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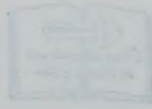
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CALIFORNIA REPORTER

258 PACIFIC REPORTER

201 Cal. 584

RICHARDSON v. MARSHALL et al.
(S. F. 11582.)

Supreme Court of California. July 8, 1927.

- 1. Compromise and settlement** ⚡23(3)—Evidence held to sustain finding that note given by judgment debtor for purpose of having judgment satisfied was given freely and voluntarily.

In action to recover balance on promissory note given by judgment debtor in furtherance of attempted settlement with creditors, after filing petition in bankruptcy, and for purpose of securing satisfaction of judgment, evidence held to sustain finding that note was given freely and voluntarily, without duress or exercise of coercion.

- 2. Appeal and error** ⚡1010(1)—Findings supported by substantial evidence will not be disturbed.

Reviewing court will uphold trial court's findings when it is satisfied substantial evidence exists to support them.

- 3. Bills and notes** ⚡144—Question of negotiability is immaterial, where note has not been transferred.

Where note is not transferred, question whether it is negotiable or nonnegotiable is immaterial in action thereon.

- 4. Estoppel** ⚡78(1)—Judgment debtor who gave note to procure satisfaction of judgment could not claim that note was canceled by entry of satisfaction.

Judgment debtor who induced creditor to accept note and satisfy judgment to solve debtor's financial difficulties could not, in action on note, claim that note was merely collateral to judgment and was canceled by entering of satisfaction.

In Bank.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by Richard Richardson against Errol Marshall and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Lawrence Sledge, of Oakland, for appellants.

Fry & Wood, Green Majors, and Charles Quayle, all of Oakland, for respondent.

PRESTON, J. This appeal presents for determination merely a disputed question of fact. Respondent sued to recover from appellants a balance of \$2,046.85, plus interest and a \$250 attorney fee, due him on a promissory note. Appellants' answer alleged fear and duress in obtaining said note, but the trial court found that it had been given freely

and voluntarily, and without any duress which would operate to defeat their liability thereon.

The facts are substantially as follows: Respondent procured a judgment against defendant Errol Marshall in the sum of \$4,000, upon which execution was taken out and levied against the property and business of said defendant. Said defendant thereupon filed a voluntary petition in bankruptcy, and was regularly adjudged a bankrupt by the United States district court. With the various other creditors, respondent filed his claim, based upon the above-mentioned judgment. In furtherance of an attempted settlement with creditors, at the conclusion of the bankruptcy hearing, appellants signed a note for \$4,200, payable to respondent, this being the full amount of his judgment and claim, upon the understanding that, as soon as the assets of the bankrupt were apportioned and paid to creditors, respondent would credit the note with the amount received as his pro rata of said assets, and would accept a new note for the balance remaining due. Several months later this was done, and the new note then executed is the basis of this action.

Said appellant Errol Marshall made the regular payments called for by the said note, and further made an advance payment of \$500, in return for which, at his request, respondent entered of record a satisfaction of the original judgment. Thereafter said appellant continued his regular payments on said note until some time in 1922, when this respondent brought an action against him for default as to one \$50 payment then overdue. In that case the court found that default as to said installment had been waived, and gave judgment for the defendant (appellant here). Thereafter said appellant continued making payments in accordance with the provisions of the note until February 1, 1924; the balance due having by that time been reduced to \$2,046. He then refused to make further payments, and this action was instituted.

It is to be noted that, at the time of the first suit, the suit based upon default as to one \$50 payment, all the defenses open to appellants here were then available, but nevertheless no claim of duress, menace, or fraud was advanced by them; on the contrary, in their answer in that suit, they alleged that they had paid all sums due to date, and were able, ready, and willing to continue making payments upon said note as they fell due, and, as above stated, they did thereafter continue said payments.

[1] The testimony taken at the above-men-

tioned bankruptcy proceeding was read into the record here in an attempt to show said note was executed and delivered to respondent through fear, coercion, threats of arrest, fear of imprisonment, and fear of being indicted for perjury, exercised by respondent, his agents and attorneys, and W. J. Hayes, the United States referee in bankruptcy for Alameda county, before whom the hearing was held. This claim is utterly without foundation. The record does show that the referee in bankruptcy considered filing a perjury charge against appellants by reason of the apparent fact that their testimony was not given in a straight-forward and honest manner, but there is no possible connection between such remarks of the referee and the claim of this respondent, nor can it be said that any abuse of discretion or any coercion on the part of said referee is shown.

The agreement with respondent was decidedly beneficial to appellants, and the notes were executed for the very purpose of aiding them by an extension of time to untangle their financial snarls. It was made at their solicitation, as the thing they most needed was a satisfaction of the judgment of record against them.

[2] Furthermore, as above stated, the trial court found all of the allegations made by appellants to be untrue, and it is elementary that this court will uphold the findings of a trial court when it is satisfied substantial evidence exists to support them. 2 Cal. Jur. § 542, p. 918 et seq.; 19 Cal. Jur. § 189, p. 1060 et seq.

[3, 4] Appellants advance the theory that, inasmuch as the note recited that it was given as collateral to a judgment, such recital rendered it nonnegotiable and a mere pledge, which was canceled by the entering of the satisfaction of judgment. The note was not transferred; hence, if such a clause rendered it nonnegotiable, that fact is immaterial. Appellants continued to make payments upon it long after the judgment was satisfied. The satisfaction was entered for their special benefit, with the understanding that respondent would thereafter rely upon the note alone for repayment of the principal obligation. Appellants cannot invoke the aid of respondent and then plead such act to his injury, and it requires but the bare statement of the facts to show that this point is without merit, and unworthy of serious consideration.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

201 Cal. 602

(258 P.)

DOYLE et al. v. COULTER. (S. F. 12601.)

Supreme Court of California. July 15, 1927.

Clerks of courts $\S$ 17—County clerk is not entitled to fee for filing protests against formation of bridge and highway district and setting hearing thereon (Pol. Code, § 4300a, as amended by St. 1921, p. 239; St. 1925, p. 714).

The county clerk is not entitled to a filing fee for filing protests by property owners against formation of bridge and highway district and setting them for hearing as St. 1925, p. 714, requires him to do, under Pol. Code, § 4300a, as amended by St. 1921, p. 239, enumerating the fees of the county clerk.

In Bank.

Application by Frank P. Doyle and others for a writ of mandate to compel W. S. Coulter, as Clerk of the Superior Court in and for the County of Sonoma, to file and to set for hearing protests in proceedings under the Bridge and Highway District Act of 1925 (St. 1925, p. 714). Peremptory writ granted.

Charles H. Brennan, of San Francisco, and George H. Harlan, of San Rafael, for petitioners.

Casper A. Ornbaun, of San Francisco, for respondent.

PER CURIAM. This is an application for a writ of mandate to compel the respondent county clerk to file and set for hearing protests forwarded to him by the secretary of state as required in proceedings taken under the Bridge and Highway District Act of 1925 (Stats. 1925, p. 714), without exacting any filing fee therefor. The statute referred to requires the secretary of state to forward said protests to the respondent, and the respondent is required to file said protests and set the same for hearing in the manner therein prescribed. The acts herein required to be performed are duties enjoined by law on the respondent on behalf of an agency of the state, and under section 4300a of the Political Code, as amended (Stats. 1921, p. 239), we think it is clear that no filing fee is required or may be demanded for the service to be so rendered by the respondent.

Let the peremptory writ issue as prayed.

201 Cal. 538

PEOPLE v. HENNESSEY et al. (Cr. 2975.)★

Supreme Court of California. July 2, 1927.

Rehearing Denied August 1, 1927.

1. Criminal law $\S$ 1159(2)—Reviewing court cannot disturb verdict for lack of evidence if it is supported by any legal evidence.

Reviewing court must accept findings of jury on disputable questions of fact supported by direct evidence or inferences, or both, and can disturb a verdict only if there is no legal

evidence supporting it.

2. Criminal law $\S$ 1144(13)—Reviewing court must assume in favor of verdict every fact reasonably deducible from evidence.

In determining the sufficiency of the evidence, reviewing court must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence.

3. Larceny $\S$ 68(1)—Whether defendants charged with grand larceny referred to specified railroad in making alleged false representations by which they secured money stolen held for jury.

In a prosecution for grand larceny, whether defendants, alleged to have obtained money stolen by fraud, referred to a specified railroad in making the alleged fraudulent representations that a certain railroad had possession of contract, held question for jury.

4. Larceny $\S$ 65—Convictions of grand larceny held sustained by evidence (Pen. Code, § 484).

In prosecution for grand larceny under Pen. Code, § 484, evidence held to sustain convictions of defendants on 30 counts.

5. Larceny $\S$ 57—Finding that defendants, who obtained money by false representations, had larcenous intent, held sustained by evidence.

In a prosecution for grand larceny, evidence held to sustain the implied finding that defendants, who obtained money by false representations, had larcenous intent.

6. Larceny $\S$ 63—Evidence that defendants charged with larceny obtained money stolen by false representations made directly, or designedly put in circulation by them, held to sustain finding as to each count that money was obtained fraudulently.

In a prosecution for grand larceny, evidence that the money stolen was obtained by false representations respecting commission contract made directly, or as direct result of false representations respecting commission contract circulated under general plan to obtain money, held to sustain finding that money was obtained by fraud, as to each count; it being unnecessary to show distinct representation under each count.

7. Criminal law $\S$ 370—Other similar offenses held admissible against defendants charged with larceny of money secured by false representations to show scienter.

In a prosecution for grand larceny against defendants who secured possession of the stolen money by trick or artifice, evidence of other similar offenses held admissible to show scienter.

8. Larceny $\S$ 14(1)—Where owners surrendered possession of money to defendants, charged with larceny, for specific purpose, and it was not used therefor, title did not pass.

Title to money did not pass to defendants charged with larceny, where the owners surrendered it to the defendants to be used by them to accomplish a specific purpose and it was not so used.

9. Criminal law §400(6)—Testimony of corporation officers to show corporation had no contract with defendants charged with larceny of money on representation of existence of contract held admissible.

In a prosecution for larceny of money secured on representations that a certain contract with a corporation existed, the treasurer and secretary of the corporation might testify that he had examined the records of the corporation to determine whether it had a contract with defendants, in order to show that no contract or reference thereto was in its possession, since keeper of records may give negative testimony under such circumstances.

10. Criminal law §1159(5)—Whether consecutive sentences on 30 counts of larceny was excessive punishment held not matter for Supreme Court.

In a prosecution for grand larceny where the defendants were each convicted on 30 counts, whether the imposition of consecutive sentences imposed excessive punishment held not a matter for the Supreme Court.

In Bank.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Thomas M. Hennessey and another were convicted of grand larceny, and they appeal. Affirmed.

Paul W. Schenck and Leo V. Silverstein, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

SEAWELL, J. By the indictment filed against them, the defendants were jointly charged under 46 counts with the commission of a like number of separate and distinct crimes of grand larceny, aggregating \$158,000 in money or its equivalent. Thirteen of said counts were withdrawn from the jury's consideration. As to the remaining counts defendants were convicted under 30 and acquitted under three. The total amount of money set out in the several counts upon which convictions were had is \$87,000. The judgment pronounced by the court under each count upon which a conviction was obtained provides that the sentences shall run consecutively. Both defendants have appealed from the judgments of conviction and from the order denying the motion of each for a new trial.

The most forceful argument pressed by appellants is that granting for the purpose of argument, but by no means conceding as an established fact, that the evidence is sufficient to establish the commission of some crime—obtaining money or property by false pretenses, as an example—against the defendants, under no theory or view of the law can it be said that the acts as related by the evidence constitute the crime of larceny as

defined by section 484, Penal Code, or as that section has been construed and applied in cases where the possession of the personal property has been obtained in the manner shown by the evidence in the instant case.

The judgments of conviction were affirmed by the District Court of Appeal, Second District, Division 2, upon a very thorough and elaborate discussion of the law and review of the facts. Thereafter a petition presented to this court for a hearing was ordered granted and the cause is before us in compliance with said order.

[1, 2] The record in the case is extensive. We have read the voluminous transcript of testimony, and have given considerable time and care in examination and consideration of the briefs and the several contentions made by counsel as to whether the evidence adduced at the trial is legally sufficient to sustain the convictions of grand larceny obtained under the various counts of the indictment upon the theory that the possession of said property was obtained by resort to fraud, trick, or device, and that possession so acquired, as declared by much respectable authority, is larcenously acquired. The findings of a jury upon disputable questions of fact, if supported by direct evidence or inferences, or both, must be given full faith and credit. It is only where, as a matter of law, there is no legal evidence supporting the charge that a reviewing court may disturb a verdict. The rule, upon an appeal in a criminal case, is that the court must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence and then determine whether or not the guilt of the defendant is deducible therefrom. The question for the court to pass upon is whether there were facts before the jury to justify the inference of guilt. *People v. Tom Woo*, 181 Cal. 315, 184 P. 389.

The evidence in this case discloses an exhibition of imperturbable credulity on the part of the persons who parted with their money and property that almost passes human understanding. From the record it appears that defendant Thomas M. Hennessey was but slightly known in the city of Los Angeles. Although Harry D. Hibbs, the other defendant, had made the city of Los Angeles his place of residence and headquarters for a number of years, it would seem that he was not widely known in the community. Neither of said defendants was at all prominent in financial or business circles, nor does it appear from the record of the transactions that either was associated or connected with any person or persons known as organizers of industrial or commercial enterprises. Nevertheless, they were able, by resorting to thinly clad deception, to interest a number of persons prominent locally in

business and financial affairs in a colossal venture that would have taxed, if not staggered, the nation's best financial geniuses to have financed, organized, and carried forward to completion. The purported plan or enterprise was to consolidate or bring into a merger system a number of the important railroads of the country and their subsidiary lines, extending from the Atlantic to the Pacific Coast, and certain other lines which extended into the Southern, Gulf, and Southwestern States. The railroads which were represented by the defendants as being included in the merger scheme were the Missouri Pacific, Western Pacific, Iron Mountain, International & Great Northern, Texas & Pacific, Denver & Rio Grande, St. Louis Southwestern, Rock Island, Cotton Belt Lines, New York Central, Gulf Belt Lines, and other lines not important here, except possibly to illustrate the magnitude of the undertaking and the methods adopted by the defendants in accounting for and lending plausibility to the existence of the contract which defendants fraudulently represented as having been executed and then existing and which, if genuine, would have richly inured to their benefit. The question vital to the maintenance of the prosecution is whether or not the representations of the defendants as to the existence of the commission contract were false. In determining this issue the jury was authorized to resort to a consideration of the whole case as presented by the evidence. The genuineness of the contract is inseparably connected with other features of the case which will later receive the attention of the court. The scheme which furnishes the background of the prosecution, so far as the counts of the indictment disclose, was first put forward in 1922. From that time forward to the month in which the defendants were indicted—March 28, 1925—Hibbs spent most of his time at Los Angeles actively inducing persons to invest in the scheme, while Hennessey, supposedly, was engaged in large eastern commercial centers promoting and bringing to a close the consolidation or merger plan. He frequently visited Los Angeles to stimulate interest in the project and quiet the unrest that occasionally developed by reason of delays in consummating the deal. He frequently reported to the investors that satisfactory progress was being made at the eastern end of the line and explained the difficulties that had caused delay, which were usually characterized as minor matters of detail, and gave full assurances that every obstacle had finally been removed and it was but a matter of a few days when all the investors would receive their money increased at the ratio of 10—and, in some instances, 15 and 20 dollars—for one.

The scheme unfolded by Hibbs and Hennessey to the prospective investors, and doubtless by them communicated to others,

was represented to have had its origin several years prior to the year 1922 with a group of capitalists who had subscribed \$50,000,000 to establish a cereal refining plant at San Diego, Cal., which was to be operated in competition with the Corn Products Refinery Company, a middle western concern. As the story was told by them, the cereal refining plant project was abandoned, and railroads which had passed or were likely to pass into the hands of receivers throughout the country attracted the attention of said group of financiers, and they conceived the plan of transferring their subscriptions and activities to purchasing such railroads and consolidating or merging them into groups, a movement that was then receiving the favorable consideration of the President of the United States, the Interstate Commerce Commission, the Congress of the United States, and the public press generally by reason of the disturbing conditions that followed the taking over of the railroads during the World War. A system of consolidation or merger that was receiving practically unanimous approval was the one formulated and promulgated by Professor Ripley of Harvard College. The interest of the government in the railroad situation and its disposition to aid in the matter was well known to the public and was used by the defendants to give their project a "goodly appearance." Hibbs gave out the word that the \$50,000,000 that had been subscribed to finance the cereal refining project had been diverted to the purchase of the Western Pacific Railway, with Hennessey and himself as brokers in the transaction. It was represented that the Western Pacific had been purchased, and it, with the acquisition of the Denver & Rio Grande, which was in litigation and was to form a part of the merger group, would give the Missouri Pacific a coast terminal. It was further represented and reported by the defendants to the persons alleged herein as having been defrauded, and who will hereafter be referred to as the "investors," that said group of capitalists had entered into a gentlemen's agreement to raise \$808,000,000 to be used in the purchase of railroads that had become bankrupt as they were offered for sale, and also to acquire control of roads by the purchase of stock and bonds, and that the men who furnished the money on the gentlemen's contract to purchase and who did purchase said railroads were required by the government at the time it took over the railroads to form a corporation that the government might have a definite entity to deal with. Both Hennessey and Hibbs separately and together stated to said investors upon a number of occasions that said group of financiers behind the merger project had caused a contract to be executed by the Western Pacific Corporation of Delaware, the entity conduct-

ing the transaction for said capitalists, with Hennessey, by the terms of which the defendants as brokers acquired a large financial interest; that certain big interests had made several unsuccessful attempts to invalidate said coveted contract; that defendants were to receive a commission of $3\frac{1}{2}$ per cent. upon \$6,000,000,000, that sum being the sales prices of said roads which would yield them in commissions \$210,000,000; that Hibbs, by an agreement with Hennessey, was to receive as his share of said commission approximately \$60,000,000 and Hennessey was to retain the overplus, something like \$150,000,000. In some instances the commissions were represented to be 3 per cent. on \$4,000,000,000 sales prices. This sum expanded as time went on. They also represented to said investors that the contract entitling them to said commission provided that said defendants should bear a certain percentage of the overhead charges and expenses, which included attorney's fees, costs of transferring stocks, and other charges which had been known to reach a figure as great as \$3,000 or \$4,000 per day. It was further represented by the defendants that they had put into the scheme a very large sum of money, but the time had come when they were no longer able to continue to carry the heavy overhead charge, and they were in immediate need of money; that they had resolved to sell to said investors an interest in their brokers' contract, and because of its generous terms they were amply able to pay ten dollars for every one dollar invested by third parties. In a few instances the bonus or return for the use of the money agreed upon was 15 and 20 dollars for 1 dollar. Upon receipt of every sum of money or check given them a receipt was given in return of which the following is an exact copy except as to dates, names, and amounts:

"Los Angeles, California.

"[Date]

"For the sum of ten thousand no/100 dollars (\$10,000.00) received I agree to pay you in return at the rate of ten to one (10-1) making a total of one hundred thousand and no/100 dollars (\$100,000.00) this sum to be paid you at the time of closing deal known to us as a merger deal. Should said merger deal fail to be consummated and I fail to receive the commission due me from it I am held free and exempt from future liabilities (principal or principal and bonus) by you.

"[Signed—Either Hibbs or Hennessey.]

"Made and signed in duplicate

"[Signature of the person advancing the money.]"

Two or three of the investors delivered in to the possession of the defendants as much as \$30,000 in \$10,000 installments with the expectation and understanding that they would receive in a short time thereafter \$300,000 or more to be paid out of the commissions which the defendants represented

themselves entitled to receive under said contract. The Western Pacific Corporation of Delaware was represented to be the holding corporation, and the Western Pacific Railroad Corporation of Delaware the purchasing corporation.

The existence of the contract made with said group of capitalists was discussed by Hibbs and Hennessey both jointly and separately with each investor prior to the making of said investment, and in each case the prospective investor was assured of the existence and validity of said contract, but was impressively reminded that the clause therein contained enjoining secrecy was to be strictly observed for the protection of the enterprise against the manipulation of the bond and stock markets by Wall Street and the "big interests." In fact, prospective investors were informed that under no circumstances would any person be permitted to inspect said contract, and if an inspection of it was made a condition precedent to investing in the project the deal would not receive consideration. Defendants represented on occasions that the Interstate Commerce Commission had approved the merger plan in which they were interested, and that the contract was in the hands of said commission and was held by it in escrow to secure the payment of the commission to Hennessey, who had been appointed a "master" by the Treasury Department in order that the commission upon the consummation of the deal would come into his hands.

[3-5] Appellants make the point that in relating certain alleged false representations made by Hennessey and Hibbs, all but one witness testified that defendants referred to the corporation which held possession of said contract as the "Western Pacific Corporation of Delaware," and that the only witness called to disprove this representation was the treasurer and assistant secretary of the Western Pacific Railroad Corporation of Delaware, who testified that there was no record in that corporation's possession of any such contract, and that neither of the defendants or the persons claimed to have been associated with them had ever had any transactions with said corporation during the eight or nine years that he had been employed by said corporation, and that none of said persons were known to him or to the corporation officers so far as he knew. One witness, however, gave the name of the corporation fully and correctly. While the fact is as stated by counsel for appellants with reference to the name of the corporation used in making the said false representations, a doubt was manifested by some of said witnesses as to whether the defendants stated the name of the corporation to be the Western Pacific Corporation of Delaware or the Western Pacific Railroad Corporation of Delaware. The variation was but slight. However this may be, it is very convincing

from the evidence, without resorting to the testimony of said one witness who stated that the name of said holding corporation was represented by the defendants to be the Western Pacific Railroad Corporation of Delaware, that the corporation which defendants had in mind and intended to identify, if indeed they did not actually do so, was the corporation last above named. The relation of the Western Pacific Corporation of California with the corporation last named, and in fact the entire proposed scheme of consolidation as explained in detail by the defendants, together with the concurrence of the same periods of time as to the identical subject-matter, show beyond a reasonable doubt that the corporation intended to be identified was the Western Pacific Railroad Corporation of Delaware. The record shows occasional inadvertent omission of a part of the corporate name of said corporation when referred to by certain witnesses. The fact was clearly one for the jury's determination under all the evidence in the case. As a part of the conspiracy to obtain large sums of money by fraudulent methods, the defendants, with a purpose of inspiring confidence in their project, represented that Fred Grant, a lawyer and nephew of General U. S. Grant, former President of the United States, was the attorney in charge of all legal matters, and he was represented as having appeared as their representative upon several occasions before the Interstate Commerce Commission and having represented them at Washington in matters of legislation and in large eastern banking and financial matters. The investors were informed of his arrivals in and departures from Los Angeles. Neither Hibbs nor any of the investors ever saw him. Mrs. Marian Grant Macy, a granddaughter of former President U. S. Grant, for some time past a resident of San Diego, had never heard of such a person as described by the defendants. Franklin F. Grant, a San Diego attorney, who has been in the practice of the law at San Diego for many years, had never heard of such a person. He never appeared in any proceeding or in any capacity before the Interstate Commerce Commission. The only person that claimed to have known Fred Grant was Hennessey. Hibbs, who had represented to the investors during the period covered by the conspiracy that he had met Grant, in a statement made by him after his arrest, stated that he had never seen Grant and all the information he had concerning Grant came from Hennessey. The same conditions existed as to the identity of the members of the "executive board," Coleman, Hickelman, Rohrer, Callahan, and others. Not one of the investors had met any one of said executive heads, who were represented to be holding frequent executive sessions in Los Angeles. Hennessey, in a statement made by him after his arrest, was not able to give the address or whereabouts of Grant or any mem-

ber of his "executive board." In fact, he did not know the Christian names of said persons. Hibbs, who affected an acquaintance with the members of said board during the period of the conspiracy, admitted that he had never seen or met any member of the "executive board."

Hennessey, in talks made at "get together" and "jollification" banquets and meetings, represented himself to be connected by blood with well-known wealthy New York families and an heir to large eastern estates from two lines of collateral kindred. He stated that he was a nephew of the late George B. McClellan, former mayor of New York City. At one of the investors' meetings, held for the purpose of reviving confidence, he stated that rather than have the investors lose one dollar he would pay them every dollar that they had put into the enterprise out of his private fortune. Hibbs also gave out reports as to the princely possessions of Hennessey. Upon one occasion two or three of the investors with their families accompanied Hennessey and Hibbs to New York City to witness the closing of the deal. They remained in New York City for two months awaiting the final adjustment of affairs. The "executive board" was represented to be in daily sessions at the Hotel McAlpine. The investors and Hibbs daily accompanied Hennessey to said hotel. Hennessey was supposed to then go into session with the board, whereupon Hibbs and the investors would go their way. Hennessey later reported to them the progress that had been made. No investor saw or met a member of the board. After the lapse of two months, Hennessey and Hibbs said matters had arisen that made it necessary for all interested to leave at once for Los Angeles. Accordingly, the meeting place was transferred to Los Angeles. The "executive board," it was represented by Hennessey and Hibbs, would follow on a special train or a second division of the same train carrying Hennessey, Hibbs, and the investors. It was represented that injunction suits in some of the states through which the consolidated lines passed and some matters of inside detail were delaying the closing of the project, but all difficulties were certainly to be settled in a few days. Shortly after the arrival of the party in Los Angeles, Hennessey and Hibbs announced the arrival of the executive board and Attorney Grant. No investor met or had any communication with any member of the board or with Grant. Reports of the proceedings were generally communicated by Hennessey to Hibbs and by the latter to the investors. On December 20, 1924, a meeting of the investors was called and the news was broken to them that the deal had been closed and a check made out to Hennessey for \$1,950,000,000 had been deposited by Grant and Hennessey with the Los Angeles branch of the Federal Reserve Bank. Hibbs remarked that this was the largest "cash

transaction in the history of railroad finance." The mental exhilaration produced by this announcement was somewhat reduced by another announcement which followed, to the effect that a court injunction had stopped payment on said check.

Of course, the representations as to the deposit of said check or any check were shown by the evidence to be monstrously false. The defendants continued their activities for several months longer. We have not recited or referred to all acts resorted to by the defendants in the furtherance of their conspiracy to obtain money and property by fraudulent methods. To do so would extend a discussion of the machinations employed by them to an unreasonable length. Upon a review of the transactions as disclosed by the record, the wonder is that persons who possess ordinary care for the affairs of life could have been so grossly deceived. Neither defendant testified in the trial of the case, but both made statements after arrest. Hibbs admitted that he collected as his part in the transaction \$300,000, in Los Angeles. Hennessey stated that he personally collected \$20,000 in Los Angeles and \$30,000 in an eastern city. Hennessey, in his statement, claimed to have been an heir to an estate to the extent of \$20,000,000 and in another to the extent of \$3,000,000. He claimed that his income amounted to \$20,000 per month. Neither seems to have had any money on deposit with the banks in which they presumably dealt in Los Angeles. Much of the money collected or received by Hibbs was paid to Hennessey. Hennessey claims that he forwarded all that came into his hands to Grant, who used most of it in paying "lobbyists" to put the scheme over.

The evidence overwhelmingly establishes the fraudulent purposes of the defendants. At the times the defendants were operating, the policy of railroad consolidation was in high public favor and was receiving the serious consideration of the national government. Consolidations such as defendants represented themselves to be interested in were brought about. But they were consolidations with which neither of the defendants had the slightest thing to do. The question is whether the defendants or either of them had a part in any consolidation or merger plan. Every representation they made as to the existence of a material fact capable of being established by proof was shown to be false. The whole plan or scheme was built upon deceit and falsehood. Fictitious personages, absurd and inherently improbable statements with reference to fabulous sums of money which were represented as playing a part in the transaction, and recourse made to every form of extravagant exaggeration which might tend to operate upon the minds of those sought to be influenced to the advantage of the defendants, form the woof and

warp of the defendants' representations. This is not a case built up by inference upon inference, but of facts which are sufficient in law, as in the affairs of human transactions, to direct the understanding and support conclusions.

The persons who were held out to the investors as constituting the executive board of the Western Pacific Railroad Corporation of Delaware were not members thereof in point of fact and were unknown to that corporation, and no such contract as the defendants represented themselves to be interested in was ever made with it or held in its possession. Neither Hennessey, Hibbs, Grant, nor any member of the "executive board," or any person acting for it or any of them, ever had any transaction whatsoever with said corporation. Neither did the Interstate Commerce Commission ever have custody or knowledge of said contract, or any acquaintance with or knowledge of Hennessey, Hibbs, Grant, or said "executive board." This being so, in the absence of evidence tending to establish a contrary conclusion, the inference is irresistible that the contract never existed. Besides, there is much other evidence in the case that tends to destroy all claim as to the existence of said contract. The whole subject-matter was fictitious. The representations as to the existence of the contract caused the investors to part with their money. Without those representations they would not have delivered their money into the possession of the defendants. This being so, the argument that the investors were willing to win or lose with the defendants is without force. The investors may have been willing to chance their money upon the success or failure of the enterprise, but, of course, it was upon the understanding that there was something to support the possibility of gain. The thing that was represented as furnishing the basis of the transaction did not in fact exist.

While the indictment in this case may well have alleged that the acts charged therein constituted obtaining money or property by false pretenses, we are not prepared to say that they do not constitute grand larceny. Unquestionably, the evidence is sufficient, and we must assume the jury found that the defendants entered into an agreement to obtain the possession of money and property by resorting to fraudulent methods which bear the appearance of trick or device. There can be but little doubt that the investors parted with the possession of their money influenced by the representations that it would be used by the defendants in promoting the enterprise to a conclusion in good faith. The money unlawfully obtained could not have been used for the purpose for which it was supposedly acquired, and as the investors believed it would be used for the reason that there was nothing upon which it could have been expended. There being no contract in existence, a fact

well known to the defendants, the moneys that came into their possession were not expended in carrying forward the enterprise which the investors intended it should aid. We are satisfied that the jury was warranted in finding a preconceived design on the part of the defendants to appropriate said moneys to their own use in furtherance of a plan and system at the time they obtained possession thereof, accomplished by means of trick and device, and therefore their acts may be classed with that species of crimes denominated larceny. *People v. Delbos*, 146 Cal. 734, 81 P. 131; *People v. Shwartz*, 43 Cal. App. 696, 185 P. 686; *People v. Edwards*, 72 Cal. App. 102, 236 P. 944; 17 R. C. L. 13 and 14.

[6] Where a false representation is made under a general plan and purpose to obtain property, it is not necessary to show that a distinct representation was made in each following act if it appears or can fairly be inferred that the first false representation was still operating upon and influencing the mind of the person imposed upon. It is only in those cases where it may be fairly presumed that the first false representation has ceased to operate upon the mind of the person thus imposed upon, or where there is some evidence tending to show that the first false representation had been removed, that full proof of the representation must again be made. In the instant case there is no doubt that under each count the possession of the money furnished by the person alleged to have been defrauded was obtained by the representation of the defendants, made either directly by them or as a direct result of the false representations which they designedly caused to be put into circulation, as to the existence of the commission contract. Other false representations shown by the evidence were made as an aid to the accomplishment of the main purpose.

[7, 8] That other offenses similar to the one charged in the indictment are provable against a defendant to show scienter in cases where the criminal intent is the gravamen of the charge, as in cases of fraud, is too firmly established by the decisions of this state to require a citation of cases. In the instant case we must assume that the possession of money was obtained with a criminal intent by means of trick and device. The owners of the property surrendered possession of their money with the understanding that it was to be used in the accomplishment of a definite object by the defendants. It was not so used. In such cases the title does not pass. The implied finding as to the intent of the defendants cannot be disturbed by this court.

[9] We think the court did not err in permitting the witness Matthews, treasurer and assistant secretary of the Western Pacific Railroad Corporation, to testify that he had made an examination of that corporation's

records for the purposes of determining whether or not it had made or had in its possession a contract with the defendants or either of them. The purpose was to show that no such contract or reference thereto was to be found in its possession or was disclosed by its records. It is permissible for the keeper of records under such circumstances to give what is termed "negative testimony."

We find no error in the court's ruling with respect to this witness' testimony that would justify a reversal of this case.

It is conceded by appellants that if the acts committed by defendants and described by the evidence are sufficient to constitute larceny, there can be no legal objection to certain instructions given by the court and objected to by the defendants. Our holding that said acts do support the judgment disposes of the objections made to said instructions.

[10] The imposition of consecutive sentences pieces out a long term of imprisonment to which the defendants are sentenced. Whether the terms of imprisonment are disproportionate to the crimes committed is a matter that may properly be considered by another branch of our state government.

The judgments and orders appealed from are affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; CURTIS, J.

201 Cal. 518

SMITH v. LOMBARD et al. (L. A. 8357.)

Supreme Court of California. June 30, 1927.

Rehearing Denied July 28, 1927.

1. Husband and wife ⚬36—Presumption of undue influence arises in transaction between wife and husband gaining advantage therefrom, which is rebuttable by proof of full disclosure to wife (Civ. Code, § 2235).

Under Civ. Code, § 2235, transaction between husband and wife, whereby husband gains an advantage, raises presumption of undue influence, which may be overcome by proof of full and fair disclosure of all that wife should know for her benefit concerning nature and effect of transaction.

2. Husband and wife ⚬36—Proof of independent advice to wife is not indispensable in rebutting presumption of undue influence in transaction by wife benefiting husband.

Finding contrary to presumption of undue influence in transaction by wife, benefiting husband, can be supported by proof other than that of independent advice to wife, which is but one circumstance in determining question of undue influence.

3. Deeds ⚡196(3)—Presumption of undue influence in transaction by wife, benefiting husband, held sufficiently overcome, though only advice to wife was by attorney acting for both parties.

Conclusion that wife acted independently, with full knowledge of effect of deed to her property conveyed through trustee to herself and husband jointly, held sufficient to overcome presumption of undue influence, notwithstanding lack of advice to wife other than that given by attorney employed by her, and acting for both husband and wife.

4. Appeal and error ⚡1010(1) — Conclusion supported by evidence that wife intended to create joint tenancy with her husband in her property cannot be disturbed on appeal.

Conclusion that it was intention of wife to part with title to her property in order to create joint tenancy therein with her husband, supported by evidence, cannot be disturbed on appeal.

5. Joint tenancy ⚡4—Joint tenant, transferring interest to another, severs tenancy.

Transfer of interest by joint tenant to another severed joint tenancy.

6. Husband and wife ⚡48(2)—Wife, transferring interest to trustee to convey property to herself and husband jointly, cannot revoke transfer without consent of husband (Civ. Code, § 2280).

Transfer by wife of interest in joint tenancy to trustee, who was to reconvey property to husband and wife jointly, could not, in absence of fraud, mistake, or undue influence, have been revoked by wife without consent of husband, in view of Civ. Code, § 2280.

7. Husband and wife ⚡48(2)—Rights of husband as joint beneficiary with wife of transfer by wife of her property to trustee are not affected by refusal of wife to accept conveyance from trustee or failure of trustee to make delivery.

Where wife transferred property to trustee, to be reconveyed to herself and husband jointly, in absence of attack on validity of transfer, wife's refusal to accept delivery from trustee, or failure of trustee to make delivery, would not deprive husband of rights as beneficiary or remedy in equity for their enforcement.

8. Deeds ⚡57—Delivery of deed to one joint owner is delivery to both.

Delivery of deed to one of two persons who in equity are joint owners is delivery to both.

9. Deeds ⚡194(1)—Assent of wife to delivery to her attorney of deed conveying her property to trustee to be reconveyed to herself and husband will be presumed.

Where wife transferred property to trustee, to be reconveyed to herself and husband jointly, and trustee acted for both beneficiaries, assent of wife to delivery of deed to attorney will be presumed.

10. Appeal and error ⚡1052(4)—Testimony as to loss of memorandum held to cure error in admitting prior testimony of its contents.

Error in admitting testimony of contents of memorandum, without showing its loss, held cured by subsequent testimony sufficiently showing loss of memorandum.

11. New trial ⚡99—New trial, based on newly discovered testimony which was incompetent and cumulative, held properly refused.

New trial for newly discovered evidence on affidavits showing that witness was without knowledge of transaction in question other than related to her several weeks after event, and otherwise containing cumulative testimony, held properly refused.

12. Trusts ⚡42—Evidence that defendant's wife was made joint tenant with parents under agreement to give parents life estate raised trust and was competent in action to quiet title.

In action to quiet title, evidence showing that property claimed by defendant through his wife was conveyed to wife as joint tenant with parents under agreement to allow parents to retain exclusive use and possession of property during their lifetimes was competent and tended to prove trust in favor of parents, and, on their death, in favor of defendant's wife, and was erroneously excluded.

13. Quieting title ⚡34(5)—Allegation that defendant's wife was made joint tenant with parents of property in dispute under agreement to give parents life estate raised confidential relationship.

In action to quiet title, allegation that property claimed by defendant through his wife was conveyed to wife as joint tenant with parents under agreement to allow parents to retain exclusive use and possession of property during their lifetimes raised confidential relationship between parties and showed that only consideration for transfer to wife was such agreement.

14. Trusts ⚡35(1)—Parol agreement by grantee in confidential relationship with grantor to hold property for benefit of third person raises trust by operation of law for grantee or third person.

Where confidential relationship exists between two parties, and one of them executes conveyance of realty to other on parol promise of such other that he will hold it for benefit of third person in whom grantor is interested, there being no other consideration for conveyance, trust arises by operation of law in favor of grantor or third person for whom property is held.

15. Trusts ⚡35(1)—Breach by grantee in confidential relation with grantor of parol promise to hold property for benefit of third person raises trust, though promise is performed for time.

Where grantee standing in confidential relationship with grantor orally promises to hold property for benefit of third person, there being no other consideration, violation of parol promise constitutes fraud on which trust arises for grantor or third person, and, if parol agree-

ment is of continuing nature, performance thereof for time does not prevent trust from arising when it is broken and repudiated.

16. Appeal and error 1178(6) — Case in which no error appeared, except for ruling on special defense, should be remanded for findings on such defense alone.

Where no prejudicial error appeared in rulings of trial court, other than that on special defense, case should be remanded for findings on such defense, leaving other findings to remain as part of record.

In Bank.

Appeals from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by D. B. Smith, as executor of the will of Mary E. Scott, deceased, substituted as plaintiff in the place and stead of said Mary E. Scott, against Charles E. Lombard and another, in which the defendant Lombard filed a cross-complaint, and in which A. C. Maple intervened against plaintiff and defendants. Judgment for the defendant Lombard, and plaintiff and intervener appeal. Affirmed in part, and reversed in part, with directions.

Frank G. Swain, of Whittier, Henry G. Bodkin, Wm. H. Neblett, and McAdoo, Neblett & O'Connor, all of Los Angeles, and W. A. Keleher, of Albuquerque, N. M., for appellant Smith.

Flint & MacKay and Robert B. Jackson, all of Los Angeles, for appellant Maple.

William Ellis Lady, of Los Angeles, for respondents.

CURTIS, J. This appeal was originally heard by the District Court of Appeal, First Appellate District, First Division, and thereafter a petition for a hearing in this court was made by appellant. Upon the consideration of this petition, we were not satisfied with that portion of the opinion dealing with the refusal of the trial court to permit appellant to prove the allegations of the second separate defense of the second amended answer of appellant Mary E. Scott to the cross-complaint of Charles E. Lombard, and, for that reason, we granted said petition. No objection was then entertained to that portion of said decision, as prepared by Mr. Justice Cashin, dealing with the other questions considered therein. We are still of the opinion that such portion of the decision contained a correct exposition of the law, and we approve and adopt the same, which is as follows:

"An action to quiet title to certain real estate and personal property was brought by Mary E. Scott against Charles E. Lombard, the surviving husband of Dolle Scott Lombard, deceased, and M. E. Dodson, in which A. C. Maple, as administrator with the will annexed of the estate

of the deceased, intervened. Mary E. Scott, following the entry of judgment in the action, died and D. B. Smith, as executor of her last will and testament, was substituted as a party thereto. The original plaintiff was the wife of Rial Scott, who died prior to the events which led to the instant action, and Dolle Scott Lombard was their daughter. At the commencement of the trial the parties stipulated as follows: 'That on or about May 27, 1915, the real estate described in the complaint was owned by Rial Scott, who was the husband of plaintiff Mary E. Scott and the father of Dolle Scott Lombard; that on or about the 27th day of May, 1915, Rial Scott and Mary E. Scott, his wife, conveyed this real estate to A. C. Maple, who in turn reconveyed it on or about the same date to Rial Scott, Mary E. Scott, and to Dolle Scott, she being then unmarried, as joint tenants with right of survivorship; that Rial Scott, on or about April 8, 1921, died, whereupon Mary E. Scott and Dolle Scott (hereinafter called Dolle Scott Lombard) obtained by right of survivorship the entire interest in the said real estate, and that they held the record title to said property as joint tenants with right of survivorship on December 29, 1922; that Dolle Scott is the same person as Dolle Scott Lombard, and that she died on March 9, 1923; that the record title to all of the personal property described in the complaint herein was on the 29th day of December, 1922, in the names of Mary E. Scott and Dolle Scott Lombard as joint tenants; that the Edison stock described in the complaint was first issued in the name of Rial Scott and Mary E. Scott as joint tenants with right of survivorship, and that after the death of Rial Scott on or about the 23d day of April, 1921, it was transferred by Mary E. Scott, who was then the sole owner thereof by right of her survivorship of Rial Scott, to herself and Dolle Scott Lombard as joint tenants with rights of survivorship.'

"In addition to the answers of defendants Dodson and Lombard the latter filed a cross-complaint alleging title in himself to an undivided one-half interest in the real property and an interest to the same extent in the personal property by virtue of certain conveyances executed prior to the death of his wife. To this pleading the plaintiff answered, denying the execution of the alleged conveyances by Dolle Scott Lombard, and alleging in substance that the latter was mentally incompetent, and that her signatures thereto were obtained by the exercise of undue influence by defendant Lombard.

"In addition to the foregoing the answer to the cross-complaint as a separate defense alleged that at the time of the transaction mentioned in the stipulation by which the Scotts and their daughter became joint tenants in the real property the latter, in consideration of the transfer, agreed that during the lives of her parents they or either of them should remain in possession, collect and expend the income therefrom, and that the daughter should not have an interest therein or the right to the possession thereof unless she survived both her parents; that Mary E. Scott, following the death of her husband, continued in the possession and control of the property, collecting and expending the income; and that defendant Lombard at all times had notice and knowledge of the agreement and the

acts of plaintiff thereunder. The plaintiff in intervention alleged title in the estate of Dolle Scott Lombard to an undivided interest in the property described in the original complaint, and sought to quiet the title thereto as against the other parties to the action.

"The court found that Dolle Scott Lombard transferred to defendant Dodson her interest in the real and personal property mentioned and that the latter in turn conveyed this interest of Dolle Scott Lombard and defendant Lombard, her husband, as joint tenants with right of survivorship, and, further, that Dolle Scott Lombard, at the time of her execution of the transfers mentioned, was competent; that the transfers were freely and voluntarily made and were not induced by fraud or undue influence.

"Judgment was entered on the findings adjudging defendant Lombard to be the owner of an undivided one-half interest in the property in common with the original plaintiff, and entitled to an accounting from the latter for one-half of the income received therefrom since the death of Dolle Scott Lombard, and that the intervenor take nothing by his complaint.

"Following the denial of motions for a new trial made by them, appeals from the judgment were taken by Mary E. Scott and the intervenor and are presented on the judgment roll with a bill of exceptions. The grounds for reversal urged are the rulings of the court in admitting and rejecting offered testimony, insufficiency of the evidence to sustain certain findings and the denial of the motion for a new trial.

"It is conceded by appellants that the evidence as to the competency of Mrs. Lombard to execute the instruments in question being conflicting, the findings on that issue cannot be disturbed; but it is urged that, the respondent having gained an advantage by their execution, it was incumbent upon him, in order to overcome the presumption of undue influence and as a condition precedent to their admission in evidence, to show that his wife had independent advice, and that in the absence of such advice the finding against the allegations of undue influence cannot be sustained, citing in support of their contention the following cases: *Ross v. Conway*, 92 Cal. 632, 28 P. 785; *Cox v. Schnerr*, 172 Cal. 371, 156 P. 509; *Piercy v. Piercy*, 18 Cal. App. 751, 124 P. 561; *Hilton v. Hilton*, 54 Cal. App. 142, 201 P. 337.

[1] "It is the rule that in transactions between husband and wife whereby the former gains an advantage a presumption of undue influence arises (Civ. Code, § 2235), but the presumption is disputable and may be overcome by proof of a full and fair disclosure of all that the wife should know for her benefit and protection concerning the nature and effect of the transaction (*Estate of Cover*, 188 Cal. 133, 204 P. 583).

"The ultimate fact to be determined in this class of cases is whether the act was induced by such influence, the fact being taken for granted prima facie where it appears that the husband gained an advantage by means of the transaction.

"In the cases relied upon by appellants the findings were fully sustained by evidence other than that of a lack of independent advice, the latter fact being but one of the circumstances leading to the conclusion that the acts in question were induced by undue influence.

[2] "Notwithstanding the expressions in the

opinions cited which support the contention that proof of independent advice is indispensable it is clear that it was not the intention to adopt a rule which, in cases where such proof is lacking, would render immaterial all other facts however cogent their tendency to negative the presumption, or to decide that a finding contrary to the presumption cannot be supported by proof other than that of independent advice. *Broaddus v. James*, 13 Cal. App. 464, 110 P. 158.

[3] "While it appears that the attorney who prepared the conveyances had been consulted by respondent in previous transactions, the court found that in the instant case he was acting for both, and that he was employed at the instance and request of Mrs. Lombard; that the latter was fully advised as to the nature of the transaction and fully understood the purpose and legal effect of the instruments here in question; that their execution was the result of an idea conceived by her and not the result of any suggestion or act on the part of her husband or the attorney; and, further, that she freely and voluntarily executed and delivered the conveyances.

"The conclusions of the trial court were supported by evidence which, notwithstanding the lack of advice other than that given by the attorney mentioned, was in our opinion sufficient to overcome the presumption.

[4] "It is further contended that the evidence fails to support the finding that the conveyances were executed by Mrs. Lombard with the intention that the title should pass, and that the transaction was in effect an attempt to make a testamentary disposition of her interest in the property.

"While inferences supporting this conclusion might have been drawn from the evidence, the conclusion of the court that it was her intention to part with the title to the property in order to carry out her plan to create a joint tenancy therein with her husband finds support from the evidence, and cannot be disturbed. *Waer v. Waer*, 189 Cal. 178, 207 P. 891.

"Defendant Dodson, following the execution of the conveyances by Mrs. Lombard, signed and acknowledged deeds in terms conveying the same property to the latter and to her husband as joint tenants with the right of survivorship. These instruments were delivered to the attorney above mentioned for the use of the grantees, and remained in his possession until March 7, 1923, on which date these deeds affecting the real property were recorded.

[5-9] "Appellants contend that the latter's assent to a delivery to the attorney was not shown and that the act of Dodson was consequently ineffectual to create a joint tenancy as between Mrs. Lombard and respondent.

"The object of Mrs. Lombard was to sever the original joint tenancy, which was accomplished by the transfer of her interest to Dodson (*Green v. Skinner*, 185 Cal. 435, 197 P. 60), and to create therein a joint tenancy between herself and respondent by means of transfers from Dodson, the latter assuming the duty as trustee to execute the necessary conveyances. The transfers to Dodson could not, in the absence of fraud, mistake, or undue influence, have been revoked by Mrs. Lombard without the consent of respondent. Civ. Code, § 2280. In the absence of grounds for an attack upon the validity of these transfers her refusal to accept de-

livery of the conveyances from the trustee, or the failure of the latter to make such delivery, would not deprive respondent of his rights as a beneficiary, or of his remedy in equity for their enforcement. It is not contended that respondent failed to assent to the delivery to the attorney, but that the assent of Mrs. Lombard was not shown. As held in *Eshleman v. Henrietta Vineyard Co.*, 102 Cal. 199, 36 P. 579, the delivery of a deed to one of two persons who in equity are joint owners is a delivery to both, and, while in the instant case the express assent of Mrs. Lombard does not appear, the acts of the trustees were designed to carry out the agreement with her and were for the benefit of both beneficiaries, to which her assent, if necessary, in view of the facts, will be presumed. 18 C. J., 'Deeds,' § 494, p. 416; *De Levillain v. Evans*, 39 Cal. 120; *Neely v. Buster*, 50 Cal. App. 695, 700, 195 P. 736.

[10] "Respondent was permitted to testify, over objection that its loss had not been shown, to the contents of a memorandum which, according to his testimony, was written and delivered to him by his wife and at her request delivered to the attorney; the witness testifying that he had not seen the paper since its delivery to the latter. The attorney subsequently testified that he had made search therefor without success. The loss and search were sufficiently shown and any error in admitting respondent's testimony was cured by that of the attorney.

[11] "Appellants' motion for a new trial on the ground of newly discovered evidence was properly denied; it being shown by the affidavit of the witness upon whose testimony they relied that she was without knowledge of any of the facts of the transaction in question other than as related to her by Mrs. Lombard several weeks after the event, and that her testimony as to other facts within her personal knowledge would have been cumulative."

[12, 13] Appellant offered to prove, by the testimony of Mary E. Scott and A. C. Maple, the facts alleged in the second separate defense of the second amended answer of Mary E. Scott to the cross-complaint of Charles E. Lombard. The allegations of this pleading, as above referred to, were to the effect that at the time of the conveyance of said real and personal property to Dolle Scott Lombard she agreed, in consideration of such transfer, that, during the lives of her parents, they, or either of them, would collect and expend the income therefrom, and that she, the said Dolle Scott Lombard, should not have any interest in said income, or any right to the possession of, or any interest in, either said real or personal property unless she survived both her parents. An objection to this offered testimony, on the ground of its incompetency, was sustained. This action of the court was undoubtedly erroneous. The proffered evidence was competent and tended to prove a trust as to said real and personal property in favor of Rial Scott and Mary E. Scott, and, upon the death of Rial Scott, in favor of Mary E. Scott alone. The said defense sufficiently alleged facts which, if proven, would show a confidential relation be-

tween the parties (*Robins v. Hope*, 57 Cal. 493, 497; *Hemenway v. Abbott*, 8 Cal. App. 450, 463, 97 P. 190; *Bacon v. Soule*, 19 Cal. App. 428, 126 P. 384), and the only consideration for the transfer to Dolle Scott Lombard was the agreement on her part that her parents should retain, during their lifetime, the exclusive possession and use of said real and personal property, and that said Dolle Scott Lombard should only succeed to the possession, use, and ownership of said real and personal property in case she survived both her parents.

[14, 15] "It has been established by a number of decisions in this state, that where confidential relations exist between two parties and one of them executes a conveyance of real estate to the other, upon a parol promise by the other that he will hold it for the benefit of * * * some third person in whom the grantor is interested, there being no other consideration for the conveyance, a trust arises by operation of law in favor of the grantor, or in favor of the third person, for whom the property is to be held. It is the violation of the parol promise which constitutes the fraud upon which the trust arises. If made in good faith, and if it is of a continuing nature, the performance of it for a time does not prevent a trust from arising when it is broken and repudiated." *Cooney v. Glynn*, 157 Cal. 583, 587, 108 P. 506, 508. This principle is restated and approved in a long line of well-considered decisions of this court, which undoubtedly establish the law in this regard in this state. *Brison v. Brison*, 75 Cal. 525, 17 P. 689, 7 Am. St. Rep. 189; *Brison v. Brison*, 90 Cal. 323, 27 P. 186; *Nordholt v. Nordholt*, 87 Cal. 552, 553, 26 P. 599, 22 Am. St. Rep. 268; *Hays v. Gloster*, 88 Cal. 560, 562, 26 P. 367; *Becker v. Schwerdtle*, 141 Cal. 386, 74 P. 1029; *Lauricella v. Lauricella*, 161 Cal. 61, 118 P. 430; *Taylor v. Morris*, 163 Cal. 717, 722, 127 P. 66; *Bradley v. Bradley*, 165 Cal. 237, 131 P. 750; *Pearl v. Pearl*, 177 Cal. 303, 177 P. 845; *Kelly v. Woolsey*, 177 Cal. 325, 329, 170 P. 837. See, also, the following decisions of the District Court of Appeal: *Tench v. McMeekan*, 17 Cal. App. 14, 118 P. 476; *Tench v. McMeekan*, 17 Cal. App. 22, 118 P. 479; *Hillyer v. Hynes*, 33 Cal. App. 506, 165 P. 718; *Willats v. Bosworth*, 33 Cal. App. 710, 166 P. 357; *Bradley v. Bradley*, 37 Cal. App. 263, 173 P. 1011; *Logan v. Ryan*, 68 Cal. App. 448, 454, 229 P. 993.

In the *Tench Cases*, cited above, a brother conveyed real and personal property to his sister for the purpose of their joint support during their lives, but with the understanding that the sister would take title to the property only in case she survived him. Before her death the sister conveyed said property, without consideration, to the defendant in said actions, she taking said property with notice of the agreement between the brother and sister. Thereafter the sister died before

the brother, and the latter conveyed said property to his wife. After his death the wife instituted the two actions against the grantee of the sister, one to recover the real property and the other the personal property. The conveyances of the real and personal property were in writing and purported by their terms to convey the absolute title to the real and personal property to the sister. The agreement between the brother and sister that the latter should hold the property for the joint support of herself and brother, and that no title to said property would vest in her unless she survived her brother, was entirely oral. The District Court of Appeal held that a constructive trust was created in favor of the brother and against the sister; that the grantee of the sister, having acquired the property without consideration and with notice of said agreement, took the same subject to said trust; and that parol evidence was admissible to prove the existence of said trust. It accordingly affirmed the judgment of the trial court directing conveyances of said real and personal property to be executed by the grantee of the sister in favor of the grantee of the brother. This court denied petitions for hearing herein in each of said cases. Under the rule enunciated in these decisions, we think there is no question as to the admissibility of the proffered evidence.

There is nothing in the stipulation of the parties, entered into at the commencement of the trial of said action, that would in any way affect the admissibility of this evidence. This stipulation refers to certain conveyances of the real and personal property during the time it was owned by the Scotts and to the condition of the record title to said property during the time of their ownership. It contains no stipulation as to the true ownership of any of said property, except that Rial Scott was the owner of the whole of said real and personal property at the time of the first conveyance thereof, and that after his death Mary E. Scott was the sole owner of certain of the personal property.

[16] No prejudicial error in the rulings of the court other than that just considered being disclosed by the record, the case is one wherein it is proper that the trial court should find on the issues presented by the special defense, leaving the other findings to remain as part of the record. *Coleman v. Coleman*, 23 Cal. App. 423, 138 P. 362; *Robinson v. Muir*, 151 Cal. 118, 125, 90 P. 521.

The judgment as to appellant A. C. Maple, as administrator with the will annexed of the estate of Dolle Scott Lombard, deceased, is therefore affirmed, and as to the appellant D. B. Smith, as executor of the last will and testament of Mary E. Scott, deceased, is reversed, with directions to the trial court to hear and determine the issues presented by the special defense mentioned, and, upon the

findings thereon and the remaining findings now a part of the record, to render and enter the appropriate judgment.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

201 Cal. 530

STRONG v. HANCOCK et al. (L. A. 8555.)

Supreme Court of California. July 2, 1927.

1. Covenants $\S$ 72—Deeds to lots in tract restricted to residential uses, permitting construction of electric railway, did not abrogate restrictions as to other lots.

Deeds to certain portions of tract, remainder of which was restricted to residential uses, which permitted such portions of tract to be used for electric railway, held not to have effect of abrogating restrictions as to other lots in tract, in absence of showing that construction and operation of railway or its approaches thereto would render the other lots less desirable or available for restricted residential uses.

2. Evidence $\S$ 25(2)—It is common knowledge that boulevards for use of vehicles usually traverse suburban areas devoted to residential purposes.

It is common knowledge that boulevards, avenues, and broad highways best suited for use of vehicles usually traverse suburban areas devoted to and favored for residential purposes.

3. Covenants $\S$ 49—Owner of lot restricted as to use indefinitely could not complain that restrictions on other lots in tract ran only until 1955, until that time arrived.

Where restriction as to use in conveyance to plaintiff's predecessor had no limitation as to time, plaintiff could not complain that deeds to certain lots in same tract contained similar restrictions which ran only until 1955, until that time arrived, when for first time whatever injurious difference there might be from operation of restrictions will arise.

4. Covenants $\S$ 69(2)—Uniform restrictions in deeds to lots are in nature of easements for benefit of each parcel in tract and run with land.

Where deeds to all lots in tract contain uniform restrictions, covenants, and conditions subsequent restricting use to residential purposes, such covenants, restrictions, and conditions subsequent are in nature of easements or servitudes for benefit of each and every other parcel of land in such tract and run with the land.

5. Covenants $\S$ 108(1)—Changed conditions in property outside tract restricted to residential uses did not make it inequitable to enforce restrictive covenants.

Changed conditions existing in and about property outside of tract in which lots were restricted to residential uses held not to make it inequitable to enforce restrictions, conditions, reservations, and covenants, or any of them.

6. Appeal and error $\S$ 949—Discretion exercised in granting equitable relief should not be disturbed on appeal, in absence of clear abuse.

Discretion exercised by trial court in granting equitable relief by enforcing restrictions, conditions, reservations, and covenants regarding use of property should not be disturbed, except in case of clear abuse.

7. Appeal and error $\S$ 1051(1)—Excluding evidence of zoning ordinance held not reversible error in suit to enjoin enforcement of restrictive covenants, where conditions in neighborhood were shown by abundance of direct evidence.

In action to quiet title as against certain restrictions as to use of property, excluding evidence of zoning ordinance affecting property, if error, did not require reversal, where actual conditions and changes in conditions which had taken place in and in neighborhood of area covered by restrictions were shown by abundance of direct evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action to quiet title as against certain restrictions and conditions subsequent in deed to plaintiff's predecessor originally instituted by W. A. Strong, in which George G. Albert was substituted as plaintiff, against G. Allen Hancock and Clara R. Shatto and others, in which Clara R. Shatto filed a cross-complaint. From the judgment, plaintiff appeals. Affirmed.

Bradner W. Lee, Bradner W. Lee, Jr., Kenyon F. Lee, and Loeb, Walker & Loeb, all of Los Angeles, for appellant.

Maurice E. Harrison, of San Francisco, *amicus curiæ*.

Stephens & Stephens, of Los Angeles, for respondent Hancock.

Schenck & Silverstein, of Los Angeles, for respondents Kelly & Cooper.

Lovett & Hervey, of Los Angeles, for respondent Reese and others.

Frank Karr, of Los Angeles, for respondent Electric Land Co.

S. F. McFarlane, of Los Angeles, for respondent Bullock.

B. Rey Schauer, of Los Angeles, for respondent Heffner.

Anderson & Anderson, of Los Angeles, for respondents Shatto and Wilton.

Shaw & McDaniel, of Los Angeles, for respondents Clark and others.

Leroy M. Edwards, of Los Angeles, for respondent Bain.

John L. Dyer, of Los Angeles, for respondent Keller.

PER CURIAM. The following opinion, prepared by Mr. Justice RICHARDS, is hereby adopted as the opinion of the court:

This action was originally instituted by W.

A. Strong, the owner of a certain lot in a certain tract of land known as "Shatto place," in the city of Los Angeles, against one Clara E. Shatto, the original owner of the entire tract and grantor of said specific lot to a predecessor of said plaintiff, the object of said action being that of having the title of said plaintiff to said lot quieted as against certain restrictions and conditions subsequent contained in said deed to the plaintiff's said predecessor. The plaintiff in his first amended complaint set forth specifically the restrictions contained in said deed, which were, in brief, that the premises conveyed were to be used for residence purposes only, and that no part thereof was to be used for business purposes or for any structure whatever other than one first-class private residence of at least two stories in height, with the customary outbuildings, such residence to cost and be fairly worth not less than \$10,000, and to occupy a certain place upon the premises with reference to the front line thereof; that no oil well should ever be drilled upon the property nor any derrick, machinery, or appliances for such drilling ever be erected thereon. Certain other restrictions, not necessary to be herein related, were embraced in said deed. The conditions subsequent contained therein were to the effect that a breach of the conditions and restrictions of said deed should work a forfeiture of said grant and cause said premises to revert to the grantor, her heirs, successors, and assigns. The plaintiff proceeded to set forth that the original grantee of said deed subjected said premises to a trust deed to secure a certain indebtedness and that having defaulted in the payment of which said premises were sold under the terms of said trust deed and were purchased by the plaintiff at such trustee's sale; and that said plaintiff thereby became the owner in fee simple of the premises free and clear of the restrictions subsequent contained in said original conveyance, notwithstanding which the said defendant asserts and claims that said restrictions and conditions are still in full force and effect and threatens that in case the plaintiff shall fail to comply with the same or shall cause or permit any breach thereof she will declare a forfeiture of the said plaintiff's title to said premises and will remove the plaintiff therefrom; that said claim constitutes a cloud upon the plaintiff's title, which he prays the court to remove by its judgment declaring that said claims are void, and decreeing that the said defendant be enjoined from further asserting the same. The defendant in her answer to said amended complaint denied those averments thereof that her aforesaid claims were void or that she had no interest in said premises arising out of the provisions of her said deed to the plaintiff's predecessor; and for a further de-

fense and as a cross-complaint she reasserted the making of said deed to plaintiff's predecessor and the covenants, restrictions, and conditions therein contained. She further alleged that she had from time to time made similar conveyances to diverse persons of other lots in said Shatto Place tract containing provisions similar to those contained in her said deed to plaintiff's predecessor, and upon which many costly residences had been erected by her grantees; that said defendant still remained the owner of a number of lots in said tract, and that both she and her grantees had, by virtue of such grants and holdings, the interest or easement respectively created in and still affecting the plaintiff's said premises; wherefore she prayed the decree of the court that said restrictions, covenants, and conditions subsequent, as set forth and contained in her deed to plaintiff's predecessor of said premises, constitute covenants binding upon said plaintiff as the present owner of said premises, and that the defendant be declared entitled to have the plaintiff's said premises used for the purposes set forth in said covenants and conditions, and for no other purpose; and for general relief.

It may clarify the issues presented to the trial court upon the first and second trials of said cause to define the area, location, and boundaries of Shatto Place tract. The tract embraces about 35 acres of land, lying in the westerly portion of the city of Los Angeles and bounded by Wilshire boulevard, Vermont avenue, Fourth street, and Westmoreland avenue. In the course of its subdivision it was intersected by Sixth street, and also in part by Fifth street, each running westerly, and had laid out through its center, running northerly and southerly, an avenue known as Shatto place. It was subdivided by its owner, Clara R. Shatto, in about the year 1904 and was laid out with the idea of forming an exceptionally high-class restricted residential district, and since its subdivision lots therein have been sold to various purchasers, who have improved the same by the erection of costly residences conforming to the conditions and restrictions contained in the conveyances of said lots. The region which lies contiguous to this tract and in its general neighborhood has also been largely subdivided, sold and improved in the manner described by the trial court in its findings made and filed upon the first and subsequent trials of this cause.

The cause proceeded to its first trial before the court on or about the 7th day of June, 1916, upon the issues as thus framed, and, being submitted, the court filed presently its findings of fact and conclusions of law, wherein it recited that the facts set forth in plaintiff's amended complaint with relation to his source of title to the premises in question were true, and referred in general terms to the restrictions, covenants and conditions

contained in the original deed thereto. The court also found that the averments in the defendant's answer respecting her conveyances to divers persons of other lots in said Shatto Place tract and to the erecting by her grantees of costly structures thereon were true. The trial court then proceeded to make certain other specific findings touching matters, which it becomes important to consider on account of the future history of the cause, and which further findings are as follows:

"That when said tract known as Shatto place was platted and laid out for sale, and the map thereof filed for record, to wit, December 8, 1904, there were then no flats, hotels, apartment houses, stores, or other places of business or business houses in the immediate vicinity thereof; that there were no street car lines running to or through said Shatto place, and no paved streets therein or bounding same; that since said December 8, 1904, there have been constructed two separate double track street railway lines now belonging to the Los Angeles Railway Company (which company is a passenger carrying public utility corporation covering practically the whole city of Los Angeles with passenger car service), serving said Shatto Place tract as well as other parts of said city, one of said lines running through said tract in an east and west direction on Sixth street, which was constructed prior to September 5, 1912, and the other running in a north and south direction on Vermont avenue, which avenue is the west boundary of said tract; franchise for which was issued prior to September 5, 1912, but same was constructed after said date; that on said double tracks at least three separate lines of cars are operated; that the intersection of said Sixth street and Vermont avenue is a transfer point for all of said lines, with cars passing said point on an average of once every minute during the day and a large portion of the night; that the said intersection has become and is now a noisy and a much traveled place; that since December, 1904, many of the streets in said tract and in the immediate vicinity thereof have been paved with asphalt or other like material, including both said Sixth street and Vermont avenue and Wilshire boulevard; that between December, 1904, and September 5, 1912, a three-story, with basement, apartment house was built on Virgil avenue, between Wilshire boulevard and Sixth street, about $3\frac{1}{2}$ blocks from the corner of Sixth street and Vermont avenue, but only $1\frac{1}{2}$ blocks easterly of the east boundary of said Shatto Place tract; and that several flats were built on both the east and west side of Westmoreland avenue between Sixth street and Wilshire boulevard, about $2\frac{1}{2}$ blocks from said corner, but that the property on the west side of Westmoreland avenue in said block abuts in the rear upon the east line of said Shatto Place tract; that several stores and apartment houses have been built in the vicinity of Tenth street and Vermont avenue, about 7 blocks southerly from said corner of Sixth street and Vermont avenue; that all of said plats, apartment houses, and stores are now in use as such and have been so used ever since their erection.

"That since September 5, 1912, another flat has been built and is now occupied as such, on Westmoreland avenue, between Sixth street and

Wilshire boulevard, and a large store building has been erected at Ninth street and Vermont avenue, and within 6 blocks of the property in suit, and there are now in the course of construction three flat buildings at the corner of Seventh street and Vermont avenue, about 1,200 feet southerly from the property in suit; that a place of business known as a gasoline station, being a light frame building about 14 by 20 feet in size, has been constructed and is now, and for a long time past has been, in use as such, on the south side of Wilshire boulevard immediately opposite said Shatto Place tract, and at a point about 20 feet west of the point where the principal street of said tract, to wit, Shatto Place street, would intersect the south line of Wilshire boulevard if said Shatto Place street were prolonged across Wilshire boulevard; that Wilshire boulevard is the south boundary of Shatto Place tract, and that a line midway between Shatto Place street and Westmoreland avenue is the eastern boundary of said tract; that the property described in the amended complaint herein is situated at the southeast corner of Sixth street and Vermont avenue, fronting 100 feet on Vermont avenue and 217 feet on Sixth street; that on the northwest corner of said Sixth street and Vermont avenue there has been erected a place of business known as a gasoline station, where gasoline, coal oil, and like products, including lubricating oils and greases, are sold and kept in stock for sale; that said building is about 14 by 20 feet in size, and of light frame construction, and sets back about 12 feet from the streets; that said place of business is now in operation and has been for about 2 years; that the property on the west side of Vermont avenue north of Sixth street up to Fifth street is free from all restraints, conditions, or restrictions concerning the use and occupation thereof; that the property on the west side of Vermont avenue in the block between Sixth street and Wilshire boulevard is limited, restricted, and conditioned in its use and occupation by terms and conditions subsequent contained in various deeds of grant to the said property made at about the time the said Shatto Place tract was laid out, which said restrictions and conditions subsequent are identical with the conditions subsequent contained in the deed as alleged in the pleadings herein, except that the restrictions and conditions subsequent to the said property on the west side of Vermont avenue expire and become ineffective for any purpose by direct stipulation and provision contained in the said deeds creating said conditions subsequent on and after January 1, 1920.

"That said Vermont avenue is one of the main north and south thoroughfares of the western portion of the city of Los Angeles, and extends from the foothills on the north of said city to the ocean front at San Pedro, a distance upwards of 30 miles; that said Sixth street is one of the main east and west thoroughfares of said city extending from the eastern city limits to the western city limits, a distance of upwards of 10 miles; that both of said streets are extensively traveled throughout their whole lengths."

Upon the foregoing findings of fact the trial court made and filed its conclusions of law: (1) That the plaintiff was the owner in fee-simple absolute of the premises described in his amended complaint; (2) that the de-

fendant Clara Shatto had no right, title, or interest whatever in said premises by reason of the conditions and covenants set forth in said amended complaint, and also in her answer thereto; (3) that said covenants and conditions subsequent are void and of no effect; (4) that said plaintiff is entitled to a decree of said court to that effect and relieving his said property from the cloud thereof, and that the said defendant be debarred, enjoined, and prohibited from asserting or causing to be asserted any title, claim, interest, or right of forfeiture on account of said covenants or conditions subsequent or of any breach thereof. Judgment was accordingly made and entered by said court on or about September 19, 1916. The defendant took and prosecuted an appeal from such judgment to the Supreme Court, which in due course transferred said cause for hearing and determination to the District Court of Appeal in and for the Second Appellate District, Division 2, and said cause was thereafter heard and decided by said appellate tribunal upon said appeal. *Strong v. Shatto*, 45 Cal. App. 29, 187 P. 159. In its decision the appellate court gave its consideration to two main questions as being presented upon said appeal. The first of these was the contention urged by the plaintiff and respondent in the case that the conditions subsequent contained in the defendant and appellant's deed to his predecessor were void as violative of the statutes against perpetuities. The appellate court held against this contention, and the correctness of its ruling in that regard is not brought in question upon the instant appeal. The second question to which the said court gave consideration was as to whether the plaintiff had sufficiently shown that the character of the property involved and of the tract affected by said restrictions and conditions subsequent and of the region had been so far changed since the creation of the restrictions and conditions contained in the appellant's deed to plaintiff's predecessor that the same has become more valuable for business than for residence purposes to such a degree as that a court of equity would no longer enforce a covenant or condition for forfeiture of title.

Upon this branch of the case, the court held (1) that the authorities seemed to support the appellant's contention that the conditions in the deeds to the properties in question were reservations in the nature of easements or servitudes for the benefit of the remaining lands of the grantor, citing *Whitney v. Union Ry. Co.*, 11 Gray (Mass.) 359, 71 Am. Dec. 715; *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632; *Evans v. Foss*, 194 Mass. 513, 80 N. E. 587, 9 L. R. A. (N. S.) 1039, 11 Ann. Cas. 171; *Dawson v. Western M. R. Co.*, 107 Md. 70, 68 A. 301, 14 L. R. A. (N. S.) 809, 126 Am. St. Rep. 337; and (2) that the doctrine that equity will not enforce

restrictions on the use of property only applies to cases where it is sought to enforce such restrictions when the reason and justification for them has failed through changed conditions, but that the rule does not go to the extent of permitting parties whose land is subject to the legal restraint of such limitations to bring an action to quiet their title against such contractual obligations because of changed conditions. Contractual obligations do not disappear as circumstances change. It is only the granting of equitable relief and not the binding force of the restrictive covenant that is affected by a change in the conditions, citing *Brown v. Huber*, 80 Ohio St. 183, 88 N. E. 322, 28 L. R. A. (N. S.) 707, and note; *Welch v. Austin*, 187 Mass. 256, 72 N. E. 972, 68 L. R. A. 189; *Coudert v. Sayre*, 46 N. J. Eq. 386, 19 A. 190; *Kountze v. Helmuth*, 67 Hun, 343, 22 N. Y. S. 204; (3) that the mere fact that property has become more desirable or valuable for business than for residence purposes where the restrictions, notwithstanding the change in conditions, still are of substantial benefit to the dominant estate will not necessarily defeat application for equitable relief, citing *Pagenstecher v. Carlson*, 146 App. Div. 738, 131 N. Y. S. 413; *Landell v. Hamilton*, 175 Pa. 327, 34 A. 663, 34 L. R. A. 227; *Spahr v. Cape*, 143 Mo. App. 114, 122 S. W. 379. The appellate court accordingly reversed the judgment of the trial court upon said first appeal; and, a petition for hearing having been presented and denied in this court, the cause was returned to the superior court for further trial.

Thereupon, one George G. Albert, who had acquired the interest of the plaintiff, Strong, in the lot in said tract involved in the action as originally brought, and who had also acquired the interests of certain other grantees of the defendant Shatto in certain adjoining lots, and who had been substituted for the plaintiff, Strong, by order of court, filed, by leave of the court, a supplemental complaint wherein he joined as codefendants with said defendant Shatto in said action the owners, individual and corporate, of all of the lots in said tract who held the same immediately or mediately under deeds from said defendant Shatto, containing similar covenants, restrictions, and conditions subsequent to those embraced in the deed to Strong and also to the other persons to whose interests in those certain lots in said tract the said substituted plaintiff had succeeded. In his said supplemental complaint said substituted plaintiff again set forth specifically the restrictions contained in the original deed to his predecessor and also, with certain exceptions, in the original deeds of the added parties to the action. He, however, averred upon information and belief that the original grantor of the lots in said tract had made conveyances of lots therein upon other conditions, restric-

tions, and reservations than those generally employed in her transfers; and, also, that she had sold lots therein without any conditions, restrictions, or reservations being imposed thereon. In his supplemental complaint the substituted plaintiff also proceeded to set forth with much of detail, following in many respects the findings of the court upon the former trial, the changes in character as to being residential, business or semibusiness districts of the region surrounding, adjacent to, and in the vicinity of the Shatto Place tract since its original subdivision, including also in his averments certain further changes therein which were alleged to have occurred since the former trial. He also alleged that the said original grantor of said tract had given certain grants and permissions to certain electric railway corporations to construct and operate electric railroads upon certain surface or subsurface roadways within and across said tract, including the right to erect and maintain a station thereon for access to such railways. He also proceeded to allege that subsequent to the creation of said tract as a restricted residential area the city of Los Angeles had adopted certain zoning ordinances creating five zones, consisting of various districts, and prescribing the classes of buildings, structures, and improvements which were to be permitted therein, respectively; that said Shatto place was partly within and partly without two of said zones; that the plaintiff's said lots are embraced within the area of "C" zone as defined by said ordinance, and that by the terms thereof, upon the lots within said zone, no buildings or structures are to be erected or used for other than certain classes of business as specified in said ordinance and set forth in said complaint; that by the terms of said zoning ordinance within the area embraced in "B" zone as described therein only such buildings, structures, or improvements are to be erected, constructed, or used therein as are to be occupied as dwellings, tenements, hotels, lodging or boarding houses, churches, clubs, educational, or eleemosynary institutions, etc. The plaintiff alleges that by the adoption of said zoning ordinance the changed conditions affecting said Shatto place and the lots therein have been so recognized and established by law as to destroy the previous restrictions, reservations, and conditions imposed by the original grantor thereon, and as to render him entitled to have the cloud of such restrictions removed from his said property, and also as to entitle the trial court to render a declaratory judgment affecting all of the lots and property owners within said tract. Wherefore the said plaintiff prays for such relief.

The aforesaid supplemental complaint with the process issued thereon was served upon all of the parties to said action named or added as defendants therein. Certain of said

defendants failed to appear and answer said supplemental complaint, and in due course their and each of their defaults were entered in accordance with law. Others of the said defendants thereafter appeared and answered said supplemental complaint. Some of these joined with the said substituted plaintiff in asking for the same relief. Others of said defendants also answered, denying in varying responses the essential averments of said supplemental complaint and asking that said restrictions, reservations and conditions subsequent be maintained and enforced. Among these was the original defendant Clara R. Shatto, who, in addition to the denials in her answer, presented a cross-complaint against said plaintiff, wherein the averments of her said answer were affirmatively set forth and wherein also she averred that said substituted plaintiff had violated the terms, covenants, and conditions subsequent of the original deed to his predecessor by the erection of an oil station upon one of his said lots, which said cross-plaintiff prayed should be ordered removed, with the alternative that if not so removed the right, title, and interest of said plaintiff be declared forfeited to said cross-plaintiff by reason of such violation. The substituted plaintiff answered said cross-complaint, denying the material averments thereof, and also answered the affirmative matter set forth in the answers of certain other of said defendants who had united with said original defendant Clara R. Shatto in asking that the restrictions, covenants, and conditions subsequent contained in the original deed to plaintiff's predecessor be maintained. The answer and cross-complaint of Clara R. Shatto, as well as the said answers of her codefendants who did answer the said substituted complaint, were not served upon the defendants who had defaulted, nor was the answer of said substituted plaintiff to said answer and cross-complaint of Clara R. Shatto and to the said answers of her several codefendants served upon said defaulting defendants. The objection of the latter to the absence of service upon them of the foregoing pleadings, filed after their defaults for not appearing to the substituted plaintiff's supplemental complaint, has been made the subject of another and independent appeal. The cause went to trial for a second time upon the issues as thus reframed and after a prolonged hearing was again submitted to the trial court for its decision. The court thereupon filed its findings of fact and conclusions of law therein.

In so doing the trial court did not apparently deem it necessary to deal with the question as to whether the substituted plaintiff had, by the additional matters set forth in his supplemental complaint or by the inclusion in said action thereby of all the owners of property within the area of Shatto place,

taken himself or the action outside of the principle announced upon the former appeal to the effect that an owner of a portion of an area affected by restrictions, reservations, and conditions subsequent, similar to those embraced in the original deeds to the lots in Shatto place, could not maintain an action to quiet his title as against covenants of his predecessor in accepting such deed. Neither did the trial court apparently deem it necessary to consider the question as to whether the substituted plaintiff was entitled to seek a declaratory judgment against parties and in an action such as were embraced in his supplemental complaint. It would seem that the reason why the trial court did not rest its decision upon either of these issues is to be found in the fact that the original defendant Clara R. Shatto had presented to said supplemental complaint an answer and cross-complaint upon which, if the facts so warranted, she would be entitled to affirmative equitable relief, rendering it unnecessary, in view of its findings and conclusions in that regard, to determine what remedies the said substituted plaintiff would have been entitled to had the court arrived at another conclusion upon the facts and law of the case. We think the trial court correct in this regard, and, in view of the conclusions as to the issues in the case presented by the said defendant's cross-complaint, we do not find it necessary to consider what the said plaintiff's remedies might have been had we arrived at the conclusion that the cross-plaintiff was not entitled to the relief which the trial court accorded her. We have thus dealt with this subject for the reason that a brief has been filed by certain counsel, as *amicus curiæ* herein, urging that this is in form a proper action calling for a declaratory judgment, under the provisions of sections 1060-1062 of the Code of Civil Procedure.

The trial court in its aforesaid findings of fact found that the averments of the supplemental complaint were true as to the derivation of the substituted plaintiff's title to the lots in the Shatto place, of which he declared himself to have become the owner from certain original grantees of the defendant Clara R. Shatto; and also found that the deeds of the latter to the substituted plaintiff's respective predecessors contained the restrictions, covenants and conditions subsequent set forth in said supplemental complaint. In this connection the trial court further found that, by the terms of said deeds:

"The said conditions are and shall be covenants running with the land for the benefit of the grantor herein, and for the benefit of each and all of said lots in said tract and of the owners of said lots and their respective successors in interest."

The trial court further found that the title of said plaintiff is and at all times has been

subject to the interest and estate therein of defendant and cross-complainant Clara R. Shatto, which interest and estate is in the nature of a reversion, to wit, a right of re-entry for condition broken, and is subject, also, to the easement imposed upon said property by virtue of the provisions, conditions, and restrictions contained in the deeds in the pleadings herein referred to, which easement inures to the benefit of each and every other lot in said Shatto place. It may be said, in passing, that in so finding the trial court was but following the interpretation of said deeds and of the restrictions, covenants, and conditions subsequent contained therein which had been placed upon them by the decision of the appellate court upon the former appeal, the substance of which has been above set forth. The trial court further found that the allegations of the supplemental complaint as to the changes in uses which had taken place in the areas surrounding and adjacent to Shatto place were true, except that it was not true that:

"The change in uses to which the land surrounding and adjacent to Shatto place has been put has been complete; nor is it true that any of said changes in use of property have taken place within the said Shatto place; nor is it true that any of said changes of use of property have made the property within Shatto place or any of the lots contained therein wholly unadapted or undesirable for residential purposes. And in this connection the court finds that the changes in use of property outside of but adjacent to and in the vicinity of Shatto place, herein found to have taken place, are the same sort and character of changes of use which the court found to have taken place in and by its written findings of fact filed herein upon the first trial of this cause, and that the difference in the said change of use and in the conditions affecting the property in the vicinity of the said Shatto place is one of degree, but not of kind."

With respect to the averments of the supplemental complaint in support of the substituted plaintiff's claim that the defendant Clara R. Shatto, as the original grantor of lots in said tract, had imposed restrictions, conditions, or reservations upon some lots therein varying in character from those impressed upon the said plaintiff's property, the trial court found that:

"It is not true that defendant Shatto has imposed any other conditions, restrictions, or reservations upon any lot or lots in Shatto place varying in character from the restrictions hereinabove referred to; nor is it true that said or any conditions, restrictions, or reservations have been imposed without any general plan for the entire subdivision; nor is it true that any of said conditions, restrictions, or reservations have expired by limitation of time, or otherwise, or at all; nor that any lot or lots within said tract have been sold, transferred, or conveyed by defendant Shatto without any conditions or restrictions or reservations. But it is true that the said tract was laid out upon a general plan for the entire subdivision as a first-class resi-

dence tract, and the only variation in the conditions, restrictions, or reservations upon which said lots were sold are those relating to the cost of houses to be erected on the corner lots and the inside lots and the character and cost of residence allowed in the low ground in lot 19, of block 4 of said tract, and also relating to the difference in the distances that residences are required to be set back from the street, as to lots upon different streets in said tract."

With respect to the averments in said supplemental complaint as to the passage and content of certain zoning ordinances by the city of Los Angeles, the trial court made no findings for the reason that it had excluded the evidence thereof offered by the said plaintiff at the trial. Whether or not it was in error in so doing is presented upon another phase of this appeal. In addition to the foregoing findings negating or modifying the averments of the substituted plaintiff's supplemental complaint, the trial court expressly found that:

"Each and all of the allegations contained in the cross-complaint of the defendant Clara R. Shatto are true."

In so doing the trial court found that the said substituted plaintiff, by the placing of an oil station upon one of his said lots affected by the foregoing restrictions, was engaged in violating the covenants, restrictions, and conditions subsequent of the deed in which his predecessor was the grantee of said lot, and was subject to the penalties of such violation. The court also found in favor of certain of the codefendants of the said cross-complainant as to the truth of certain averments in their respective answers which accorded with the findings favorable to said cross-complainant upon her answer and cross-complaint. As conclusions of law based upon the foregoing findings of fact, the trial court found that the covenants, reservations, restrictions, and conditions subsequent contained in said deeds were legal, valid, and enforceable; that the owner of each lot and parcel of land in said Shatto place owns the same subject to said covenants, reservations, restrictions, and conditions subsequent; that the changed conditions in and about the property outside of said Shatto place have not made and do not make it inequitable to enforce said covenants, reservations, restrictions, and conditions, or any of them; that the plaintiff has violated and is violating said "conditions, reservations, restrictions, and covenants, and that the defendant and cross-complainant Clara R. Shatto is entitled to an interlocutory decree that the title of plaintiff in and to lot 15, block 2, of said Shatto place be forfeited, and that the same be vested in her, unless the structure maintained on said lot be removed within 10 days after entry of said decree, and that if it be not so removed within said period then said Clara R. Shatto shall be entitled to a

final decree declaring plaintiff's title to said land forfeited and the whole title thereto re-vested in her." From the judgment of the court in accordance therewith, the said plaintiff has prosecuted this appeal. The main issue litigated upon this appeal is as to whether certain changed conditions affecting the uses of property within the area of the Shatto place have operated to abrogate the covenants, restrictions, and conditions subsequent in the deed of plaintiff's predecessor in title to the property described in his supplemental complaint, or, if not entirely to abrogate these, to at least render their enforcement inequitable; and also, whether certain changed conditions in respect to the uses of property and in the movement of traffic in the near neighborhood of said tract operated and are operating to render it no longer equitable to enforce against said plaintiff and his said properties the burden and the penalties of said covenants, restrictions, and conditions subsequent.

In presenting the foregoing phases of this main issue the appellant urges that the findings of fact of the trial court do not support its conclusions of law and its judgment based thereon; that the said findings of fact of the trial court are not supported by the evidence in the case; and that the trial court erred in the exclusion of certain evidence bearing materially upon the issues of fact presented by the pleadings in the cause. In support of the first phase of the foregoing contentions the appellant insists that the uncontradicted evidence in the case shows that the defendant Shatto, in the making of certain conveyances subsequent to the laying out by her of Shatto place as a restricted residential tract, departed from the rule of uniformity in respect to the uses to which the properties therein to be conveyed should be put, and also in respect to the length of time during which such restrictions, etc., upon such other properties were to be operative. The appellant refers specifically to four deeds, three of which were to Los Angeles Pacific Land Company, a corporation, and the other of which was to one Hazel Kibby. These deeds contain in addition to the restrictions, etc., found in the deed to plaintiff's predecessor two variations not contained therein. By one of these permission was expressly granted to operate an electric railway with tracks over and subways under the particular lots so conveyed, and also permission to said Pacific Land Company to provide a proper station and access to such railway. The other variation consisted in the provision that the restrictions, etc., contained in all of the grantor's deeds and which were otherwise to be perpetual, should, in respect to these four particular conveyances, cease and terminate in the year 1955 and be of no further force and effect. The evidence educed upon the trial

disclosed that these four deeds were made about three years prior to the conveyance of said plaintiff's lots to his predecessors in title; that the deed to said Pacific Land Company (which is, in fact, a corporation operating electric railways) covering a portion of block 19 in said tract, conveyed to it lands lying in low ground formed by the valley of a little stream which ran across that portion of said tract, which lands had not been subdivided into residence lots but remained in one large tract apparently because not suited to residential uses. The said corporation planned to run a railway to the beach, the route of which would lie across Shatto place and upon and along this particular low-lying plot of ground with subway approaches underlying certain other lots also granted to it and to said Hazel Kibby. It would, of course, be beneficial to said entire tract to have a station and means of access to such railway, in case permission was given in these grants to construct the same, and it would require no straining of reason to conclude that the construction and operation of such a railway with convenient station and approaches would be a benefit to said tract and to the subsequent purchasers of residential lots therein. Some such benefit might well have been contemplated by the original owner of said tract in the adoption of a general plan for the devotion thereof generally to restricted residential uses; and that some such purpose was in her contemplation at the time of the subdivision of said tract and of its devotion to such restricted uses seems to have been agreed to by the parties to this action in the course of the trial thereof by a stipulation wherein such general plan was conceded, and wherein the specific portion of block 19 of said tract described as low-lying ground was specifically referred to.

[1] It would thus seem that a variation in the otherwise uniform restrictive uses to which the lots generally in said tract were to be subjected, which would permit these particular portions of said tract to be utilized for an electric railway, ought not to be held to be such a variation as would in any way injuriously affect the lots which the plaintiff's predecessors subsequently acquired, especially in the absence of any showing that the construction and operation of such railway or of the station and approaches thereto would render the plaintiff's said lots less desirable or available for the restricted residential uses to which by the terms of the deeds to his predecessors they were to be confined. No such showing was made or attempted on the part of the appellant. The only case which is cited by appellant's counsel as sustaining his contention that the construction and operation of a railway along or across a tract set apart to restricted residential uses would have the effect of abro-

gating such restrictions as to the other lots in said tract is the case of *Columbia College v. Thacher*, 87 N. Y. 311-317 (41 Am. Rep. 365). In that case the court found that an elevated steam railway had been built and was being operated past the premises and that "not only large depreciation in rents when occupied, but also frequent vacancies have followed the construction of the road"; and further found "that the construction of this road and its management have rendered privacy and quiet in the adjacent buildings impossible, and so affected the premises of the defendant, and all those * * * who, with the plaintiff, entered into the covenant, that neither their better improvement nor permanent value can be promoted by enforcing its observance." The conclusion of the court upon appeal in that case is well founded upon the foregoing findings of fact, but it is obvious that they afford no comfort to the appellant in the instant case by reason of the difference in the facts and of the findings and conclusion of the trial court thereon.

[2] As to the appellant's contention that vehicular traffic and travel other than by railways along or even across Shatto place has rendered undesirable residence therein, he cites no authority to support such a theory. It is a matter of common knowledge that boulevards, avenues, and broad highways best suited for the use of vehicles usually traverse suburban areas devoted to and favored for residential uses. To hold that the several broad boulevards and avenues which lead from Los Angeles to the sea have by their increasing travel destroyed restricted residential uses of property along their route would be contrary to both reason and experience; besides, the trial court has found to the contrary.

[3] The appellant's second contention upon this phase of his appeal is that the fact that the restrictions in the four deeds above referred to, which are similar to those in the conveyance to his predecessor, run for a limited time, viz., until 1955, while the restrictions, etc., in his predecessor's deed have no such limitation. The reply which the respondents make to this contention, and the one which the trial court apparently adopted is that this claim will not be available to the plaintiff until the year 1955, when, for the first time, whatever injurious difference there might be from the operation of these restrictions will arise. In the meantime, their operation is uniform upon all of the lot owners whose deeds contain them, and they are, therefore, equally binding upon all. We are satisfied with this contention.

[4-6] The next and in fact the main and most serious contention which the appellant urges upon this appeal is that the changes in the westward movement of business in the city of Los Angeles and in the consequent uses of property in the neighborhood of Shatto

place have been such as to render it inequitable to enforce the restrictions and conditions subsequent contained in the deeds to the original grantees of the lots in Shatto place against the present owners of any and all of the lots therein affected thereby, and particularly against the plaintiff as the present owner of the particular lots described in his supplemental complaint. At the outset of the discussion as to the merits of this contention it is to be noted that the appellant does not contend that any changes have occurred in the uses of lots within Shatto place other than those connected with the building and operation of the electric railway with its station and approaches, the effect of which has already been discussed and the change which he is attempting to make in the use of one of his own lots therein through the erection of an oil station thereon. Otherwise Shatto place remains the exceptionally high class residential district, having an area of about 35 acres, which its original owner through its subdivision and sale of its lots with the restrictive covenants above referred to designed it to be. It is contended by the respondent herein and is not denied that there is no like area in the city of Los Angeles so uniformly occupied with palatial homes as is this district. With respect to the changes, which, since its original subdivision, have occurred in the neighboring region, these were originally found upon specifically by the trial court, as hereinabove set forth, upon the first trial of this cause. Upon the second trial thereof the court, in substance, adopted the detail of its former findings in the foregoing regard, and as to whatever additional evidence was presented upon that issue upon the second trial, the trial court found:

"That the changes in use of property outside of but adjacent to and in the vicinity of Shatto place herein found to have taken place are the same sort and character of changes of use which the court found to have taken place in and by its written findings of fact, filed herein upon the first trial of this cause, and that the difference in the said change of use and in the conditions affecting the property in the vicinity of said Shatto Place is one of degree, but not of kind."

The trial court further found:

"That it is not true that the change in uses to which the land surrounding and adjacent to Shatto place has been put has been complete; nor is it true that any of said changes in use of property have taken place within said Shatto place; nor is it true that any of said changes of use of property have made the property within Shatto place, or any of the lots contained therein wholly unadapted or undesirable for residential purposes."

These findings, taken in connection with the express averments of the cross-complaint of the defendant and respondent Clara R. Shatto and of the further finding of the trial court, "That each and all of the allegations

of the cross-complaint of the defendant Clara R. Shatto are true," amount to a finding by the trial court that whatever changes it may have found to have occurred in the uses of property adjacent to, in the vicinity of, or in the near neighborhood of Shatto place have not, thus far at least, affected the availability, desirability, or value of all or any of the lots within its area for such restricted residential uses as were contemplated and provided for in the deeds to the original grantees thereof. We are of the opinion that the evidence introduced before the trial court upon the second trial of this cause was and is sufficient to justify the foregoing findings of fact by the said court; and, this being so, we are further of the opinion that the conclusions of law which the trial court based upon its aforesaid findings of fact are fully supported by the great weight of authority upholding the validity and sustaining the enforcement of like covenants and conditions subsequent entered into between the owners and their grantees of lots within areas devoted to strictly residential uses. The trial court held, conformably to the decision of the appellate tribunal in *Strong v. Shatto*, supra, and the cases cited therein, and also consistently with the decision of this court in the case of *Martin v. Holm*, 197 Cal. 733, 242 P. 718, that the covenants, restrictions, and conditions subsequent in the deeds of said grantor to her grantees are in the nature of easements or servitudes for the benefit of each and every other parcel of land in said tract, and that such covenants, restrictions, and conditions subsequent run with the land. The trial court was also correct, in conformity with the ruling in the case of *Miles v. Clark*, 44 Cal. App. 539, 549, 187 P. 167, in holding that the changed conditions which it found to exist in and about property outside of Shatto place "have not made and do not make it inequitable to enforce said conditions, reservations, restrictions, and covenants, or any of them." The cases cited by the appellant himself, such as the case of *Columbia College v. Thacher*, supra, and *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476, recognize the rule that restrictions upon the uses of residential areas which are interbinding upon each and all of the purchasers of lots within such areas, and which have for their purpose that of making the locality a suitable one for residences, will be enforced in equity unless and until, "owing to the general growth of the city, and the present use of the whole neighborhood for business, this purpose can no longer be accomplished." In the last above-cited case from which the foregoing excerpt is taken, the court aptly says that whether the right to equitable relief exists "depends upon the circumstances of each case." These are reflected in the findings of the trial court and if there is suf-

ficient evidence to sustain them the discretion exercised by the trial court in granting or refusing such equitable relief ought not, except in case of clear abuse, to be disturbed upon appeal. This rule was given application in the majority opinion of this court in the case of *Downs v. Kroeger*, 254 P. 1101, wherein the trial court upon a somewhat different state of facts had refused to grant equitable relief. It should for a like reason be given application to the instant case wherein the trial court has, upon the facts found, exercised its discretion in favor of granting to the cross-complainant the equitable relief prayed for in her cross-complaint.

[7] The appellant makes the final contention that the trial court was in error in the refusal to admit in evidence certain zoning ordinances of the city of Los Angeles which affected property in the neighborhood of and in part within said Shatto place, including the lots owned by the substituted plaintiff herein, and which ordinances had been pleaded in his supplemental complaint. The ground given by the trial court for such refusal was that the enactment by the city of such ordinances could not be claimed to directly affect the covenants, conditions, or transfers between private parties relating to their rights and obligations respecting the property in question; and that the intimations or recitals in such ordinances as to the existence of changed conditions in or in the neighborhood of the property under consideration as being a restricted area were not to be considered evidence of the existence or non-existence of the actuality of such changed conditions. It may be that the adoption of such ordinances by the municipality affecting property subjected to residential restrictions would shed some light upon the question as to whether, in the course of civic growth, changed conditions had arisen in the neighborhood of such property which would render the application of such zoning provisions advisable, and hence render the admission in evidence of such ordinances proper in a litigation between strictly private parties involving their contractual rights and obligations.

The appellant has, however, furnished us with no authority supporting this view; but even assuming it to be correct, we do not consider that the error, if it be such, of the trial court in the exclusion of such indirect evidence would be sufficiently prejudicial to justify a reversal in view of the fact, as shown by the record herein, that the respective parties to this action presented an abundance of direct evidence with respect to the actual conditions and changes in conditions which had taken place in and in the neighborhood of the area covered by the restrictions in question. Reviewing this record as a whole, we conclude that the findings of fact of the trial court are sufficiently supported by the

direct evidence in the case; that its conclusions as to the law applicable to such a state of facts are correct; and that it did not abuse its discretion in awarding to the cross-complainant herein the relief sought in the prayer of her cross-complaint.

The judgment is affirmed.

SHENK, J. I concur in the judgment for the reason that, under the pleadings and evidence on the second trial, it may rightly be said (1) that it was competent for the trial court to grant the relief prayed for in the cross-complaint of Clara R. Shatto, and (2) that there was evidence to support the finding that the conditions in and surrounding said tract had not so changed as to render it inequitable to enforce said restrictions. It may also be said that if said finding had been the other way likewise it would have had sufficient evidentiary support. Under these circumstances, this court may not properly disturb the finding now made on that subject. *Downs v. Kroeger* (Cal. Sup.) 254 P. 1101; *Miles v. Clark*, 44 Cal. App. 539, 187 P. 167. The finding on this issue was favorable to the plaintiff on the first trial. The judgment on that trial was reversed for the reason, as I understand the decision in *Strong v. Shatto*, 45 Cal. App. 29, 187 P. 159, that an action brought by a lot owner in the tract to quiet his title against such restrictions could not prevail when it appeared that there had been no breach of the restrictions nor any attempt by an interested property owner to enjoin a breach or to enforce a forfeiture. It was held on the former appeal, following a recognized and controlling line of authorities, that a landowner in the tract had no standing in court in his endeavor to quiet his title against and to have declared void the restrictions on his lot, and that it was only when it was sought to enjoin a breach of such restrictions or to declare a forfeiture that equity would refuse, because of changed conditions, to lend its aid in the enforcement thereof. It was further held on the former appeal that it was "premature, at least, to determine the equities of the parties as they might exist at some future time in the event of such breach." This action was commenced prior to 1921. In that year sections 1060, 1061, and 1062, relating to declaratory relief, were added to the Code of Civil Procedure. The supplemental complaint was filed after those additions to the Code. This change in the law was, in my opinion, sufficient to enable the substituted plaintiff to proceed thereunder and to have his status declared under the conditions as were then shown to exist, and this, notwithstanding the old rule which required him to be hazardingly active in the breach of such restrictions and passive in litigation. The

history of this case would indicate that on the second trial undue importance was given to the decision on the former appeal. As stated, the finding as to changed conditions was favorable to the plaintiff on the first trial. On the second trial the court found that the changes in the use of property adjacent to and in the vicinity of Shatto place, "herein found to have taken place, are the same sort and character of changes of use which the court found to have taken place in and by its written findings of fact filed herein upon the first trial of this cause, and that the difference in the said change of use and in the conditions affecting the property in the vicinity of said Shatto place is one of degree, and not of kind." Nevertheless the court proceeded to and did deny the substituted plaintiff any relief when not only the same business conditions surrounding the tract were proved as were shown to exist at the former trial, but also further development of business adjacent to the tract was shown to have taken place. It cannot be disputed that, notwithstanding the findings on the first trial, the trial court on the second trial had the right to weigh the evidence and to find either way on the conflicting evidence then presented, but it seems to me that the result of this litigation has become abortive if the decision on the former appeal was considered, as it must have been, as in any way establishing the law of the case. In view of the fact that the conditions surrounding the tract are or may be continually changing, no question of the law of the case could properly arise as affecting the substituted plaintiff's standing in court unless it be true, which I think it is not, that the declaratory relief sections of the Code have no application to this sort of an action.

The trial court also found that, although the changes in the use of the property surrounding the tract had taken place as alleged in the supplemental complaint, yet "it is not true that the change in uses to which the land surrounding and adjacent to Shatto place has been put has been complete." The main opinion quotes this finding as apparently having some bearing on the case. If from such finding it may be concluded that the tract in question must be entirely surrounded with skyscrapers or other business establishments in order that the rule of changed conditions be made applicable, I am not prepared to subscribe to that doctrine. If the finding points to any other conclusion, I am not able to discover it. However, disregarding said finding, whatever it may mean, the judgment appealed from seems to be immune from successful attack in the light of the record on which it is based.

I concur: **PRESTON, J.**

201 Cal. 555

STRONG v. SHATTO et al. (L. A. 8530.)

Supreme Court of California. July 2, 1927.

1. Action $\Leftrightarrow$ 6—In action to quiet title and for declaratory judgment defining rights of parties in tract, court could render judgment binding upon all defendants served.

In action to quiet title as against certain restrictions and conditions subsequent, in which plaintiff sought declaratory judgment defining rights and interests of all parties to said action in and to properties within tract, trial court had power to render whatever judgment, binding upon all defendants who had been served, defining and determining their respective rights in tracts, as was fairly within issues tendered by complaint.

2. Judgment $\Leftrightarrow$ 112—Default of defendants in action to quiet title and for declaratory judgment declaring rights of parties in tract, admitted every material fact essential to judgment.

In action to quiet title against restrictive covenants and for declaratory judgment defining rights of all parties to action in properties within tract, default of defendants, who, being duly served, did not appear and answer, constituted admission of every material fact essential to such judgment.

3. Judgment $\Leftrightarrow$ 113—In action to quiet title, defaulting defendants were not entitled to service of answers of codefendants wherein no additional relief was sought.

In action to quiet title against restrictive covenants and for declaratory judgment declaring rights of all parties in certain tract, defaulting defendants were not entitled to be served with answers of codefendants wherein no further relief was sought than that grantable under terms of complaint.

4. Judgment $\Leftrightarrow$ 113—Codefendant's cross-complaint relating to property of plaintiff in action to quiet title need not be served on defaulting defendants (Code Civ. Proc. § 442).

In action to quiet title against restrictive covenants and for judgment declaring rights of all parties in certain tract, codefendant's cross-complaint, in which only remedy sought related to property of plaintiff and did not affect in any degree rights and interests of any other defendant, need not have been served on defaulting defendants, under Code Civ. Proc. § 442.

5. Appeal and error $\Leftrightarrow$ 151(2)—Defaulting defendants held not entitled to appeal from judgment entered on cross-complaint, which did not affect them (Code Civ. Proc. § 938).

In action to quiet title against building restrictions and for declaratory judgment declaring rights of all parties in certain tract, in which one defendant filed cross-complaint relating only to property of plaintiff, defaulting defendants were not entitled to appeal from judgment entered on cross-complaint, since they were not aggrieved thereby, under Code Civ. Proc. § 938.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action to quiet title as against certain restrictions and conditions subsequent in deed to plaintiff's predecessor by W. A. Strong, in which George C. Albert was substituted as plaintiff, against Clara R. Shatto, John G. Bullock, and others. From the judgment, John G. Bullock and other defendants not named appeal. Affirmed.

Frank Karr and C. W. Cornell, both of Los Angeles, for appellant Pacific Electric Land Co.

S. F. McFarlane, of Los Angeles, for appellant Bullock.

B. Rey Schauer, of Los Angeles, for appellants Heffner.

Shaw & McDaniel, Bradner W. Lee, Bradner W. Lee, Jr., and Kenyon F. Lee, all of Los Angeles, for respondent.

PER CURIAM. The following opinion, prepared by Mr. Justice Richards, is hereby adopted as the opinion of the court:

This appeal is by certain defendants in the case of Strong v. Hancock, 258 P. 60, wherein the decision of this court upon the main appeal has been this day filed. The facts upon which the present appeal is predicated are fully set forth in said decision. The appellants herein were brought into this case after it had been for the first time tried in the superior court, and after the judgment of said court rendered and entered upon said first trial had been reversed by the District Court of Appeal (45 Cal. App. 29, 187 P. 159), and after the substituted plaintiff in the action had filed a supplemental complaint amplifying the issues in the cause and making all of the lot owners in Shatto place parties to the action prior to the second trial thereof. Said supplemental complaint having, with proper process, been served upon each and all of said added defendants, those of said defendants who are the appellants herein defaulted. After their said defaults had been duly entered, the others of said new-made defendants who had not defaulted filed their respective answers to said supplemental complaint wherein they each set forth their respective claims as to their and each of their ownership and interest in their respective lots in said Shatto tract and generally in the properties embraced within said tract. Their said answers were not served upon those of their codefendants whose defaults had been entered. The original defendant, Clara R. Shatto, also answered the said supplemental complaint with similar denials and averments to those of her codefendants who had answered, and also filed and served upon said substituted plaintiff and upon her codefendants who had not de-

faulted her said answer and cross-complaint, but did not serve either her answer or her said cross-complaint upon said defendants who are the appellants herein and whose defaults had prior thereto been duly entered. The appellants herein contend that they were entitled, notwithstanding their aforesaid defaults and the due entry thereof, to be served with their codefendants' said answers, and especially with the answer and cross-complaint of their codefendant Clara R. Shatto, and hence urge upon this appeal that the judgment herein should be reversed. We find no merit in this contention. This action in its original inception was an action to quiet title and it retained this character throughout, notwithstanding its amplification both as to parties and as to the relief sought through the filing and service of the substituted plaintiff's supplemental complaint. This being so, these appellants upon their introduction into this action became actors therein and were called upon to set forth their own respective rights with reference not only to the lot owned by each in said tract, but with reference to the lots, ownerships, and interest generally in said tract not only as against the plaintiff, but also as against each and all of their codefendants in said action.

[1, 2] This is true not only because of the nature of the action but doubly so because of the amplitude of the averments of the supplemental complaint as to the source and limitations upon the titles of each and all of said defendants in relation to their own particular property and the properties of each of the parties to said action, but also because of the fact that a declaratory judgment was sought by said substituted plaintiff defining the rights and interests of each and all of the parties to said action in and to the properties within the area of the entire tract. The trial court was thus invested with power to render whatever judgment, binding upon all of said defendants who had been duly served, defining and determining their and each of their respective rights and interests in said tract as was fairly within the issues tendered by said supplemental complaint, and the default of said defendants, who being duly served, did not appear and answer, constituted an admission of every material fact essential to such judgment. *Rowe v. Table Mountain Water Co.*, 10 Cal. 441; *Hutchings v. Ebeler*, 46 Cal. 557; *Title Ins. & Trust Co. v. King, etc., Co.*, 162 Cal. 44, 120 P. 1066.

[3] Having defaulted, these defendants and appellants were no longer entitled to be served with pleadings thereafter filed, which did not broaden the scope of the relief to which the plaintiff or their codefendants would be entitled as against them or any of them under the averments of the supplemental complaint, other than those specially ex-

cepted to by the terms of sections 650 and 1014 of the Code of Civil Procedure. The answers therefore of their codefendants, wherein no further relief was sought than that grantable under the terms of the said supplemental complaint, were not required to be served upon such defendants in default, and hence as to these the appellants herein are entitled to no consideration upon this appeal. This conclusion applies as well to the answer of the defendant Clara R. Shatto as to the like answer of her codefendants who did not default. This leaves as the only remaining problem upon this appeal the question as to whether said defaulting defendants were entitled, notwithstanding the prior entry of their and each of their said defaults, to be served with their codefendant Shatto's cross-complaint. Section 442 of the Code of Civil Procedure provides that "The cross-complaint must be served upon the parties affected thereby."

[4, 5] An examination of the cross-complaint of Clara R. Shatto in this action discloses that the only remedies which she sought thereby related to the property of the substituted plaintiff herein within said Shatto place and did not affect in any degree whatever the rights and interests of any other defendant therein. These appealing defendants were, therefore, in no wise injuriously affected by the averments of said cross-complaint, nor by the limited relief sought therein, nor by the judgment of the trial court in favor of said defendant Clara R. Shatto upon her said cross-complaint. They were therefore neither entitled to be served with said cross-complaint, nor were they entitled to appeal from the judgment entered thereon, for the reason that they were not "aggrieved thereby." Code Civ. Proc. § 938. The appellants, however, claim that they were aggrieved by the portion of such judgment, wherein it was decreed "that the owner of each lot and parcel of land in said Shatto place is the owner of an easement in each and every other lot or parcel of land in said tract to the extent of and as provided in and by said conditions, restrictions, and covenants for the benefit of the parcel of land which he owns." The answer to this contention is that already suggested herein, viz., that since the terms, restrictions, reservations, and conditions subsequent of each and all of the deeds of each and all of the defendants to this action were fully set forth in the supplemental complaint filed herein, and the court was thereby asked to determine the respective rights and interests of each and all of said defendants thereunder and to render a declaratory judgment so doing, the court in the judgment it did thereafter render did not, in the particular aspect thereof above complained of, go beyond the issues tendered in said supplemental complaint and which said defendants by

their and each of their defaults consented that the said court should so determine.

The judgment is, as to these defendants, affirmed.

201 Cal. 773

W. A. STRONG (George C. Albert, substituted), Plaintiff and Respondent, v. **Clara A. SHATTO et al.**, Defendants, and **G. Allan Hancock et al.**, Defendants and Appellants. (L. A. No. 8556.)

Supreme Court of California. July 2, 1927.

In Bank. Appeal by defendant from a judgment of the Superior Court of Los Angeles County, Charles S. Burnell, Judge, in an action to quiet title as against certain restrictions and conditions subsequent in deed to plaintiff's predecessor. Affirmed.

Stephens & Stephens, of Los Angeles, for appellant Hancock.

Schenck & Silverstein, of Los Angeles, for appellants Kelly & Cooper.

Lovett & Hervey, of Los Angeles, for appellants Minnie B. Reese and others.

Frank Karr, of Los Angeles, for appellant Pacific Electric Land Co.

S. F. McFarlane, of Los Angeles, for appellant Bullock.

B. Rey Schauer, of Los Angeles, for appellant Heffner.

Anderson & Anderson, of Los Angeles, for defendant Josephine Wilton.

Victor E. Shaw, of Los Angeles, for defendants Frank L. Clark and others.

Leroy M. Edwards, of Los Angeles, for defendant Ferdinand R. Bain.

Bradner W. Lee, Bradner W. Lee, Jr., Kenyon F. Lee, and Loeb, Walker & Loeb, all of Los Angeles, for respondent.

PER CURIAM. The parties to this appeal having stipulated that the same may stand submitted upon the briefs on file in the causes of **W. A. Strong** (George C. Albert, Substituted), Plaintiff and Appellant, v. **G. Allan Hancock et al.**, Defendants and Respondents (L. A. No. 8555) 258 P. 60, and **W. A. Strong** (George C. Albert, Substituted), Plaintiff and Respondent, v. **Clara A. Shatto et al.**, Defendants, and **John G. Bullock et al.**, Defendants and Appellants (L. A. No. 8530) 258 P. 71, this day decided, and having further stipulated that no other questions are presented upon this appeal than those presented and decided in the aforesaid causes, it is hereby ordered, upon the authority of the decisions in said causes this day filed, that the judgment, in so far as the appellants herein are affected thereby, is affirmed.

201 Cal. 601

PEOPLE, etc., Plaintiff and Respondent, v. **Harry K. WEITZEL**, Defendant and Appellant. (Cr. 2962.)

Supreme Court of California. July 15, 1927.

In Bank.

Appeal by defendant from a judgment of the superior court of San Diego county, Geo. H. Cabaniss, judge, of conviction of the crime of

bribery and from an order denying motion for a new trial. Reversed.

Sample & Harden, of San Diego, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Chester C. Kempley, of San Diego, for the People.

PER CURIAM. The judgment against the defendant and appellant having been reversed without ordering, a new trial (opinion filed April 22, 1927 [Cal. Sup.] 255 P. 792), it is ordered that the bail of said defendant and appellant be exonerated. Pen. Code, § 1262.

201 Cal. 560

CHAPPELL v. SAN DIEGO & ARIZONA RY. CO. (L. A. 7642.)

Supreme Court of California. July 2, 1927.

1. Negligence ⇨83—Doctrine of last clear chance presupposes plaintiff's negligence, resulting in imminent danger, and defendant's failure to exercise ordinary care to avoid injury.

The doctrine of the last clear chance presupposes plaintiff, as result of own negligence, is in situation from which she cannot escape by exercise of ordinary care, and defendant, though realizing situation, fails to utilize clear chance by ordinary care to avoid injury.

2. Negligence ⇨83—Doctrine of last clear chance applies where defendant perceives peril in time to avoid accident by ordinary care.

Doctrine of last clear chance applies where defendant actually perceives perilous position of plaintiff in time to avoid accident by exercise of ordinary care.

3. Railroads ⇨350(33)—Whether motorman perceived peril of passenger in automobile on tracks and failed to exercise ordinary care to stop held for jury.

Whether motorman perceived perilous position of passenger in automobile stalled on track at crossing in time to stop and failed to exercise ordinary care to do so held, under the evidence, for jury, under doctrine of last clear chance.

4. Appeal and error ⇨978(3)—Supreme Court may not disturb finding on affidavits on motion for new trial, of plaintiff's prejudicial conduct, in absence of abuse of discretion.

The Supreme Court may not disturb finding on affidavits and counter affidavits, filed on motion for new trial, of plaintiff's prejudicial conduct in seeking to influence women jurors by conversation during recess, in absence of abuse of discretion.

5. Appeal and error ⇨1050(1)—Error in permitting testimony of railway car's speed at other times held not reversible under other evidence of speed at time of accident.

Error in permitting testimony of speed of defendant's railway car at dangerous curve on days other than day of accident held not reversible, where there was other evidence of speed of car at the time of the accident.

6. Damages $\S$ 130(3)—\$3,000 held not excessive for woman's injuries consisting of pain, fracture of breastbone, and traumatic neurosis.

\$3,000 held not excessive for personal injuries confining woman to bed for 27 days, resulting in continual pain, numbness, fracture of breastbone, and definite traumatic neurosis, even though plaintiff falsely testified concerning injuries, where jury was fully advised of the falsity.

7. Appeal and error $\S$ 1004(1)—Supreme Court would not set aside verdict for damages for personal injuries as excessive unless so excessive as to raise presumption of passion or corruption.

The Supreme Court would not be warranted in setting aside verdict for damages for personal injuries as excessive unless the award is so grossly disproportionate to compensation reasonably warranted as to raise a presumption that it was the result of passion, prejudice, or corruption.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action for damages for personal injuries by Anna R. Chappell against the San Diego & Arizona Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Read G. Dilworth, of Coronado, and V. F. Bennett, of San Diego, for appellant.

Charles C. Crouch, Hugh A. Sanders, and Crouch & Sanders, all of San Diego, for respondent.

SHENK, J. This is an appeal from a judgment on a verdict in favor of the plaintiff in an action for damages for personal injuries. The collision involved occurred on May 12, 1921, at a point in the outskirts of the city of San Diego where Francis street, a north and south street, crosses the tracks of the defendant railway company at right angles. The defendant company operates a line of railroad, from San Diego to Lakeside, about 17 miles in length. On this line steam trains are operated for the carriage of passengers and freight. The company also operates thereon a heavy type of passenger and freight car, the motive power of which is distillate. Before the Francis street crossing is reached on the course outwardly from San Diego the cars of the railroad company proceed over a reverse or horseshoe curve. The view to the west of Francis street is in part obstructed by a hill and at the time of the accident was further partially obstructed by a growth of brush bordering the right of way. The grade of the curve is slightly upward as the tracks approach and cross Francis street. Just before the accident one of the gas motorcars of the defendant was nearing the Francis street crossing from the west. It was proceeding

through the cut in the hill, which cut is from 5 to 9 feet in depth. The hill slopes downwardly to the level of the tracks at a point about 100 feet westerly from the crossing.

The plaintiff resides in the vicinity of said crossing. She has a son who was living at home at the time. He was employed in San Diego, usually not returning to his home for his noonday meal. On the day of the accident the plaintiff requested her son to return home at midday and as driver convey her to San Diego in a Ford automobile owned by the plaintiff. As the two proceeded along Francis street the automobile slowed down at a point about 8 or 10 feet from the tracks. It then proceeded slowly to the center of the railway track, where its motor stalled and the automobile stopped. The gas motorcar of the defendant struck the automobile and "dragged" it for some distance away from the crossing. Just before the impact the plaintiff's son jumped from the automobile, but the plaintiff remained therein, receiving as the result of the collision the injuries alleged in the complaint. The plaintiff charged the defendant with negligence, which the defendant denied. In a special defense the defendant charged the defendant with contributory negligence.

The court instructed the jury on the doctrine of the last clear chance, and from a survey of the record the jury must have applied that doctrine to the facts presented. Numerous specifications of error are advanced by the defendant. The first one to be discussed is that the facts presented to the jury were not such as to justify the instruction on last clear chance and that the giving of that instruction was prejudicial error. Without reviewing the evidence in detail it may be said from an examination of the record that there was sufficient evidence upon which the jury could find negligence on the part of the defendant. One witness testified that as the gas motorcar of the defendant was immediately approaching the crossing it was going 30 miles per hour. Another witness testified that it was going 45 miles per hour. Another witness testified that as the said car was approaching the crossing there was no signal or alarm given by the operator of the car. The civil engineer of the defendant testified that if the motorman was running his car faster than 25 miles per hour at the time in question he was going faster than the track at that point was built for. It was in evidence that the crossing was a very dangerous grade crossing especially by reason of the cut and the curve. There was also sufficient evidence upon which the jury could find contributory negligence on the part of the plaintiff. She was familiar with the dangerous character of the crossing and was in practical control of the car at the time of the accident. The approaching gas motorcar was observable for a distance of ap-

proximately 200 feet as it approached the crossing, and the son testified that but for unwarranted physical interference on the part of the plaintiff in driving the car at the crucial moment he would have gotten the car across the track in time to have avoided the collision. With the automobile stalled on the track the plaintiff was in a position of danger from which, it is reasonable to conclude, she could not, with the exercise of ordinary care, extricate herself.

[1-3] The doctrine of the last clear chance presupposes "that the plaintiff has been negligent; that as a result thereof she is in a situation of danger from which she cannot escape by the exercise of ordinary care; that the defendant is aware of her dangerous situation under such circumstances; that he realizes, or ought to realize, her inability to escape therefrom; that he then has a clear chance to avoid injuring her by the exercise of ordinary care, and fails to do so. If all of these elements are present the rule applies and enables the plaintiff to recover, notwithstanding her own negligence. But if any of them be absent the rule does not apply and the case is governed by the ordinary rules of negligence and contributory negligence." *Palmer v. Tschudy*, 191 Cal. 696, 700, 218 P. 36, 37. The doctrine is applicable when the defendant actually perceives the perilous position of the plaintiff in time to avoid the accident by the exercise of ordinary care. *New York L. Oil Co. v. United Railroads*, 191 Cal. 96, 101, 215 P. 72; 19 Cal. Jur. 651. The motorman testified that he was proceeding around the curve toward the crossing at about 25 miles an hour; that when he got within 55 or 60 feet of the crossing he saw the plaintiff's automobile moving slowly 6 or 8 feet from the track, and it looked as though it was trying to stop; that he immediately applied the emergency brake and, "did everything he could to stop." There was evidence that the automobile was "dragged" 70 feet east of the crossing where it stopped in a position parallel with that of the gas motorcar, and that the latter car, which was 72 feet long, then proceeded about half its length beyond the automobile with its front end approximately 106 feet from the center of the crossing. The motorman testified that as he approached the crossing he first saw the automobile from a point 50 or 60 feet from the crossing, at which time he was going about 20 miles per hour. The conductor testified that at the time of the impact his car was going about 12 miles per hour and that a car of that size going at the rate of 25 miles per hour would, with the emergency brakes applied, stop in 70 feet.

The jury had the right to believe from the testimony of the motorman and the conductor that the car could have been stopped before it reached the crossing. Under the evidence it could also have concluded that the car actual-

ly stopped with its front end about 166 feet easterly from the point where the motorman first observed the plaintiff in her perilous position. The conclusion of the motorman that he did everything he could to stop was not, under the evidence, binding on the jury. Independently of the speed of the car the jury could find negligence on the part of the defendant by reason of a lack of sufficient warning signal. True, there was abundant evidence upon which a contrary conclusion could have been based on the issue of defendant's negligence, but from what has been said as to the evidence favoring the plaintiff it is seen that from the proximity of one evidentiary fact to another it was the province of the jury to determine their relation. The verdict must be taken as a finding that the defendant's car failed to stop as soon as it was possible for it to have done so in the exercise of due care, and that the last act of negligence of the defendant was the proximate cause of the injury. This it was the province of the jury to find under the instructions of the court relating to the doctrine of the last clear chance. There was no error in giving the instruction complained of on that subject.

We have examined and considered the other points elaborately briefed by the defendant and orally argued. Certain remarks made by counsel for the plaintiff in the closing address to the jury commenting on the stop, look, and listen rule were highly improper, and standing alone might call for a declaration of prejudicial misconduct if it were not for the fact that the trial judge's reprimand and strictures on the argument, in our opinion, fully offset any possible damage which the remarks otherwise might have had.

[4] Prejudicial misconduct is charged against the plaintiff herself. It was averred in affidavits filed on the motion for a new trial that the plaintiff sought to influence certain women jurors during the course of the trial and when the court was in recess by voluntarily addressing said jurors and representing to them her serious physical condition. These statements were denied by the plaintiff in counter affidavits filed on the hearing of the motion. The conflict in the evidence thus presented was resolved in plaintiff's favor in the denial of the motion, and we are not at liberty on appeal, in the absence of an abuse of discretion, and none appears, to disturb the court's conclusion thereon.

[5] Certain rulings of the court are challenged. Over the objection of defendant's counsel a witness on behalf of the plaintiff was permitted to testify concerning the speeds at which gas motorcars of the defendant had been observed by him to be operated around said curve on occasions other than upon the day and at the time of the accident. Clearly it was error to permit this testimony to go to the jury (*Starr v. Los Angeles Ry.*

Corp., 187 Cal. 270, 281, 201 P. 599), but in the light of other evidence concerning the speed of the car at the time in question it cannot be said that but for said improperly admitted evidence the verdict would have been for the defendant. Objections to other rulings of the court have been examined. Many of them are without merit, and none of them is deemed of sufficient importance to warrant a reversal of the judgment. Nor do we find any valid objections to the charge to the jury.

[6] Finally, it is contended by the defendant that the verdict was excessive. The plaintiff sued to recover \$274 for expenses incurred for medical attention, medicines, and nurse hire, and \$40,000 for personal injuries. The verdict was in a lump sum of \$3,000. The claim of excessive damages is based largely on the admittedly false swearing of the plaintiff as to matters bearing on her physical condition. It is beyond question that she received substantial injuries. She testified that she was confined to her bed for a period of 27 days; that when she was able to get up from her bed she had to have help to get around; that she was hurt from head to foot; that she was a mass of black and blue bruises; that she was unable to do her housework for a long period of time, and that at the time of the trial she was not able to do all of it; that she had not recovered and is in continual pain; that her chest and her arm are numb and that she could not raise her hand with which to comb her hair; that she could not carry her foot in walking; that she gets numb and is continually falling; that she had no appetite and does not care to eat and has indigestion; that her outlook on life has changed and she does not want to go any place; that she is very easily excited and is tired all of the time; that there are permanent marks on her body; that there is a large lump on her back; that there is a fracture of the breastbone with a lump thereon about the size of an egg; that there is a lump on her ear; that there is a large place on her shoulder and that she has severe trouble with her eyes.

On cross-examination, she admitted that she had gone for an automobile ride on the day after the accident. She denied that she had gone about 10 months after the accident, to Tiajuana to attend the races; she denied that she had taken automobile trips during the time that she claimed to have been disabled; she denied that she requested a friend on one of said trips to introduce her as Mrs. Caudell, so that her identity might not be known; she denied that she had gone to numerous cafés, saloons, and cabarets on a trip to Tiajuana, drinking and dancing therein; she denied that she had endeavored to influ-

ence certain witnesses who might be called to testify; she denied that she had told her friends that she was going to lengthen her dress and wear the same with an old coat and shoes at the trial because she had been told that the jurors on a former mistrial of the cause had said that she looked too "young and cattish" to be injured to the extent she claimed, and that she could afford to wear these old clothes for a few days because of the large verdict she expected to get. She made the foregoing and similar denials on her cross-examination. Subsequently she returned to the witness stand and admitted that said denials were not true. This she did, so she testified, on the advice of her counsel to tell the truth as to all such matters. The record discloses a deliberate purpose on the part of the plaintiff to exaggerate her injuries and to play upon the sympathies of the jurors. Her counsel, in his closing argument to the jury, said:

"I don't want you to believe my client, because I don't believe her, she has lied to me and she has lied to you."

[7] The medical testimony on behalf of the plaintiff did not show any causal connection between the lumps on her breastbone and her ear and the injuries actually received, but there was reliable evidence that she was suffering from a "clear-cut, definite traumatic neurosis." This testimony need not be elaborated upon. It may be said, however, that if the extent of the plaintiff's injuries were to be determined by the testimony of the medical experts and other witnesses produced on behalf of the plaintiff, and entirely independent of her own testimony on the subject, it could not be concluded that the amount of the verdict was disproportionate to the injuries received. Since the plaintiff's exaggerations as to her injuries and physical condition and her false swearing with reference thereto were before the jury on her own admissions at the trial, it is quite probable that the jury took into consideration those factors in fixing the amount of the verdict. On the record we cannot say that the award of damages in this case was so grossly disproportionate to any compensation reasonably warranted as to be a shock to the sense of justice and raise a presumption that the verdict was the result of passion, prejudice, or corruption rather than of an honest and sober judgment. Unless this may be said, the court on appeal would not be warranted in setting aside the verdict as excessive. *Kelley v. Hodge Transportation System*, 197 Cal. 598, 610, 242 P. 76.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

201 Cal. 486

CAPRON v. VAN HORN. (L. A. 8546.)

Supreme Court of California. June 30, 1927.

Rehearing Denied July 28, 1927.

1. Public lands ⇨122—Limitation on suits by United States held not to validate patent as against person in possession claiming adverse equitable interest (U. S. Comp. St. § 5114).

Patent issued by United States to patentee selecting land in lieu of school land, on revocation of order withdrawing lands from entry, held not validated, as against adverse equitable interest of person in possession, by Act Cong. March 3, 1891, c. 561, § 8 (U. S. Comp. St. § 5114), limiting suits by United States to vacate and annul patents to period of six years after issuance, as statute constitutes bar as against United States only.

2. Public lands ⇨122—Limitation on suits by United States is effective to validate patentee's title only as against United States (U. S. Comp. St. § 5114).

Act Cong. March 3, 1891, c. 561, § 8 (U. S. Comp. St. § 5114), limiting suits by United States to annul patents to period of six years, merely fixes time within which United States may institute proceedings to vacate and annul patent for mistake or fraud, and running of statutory period does not validate patentee's title except as against United States.

3. Public lands ⇨128—Equitable claimant to land as against patentee must show superior right entitling him to patent.

Equitable claimant who institutes proceedings to have patentee of government lands declared trustee of title in his favor must not only show that patentee should not have received patent, but that claimant's right in land is superior to that of patentee, such as would have entitled claimant to patent.

4. Public lands ⇨29—One occupying public land withdrawn from entry is trespasser, and makes improvements at own risk (Reclamation Act Cong. June 17, 1902 [U. S. Comp. St. §§ 4700-4708]).

Occupancy by private individual of public lands during time order of withdrawal from entry under Reclamation Act Cong. June 17, 1902 (U. S. Comp. St. §§ 4700-4708), is in force constitutes trespass, and occupant's improvements are made at his own risk.

5. Public lands ⇨29—Unauthorized occupancy of public land withdrawn from entry nevertheless became lawful on revocation of withdrawal order "vacant"; "unreserved" (Reclamation Act Cong. June 17, 1902 [U. S. Comp. St. §§ 4700-4708]; Act Cong. May 2, 1914 [38 Stat. 372]).

Though entry on public land was unauthorized, occupancy at time of revocation of order withdrawing land from entry under Reclamation Act Cong. June 17, 1902 (U. S. Comp. St. §§ 4700-4708), became lawful, especially where occupant had applied for desert land entry, and made improvements, and land on revocation of withdrawal order ceased to be

"vacant" or "unreserved" land under Act Cong. May 2, 1914 (38 Stat. 372).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Vacancy—Vacant—Vacate.]

6. Public lands ⇨53—Where approval of patentee's lieu selection and revocation of withdrawal order were simultaneous, patentee acquired no rights except as against United States (Reclamation Act Cong. June 17, 1902 [U. S. Comp. St. §§ 4700-4708]; Act Cong. May 2, 1914 [38 Stat. 372]; U. S. Comp. St. § 5114).

Where revocation of order which withdrew land from entry in connection with reclamation project under Reclamation Act Cong. June 17, 1902 (U. S. Comp. St. §§ 4700-4708), and approval of selection of patentee of part of such land in lieu of school land were simultaneous acts, approval of lieu selection took place before land became "unreserved" and "vacant" public land, subject to disposal under Act Cong. May 2, 1914 (38 Stat. 372), and gave patentee no rights therein except as against United States on expiration of period of limitation on patent under Act Cong. March 3, 1891, c. 561, § 8 (U. S. Comp. St. § 5114).

7. Public lands ⇨53—Person in possession on revocation of withdrawal order held entitled to land as against patentee whose lieu selection was approved at revocation (Reclamation Act Cong. June 17, 1902 [U. S. Comp. St. §§ 4700-4708]; Act Cong. May 2, 1914 [38 U. S. St. 372]).

In action to recover real property and quiet title, defendant holding possession of government land and making improvements under application for desert land entry during pendency of order withdrawing land from entry under Act Cong. June 17, 1902, commonly known as Reclamation Act (U. S. Comp. St. §§ 4700-4708), and at and after time of revocation of such order, held entitled to land as against patentee whose selection thereof in lieu of school land under Act Cong. May 2, 1914 (38 Stat. 372), was approved at time of revocation of order, as defendant in possession and making improvements became rightful occupant when land was thrown open to entry.

8. Public lands ⇨41—Finding that unauthorized possession during period when land was withdrawn from entry was not in good faith held unsupported (Reclamation Act Cong. June 17, 1902 [U. S. Comp. St. §§ 4700-4708]).

In action by patentee to quiet title against person who had possession and made improvements while land was withdrawn from entry under Reclamation Act Cong. June 17, 1902 (U. S. Comp. St. §§ 4700-4708), and who had applied for desert land entry, evidence held insufficient to support finding that defendant's unauthorized possession was not in good faith.

9. Public lands ⇨41—Attempt of person in possession of lands without authority to protect right of settlement against patentee is not evidence of bad faith.

Fact that claimant to property appears holding under government patent, and that person in possession of land, previously withdrawn

from entry, seeks by all available means to protect his right of settlement, does not constitute evidence of lack of good faith on part of person in possession.

10. Public lands ☞ 116—Acceptance of patent to portion of land in desert land entry held not to estop claimant as against patentee of remaining part.

Fact that person holding possession of tract of government land accepted patent of portion of land included within original application for entry under desert land law held not to constitute estoppel to assert claim to remaining portion as against patentee of United States.

11. Appeal and error ☞ 1122(2), 1176(4)—Supreme Court has no power to make findings or to direct judgment when existing findings will not support judgment directed (Code Civ. Proc. § 956a, as added by St. 1927, c. 352; Const. art. 6, § 4¾, as added by Const. Amendment No. 16 [see St. 1925, p. 1380]).

Supreme Court has no power to make findings or to direct judgment when existing findings of trial court will not support judgment so directed, as Const. art. 6, § 4¾, added by Const. Amendment No. 16 (see St. 1925, p. 1380), is not self-operative; Code Civ. Proc. § 956a, as added by St. 1927, c. 352, not having become effective.

12. Constitutional law ☞ 33—Constitutional provision relating to power of Supreme Court to make findings is not self-operative (Const. art. 6, § 4¾, as added by Const. Amendment No. 16 [see St. 1925, p. 1380]).

Const. Amendment No. 16, amending Const. art. 6, by adding thereto section 4¾ (see St. 1925, p. 1380) relative to subject of power of Supreme Court to make findings contrary to those of trial court, is not self-operative.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Irene Elizabeth Capron, individually and as administratrix with the will annexed of the estate of Sarah F. Donley, deceased, against Erwin Ray Van Horn, in which defendant interposed a cross-complaint. From a judgment for plaintiff, defendant appeals. Reversed.

Harry W. Horton, of El Centro, for appellant.

Haines & Haines, of San Diego, and J. S. Larew, of El Centro, for respondent.

SHENK, J. This is an appeal from a judgment of the superior court in and for the county of Imperial. Sarah F. Donley, the patentee of the land in controversy, instituted this action for its recovery and to quiet her title thereto. In his answer to the complaint the defendant denied that the patentee had any right, title, or interest in and to said property or any part thereof, and by way of cross-complaint alleged the equitable title to said property to be in himself. The cross-complaint concluded with a prayer that

the patentee be required to execute and deliver to the defendant a deed of grant conveying said property to him. After trial the court adjudged the patentee to be the owner and entitled to the possession of the land. An appeal from said judgment was taken by the defendant, which appeal resulted in a reversal of the judgment. *Donley v. Van Horn*, 49 Cal. App. 383, 193 P. 514. Thereafter, and pending a retrial, the patentee died, and the present plaintiff was, by order of court duly substituted in her personal capacity as grantee of the patentee and in her representative capacity as administratrix of the estate of said deceased patentee. Upon the second trial of the cause judgment was again entered in favor of the plaintiff, whereupon the present appeal is prosecuted by the defendant.

The complicated facts giving rise to this litigation are fully stated in the following portion of the opinion of the District Court of Appeal rendered upon the first appeal:

"The land which is situated in Imperial county has been in the exclusive occupancy of defendant ever since some time prior to December 26, 1911, on which date he filed in the proper office, viz., the local land office at Los Angeles, his application to make entry under the desert land law. The land is a part of a large tract that, on April 2, 1909, was withdrawn from entry by the secretary of the interior in connection with the Yuma reclamation project, pursuant to authority conferred by the act of June 17, 1902 (32 Stats. at L., p. 388), commonly known as the Reclamation Act (U. S. Comp. St. §§ 4700-4708). This withdrawal was under what is known as the first form of withdrawal; that is, it was the withdrawal of lands that, in the opinion of the secretary of the interior, may be needed in the construction and maintenance of irrigation works. * * *

"On May 10, 1915, while the land still was withdrawn from entry or sale under the secretary's withdrawal order of April 2, 1909, plaintiff, who claimed to be the owner of a certain section of state school land, for which the state had issued to her a patent, made selection of the land in controversy under the act of May 2, 1914 (38 U. S. Stats. 372), in lieu of her school land, and a patent of the lieu land so selected by her was issued to her by the United States on August 9, 1916. The act under which plaintiff made her lieu selection—the act of May 2, 1914—provides that 'the state of California or its grantees may, with the approval of the secretary of the interior, reconvey to the United States any of the lands heretofore granted to said state in the townships authorized to be resurveyed by the act of July 1, 1902, * * * and select in lieu thereof an equal amount of vacant, unappropriated, surveyed, unreserved, nonmineral public lands within said state.' * * *

"Subsequently to the withdrawal of the land from entry on April 2, 1909, under the first form of withdrawal authorized by the act of June 17, 1902, viz., on March 17, 1913, the reclamation service reported to the secretary of the interior that certain of the lands so

withdrawn, including the land in controversy, were not necessary to the reclamation project, and recommended the revocation of the withdrawal order. The day following the filing of this report, viz., March 18, 1913, the assistant secretary of the interior indorsed on the report of the reclamation service an order approving the recommendation. This indorsement did not operate as an absolute and immediate revocation of the withdrawal order of April 2, 1909; for, by the express terms of this order of March 18, 1913, so indorsed on the report of the reclamation service, the assistant secretary directed the commissioner of the general land office to ascertain whether the lands included in the report of the reclamation service had been otherwise withdrawn or reserved by law, and, if not, to cause notice to be given that they will be open to settlement and entry at times to be fixed by the commissioner. Before such notice could be given, viz., on April 17, 1913 the order of March 18, 1913, was suspended, after a copy thereof had been forwarded to the register and receiver of the Los Angeles land office. The order that the assistant secretary had so indorsed on the report of the reclamation service on March 18, 1913, was thus suspended 'pending determination of the best method of opening the lands to entry.' At the date of the suspension of the order of March 18, 1913, viz., on April 17, 1913, it was further ordered that the land that plaintiff proposed to select in lieu of her state school land be not restored to entry, in order that the land department might effect the exchange that it was proposed to make with her if and when the bill that later was enacted as the act of May 2, 1914, should become a law. On the same day that this suspension order of April 17, 1913, was made, the assistant commissioner of the general land office sent a telegram to the register and receiver of the Los Angeles land office, notifying the latter that the order of March 18, 1913, revoking the withdrawal of the lands, had been suspended, and to return the revocation order to the general land office in Washington. This was done. Thereafter no attempt was made by the land department to revoke the original withdrawal order of April 2, 1909, in so far as the land in controversy is concerned, until November 3, 1915, on which date the first assistant secretary of the interior approved a report of the commissioner of the general land office, recommending that, as to this land, the withdrawal order of April 2, 1909, be revoked, and that the lieu selection that plaintiff previously had made on May 10, 1915, under the act of May 2, 1914, be approved. The net result of the foregoing is that, as to the land in controversy, the withdrawal order of April 2, 1909, was in full force and effect from the time when it was made until November 3, 1915.

"On December 26, 1911, defendant, as we already have stated, tendered to the local land office in Los Angeles an application to make a desert land entry on the land in controversy. This application was rejected on the ground that the land had been withdrawn from entry by the withdrawal order of April 2, 1909, and that such withdrawal was still in full force and effect. Defendant appealed successively to the commissioner of the general land office and to the secretary of the interior, by both of whom his right to make such entry while the land was

withdrawn for irrigation works was denied. During all these times defendant was a citizen of the United States, possessed of all the qualifications essential to qualify him to make entry upon such of the public lands as might be open to entry and legal settlement. At all times since December 26, 1911, the land has been in the exclusive occupancy of defendant, who went upon it and made settlement, with the intention of perfecting a title thereto under the United States land laws, as soon as an application to make entry might be favorably acted upon by the land department. During his occupancy he cultivated the land, and, at considerable expense, made valuable improvements thereon. * * *

"On February 17, 1914, which was prior to the passage of the act of May 2, 1914, and while the land was still withdrawn from settlement or entry under the secretary's withdrawal order of April 2, 1909, plaintiff wrote a letter to the land department, expressing a willingness to select the land in controversy in lieu of her state school land. The first assistant secretary of the interior, in a letter dated March 21, 1914, addressed to plaintiff, informed her that if the bill then pending in congress, and which subsequently was enacted as the act of May 2, 1914, became a law, its provisions would enable her to make the selection. 'In the meantime,' so the letter runs, 'the Commissioner of the General Land Office has been directed to withhold any of the above tract that you desire to select from restoration to entry. Should H. R. 122 be enacted into law, proper steps will be taken by this Department to enable you to make selection of the land in lieu of that claimed by you under the grant from the State of California.' On November 14, 1914, the secretary of the interior notified the commissioner of the general land office that, in view of the fact that the department had knowledge of the character and status of the land that plaintiff desired to select under the act of May 2, 1914, the usual affidavit as to the character and status of lieu land, required by the departmental regulations to be made by persons making such lieu selections, could be waived. The secretary also notified the commissioner to instruct the local register and receiver to transmit to the general land office at Washington, without action on their part, the papers to be filed by plaintiff in the Los Angeles office, when she should make her lieu selection. The commissioner likewise was instructed to take prompt action upon plaintiff's deed of reconveyance and lieu selection, upon receipt thereof. On May 10, 1915, plaintiff filed in the local land office at Los Angeles her lieu land selection, whereby she made selection of the land in controversy, and, at the same time, recorded a deed whereby she conveyed to the United States the base land for the lieu selection, viz., the state school land for which she held a patent from the state.

"On June 27, 1915, the commissioner of the general land office transmitted to the secretary of the interior a written report wherein he recommended approval of plaintiff's lieu selection. This report to the secretary of the interior, after reciting the complications and conflicts involved in plaintiff's school section and stating that plaintiff is willing to reconvey her school land to the United States, and, in lieu thereof, select the land in controversy, and after reciting the facts showing the exact status

of the land, including defendant's attempted desert land entry and his occupancy, concludes with the following recommendations: (1) That the withdrawal order of April 2, 1909, be revoked, and the fixing of dates for settlement and entry waived; and (2) that the plaintiff's selection, made May 10, 1915, be approved. On November 3, 1915, these recommendations were approved by the following order indorsed on the commissioner's written report: 'Nov. 3, 1915. Approved; and it is so ordered. Andrieus A. Jones, First Assistant Secretary.' Thereafter, on August 9, 1916, the United States issued to plaintiff the patent under which she claims title to the land in controversy."

The District Court of Appeal on the former appeal decided that title had not passed from the United States under the patent issued to the plaintiff's predecessor in interest, for the reason that the land purporting to have been so patented was not at the time "vacant" and "unreserved" land within the meaning of the act of May 2, 1914, and that there was a period of time, although short, just before the effectual moment of the patent, when the defendant was a legal occupant of the land, with improvements thereon made by him, and not a mere trespasser. The judgment decreeing title to be in the patentee and quieting her title was therefore reversed. Upon the going down of the remittitur the plaintiff, on May 18, 1925, filed in the trial court what is termed a "Supplement to Complaint," wherein it was alleged, among other things, that more than six years had elapsed since the issuance of the patent to plaintiff's predecessor in interest, and that under and by virtue of that certain act of Congress of March 3, 1891, c. 561, § 8 (26 Stats. at Large, 1099 [U. S. Comp. St. § 5114]), the said patent and all said proceedings leading up to it had become absolute, and their validity not open to attack on any ground by the United States. The defendant denied that said act of Congress had the effect of validating the patent issued to the plaintiff's predecessor in interest as against him, and alleged that said congressional act "has no reference to suits by an individual brought by reason of private right."

The act relied upon by the plaintiff in the supplement filed to the complaint reads, in part, as follows:

"Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." 26 Stats. at Large, 1099 (U. S. Comp. St. § 5114).

It appears that the six-year period prescribed for the institution of proceedings by the United States to annul and vacate the patent under which plaintiff claims title had expired subsequent to the decision herein by the District Court of Appeal upon the former appeal, but prior to the filing of said "Sup-

plement to Complaint." The court on the second trial of the cause found, among other things:

"That more than six years have elapsed after the date of the issuance of said patent as aforesaid, and that the United States never brought any action to vacate and annul said patent, and that by virtue of that certain act of Congress approved March 3, 1891, chapter 561, section 8, of 26 Statutes at Large, page 1099, said patent and all the proceedings in the General Land Office of the United States in all its departments taken and had leading up to said patent have become absolute and valid from the beginning, and are not open to attack on any ground, and that said Sarah F. Donley became the owner of the fee title to said land by virtue of said patent."

In view of this finding, it becomes necessary to determine what effect, if any, the expiration of this statutory period had on the rights of the respective parties.

[1] The decisions of the United States Supreme Court are uniform to the effect that the act of March 3, 1891, supra, merely fixes the period of time within which the United States may institute proceedings to vacate and annul a patent issued by mistake or as a result of fraud, and that the period of limitation therein prescribed may not be availed of by the patentee in defense of other actions bringing into issue the validity of a patent. That this statutory bar may be relied upon by a patentee only in defense of actions commenced by the United States and having for their purpose the annulment of a patent is indicated in the case of *United States v. Winona, etc., R. R.*, 165 U. S. 463, 475, 17 S. Ct. 368, 371 (41 L. Ed. 789) where it is stated that Congress "has distinctly recognized the fact that when there are no adverse individual rights, and only the claims of the government and of the present holder of the title [are] to be considered, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the land department should be open for consideration. In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties have conveyed away lands which belonged to the government, such conveyances should, after the lapse of a prescribed time, be conclusive against the government, and this notwithstanding any errors, irregularities or improper action of its officers therein." Further along in the opinion it is declared:

"There can be no question of the power of Congress to terminate, by appropriate legislation, any suit brought to assert simply the rights of the government."

The case of *United States v. Chandler-Dunbar Co.*, 209 U. S. 447, 450, 28 S. Ct. 579, 580 (52 L. Ed. 881) from which the plaintiff at-

tempts to derive some comfort, also holds that:

"This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place."

In *United States v. Whited & Wheless*, 246 U. S. 552, 561, 562, 38 S. Ct. 367, 62 L. Ed. 879, it was held that, while the expiration of the six-year period precluded the federal government from annulling the patent therein involved, it did not constitute a bar to the government's right of action to recover the value of the lands fraudulently procured under said patent. In reaching such a conclusion the court stated:

"The statute of limitations did not create the right of action in the government or either of the remedies for enforcing that right. It relates to the remedy, and in terms applies only to one remedy, that for annulling the patent. * * * The statute was passed to promote prompt action for annulling patents where cause therefor was believed to exist and to make titles resting upon patents dependably secure when the period of limitation should expire."

[2] The foregoing authorities definitely establish that the running of the period prescribed in the act of March 3, 1891, *supra*, has no other effect than to make the title in the patentee good as against the grantor—the United States. That the expiration of said statutory period within which the federal government might proceed to annul a patent does not preclude a person other than the patentee from asserting and enforcing an interest adverse to that of the patentee was decided in the case of *United States v. New Orleans Pac. Ry. Co.*, 248 U. S. 507, 39 S. Ct. 175, 63 L. Ed. 388. That action was instituted by the United States for and on behalf of certain homestead claimants, who were permitted to intervene. It was sought therein to procure the annulment of the defendant's patents to certain lands, or, if that relief be denied, to have the defendant decreed to be trustee of the title to said land for the homesteaders. Construing a statute of limitation similar to the one here involved, the court said:

"As the patents were issued before, and the suits were brought more than five years after, the Act of March 2, 1896, c. 39, 29 Stat. 42 [U. S. Comp. St. §§ 4901–4903] the prayer that the patents be canceled must be put out of view, and the alternative prayer—that the title under the patents be declared to be held in trust for the homestead claimants and the trust enforced—must be regarded as if standing alone."

It is readily apparent from a reading of that decision that the equitable claimant to patented land may assert and enforce his adverse interest therein even though as against the United States the patent has become valid and conclusive by the running of

the period limited for the institution of proceedings by the government to annul such patent.

It follows from what has been said that the expiration of the six-year period prescribed in the act of March 3, 1891, may be availed of by a patentee under the federal government only in defense of an action brought by said government to annul the patent. It does not constitute a bar to the assertion and enforcement of an adverse equitable interest in and to the land so patented. This being so, the trial court's finding, quoted above, to the effect that the plaintiff's patent and the proceedings leading to the issuance thereof "have become absolute and valid from the beginning, and are not open to attack on any grounds" was erroneous, and prejudicially affected the adverse equitable claim advanced by the defendant in his cross-complaint.

[3] That an equitable claim to patented land may institute proceedings to have the patentee declared trustee of the title to said land has been determined upon numerous occasions. The cases indicate, however, that it is not sufficient that such equitable claimant show that the patentee ought not to have received the patent, but it is incumbent upon him to show a better right to the land than the patentee, such as in law should have been respected by the officers of the land department, and, being respected, would have given him the patent. *Sparks v. Pierce*, 115 U. S. 408, 413, 6 S. Ct. 102, 29 L. Ed. 428; *Lee v. Johnson*, 116 U. S. 48, 49, 6 S. Ct. 249, 29 L. Ed. 570; *Duluth & Iron Range R. R. v. Roy*, 173 U. S. 587, 590, 19 S. Ct. 549, 43 L. Ed. 820. In the case of *Bohall v. Dilla*, 114 U. S. 47, 50, 5 S. Ct. 782, 783 (29 L. Ed. 61) it is recognized that "the system of pleading in civil cases in the courts of California permits an equitable defense to be set up in a special count, by way of cross-complaint, in the answer to an action for the possession of lands. The cross-complaint is in the nature of a bill in equity, and must contain its material allegations, disclosing a case which, if established, would entitle the defendant to a decree * * * directing that the title be conveyed to him." The defendant herein has followed the procedure indicated in the case last cited.

[4-7] It remains to determine whether the defendant has established a better right to the land than the patentee and her successor in interest and a right to the conveyance prayed for. It will be remembered from the statement of facts that the land had been withdrawn by the Secretary of the Interior from entry and selection by an order bearing date April 2, 1909, and that defendant entered and settled upon the land prior to the revocation of said order of withdrawal. The defendant's occupancy of the land during all of the time that the order of withdrawal was in force was, of course, no better than that

of a trespasser, and any improvements were made at his own risk. However, the fact that defendant's entry upon the land was unauthorized would not prevent his occupancy from becoming lawful, if, before any right could vest in a third person, the withdrawal order should be revoked and the land again restored to settlement and entry while occupied by the defendant. To preclude the defendant's occupancy from thus assuming the character of lawfulness, the respondent urges that the revocation of the withdrawal order and the approval of the patentee's lieu selection took place at the same instant, without any interval of time intervening. "If the revocation of the withdrawal order and the approval of respondent's lieu selection were so absolutely synchronous that no instant of time whatever, however short, elapsed between the revocation of the withdrawal and the approval of respondent's lieu selection, then it necessarily follows that, at the very instant when the secretary approved respondent's lieu selection, the land still was under the spell of the withdrawal order, and that therefore, when her selection was approved, the land was not 'unreserved' public land subject to disposal by the land department under the act of May 2, 1914." *Donley v. Van Horn*, supra, page 393 (193 P. 518). Inasmuch as the land in question was not "vacant" and "unreserved" land at the time the plaintiff's predecessor secured approval of her lieu selection, such selection and approval were unauthorized under the act of May 2, 1914, and the patent purporting to grant said land was unauthorized, and plaintiff's predecessor in interest acquired no right or title in or to said land by virtue of the patent except as against the United States upon the expiration of the period of limitation. This being so, the defendant's occupancy, theretofore ineffectual, became lawful, for "at the very instant that the withdrawal order was revoked, the land became open to entry, and appellant, who had occupied the land all this time waiting for the day when he lawfully could make entry under the public land laws, who had made valuable improvements, who, possessing the necessary qualifications, had vainly tried to enter the land under the Desert Land Act, who diligently prosecuted appeals from adverse decisions of the local land officers and the commissioner of the general land office to the Secretary of the Interior himself, and whose every act betokens a patient awaiting of the time when he could make lawful entry under the public land laws, became a lawful settler in actual and lawful occupation, and at that very instant the land ceased to be 'vacant.'" *Donley v. Van Horn*, supra.

In *Moss v. Dowman*, 176 U. S. 413, 420, 20 S. Ct. 429, 44 L. Ed. 526, one Doran had made a homestead entry of the land there in controversy on May 7, 1890, without occupying

the same. Thereafter, and on September 18, 1890, Dowman went upon said land, built a cabin, and continued to live there. Moss subsequently paid Doran \$1,000 for the relinquishment of his homestead entry, which relinquishment was filed in the local land office by Moss on October 24, 1890, and a homestead entry made in her (Moss's) own name. Said Moss thereafter occupied the land. In a contest between Dowman and Moss as to which had the right to acquire title to the land, the Secretary of the Interior determined in favor of Dowman and a patent issued to him. The United States Supreme Court affirmed the decision of the Secretary of the Interior, declaring, in part:

"At the moment of filing that relinquishment, Dowman, the defendant, was a settler in occupation of the tract, and Moss, the plaintiff, made her application to enter, and the question is as to the relative rights, at the moment the land becomes open to entry, of one a settler in actual occupation and one making a formal entry in the land office. For reasons heretofore stated, we have no doubt that the settler is entitled to preference. * * * That Dowman had acquired no rights by his settlement prior to Doran's relinquishment, and might as respects Doran have been regarded as a trespasser, makes no difference. When Doran relinquished Dowman ceased to be a trespasser, and was not only an actual, but a lawful settler. There was no evidence of mala fides about Dowman's settlement which should affect its legality when the time came for a right to attach to it under the land laws. Neither Doran nor any of the long line of speculative homesteaders who had kept up holdings by entries and relinquishments every six months had ever appeared on the land. The object of the homestead laws is not to encourage speculation, but settlement, and if Dowman knew all the antecedent facts he might well expect that an actual settler would acquire the right to the land, lawfully, upon the next relinquishment, and make his settlement as the Secretary finds as a fact that it was made—in good faith."

In the case of *Svor v. Morris*, 227 U. S. 524, 527, 33 S. Ct. 385, 57 L. Ed. 623, the defendant had settled upon land not then open to entry because of a prior indemnity withdrawal. The court assumed, without deciding, that such original and wrongful entry established no right in the defendant, but concluded that "he was not disqualified by reason of what he had done before" from acquiring the land, and that "it was not necessary that he should go through the idle ceremony of vacating the land and then settling upon it anew."

[8-10] The record on this appeal consists of the judgment roll and a bill of exceptions. In addition to the finding that the patent was valid as against the defendant by reason of the lapse of the six-year period from the issuance thereof, the court also found that the possession, use, and occupation taken, made, and held by the defendant was not in good faith. Aside from the documentary evidence above referred to, the only evidence

appearing in the bill of exceptions bearing on the subject of good faith is that of the defendant himself. He testified that he went upon the land in 1912. At that time it was in its desert state, with no improvements upon it whatsoever. He bought water stock, which is now appurtenant to the land. He cleared, leveled, and fenced the entire tract. He ditched and bordered the land, and installed cement headgates. He built a house and constructed other permanent improvements. He moved on the land with his family in 1912, and lived on the same continuously from that time until 1919, conducting farming operations thereon during all of that time. This action was commenced on February 1, 1917. The defendant went on the land when no other claimant was in sight or apparently in being, and at all times intended to, and did, reclaim it at great expense. There is in the record no evidence of lack of good faith and the finding is unsupported. The fact that a claimant later appeared and that the defendant has sought by all available means to protect his right of settlement under the law do not constitute evidence of lack of good faith. There was never a time when the plaintiff's predecessor in interest could have legally made an entry on the land owing to the fact that, by the terms of the act of Congress under which the plaintiff claims, the occupancy of the defendant at the very time such entry was attempted to be made precluded such entry. The defendant made application for the land under the desert land law, and made his payment as required by law. After rejection of his original application, he renewed the same, and the land department still retains the money. On the record before us it is clear that his claim should have been recognized. We attach no controlling importance to the fact that he accepted from the government a patent to a portion of the land included within his original application, which portion was not sought to be patented by the plaintiff's predecessor in interest. He thereby merely took what he was lawfully entitled to take, and was not estopped from claiming what was further due him.

By reason of the trial court's erroneous conclusion that the statute of limitation had in effect confirmed the patent here involved in the plaintiff's predecessor in interest, and was a bar to any relief to the defendant on his cross-complaint, and further by reason of the fact that the findings are otherwise unsupported, as above indicated, the judgment must be reversed.

[11, 12] We are asked, in the event of a reversal, to direct the trial court to enter a judgment in favor of the defendant on his cross-complaint. The legal title to the land in suit is unquestionably in the plaintiff. The federal government appears to have no further interest in the same. This litigation is now resolved into a controversy between the

plaintiff and the defendant, and, as the facts are undisputed, the situation might present a case wherein this court could make its own findings consistent with and in support of the judgment sought to be ordered, if the legislation designed to authorize courts on appeal to make findings of fact contrary to those made by the trial court were now effective. But bearing on this subject constitutional amendment number 16, adopted at the last general state election amending article 6 of the Constitution by adding thereto section 4 $\frac{1}{2}$ (see St. 1925, p. 1380), is not self-operative. Nor is chapter 352 of the laws of 1927, adding section 956a to the Code of Civil Procedure, and providing for such findings of fact on appeal, yet in effect. When that section becomes a law by reason of the constitutional lapse of time it will not even then be self-operative, for the reason that rules of this court must thereafter be promulgated in order to effectuate the purpose of the legislation. At the present time this court has no power to make findings; nor has it the power to direct a judgment when the existing findings of the trial court would not support the judgment so directed. *Bank of British Columbia v. Frese*, 116 Cal. 9, 16, 47 P. 783; 2 Cal. Jur. 993. This case does not, therefore, present a situation where the court would now be justified in directing a judgment as requested. Accordingly the only appropriate order is an order of reversal.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

201 Cal. 772

Irene Elizabeth CAPRON and Irene Elizabeth Capron as Administratrix with the Will Annexed of the Estate of Sarah F. Donley, Deceased, Plaintiffs and Respondents, v. Prescott WEST, Defendant and Appellant. (L. A. 8545.)

Supreme Court of California. June 30, 1927.

Rehearing Denied July 28, 1927.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Harry W. Horton, of El Centro, for appellant. Haines & Haines, of San Diego, and J. S. Law, of El Centro, for respondent.

PER CURIAM. This is an appeal from a judgment of the superior court in and for the county of Imperial in favor of the plaintiff and against the defendant. The facts are the same as those involved in the case of *Capron v. Van Horn* (L. A. No. 8546), 258 P. 77, this day decided, with the exception of the name of the defendant and the description of the land. On the authority of said case this day decided it is ordered that the judgment be, and the same is hereby, reversed.

201 Cal. 603

**MONTEZUMA MOUNTAIN RANCH SCHOOL
et al. v. INDUSTRIAL ACC. COMMISSION
OF CALIFORNIA et al. (S. F. 12402.)★**

Supreme Court of California. July 15, 1927.

Rehearing Denied Aug. 11, 1927.

1. Master and servant  **403**—Burden was on employer and insurer to show compensation claimant was employee of independent contractor (Workmen's Compensation, Insurance, and Safety Act, § 19d).

Where a compensation claimant was at the time of the injury actually performing services for the alleged employer, the alleged employer and its insurer had the burden of proving their claim that the claimant was an employee of an independent contractor and not a compensable employee, under Workmen's Compensation, Insurance, and Safety Act, § 19d (St. 1917, p. 831).

2. Master and servant  **405(2)**—Finding of Industrial Accident Board that claimant was compensable employee held sustained by evidence (Workmen's Compensation, Insurance, and Safety Act, § 19d).

In compensation proceedings, evidence held to sustain finding of Industrial Accident Board that the alleged employer and its insurer did not sustain the burden imposed by Workmen's Compensation, Insurance, and Safety Act, § 19d (St. 1917, p. 831), of proving their claim that the compensation claimant was an employee of an independent contractor and not a compensable employee.

In Bank.

Proceedings under the Workmen's Compensation Act by Forrest Wilder, opposed by the Montezuma Mountain Ranch School, a corporation, employer, and the Employers' Liability Assurance Corporation, insurer. To review an order of the Industrial Accident Commission awarding compensation, the employer and the insurer bring certiorari. Award affirmed.

R. P. Wisecarver, and Redman & Alexander, all of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

SEAWELL, J. This is a petition for a writ of certiorari in the matter of an award made by the Industrial Accident Commission to Forrest Wilder, who lost his foot while engaged in operating a gasoline motor saw. J. A. Wilder, the father of the compensation claimant, a rancher, purchased a gasoline wood-sawing outfit to be used by him in cutting or sawing timbers into fuel wood lengths for his own use. The saw required a crew of three in its operation. H. J. Lloyd, the business manager of the Montezuma Mountain Ranch School, located in the county of Santa Clara, requested said J. A. Wilder to bring his outfit to the school grounds and saw into stove wood lengths certain wood upon the premises. An oral contract was made where-

by Wilder was to receive \$1.50 and \$1.75 per cord, respectively, according to the lengths of the cuts. Wilder, Sr., was assisted in this work by his son, a young man 22 years of age, and another workman. At the conclusion of his employment, Mr. Lloyd took up with Wilder the proposition of sawing into usable sizes old materials taken from wrecked buildings, which had been piled in disorderly fashion upon the premises. Said old materials consisted of old doors, frames, window sashes, and other used materials. Iron locks, hinges, and nails were fastened to or imbedded in much of the old materials, which made it impractical to undertake the job upon a cord basis. Consequently it was agreed that the compensation should be \$1.50 per hour for Wilder's services, including the use of the sawing outfit, and 50 cents per hour each for Wilder's son and the other man, who had worked with Wilder, Sr., and son in the first instance. The third man refused employment on the theory that the character of the materials to be handled was attended with more or less danger. Another man was furnished by Mr. Lloyd, the business manager of said Montezuma Mountain Ranch School. Several other employees of the Montezuma Mountain Ranch School were also put upon the job by Mr. Lloyd to assist in assorting and arranging the material to the end that the task might be finished as expeditiously as possible.

Mr. Lloyd admitted that he reserved the right to terminate the work at will. He also reserved and exercised the right of placing more men at work on the job than was necessary to complete the crew complement of three men, and the amount of compensation that the elder Wilder and his son and any other person who might render service was to receive was discussed by Wilder and Lloyd, and the reasonable value of such services was understood to be \$1.50 per hour and 50 cents per hour, respectively. In other words, \$2.50 per hour or \$20 per day (8-hour day was the basis of the employment. The most that can be said in this case is that there is an admixture of elements from which either of two conclusions may be drawn as to whether Forrest Wilder was an employee of the Montezuma Mountain Ranch School or an employee of his father, being an independent contractor.

[1, 2] The burden of proving that claimant was an employee of an independent contractor and not a compensable employee was upon petitioners. Section 19d, Workmen's Compensation, Insurance, and Safety Act (Stat. 1917, p. 831); *Hillen v. Industrial Accident Commission*, 199 Cal. 577, 250 P. 570. This burden they did not fully overcome, in the view of the commission, and we are not convinced that the award stands wholly unsupported by proof. The fact that the check

handed the father as full payment for the services rendered also included his son's earnings at 50 cents per hour, and was deposited in a bank to the credit of said son, has no significance in the circumstances of the situation.

The award is affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

201 Cal. 605

FINN v. GOLDSTEIN. (S. F. 11321.)★

Supreme Court of California. July 15, 1927.

Rehearing Denied Aug. 11, 1927.

1. Frauds, statute of §103(1)—Specific performance §25—Memorandum for sale of real property in form of receipt held sufficient within statute of frauds and for specific enforcement.

Memorandum for sale and purchase of real property, in form of receipt by the vendor, of "deposits on three flats and four stores located on Twenty-Fourth street, known as Nos. 3257-3269," stating "cost of property—\$11,500," with signed acceptance by purchaser, held sufficient under the statute of frauds and sufficiently certain for specific enforcement.

2. Specific performance §114(2)—Allegation in complaint for specific performance that purchase price was not disproportionate to value held technically insufficient to show contract equitable.

Allegation of complaint for specific performance that the purchase price was "not disproportionate to the value of the property" held technically insufficient to show that the contract was equitable.

3. Appeal and error §1039(2)—Supreme Court will not reverse judgment for specific performance for technical insufficiency of complaint to show contract equitable, where plaintiff was not given opportunity to amend.

The Supreme Court will not reverse a judgment for specific performance of agreement to sell real property for reason that allegation of complaint, that the purchase price "is not disproportionate to value," is insufficient to show that the contract was equitable, where plaintiff was not given an opportunity to amend.

4. Appeal and error §907(3)—Intendments are in favor of judgment on appeal on judgment roll.

On appeal on the judgment roll, where the evidence is not before the Supreme Court, all intendments are in favor of the judgment.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action for specific performance by Joseph T. Finn against Rose Goldstein. Judgment

for plaintiff, and defendant appeals. Affirmed.

Milton T. U'Ren and Albert Jacoby, both of San Francisco, for appellant.

R. M. J. Armstrong and Daniel A. Ryan, both of San Francisco (George F. Snyder, of San Francisco, of counsel), for respondent.

LANGDON, J. This is an action brought to compel specific performance of a contract for the purchase and sale of certain real property in San Francisco, Cal. The written agreement pleaded and proved reads as follows:

"San Francisco, March 19, 1923.

"Received from Mr. Joseph Finn \$50. Deposit on three flats and four stores located on Twenty-Fourth street. Known as Nos. 3257 to 3269—Twenty-Fourth Street.

"Cost of property—\$11,500.

"Deposit to stand good until April 2, 1923.

"[Signed] Rose Goldstein.

"I accept above agreement.

"[Signed] Joseph T. Finn."

[1] The only serious question involved upon appeal is the sufficiency of this memorandum. The trial court held it sufficient and gave judgment for the plaintiff. We think it meets the test laid down in Breckinridge v. Crocker, 78 Cal. 529, 535, 21 P. 179, 181, as follows:

"But the memorandum must contain all the material elements of the contract; that is, it must show who is the seller and who is the buyer, what the price is and when it is to be paid, and must so describe the land that it can be identified."

Fritz v. Mills, 170 Cal. 449, 150 P. 375, announces the same rule. In the instant case, the buyer is the plaintiff and the seller the defendant; the price is \$11,500; and the time of payment is April 2, 1923. The land is described sufficiently for identification.

In the case of McKevitt v. City of Sacramento, 55 Cal. App. 117, 127, 203 P. 132, 137, it was said:

"The property might be readily identified by a competent surveyor, with reasonable certainty. When that is possible, either with or without the aid of extrinsic evidence, the description is sufficient [citing cases]. If it ever became necessary to establish the sufficiency of the description it might be shown by extrinsic evidence, not for the purpose of adding to or varying the description contained in the contract, but for applying the description to that part of the surface of the earth which is the subject-matter of the agreement. In such cases, whether or not such evidence is sufficient to show that the land can be identified with reasonable certainty, is a question of fact for the trial court [citing cases]."

In the instant case, the trial court, by extrinsic evidence, obtained the description of the land by metes and bounds and set the same out in its findings of fact. The appeal

is taken upon the judgment roll alone, and there is no contention that the evidence was insufficient to identify the property designated in the memorandum as Nos. 3257 and 3269, Twenty-Fourth street, as that described in the findings by metes and bounds.

This conclusion meets the two attacks made by the appellant, i. e., that the memorandum is insufficient under the statute of frauds, and that it is too vague and uncertain to be specifically enforced.

[2, 3] The remaining contention upon appeal is characterized by appellant as a minor one, and is to the effect that the allegation of the complaint, "that the sum of \$11,500 is not disproportionate to the value of the property," is insufficient to show that the contract sought to be specifically enforced was in all respects just, fair, and equitable. Technically, the allegation is insufficient, but we think, under the circumstances of this case, that fact would not warrant a reversal of the judgment. The answer to the amended complaint denied "that the sum of \$11,500 is not disproportionate to the value of said property, but, upon the contrary, alleges that the sum of \$11,500 is wholly disproportionate to the value of said property and that the sum of \$11,500 is an inadequate and unfair consideration for said property and in this connection, defendant alleges that upon the 19th day of March, 1923, and upon the 13th day of April, 1923, and at the present time a fair and adequate value of and for said property was and is the sum of \$15,000." The trial court found that the consideration mentioned in the contract was an adequate consideration for the property.

While a demurrer to the amended complaint was filed, together with the answer thereto, the record shows no ruling upon said demurrer, and, apparently, the matter was never called to the attention of the court and the plaintiff was not given an opportunity to amend his complaint to meet the technical requirements of a pleading in specific performance. Under such circumstances, this court will not reverse a judgment for this defect in the pleading. Regarding a similar situation, this court said, in *Baker v. Miller*, 190 Cal. 263, 212 P. 11:

"Viewed as a whole, we feel there is no escape from the conclusion that the complaint is insufficient and the general demurrer interposed by the defendant should have been sustained. We are not inclined, however, to reverse the judgment for that reason. Whether the defendant called the attention of the court below to the infirmity of plaintiff's complaint, or only demurred as a matter of form, does not appear. After the demurrer was overruled, however, she answered, denying generally and specifically the averment of the complaint attempting to allege the adequacy of the consideration and the fairness of the contract. * * * With all of the evidence before it, the trial court found that the contract between the parties was fair

and just and liberal in its provisions in favor of the defendant. * * * The case presented is one which falls squarely within the constitutional inhibition that no judgment shall be set aside for any error as to any matter of pleading, unless after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

[4] In the instant case, the evidence is not before us, as the appeal is upon the judgment roll and all intendments are in favor of the findings and judgment.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; PRESTON, J.; CURTIS, J.

201 Cal. 597

SAN FRANCISCO & S. RY. CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 12403.)★

Supreme Court of California. July 15, 1927.

Rehearing Denied Aug. 11, 1927.

Master and servant — 375(1)—Injury to ferryboat captain repairing electric line outside scope of employment without employer's consent, and not in emergency, held not compensable.

Compensation could not be allowed for death of captain of ferryboat who had been specifically instructed to report any damage to electric line to repair station, and who was killed while repairing electric line, not in emergency case, since he was working beyond scope of his employment without knowledge or consent of employer, and not in emergency.

In Bank.

Proceeding under the Workmen's Compensation Act for death of Captain Ough by Jack M. Ough and George R. Ough, minors, by their guardian ad litem and trustee, Clark A. Ough, claimants, against the San Francisco & Sacramento Railway Company, employer, and others. The Industrial Accident Commission awarded compensation for death, and the employer and another bring certiorari. Award annulled.

Jesse H. Steinhart and R. P. Wisecarver, both of San Francisco, for petitioners.

G. C. Faulkner and W. A. Breen, both of San Francisco, for respondents.

PER CURIAM. A petition for hearing herein was granted by this court after decision by the District Court of Appeal. A more thorough consideration, however, of the legal question presented in the petition has convinced us that the law of the case is correctly expressed in the opinion prepared by Mr. Justice Nourse of the District Court of Appeal. It is, therefore, adopted as the opinion of this court. It is as follows:

"Certiorari to review an award of the Industrial Accident Commission. The petitioner owns and operates the ferryboat Ramon, used for the purpose of transporting its electric trains over the San Joaquin river. These trains are operated by means of an overhead electric trolley terminating at each wharf in a V-shaped contact point, so that when the ferryboat is docked the train can readily take up the electric current and proceed on its way. These contact points had frequently been bent out of place through careless docking of the ferryboat, and the captains had been specifically instructed to 'log' the damage and to immediately report it to the line repair staff for repair. Captain Ough was one of three captains working on separate shifts and, as such, was in full charge of the ferryboat during his period of service. One of these contact points having been 'jammed,' Captain Ough left his boat and went on the wharf to repair it. He failed to take the precaution of turning off the current, but climbed a ladder to the place where the live wires were attached and coming in contact with the current, was thrown to the wharf and killed.

"At the hearing before the commission the defendant (petitioner herein) contended that, because the work of repairing the electric lines was of a technical and hazardous character, it had provided a specially trained staff of electric linemen for that work; that the captain had been given express orders to call upon these linemen when repairs were needed; and that when he left his ship and attempted to repair the contact point on the wharf, he was acting beyond the scope of his employment. At the close of the hearing a continuance was granted at the request of those seeking compensation for the death of the captain to enable them to produce some evidence tending to show that the captain was acting within the scope of his employment when the accident occurred. Some time thereafter the parties reached an agreement of compromise for the sum of \$1,000. When this was filed the commission forthwith ordered the cause submitted, and, without notice or hearing, entered judgment against the defendant for the sum of \$5,150. A rehearing was denied the defendant, and it prosecutes this application on the ground that there is no evidence to sustain the award.

"The evidence is without conflict and shows beyond question that the captain was killed while engaged in work entirely beyond the scope of his employment; that it was done without the knowledge or consent of the employer, and was not a case of emergency which called the captain in his employer's interest to go beyond the scope of his employment. The case is covered by the rule of *Williamson v. Industrial Acc. Com.*, 177 Cal. 715, 718, 171 P. 797, 798, where the Supreme Court say: 'It would be an unwarranted extension of the statute to give it application to acts done without the knowledge or consent of the employer, which, however commendable from the viewpoint of loyalty to one's employer, are not only outside of the employee's specific employment and duty, but which are in themselves of such a hazardous character as that the employee ought not to be reasonably expected or required to do them.'

"The same principle is stated in a different way by *Schneider on Workmen's Compensa-*

tion Law, vol. 1, p. 696, where it is said: 'Notice must be taken that a factory of today usually includes within the field of its operations many fairly distinct lines of work, from that of the roustabout engaged in the ordinary labor that almost any one may perform, to that of the expert mechanic, which can be done safely by those only with skill and experience. The difference between these various kinds of work was always recognized by the common law, and it was held to be negligence for the master to require of the servant, without warning and instructing him, the performance of work outside and more dangerous than that which the latter had contracted to perform. Such classification of work exists in the very nature of things, and as much under the statute as at common law. Its recognition is required by any organization of a factory, not only for efficiency, but as well for the purpose of guarding against accident and injury. And if a workman, when there is no emergency, should of his own volition see fit to intermeddle with something entirely outside the work for which he is employed, he ought not to be allowed compensation upon the mere plea that he thought his act would be for the benefit of his employer.'"

Our research has brought to light many authorities, other than those cited in the opinion of the District Court of Appeal, which tend to indicate the incorrectness of the award made herein by the respondent commission. The following cases would seem to be pertinent: *Losh v. Evans & Co.*, 5 W. C. C. 17, 19 T. L. R. 142; *Wilson v. Dakota L. & P. Co.*, 45 S. D. 175, 186 N. W. 828; *Dietzen Co. v. Industrial Board of Ill.*, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764; *Mephram & Co. v. Indus. Com.*, 289 Ill. 484, 124 N. E. 540; *Bischoff v. Amer. Car & Foundry Co.*, 190 Mich. 229, 157 N. W. 34.

This court has upon earlier occasions recognized that an employee may go outside the sphere of his employment by doing work he was not engaged to perform. *Assur. Corp. v. Industrial Accident Commission*, 182 Cal. 612, 614, 187 P. 42; *Sherer & Co. v. I. A. C.*, 175 Cal. 615, 618, 166 P. 318. In our opinion, neither the evidence adduced before the respondent commission nor any inference that might reasonably be drawn therefrom tends to in any manner support a finding that the injury resulting in the demise of the deceased was one "arising out of and in the course of the employment," or that the deceased was, at the time of injury, "performing service growing out of and incidental to his employment" or "acting within the course of his employment." As we read the record herein, it was no part of Captain Ough's marine duties to repair the bent contact point referred to above. Such hazardous repair work was unmistakably and unquestionably within the range of duties of the line crew. The express instructions of the deceased's employer required that he communicate the necessity for such repair work to the line crew.

For the foregoing reasons it is ordered that the award of the respondent commission be and the same is hereby annulled.

201 Cal. 610

MOSS v. CHRONICLE PUB. CO. et al.
(MARYLAND CASUALTY CO., Intervener). (S. F. 11314.)★

Supreme Court of California. July 18, 1927.

Rehearing Denied Aug. 15, 1927.

1. Master and servant ⇨330(3)—Finding that newspaper company's employee, causing injuries while aiding independent contractor in unloading newspapers, was acting as servant of company held sustained.

In an action for personal injuries caused by the negligent act of the employee of a newspaper company while he was aiding an independent contractor in unloading newspapers from a truck at a pier, held that the evidence sustained the jury's finding that, at the time of the accident, the servant was acting as the servant of the newspaper company within the scope of his employment, and was not a general servant loaned to an independent contractor for a specific service, and not the servant of the independent contractor.

2. Master and servant ⇨301(4)—Where two servants engage in joint work, each is servant of own master, though one takes orders as to details from other.

Where the servants of two masters in an emergency or otherwise jointly engage in a work of mutual interest, each employee is the servant of his own master, and neither employee is the servant of the other's master, even though one master's servant takes orders as to details of work from the other master's servant.

3. Master and servant ⇨301(4)—Servant may be loaned so that only new master is liable for his acts.

A servant may be loaned by his master to another so that the act of the servant becomes the act of the one to whom he has been loaned and so that the master loaning him is not liable therefor.

4. Master and servant ⇨301(4)—Doctrine of respondeat superior does not apply where special employer has no voice in selection or retention of negligent subordinate.

The application of the doctrine of respondeat superior depends upon the power of control which the superior possesses over the conduct and activities of his subordinates, and which he is required to exercise for the protection of third persons and the doctrine has application only where the power of control exists and does not apply where the special employer has no voice in the selection or retention of the negligent subordinate.

5. Master and servant ⇨301(4)—To escape liability for negligence of servant loaned to another, master must have resigned full control of servant.

In order that a master may escape liability for the negligent act of his servant on the ground that the servant was loaned to another,

the original master must have resigned full control over the servant for the time being; it not being sufficient that the servant be partially under the control of another, and it being necessary to distinguish control and mere suggestions as to details and the necessary co-operation where work is part of larger operation.

6. Evidence ⇨590—Jury has large latitude in accepting testimony, particularly that of negligent servant as to which defendant was employer.

In accepting or rejecting the testimony of witnesses in an action against alleged master for the negligent act of a servant, and particularly as to the testimony of the negligent servant as to which defendant was his employer, the jury has a large latitude.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action for personal injuries, brought by Charles Moss against the Chronicle Publishing Company and Charles A. Mowry, in which the Maryland Casualty Company intervened as plaintiff. Judgment was rendered in favor of plaintiff against defendant the Chronicle Publishing Company, and against plaintiff as to defendant Charles A. Mowry. The Chronicle Publishing Company appeals. Affirmed.

Percy E. Towne, of San Francisco, for appellant.

Sullivan & Sullivan, Theo J. Roche, Edward I. Barry, and William A. Kelly, all of San Francisco, for plaintiff respondent.

Ford, Johnson & Bourquin, of San Francisco, for respondent Mowry.

John Ralph Wilson, of San Francisco, for intervener.

PRESTON, J. [1] This is an action by plaintiff for personal injuries received by him in June, 1922. Said injuries were caused by the act of one Robert Miotti, and the question of negligence is not an issue on this appeal. Plaintiff alleged a cause of action against each of the defendants, Charles A. Mowry and the Chronicle Publishing Company, a corporation, under the rule of respondeat superior. The trial developed into a contest between these two defendants as to whose servant Miotti was in the doing of the act out of which plaintiff's cause of action arose. The jury rendered a verdict in favor of the defendant Mowry and against the defendant Chronicle Publishing Company. The latter has appealed, and presents as the sole issue for our determination a question which may be stated thus: Was the evidence sufficient to warrant the jury in finding that Miotti, at the time and place in question and in the doing of the act causing the injury to plaintiff, was the servant of appellant and acting within the scope of his employment?

Appellant, at the time in question, and for many years prior thereto, owned, published, and distributed a large metropolitan daily morning newspaper. It is admitted that the distribution of this paper to the various carriers to be delivered over the state and elsewhere was under the jurisdiction and control of one Pirie, a servant of appellant, called the superintendent of the mailroom. To facilitate the daily delivery of papers to the carriers for distribution, Mowry and appellant in the year 1919 entered into a written hauling contract which was to be in existence for the period of one year; the essence of which was that Mowry was "to do all of the hauling of newspapers from their mailroom in the Chronicle building to ferries, depots, or post offices for transportation outside the city of San Francisco, also two loads to Oakland each week. * * *" The contract then named the compensation and concluded with these clauses:

"This agreement to remain in effect for one year from August 10, 1919, at which time I (meaning Mowry) am to have the option of renewing this agreement for two years.

"It is understood that the Chronicle Publishing Company may terminate this agreement at any time should the service rendered not be satisfactory to them. It is also understood that I am to carry adequate compensation, public liability, and property damage insurance."

The evidence shows that no additional written contract was ever executed by the parties, but that from time to time the compensation of Mowry was increased. It is also admitted that Pirie had the right to employ and discharge all help in connection with the mailroom department. It is also admitted that on the day in question and for several years prior thereto said Robert Miotti was and had been in the general employ of the appellant and under the direction of said Pirie, and that his wages were exclusively paid by appellant. It is also admitted that on an average of three nights per week, and at times when the issue of said paper was of more than 26 pages, pursuant to the direction of said Pirie, said Miotti, between the hours of 10 o'clock p. m. and 5 o'clock a. m. of the same night, had as his exclusive duty the work of assisting Mowry's servant in loading papers at the mailroom, accompanying said truck to the place of discharge, and there assisting in unloading said papers, in order that they might be delivered on schedule and reach the place of distribution at the time desired by appellant. It was in so unloading certain bundles of papers at the pier that the accident happened which resulted in injury to plaintiff. It is also conceded that Mowry's interest in the transaction ceased when the delivery of the papers had been made at the various points specified by appellant, but appellant's interests did not cease at that time. It was scrupulously solicitous and active in

seeing that the papers reached the various carriers on schedule and arrived at the various points at the time they were expected. The object in ordering Miotti to assist Mowry was to insure this prompt dispatch of the papers so that no delay might result in their delivery. The greater the size of the paper, the greater the weight, and, the item of time being of the essence, the need for assistance in order to meet the schedule for delivery was imperative and in reality an emergency.

Appellant, however, strongly insists that Miotti at the time and place in question occupied the status of a general servant loaned to an independent contractor for a specific or special service, and that Miotti was therefore, in the doing of the act causing plaintiff's injury, the servant of Mowry and not its servant.

[2] The fact is that for many years prior to the happening of this accident, and before the contract with Mowry, appellant had used Miotti for the identical work in which he was engaged on the night of this accident. As pointed out above, it is also true that on the nights in question Miotti performed no other work whatsoever for appellant except the work of assisting the delivery of these papers. It is also true that this service was performed by Miotti upon the orders of Pirie, except in a few cases when Pirie would neglect or forget to issue the order and Mowry or his servant would make a request for Miotti's help. Inasmuch as no additional written contract was ever executed by the parties, the presence of Miotti on the truck and the fact that for three nights each week he was exclusively engaged in aiding the dispatch of this work, coupled with the further fact that Mowry exercised the right to demand a helper on these special nights, in case it was forgotten or neglected by Pirie, would warrant the jury in believing that by the conduct of the parties, if not expressly, they had contracted that appellant should furnish a man to aid in the work, which said work was of interest to both parties. The jury could even have found under the evidence that Miotti was at the time, pursuant to the orders of Pirie, really in charge of the deliveries. Certain it is that appellant was so vitally interested in the dispatch of the work that the jury could have found that appellant's servant and Mowry's servant were at the time of the accident jointly engaged in a work of mutual interest to the parties, and this is true even if it be conceded that Miotti, after being ordered to this service, thereafter took his orders as to the details thereof from the servant of Mowry. It is a well-recognized principle that, where the servants of two parties are jointly engaged in a work of mutual interest, each employee is the servant of his own master and neither of the employees is the servant of the other's master. This principle has been stated as follows:

"Servants of separate masters, although engaged in a common undertaking, are not fellow servants. To constitute that relation, servants must be in the employ of, or controlled by, a common master.

"If, with a view to expediting the business or furthering the interests of his general master, the servant assists the servants of another in their work, he is not the fellow servant of those whom he is assisting, although, acting under general orders from his employer to assist such servants, he does so at their request." 39 Corpus Juris, § 668, pp. 557, 558.

The case of *Cannon v. Fargo*, 222 N. Y. 321, 326, 118 N. E. 796, 798, is in point, as follows:

"The New York Central Railroad operated trains over a line. * * * The defendant carried on a general express business using for that purpose cars connected with the trains of the railroad company. It may be assumed that * * * it was to the interest of the railroad company to have its trains, as far as possible, adhere to the schedule and arrive and leave on time. Likewise, it may be assumed that it was to the interest of the railroad company to have express matters and baggage transported and delivered for the accommodation of its patrons and the shipping public. In order to facilitate the movement of trains and their speedy dispatch, the railroad company could have employed a man, * * * to remove or take out express matter * * * so that there might be no delay or difficulty in shipment. While such a man, with no other duties to perform, might thus incidentally be of assistance and help to the express company and relieve it from some of its work, yet the widest stretch of the ad hoc doctrine would never make such an employee a servant of the express company. * * * Only one step further and we have the case at bar. * * * This railroad company, * * * upon a line which was not so busy as to keep a gate-man constantly at his post, gave him the additional duty of a baggageman or express helper instead of employing another man for that sole purpose. * * * It was part of his duties for his employer and for his employer's benefit, and the fact that in doing this work he assisted the express company did not make him the servant of the express company in the doing of it. No authority can be found to sustain such a proposition. Otherwise we would have it as the law that, whenever the master sent his servant in his own interests to do a bit of work which also benefited others, the servant, for the time being, ceased to be his employee."

In the case of *Mandala v. Wells*, 212 App. Div. 370, 374, 209 N. Y. S. 35, 39, in discussing the question of a servant loaned to another, it was said:

"Nor should the case at bar be confused with cases where the servant of one master in an emergency assists the servant of another in the mutual interest of both masters, because in such a case there is implied authority in the defendant's servant to procure his assistance, but he still remains the servant of his original master and does not become a fellow servant."

To the same effect, see *Welch v. Maine Cent. R. Co.*, 86 Me. 552, 30 A. 116, 25 L. R. A.

658; *Sandon v. Kendall*, 233 Mass. 292, 123 N. E. 847; *Sprague v. General Electric Co.*, 213 Mass. 375, 100 N. E. 628, 45 L. R. A. (N. S.) 962, Ann. Cas. 1914A, 431; and *Mayer v. Kenyon-Rosing Mach. Co.*, 95 Minn. 329, 104 N. W. 132. See, also, *Labatt's Master and Servant* (2d Ed.) vol. 1, § 48, p. 159, where it is said:

"A servant who is engaged, together with the servants of a third person, in loading or unloading or otherwise handling goods, is regarded as acting in behalf of his own master with respect to whatever he does in the course of the work, unless some specific evidence is produced of his having been temporarily placed under the control of the third person."

Under the principle announced above, the fact that one servant may have taken orders as to details from the servant of the other employer would not affect this rule. "A servant of one employer does not become the servant of another for whom the work is performed merely because the latter points out the work to the servant, or gives him signals calling the service into activity, or gives him directions as to the details of the work and the manner of doing it." 39 Corpus Juris, § 1462, p. 1275. See, also, *Quinby Co. v. Estey*, 221 Mass. 56, 108 N. E. 908; *McNamara v. Leipzig*, 227 N. Y. 291, 125 N. E. 244, and *Flori v. Dolph* (Mo. Sup.) 192 S. W. 949.

[3] Moreover, under the evidence, it may well be doubted whether the jury would have been justified had it found that the services of Miotti had been loaned to Mowry under such circumstances as to make Miotti the servant of Mowry and not the servant of appellant. It is, of course, well recognized in this state that a servant may be loaned by his master to another so that the act done by the servant becomes the act of the master to whom he has been loaned and for the time being the general master is not responsible for his acts. *Burns v. Jackson*, 59 Cal. App. 662, 668, 669, 211 P. 821, hearing in this court denied; 18 R. C. L. § 244; *Pruitt v. Industrial Acc. Commission*, 189 Cal. 459, 209 P. 37.

[4] In the recent case of *Billig v. Southern Pacific Co.*, 189 Cal. 477, 483, 209 P. 241, 243, this court stated the governing principle as follows:

"In other words, the application of the doctrine of respondeat superior in any given case depends upon the power of control which the superior possesses, and which for the protection of third persons he is required to exercise, over the conduct and activities of his subordinates. Consequently the doctrine has application only in cases where the power of control exists, and such power does not exist in a situation where the special employer has no voice in the selection or retention of the negligent subordinate. *Du Pratt v. Lick*, 38 Cal. 691; *Higham v. Waterman*, 32 R. I. 578, 80 A. 178; *Quinn v. Complete Electric Const. Co.* [C. C. A.] 46 F. 506."

[5] Again, quoting from 39 Corpus Juris, § 1462, p. 1275:

"To escape liability, the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under the control of a third person; and it is necessary to distinguish between authoritative direction and control and mere suggestions as to details or the necessary co-operation where the work furnished is part of a larger operation."

A familiar illustration of the lack of full control is found in the case of *Chamberlain v. Lee*, 148 Tenn. 637, 257 S. W. 415, 417. There the servant of an independent contractor went to the building of another master to repair the elevator. There the operator of the elevator, the servant of the owners of the building, was told to operate the cage in such way and manner as he might be directed by the servant of the independent contractor. In manipulating the elevator, the latter servant was injured. The owners of the building were held liable upon the ground that, although their servant was directed to place himself for certain purposes under the control of the independent contractor, nevertheless their control over said servant was not completely resigned, and the cause of action by the employee of the independent contractor against them was sustained, the court saying:

"This does not make out a case of lending a servant. The servant was put under the control of plaintiff for one purpose alone; that is, to move the car up and down as plaintiff desired while the particular job was being done. The elevator car was put under the control of the plaintiff for the time, but it was put under his control along with its attendant, who remained in the service of the defendants. There is nothing to show that plaintiff could have discharged this boy, and put another boy to running the elevator at this time. Plaintiff certainly had no right to use this elevator boy for any purpose in connection with the work other than running the elevator up and down. The plaintiff could not have required the elevator boy to remain on duty for a longer period than his regular hours under his contract with defendants. In order to escape responsibility for the negligence of his servant on the theory that the servant has been loaned, the original master must resign full control of the servant for the time being."

See, to the same effect, *Flori v. Dolph*, *supra*, and *Billig v. Southern Pacific Co.*, *supra*, opinion on rehearing.

[6] It must be borne in mind that the jury had a large latitude in accepting or rejecting the evidence of the witnesses, and particularly that of *Miotti*. *Burns v. Jackson*, *supra*. And, when this latitude is allowed the jury, the evidence was such as to render it impossible for us to say as a matter of law that the verdict was unwarranted.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

BOYER et al v. MURPHY. (Civ. 3199.)★

District Court of Appeal, Third District, California. June 24, 1927.

Hearing Granted by Supreme Court Aug. 22, 1927.

1. Deeds $\Leftrightarrow$ 100—Testimony of conditions surrounding and relating to execution of deed is considered only for aid in construing deed.

In action to quiet title in which principal issue is construction of deed, testimony concerning conditions surrounding execution of deed will be considered to extent only of assistance it affords in construing deed.

2. Deeds $\Leftrightarrow$ 143—Whether grantor, sole owner of fee, reserved life interest for benefit of husband out of grant is determined by parties' intention.

In construing deed to determine whether sole fee owner could create, by reservation or otherwise, life interest for benefit of husband who was stranger to title, is to be determined chiefly by grantor's intention, regardless of common-law rule that granting clause overruled repugnant habendum clause.

3. Deeds $\Leftrightarrow$ 143—Deed by grantor and sole owner of fee, reserving to herself and husband ownership and possession during their lives and life of survivor held to establish life estate in grantor's surviving husband (McEnerney Act).

Where wife, declared sole fee owner in proceeding under McEnerney Act (St. 1906 [Ex. Sess.] p. 78, as amended), granted remainder of fee, reserving to her and her husband ownership and possession during their lives and life of survivor, life estate was reserved to grantor's husband surviving her.

4. Exceptions, bill of $\Leftrightarrow$ 8—Objection that failure of bill of exceptions to specify particulars in which findings are unsupported precludes review of evidence is unavailing, where findings are based entirely on construction of deed (Code Civ. Proc. § 648).

Although Code Civ. Proc. § 648, requiring bill of exceptions to specify particulars in which it is claimed findings are not supported by evidence, should generally be followed, in action to quiet title where decision on trial and on appeal was predicated entirely on construction of deed and there was no conflict in evidence, objection that sufficiency of evidence to support findings of fact could not be reviewed for failure of bill of exceptions to contain specification of particulars in which findings were not supported by evidence is ineffectual on appeal, since they were in reality conclusions of law following construction of deed.

5. Quieting title $\Leftrightarrow$ 47(2)—Where conclusion depended on deed, finding that defendant's claim was without right held unsupported conclusion of law subject to reversal.

In action to quiet title, where conclusion arrived at on merits was solely founded on deed, which was wrongfully construed, finding that defendant's claim was without right amounted to no more than unsupported conclusion of law which could be reversed on appeal.

Appeal from Superior Court, City and County of San Francisco; J. E. Woolley, Judge.

Action by Alice M. Boyer and another against Edward F. Murphy to quiet title. From a judgment for plaintiffs, and an order denying a motion to vacate it and to enter judgment for defendant, the defendant appeals. Reversed with direction.

Herman J. Widman, Wm. M. Madden, and Charles J. Heggerty, all of San Francisco, for appellant.

Ivan T. Crase, of San Francisco, and Fred C. Peterson, of Oakland, for respondents.

HART, J. [1] This is an action by the plaintiffs to obtain a decree quieting their alleged title to certain improved real property situated in the city of San Francisco, as against the alleged claim of defendant to an interest or estate therein "adverse to the said plaintiffs."

The complaint alleges that the claim so made by the defendant "is without any right whatever, and that said defendant has not any estate, right, title, or interest whatever in said land or premises, or any part thereof." The prayer, besides asking for an adjudication that defendant has no interest, etc., in said real property and that he be enjoined from asserting such claim, asks that "an account be taken of all the rents, issues, and profits of said property, which have accrued to the defendant since the first day of April, 1919, and for such other relief," etc., as may be justified in equity.

The answer consists of specific denials of the material allegations of the complaint.

The court found (finding No. 2) that defendant "claimed an interest or estate therein (the real property specifically described in the complaint and the findings) adverse to plaintiffs, but that said claim was without right by said defendant, and said defendant had no right, title, or interest of any kind, character, or description in and to said described premises, either as set out in defendant's answer or otherwise"; that (finding No. 3) "on the 21st day of March, 1919, the premises described in such complaint was the separate property of Teresa Doyle Murphy, and that at said time defendant, Edward F. Murphy, did not have any right, title, or interest in and to said property of any kind, character, or description"; that (finding No. 4) "on the 21st day of March, 1919, the said Teresa Doyle Murphy, and Edward F. Murphy, defendant herein, executed and delivered to the plaintiffs, James E. Murphy and Alice M. Boyer, a certain indenture in writing, which indenture in writing is in certain words and figures, as follows, to wit," following which is a deed executed by Teresa Doyle Murphy and Edward F. Murphy, conveying the fee in said property (therein spe-

cifically described) to the plaintiffs herein, the habendum clause of said deed reading as follows:

"To have and to hold the said premises, together with the appurtenances, unto the parties of the second part, and to their heirs and assigns forever, reserving to the parties of the first part the ownership and possession thereof during the lifetime of the parties of the first part and the survivor of them."

The court further found: That Teresa Doyle Murphy died in the city and county of San Francisco on April 1, 1919; "that in and by virtue of said instrument in writing the said Edward F. Murphy did not take a life estate in and to the premises described herein, or take any interest of any kind or character in and to the premises described therein."

The conclusions of law are in accord with the findings, and judgment was entered for the plaintiffs in conformity to the prayer of the complaint. Defendant made a motion for a new trial and also a motion to vacate the judgment made and entered and to give and enter a judgment in favor of the defendant. Both motions were denied.

The defendant appeals from the judgment and also from the order denying his motion to vacate the judgment made and entered and in lieu thereof to make and enter a judgment in his favor. The appeals are supported here by a record made up in the form of a bill of exceptions.

From the testimony it appears that the defendant Edward F. Murphy and Teresa Doyle Murphy were husband and wife, and were the parents of the plaintiffs; that, in the month of April, 1906, the records pertaining to the title to real property in controversy, as were all the public records of the city and county of San Francisco, were destroyed by fire; that thereafter, and on December 30, 1912, Teresa Doyle Murphy, separately and alone, in pursuance of the provisions of an act of the Legislature popularly known as the "McEnerney Act" (St. 1906 [Ex. Sess.], p. 78, as amended), instituted an action in rem, "against all the world" in the superior court in and for the city and county of San Francisco, to secure a decree restoring the records pertaining and also quieting her title to the real estate in dispute; that, after due proceedings had under said act, said superior court, on April 30, 1913, rendered its judgment in said action restoring the records affecting said property and quieting Teresa Doyle Murphy's title thereto as follows:

"(a) That plaintiff was at the time of the commencement of this action the owner in fee simple absolute, and in the possession of the real property above described and of the whole thereof.

"(b) That her title thereto be and the same is hereby established and quieted against all the world as of said date.

"(c) That at said time no other person had any estate, right, title, interest, or claim in or to said property or any part thereof, either legal or equitable, present or future, vested or contingent."

On March 25, 1919, Teresa Doyle Murphy and Edward F. Murphy, her husband, executed a deed granting and conveying to their son and daughter, the plaintiffs herein, the fee in the real property in question. On the 1st day of April, 1919, Teresa Doyle Murphy passed out of this life, and said deed was, subsequent to the date of her death, duly recorded in the official records in the office of the county recorder of said city and county.

The defendant testified that the deed referred to in the complaint and the findings was jointly executed by him and his wife; that he and his wife bought the property at a probate sale in 1897 or 1898, and was acquired 10 years after their marriage; that when they acquired the property "in 1898, there was a little cottage and two flats thereon. Sometimes," defendant continued, "the flats were rented, and sometimes I would collect the rents and sometimes my wife would. When I did, I would give them to my wife. We were living in the cottage in the rear during this time. After the fire in 1906, we constructed two flats on the property, that is, the cottage on the rear was moved to the front and became a part of those two flats, and my wife and I lived in one of the flats, and rented the other. Sometimes I would make payments to the bank on the mortgages (the property having been mortgaged to secure a loan of \$2,000 to be used as in part payment of the purchase price of the property), and sometimes my wife would. I have taken rent money and paid it to the bank on these mortgages." He further testified that "up to the fire and earthquake in 1906, the property in question was occupied by myself and wife, a part of it, a little cottage, and from that time until the death of my wife, my wife and I were in possession of the property." He testified that his wife "did not receive any gifts of any property—not a dollar of money or anything else that I ever knew of. She never inherited any property from any relative." Defendant proceeded to testify, without objection, that some of the money—about \$1,000, which he had earned as wages prior to his intermarriage with Teresa Doyle Murphy and which he had on deposit in a bank—was contributed to the payment of the purchase price of the property, and that, from time to time after his said marriage, he contributed portions of his wages to the same purpose; that the money received by him and his wife for rent of certain parts of the premises and such of his wages as he intended should be applied to the extinguishment of the mortgage debt on the property were placed in a single de-

posit in the bank, and the two funds were therefore commingled. All this testimony—that is, all of the defendant's testimony to the effect that much of his earnings as a laborer or mechanic had been used as in part payment of the indebtedness against the property or the purchase price thereof—was, on motion of counsel for the plaintiffs, at the close of defendant's direct examination, stricken out upon the theory that such testimony would involve a collateral attack upon the judgment obtained by Mrs. Murphy under the McEnerney Act.

The foregoing constitutes a statement in substance of all the testimony received respecting the defendant's connection with or relation to the property here in dispute; and, while it is set forth herein, it is to be understood that we attach importance to the testimony to the extent only of whatever assistance it may afford and has afforded in the construction of the deed in question and may lend support to the result at which we have arrived as to the effect of said deed with respect to any interest in the property therein described which Mrs. Murphy thereby sought to vest in her husband, the defendant herein.

[2] The theory upon which the case was tried and decided below is that, inasmuch as Mrs. Murphy was the sole owner in fee of the property described in the deed, it was not legally competent for her to create, by way of a reservation or otherwise, out of the fee in said property, which she at the same time granted to the plaintiffs in remainder, a life interest therein to and for the benefit of her husband, he being a stranger to the title. The polestar in the determination of this question is the intention of the parties to the deed, particularly that of the deceased wife of the defendant, to be ascertained by a consideration of the deed itself and, if necessary, the circumstances surrounding the execution thereof, by the light of the rules by which any other contracts are construed or interpreted, where construction or interpretation is necessary to ascertain the intention of the parties to such instruments as to the scope and effect thereof as intended by the parties thereto. *Barnett v. Barnett*, 104 Cal. 298, 300, 301, 37 P. 1049; *Pavkovich v. Southern Pac. Co.*, 150 Cal. 39, 45-47, 87 P. 1097; *Parks v. Gates*, 186 Cal. 151, 155, 199 P. 40; *Duncan v. Wolfer*, 60 Cal. App. 120, 212 P. 390; *Devlin on Deeds* (3d Ed.) §§ 843, 843a, 844a and 850. In 17 *Ruling Case Law*, § 6, p. 619, the rule now generally followed in the construction of deeds is thus stated:

"It was a rule of the common law that if the habendum or any later clause in a deed was repugnant to the granting clause, the granting clause would override the repugnant clause or clauses, and under this rule if a grant is to one and his heirs and the habendum clause or a later clause is to the grantee for his life, or life of another, the habendum or later clause is considered void as being repugnant to the meaning

conveyed by the words 'his heirs' as previously used. The modern tendency, however, is to abandon the strict common law rule of construction, the broad doctrine being asserted that in the construction of deeds as in the construction of other instruments the intention of the parties thereto as gathered from the whole instrument must govern. In jurisdictions which adhere to this doctrine it is held that where a deed appears from the premises to give a fee, but the habendum makes it clear that a life estate is intended, the grantees will take a life estate only. And where the granting part of a deed creates a life estate only, it has been decided that the use of the word 'heirs' in the warranty clause is not sufficient to show that the real intention was to convey a fee."

Referring to the same subject, our Supreme Court, in *Barnett v. Barnett*, supra, approves the rule as it is above declared in *Ruling Case Law*. It is there said:

"A grant is to be interpreted in the same manner as any other contract (section 1066 [Civ. Code]), so as to give effect to the intention of the parties, if that intention can be ascertained (section 1636); and for the purpose of ascertaining that intention 'the whole of the contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other' (section 1641). The intention, it is sometimes said, is to be gathered from the four corners of the instrument, and in case of a grant the habendum, as well as any other portion of the instrument, is to be considered. The ordinary use of the habendum is to define or limit the quality of interest, or the estate which the grantee is to have in the property granted, and, although usually made a separate portion of the instrument, is not necessarily so, but may be wholly omitted, and the interest or estate granted may be defined or limited in the premises or granting part of the conveyance. *Montgomery v. Sturdivant*, 41 Cal. 290. The rule that if the habendum is repugnant to the premises it is to be disregarded, is only another form of the rule that 'if several parts of a grant are absolutely irreconcilable the former part prevails.' Civ. Code, § 1070. The intention of the parties to the grant is to be gathered from the instrument itself, and determined by a proper construction of the language used therein, but for the purpose of ascertaining this intention the entire instrument, the habendum as well as the premises, are to be considered, and, if it appear from such consideration that the grantor intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause the habendum will prevail over the granting clause. *Faivre v. Daley*, 93 Cal. 670 [29 P. 256]; *Pelissier v. Corker*, 103 Cal. 516 [37 P. 465]. 'It is in such case to be considered as an addendum or proviso to the conveyancing clause, which by a well-settled rule of construction must control the conveyancing clause or premises, even to the extent of destroying the effect of the same.' *Bodine v. Arthur*, 91 Ky. 53 [14 S. W. 904], 34 Am. St. Rep. 162."

[3] It will not be questioned that Teresa Doyle Murphy intended to convey the fee in the premises to the plaintiff as a remainder over after the determination of a life estate

therein to herself and her husband "and the survivor of them." The language of the habendum clause of the deed so plainly and unequivocally confirms this proposition as to remove it beyond the realms of disputation. This conclusion is not only clearly warranted by the language itself of said clause of the deed, but is reinforced by the uncontradicted testimony of the defendant. Thus it was shown (and this particular part of the defendant's testimony did not fall within the scope of the motion to strike and the order striking out certain of the testimony given by him) that the premises in controversy were acquired jointly by him and his wife some ten years after the date of their intermarriage, and that the couple jointly held continuous actual possession thereof and together resided thereon down to the date of the death of the wife on April 1, 1919. Under these circumstances, it was only natural that the wife, having, long after they acquired the property, obtained a decree under the *McEnerney Act*, adjudging her the sole owner in fee of the property, should not only desire but intend to provide for her life companion, to be enjoyed during the remaining years of his rapidly waning life, at least such an interest in the premises as would assure him an abiding place at the "old homestead" and, peradventure, vouchsafe to him, in his old age, protection against want of the common necessities of life. There is, however, no serious claim here that the deceased wife of the defendant did not intend and attempt to carve out of the fee in the property a life interest therein for the benefit of herself and husband "and the survivor of them." The point urged here by the plaintiffs is, as stated, that Mrs. Murphy utterly failed legally in whatever attempt she might have made to provide for a life estate in her husband, to be enjoyed by him after her death, if she predeceased him. In other words, we may pardonably repeat, the contention of the plaintiffs is that the defendant being a stranger to the title to the property, his wife, the sole owner of the fee therein, could not legally create in him a life interest or estate in the premises, and that therefore the instant she died the life estate reserved in the property to herself terminated and simultaneously therewith the right of the plaintiffs to the enjoyment of the estate passing to them, under the terms of the grant, inured to them. Obviously, in so far as the habendum clause of the deed applied to the wife of the deceased, there was a reservation of a life estate out of the fee. Undoubtedly, as before stated, Mrs. Murphy intended and undertook to create a life estate in her husband (the defendant).

But, whether the life interest which Mrs. Murphy sought to withhold from the fee for the benefit of her husband constitutes a reservation, in the technical sense of that term, is a matter of no particular consequence in determining the rights of the defendant here-

in, although it may be well enough to say that the authorities generally, to which our attention has been called, in considering whether the attempted creation, for the benefit of a third party, of a life estate out of the fee in real property which has been granted by the owner of the fee to another, declare that, to create a life estate by way of a reservation, the party for whom such estate purports to be created must be a party or not a stranger to the deed or grant (they do not say to the title) conveying the fee in remainder. See Devlin on Deeds (3d Ed.) § 222, p. 318; 18 Corpus Juris, § 339, p. 342, and cases named in the footnotes; 8 R. C. L. § 148, pp. 1091, 1092, and cases cited in footnotes; Butler v. Gosling, 130 Cal. 422, 426, 62 P. 596. We have found one case in which the rule as so expressed has been interpreted to mean:

"When the books and the cases say that a reservation in a grant, in order to be valid must be for the benefit of the grantor, or some one of the grantors, and that a reservation cannot be made for the benefit of a stranger to the deed, it is meant and the language used connotes, that the reservation must be for the benefit of that grantor who, having an interest in the thing granted, may logically reserve from the operation of the grant a part of the estate or thing granted, or some right growing out of or appurtenant thereto." Lemon v. Lemon, 273 Mo. 484, 496, 201 S. W. 103, 106.

But, as before in effect declared, we are not required to express an opinion herein upon the question whether that part of the habendum clause of the grant purporting to reserve a life estate out of the fee in the real property in dispute to the defendant is, strictly speaking, a reservation, for, as pointed out above, the language of the grant, particularly the reddendum words embraced within the habendum clause, must be so construed as to give effect to the intention of Mrs. Murphy with respect to the interest in the fee which evidently she desired to withhold therefrom for the benefit of her husband, regardless of the technical form in which it may be found to be necessary to sustain and carry out such intention, provided, of course, that such intention may be worked out, as in our opinion it may be, without doing violence to any of the canons of construction established and commonly invoked as a guide to the ascertainment of the meaning and intent at the bottom of contracts in general. If, therefore, the clearly manifested intention of Mrs. Murphy to provide a life interest for her husband in the property in question cannot be sustained upon the theory that such intention has been evinced in the form of a reservation, as that term in law is technically understood, then it is clear that the provision for the defendant, in order to enforce the manifest intention of Mrs. Murphy, may, in practical effect, be invested with the force of a reservation by construing it as an exception to the estate granted to plaintiffs, whereby Mrs. Murphy, for the benefit of her husband, ex-

cepted, for a specified time, from the operation of the grant to plaintiffs of the fee, an interest which must cease to exist in the manner expressed by or necessarily implied from the language of the habendum clause of the grant before the right of the plaintiffs to the enjoyment or beneficial use of the estate passing to them arises or inures to them. Or, stating the proposition in other language: The plaintiffs being granted the whole of the estate in fee, subject to a certain interest therein which was expressly withheld or excepted therefrom by their grantor, are not, in the very nature of the situation, entitled to the enjoyment of the beneficial use of the fee until the excepted interest shall have ceased to exist, or has terminated, according to the terms of the instrument creating it. This construction legally facilitates the carrying out of the plan or manifest intention of Mrs. Murphy and is in consonance with the theory according to which the courts and other authorities hold that deeds of like character to the one here should be construed, where it is necessary to do so, to effectuate the clear intention of the grantor with respect to several different estates sought to be carved out of a single fee in real property. A few excerpts from the statement of the rule as it is formulated by the text-writers which we conclude controls in the construction of the deed in question, and which rule as so stated is predicated upon or approved by the cases generally, will be sufficient for our purposes here.

Mr. Devlin, in his very excellent work on Deeds (volume 2, 3d Ed. § 982), says:

"A stranger to a deed cannot take title by reservation. But it may operate, when so intended by the parties as an exception from the thing granted."

In 8 Ruling Case Law, § 148, p. 1092, the rule is thus stated:

"Generally it is declared that a reservation must be in favor of a grantor or party executing the conveyance, and not to a stranger.

"A better statement of the rule is that, a reservation in a deed to a stranger being by right of authority invalid as a reservation, the tendency of the courts is to effectuate the intention of the grantor by treating it as an exception.

"A reservation is none the less made to a grantor if it is so made that others can derive advantage from it; it will be considered as made to him when valuable rights are secured to him, though others may be benefited by it."

In 18 Corpus Juris, § 339, p. 340 et seq., it is stated:

"A reservation is a clause in a deed whereby the grantor reserves some new thing to himself out of that which he granted before. It differs from an exception which is ever of part of the thing granted and of a thing in esse at the time. The office of an exception is to take something out of the thing granted that would otherwise pass. While this distinction between a reservation and an exception has been uniformly recognized, the terms 'reser-

vation' and 'exception' are often used interchangeably; and the technical meaning will give way to the manifest intent, even though the technical term to the contrary is used."

Again, in the same volume of the same work, section 340, p. 343:

"The true rule is said to be that, where words taken according to their technical meaning do not create a legal reservation and are notwithstanding construed to amount to a reservation, it is always done with a view to advance the intent of the parties, but not to defeat or destroy it. And words not technically amounting to a reservation are not to be so construed unless to effectuate a manifest intention. Where not repugnant to the grant, a reservation or exception may appear in any part of the deed."

See, also, the many cases cited in the footnotes, which support the text.

In *Martin v. Cook*, 102 Mich. 267, 60 N. W. 679, the grantor reserved to himself and to his daughter, who was a stranger to the deed and to the title, an estate for the lives of both in the property conveyed. The court, on page 272 of 102 Mich., on page 680 of 60 N. W., said:

"While the rule that a reservation in favor of a stranger to the instrument is invalid as a reservation has been adhered to, yet, in order to effectuate the intention of the grantor, such a reservation has uniformly been treated as excepting from the grant the thing reserved."

See, also, *Burchard v. Walther*, 58 Neb. 539, 78 N. W. 1061; *In re Dixon*, 156 N. C. 26, 72 S. E. 71.

Nothing further need be said upon the question under consideration than what is declared in the above authorities. The case here unquestionably falls within the rule as to exceptions as declared therein.

[4] In conclusion, it is proper to say that, in taking up this record for consideration, we did not overlook the point made by respondents at the outset of the argument presented in their brief, that the "attempt on the part of the appellant to attack the sufficiency of the evidence to support the findings of fact" cannot be reviewed for the reason that the bill of exceptions does not contain a specification of the particulars in which it is claimed that the findings are not thus supported. Code Civ. Proc. § 648. While the rule as declared in that section of the Code in cases where the appeal is supported by a bill of exceptions, and where the findings are challenged for want of sufficient evidence to support them, should generally be followed, yet in the instant case the decision below, as is the decision here, was predicated entirely upon the construction of the deed constituting the foundation of this action. There was little evidence received in the case and in that there was no conflict whatever, viz.: The testimony of the plaintiff Mrs. Boyer, giving the date of her mother's death, the defendant's testimony, of which a synoptical statement is hereinabove given, and the deed. The find-

ings which might be sufficient as such under other circumstances are in the present situation in reality conclusions of law following the construction of the deed.

[5] The conclusion arrived at upon the merits, as stated, and as is obvious, is wholly founded on a construction of the grant. It follows that the instrument is subject to no other construction. The finding, therefore, that the defendant's claim of interest in the property is without right, etc., amounts to no more than an unsupported conclusion of law. See *Carr v. Carr*, 15 Cal. App. 480, 495, 496, 115 P. 261; *Rosenberg v. Bump*, 43 Cal. App. 376, 398, 185 P. 218.

Accordingly, the judgment and the order denying defendant's motion to vacate said judgment "and to enter another and different judgment in said cause, to wit, a judgment in favor of the defendant and against the plaintiffs," are, and each of them is, reversed and the court below is hereby directed to enter or cause to be entered judgment in favor of defendant in harmony with the prayer of his answer.

We concur: FINCH, P. J.; PLUMMER, J.

HUTTON et al. v. YOLO ORCHARD CO. et al. (Civ. 3287.) ★

District Court of Appeal, Third District, California. June 30, 1927.

Hearing Granted by Supreme Court Aug. 29, 1927.

1. Boundaries ⇨14—Under deed describing lot as "running eastwardly to bank of Cache creek," "bounded on east by Cache creek," east boundary of lot was center of creek (Civ. Code, § 830).

Under deed conveying lot as laid down and designated on plat of town of Cacheville, which lot contained 60 feet frontage and running back eastwardly to bank of Cache creek and boundary of which was stated as follows: "On north by lot No. 3 of same block; east by Cache creek," "bank of Cache creek," and "bounded east by Cache creek"—were used as synonymous terms, and, under Civ. Code, § 830, eastern boundary was center of creek.

2. Boundaries ⇨3(4)—Where deeds of lots referred to plat on which creek was eastern boundary, length of lots stated had to give way to boundary of creek (Code Civ. Proc. § 2077, subd. 2).

Where deeds of lots referred to plat of town which showed Cache creek as eastern boundary of lots, language of lots stated as 150 feet, and also as about 150 feet, had to give way to definite and ascertained boundary of Cache creek, the water line of center of stream, under Code Civ. Proc. § 2077, subd. 2.

3. Deeds ⇨90—Where private party is grantor, grantee is favored one in event of controversy.

Where a private party is grantor, grantee is the favored one in the event of any controversy.

4. Boundaries ⇨14—Deeds carrying side lines to bank of stream without limitation by description of short line connecting side lines carries conveyance to center of stream.

Deeds carrying side lines to bank of stream without any limitation by description of a short line connecting two side lines, as running along shore or bank of a stream, carries conveyance to center of stream.

5. Confusion of goods ⇨3—Injured party may recover value of whole only when confusion of goods is such that true proportions are indistinguishable.

Where confusion of goods is caused by wrongful act of another, injured party may replevy whole or sue in damages for value of whole only when admixture is such that true proportions are indistinguishable.

6. Confusion of goods ⇨13—Burden of proof rests on person causing confusion of goods to show that rights of parties can be approximated.

Where wrongful act of party causes confusion of goods, burden of proof rests on him to show that rights of parties can be approximated.

7. Confusion of goods ⇨15—Whether confusion of goods prevents recovery of his proportion thereof by one of owners is question of fact.

Whether there has been such confusion of goods as will prevent recovery of his proportion thereof by one of owners is a question of fact.

Appeals from Superior Court, Yolo County; W. A. Anderson, Judge.

Action to quiet title and for damages by J. A. D. Hutton and others against the Yolo Orchard Company and another. From a judgment for plaintiffs, defendants appeal. Reversed.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for appellants.

Hurst & Hurst, of Woodland, and E. B. Mering, of San Francisco, for respondents.

PLUMMER, J. Plaintiffs began this action in 1915 to quiet title to certain lands and premises situate in the county of Yolo, state of California, described as follows:

"Commencing at a point on the south property line of Washington street in the town of Cacheville county and state aforesaid, as shown by plat of said town of Cacheville, filed October 10, 1857, in Map Book No. 1, page 37 of the records of the county recorder of the county of Yolo, state of California, and to which map all reference to streets in said town of Cacheville are made, 150 feet easterly from First street in said town of Cacheville, running thence southerly and parallel to said First street to a point 300 feet southerly of the south property line of Clay street in said town of Cacheville to the property of Mary Griffith; thence easterly and along the line of said Mary Griffith's property to the eastern boundary of the original Hutton property; thence down the bed of Cache creek upon said

eastern boundary line of said property to a point where said south property line of said Washington street, if extended, would intersect said eastern boundary line; thence westerly along said extended line to the place of beginning. Said eastern line of said Hutton tract above mentioned is located in the following manner, to wit: Commencing at the southwest corner of lot 2 as described in a deed executed by James M. Harbin and others to James A. Hutton, dated February 4, 1857, and recorded February 5, 1857, in Book C of Deeds, at page 82 records of the office of the county recorder of Yolo county, state of California; thence south and east 18 degrees, 100 rods to the middle of Cache creek; thence down said Cache creek east of north 18 degrees, 64 rods; thence east of north 78½ degrees, 24 rods."

The premises above described are included within the red line on a map, marked "Exhibit 9," and are situated along the bed of that certain stream in said county, known as and called "Cache creek."

In connection with their action to quiet title to said premises the plaintiffs also joined a cause of action for damages against the defendants, alleging that the defendants had removed certain gravel deposits from the easterly side of the center line of said stream to the damage of the plaintiffs in the sum of \$25,000. The damages above referred to are set forth in a supplemental complaint filed by said plaintiffs, wherein said sum is alleged to be the value of sand and gravel removed from premises belonging to the plaintiffs by the defendants and converted to their use.

The trial court awarded judgment to the plaintiffs, quieting title to that portion of the premises herein described, lying west of a certain line running along the bed of said Cache creek, known as and called during the trial the "Harter line," being the line shown on Exhibit No. 9 as the west boundary of lands deeded by Harriet S. Hutton et al. to W. W. Brownell et al., by a deed recorded in Book of Deeds 41, page 487, Yolo county records. Judgment was also awarded the plaintiffs in the sum of \$4,000. From the judgment quieting title and awarding damages, the defendants appeal.

The record shows that at 10 minutes past 10 o'clock a. m. on February 5, 1857, a deed bearing date of February 4, 1857, was recorded in Book C of Deeds, page 82, wherein and whereby James M. Harbin et al., parties of the first part, conveyed and confirmed unto James A. Hutton, of the county of Yolo, a tract of land containing about 316 acres in the county of Yolo, state of California, upon a part of which premises the town site of Cacheville referred to herein was thereafter located; that on the same day, to wit, at 10 minutes past 1 o'clock p. m., February 5, 1857, there was recorded in Book C of Deeds, page 84, a deed executed by James A. Hutton to James M. Harbin, dated February 4, 1857,

of Cache creek, south by Hyman, and west by First street."

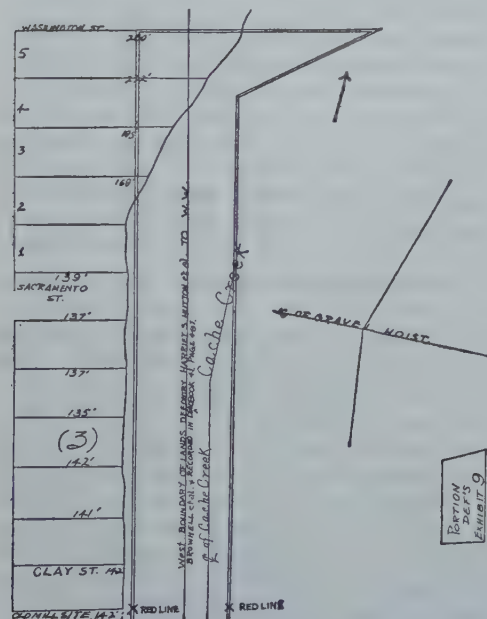
On September 30, 1858, James A. Hutton conveyed and granted to P. L. Dustin those certain premises situate in the town of Cacheville, as appears on the map thereof, and described as follows:

"The south half of lot No. four (4) in fractional block No. two (2), containing a front of thirty feet on First street and running back eastwardly to the water line of Cache creek; bounded west by First street, north by the north half of said lot formerly sold to said Dustin, east by Cache creek, and south by lot No. three."

On May 13, 1857, said Hutton sold to Laurence Hollenbeck and John T. Noel those certain premises in the town of Cacheville, described as follows:

"Being in the town of Cacheville and known and designated on the official plat of said town of Cacheville as lot No. five in fractional block No. two, lying sixty feet front on First street and running back one hundred and fifty feet on Washington street."

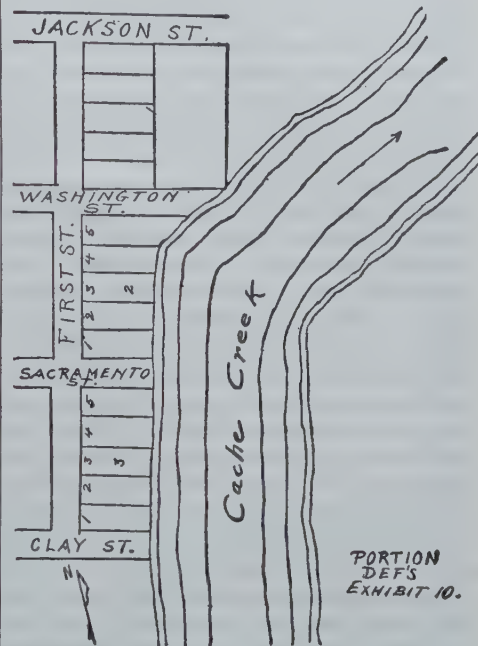
On June 7, 1887, Harriet S. Hutton and others granted and conveyed to W. W. Brownell all and singular those certain premises situate in the county of Yolo, containing about 212 acres, being a portion of the premises theretofore conveyed by James M. Harbin to the said James A. Hutton, by the deed first mentioned herein. This deed, among



"Thence east 30 feet to the fence on the east side of the road; thence southerly on the line of said fence to the center of Cache creek; thence down the center of said creek to Cramer's southwest corner."

On February 9, 1860, James A. Hutton conveyed to William Campbell those certain premises in Yolo county, described as follows:

"Commencing at the southeast corner of the junction of Clay and First streets in the town



of Cacheville; thence running southerly with the direction of said First street 300 feet; thence easterly to the western bank of Cache creek; thence northerly with the western bank of said Cache creek 300 feet to the south boundary line of Clay street; thence westerly with the southern boundary of said street to the place of beginning."

Thereafter said premises were conveyed by S. N. Mering to Mrs. Nancy Mering, his wife, by a deed dated May 14, 1892, describing the premises as follows:

"Commencing at a point common to the middle of Clay and First street in the village of Cacheville; thence running southerly in the direction of said First street one hundred and sixty feet (160) to the lands of A. Griffith; thence easterly to the middle of Cache creek; thence northerly down the middle of said Cache creek one hundred and sixty (160) feet to the middle of Clay street; thence westerly down the middle of said Clay street to the place of beginning."

"Also that certain piece of land adjoining the above-described land commencing at a point common to the center of Clay and First streets; thence running westerly down the middle of Clay street, three hundred and sixty (360) feet to a point common to the middle of Clay and Sec-

other lands, conveyed the premises described on one of the maps as property belonging to the defendant Yolo Orchard Company. The boundary lines in this deed, so far as material here, are as follows:

ond streets; thence southerly down the middle of the county road one hundred and ninety (190) feet; thence easterly and parallel with Clay street three hundred and sixty (360) feet; thence northerly and parallel with said Second street one hundred and ninety (190) feet to the place of beginning, commonly known as the New Process Flouring Mills."

Thereafter, on October 26, 1926, said Nancy Mering conveyed to C. S. Mering all of the premises just herein described. On February 13, 1901, C. S. Mering conveyed to E. B. Mering et al. all of the premises last described. On June 24, 1901, C. S. Mering, E. B. Mering et al., sold and conveyed to E. J. De Pue all of the premises last herein described, and on July 29, 1901, said De Pue conveyed to the Yolo Orchard Company all of the premises herein described.

It will be observed that all of these deeds beginning with May 14, 1892, described the easterly boundary of the premises conveyed as being the middle of Cache creek. The controversy herein revolves around the question of whether the several deeds herein referred to have conveyed whatever interest James A. Hutton originally acquired to the bed of Cache creek, or whether the conveyances limited the boundary line of the several tracts so as to leave in the said Hutton, and therefore in the present plaintiffs as his heirs, a small portion of the bed of the Cache creek lying west of the center line thereof and adjoining fractional blocks Nos. 2 and 3 in Cacheville and a small portion of the bed of said creek lying east of property belonging to the defendant known as the "mill site." The record does not disclose that James M. Harbin ever parted with his half interest in the 40 acres conveyed to him by Hutton, other than as the fractional block No. 3, in the town of Cacheville and certain lots in fractional block No. 2.

On the part of the respondents it is contended that no title to said premises is shown by the record to have been vested in James M. Harbin by virtue of the deed to him of a half interest in the 40 acres herein referred to, by reason of the fact that the conveyance from Hutton to Harbin appears to have been acknowledged by Harbin and not by Hutton. As meeting this contention, appellant calls attention to section 1207 of the Civil Code relating to conveyances defectively acknowledged prior to a certain date. Respondent questions the applicability of this section, insisting that it relates only to the protection of subsequent purchasers or incumbrancers, and does not permit the admission of the deed from Hutton to Harbin as evidence for any purpose in this case. The last sentence of said section, however, is general in its terms, and makes a recorded instrument, though defectively acknowledged, as effective as though it were properly acknowledged. The last part of the sentence reads as follows:

"Duly certified copies of the record of any such instrument may be read in evidence with like effect as copies of an instrument duly acknowledged and recorded; provided, when such copying in the proper book of record occurred within fifteen years prior to the trial of the action, it is shown first that the original instrument was genuine."

The deed in this case defectively acknowledged was recorded some 60 years prior to the date when it was sought to introduce it in evidence. The admissibility of such a deed is considered in the case of *Mercantile Trust Co. v. All Persons*, 183 Cal. 369, 191 P. 691, and does not appear to be limited to controversies simply between purchasers and incumbrancers. However, as to whether Harbin ever acquired a one-half interest, or now has any interest in the Cacheville premises involved in this action, is wholly immaterial. The relevancy of the conveyance of Hutton to Harbin is only as a circumstance, along with others, tending to evidence the intent of Hutton to part with or withhold his interest in the bed of Cache creek. After the various deeds executed by both Hutton and Harbin, and by Hutton alone, conveying all the lots in fractional blocks Nos. 2 and 3, having an east frontage on Cache creek, or wherever the line may be, we find that the Hutton heirs joined in a deed conveying all the property belonging to him lying easterly of Cache creek and east of the said town of Cacheville and the lots herein described, which deed places the west boundary line of the lands conveyed as running to the center of Cache creek, and thence down the center of said Cache creek to a certain designated corner.

In the conveyance executed by Hutton and Harbin to Price, conveying fractional block No. 3, in the town of Cacheville, the premises are described as follows:

"Being three hundred (300) feet front on First street and running back on Sacramento and Clay streets to the bank of Cache creek."

In the deed from Hutton to Harbin and in the mortgage from Harbin to Hutton, the east boundary line of the same premises is described as the center of Cache creek. The reasonable inference from the language used in these instruments would be that the boundary line is intended to be the same in all three cases; there being nothing to indicate a contrary intention. The deed from Hutton and Harbin to Price not containing any reference to a line running northerly and southerly along the west bank or along the bank of Cache creek, delimitating or evidencing an intention to mark out a boundary line different from that referred to in the instruments executed by Hutton to Harbin and Harbin to Hutton, the east line would be the center of the creek. In the deed from Hutton and Harbin to Dustin conveying the north half of lot No. 4, in block No. 2, the premises are described as running back 150 feet, but the ref-

erence is first made to the lot as described on the plat. The tracing from the plat on file shows a different length, from which it follows that the 150 feet line does not limit the extent of the lot, but it extends back from Front street the distance necessary to make it conform to the plat according to which it is conveyed.

Lot No. 1 in block No. 2 is described as running back 150 feet on Sacramento street. This lot is also sold as laid down on the official map of the town of Cacheville. A reference to the tracing from the original plat shows that the northerly line of the lot is longer than the southerly line. No distance is given for the northerly line in the conveyance, nor is there any connecting boundary line mentioned as defining the easterly boundary line connecting the north and south boundary lines of said lot. From this it follows that, wherever the map filed carries the lines, the conveyance must be held as conforming thereto. In the deed executed by Hutton to Selig and Hyman, lot No. 2, in block No. 2, is conveyed as laid down and designated on the plat of the town of Cacheville, which lot contains 60 feet frontage on First street and running back eastwardly to the bank of Cache creek, and then the boundary is stated as follows:

"On the north by lot No. three (3) of the same block, east by Cache creek, south by lot No. one (1) of same block, * * * and west by First street."

[1] There seems to us no reasonable question but that "the bank of Cache creek and bounded east by Cache creek" are used as synonymous terms and under section 830 of the Civil Code carries the east boundary to the center of the creek. Again, in the conveyance of lot No. 3, in block No. 2, "as laid down on the official map of said town," the lot is described as "containing 60 feet frontage on First street and running back *about* 150 feet to the bank of Cache creek; bounded north by P. L. Dustin, east by the bank of Cache creek, south by Hyman, and west by said First street."

Cache creek, being a permanent natural monument, carries the line back to the creek, and, under section 830 of the Civil Code, to the center of the creek. It also appears that the language "150 feet" to the bank of Cache creek has preceded it the word "about," which shows that the parties did not intend to limit said line to 150 feet, but to carry the line back to Cache creek, irrespective of whether it was or was not 150 feet. The distance in this case mentioned is only relative, or given in such terms as to indicate no intention to cut off the lot before it reached the creek.

The conveyance of lot No. 4, in block No. 2, was effected by two deeds, one conveying the north half and the latter the south half. In the deed conveying the north half of lot No. 4, after describing the lot as described on

the official map, the description contains the following:

"The north half of lot No. four in fractional block No. two, lying thirty feet front on First street and running back one hundred and fifty feet."

The conveyance of the south half of the same lot, after referring to the lot as designated and numbered according to the official map of the town of Cacheville, etc., uses the following description:

"The south half of lot No. four (4) in fractional block No. two (2), containing a front of thirty feet on First street and running back eastwardly to the water line of Cache creek; bounded west by First street, north by the north half of said lot formerly sold to said Dustin, east by Cache creek, and south by lot No. three."

This deed clearly shows the intention of the grantor to carry the line of the lot eastwardly to Cache creek. A reference to the maps which we have set forth herein shows that the north line of lot No. 4, in block No. 2, is longer than the south line and that the easterly line of the north half of lot No. 4 would be longer than the easterly boundary line of the south half of lot No. 4, even though Cache creek is the easterly boundary line of both the north and south half of said lots. Also, in this latter deed, we have the water line of Cache creek and east by Cache creek used in the same sense of fixing the east boundary line, which under section 830 of the Civil Code means the center line of Cache creek.

In the instrument conveying lot No. 5, in block No. 2, the description is as follows:

"Being in the town of Cacheville and known and designated on the official plat of said town of Cacheville as lot No. five in fractional block No. two, lying sixty feet front on First street and running back one hundred and fifty feet on Washington street."

The description in feet cuts the line short a considerable distance from Cache creek as the lot is delineated on the official plat of the town of Cacheville, and this is true whether the bank of the creek or the center line of the creek be held as the easterly boundary line of the lot. Here, again, we may refer to the boundary lines given in the deeds conveying lot No. 4, in said block, which goes back to the water line of Cache creek, and upon the official map the north line of lot No. 4, in block No. 2, and the south half of lot No. 5, in block No. 2, are one and the same. Thus, if lot No. 4 goes to the water line of Cache creek or to Cache creek, lot No. 5 extends to the same boundary.

Section 830 of the Civil Code reads as follows:

"Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where

there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

This section must also be read in connection with certain subdivisions of section 2077 of the Code of Civil Procedure, in considering the deeds, to which we have referred. In subdivision 2 of said latter section we find the following:

"When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount."

And also subdivision 4:

"When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or thread of the stream is held under another title."

And subdivision 6:

"When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars."

As we have said, there appears to be nothing in any of the deeds conveying the fractional parts of blocks 2 and 3, which would indicate an intention on the part of the grantor to limit the easterly boundary of the lots to a line 150 feet east of First street or to the west bank of Cache creek. None of the deeds contain such words of limitation as running along the bank of Cache creek or running along the westerly bank of Cache creek, as appears in some of the cases holding that such language limits a deed to the bank instead of the conveyance carrying title to the center of the stream, as would otherwise be the case under section 830 of the Civil Code.

[2] Under subdivision 2 of section 2077 of the Code of Civil Procedure the distance in this case stated as 150 feet and also as *about* 150 feet must give way to the definite and ascertained boundary of Cache creek, the water line of the center of the stream. In all cases the official map was referred to as the lot conveyed and the further description of the lots contained in the deeds do not appear in any way to affect such description, nor are they inconsistent therewith, unless it be held that in the instances where certain lines are mentioned as running 150 feet or about 150 feet easterly are inconsistent with the map, but, in view of the fact that in some of those very deeds, the bank of Cache creek, the water line of Cache creek and Cache creek are designated as the easterly line, it is evident that the grantor intended to convey according to the map which carried the lots to Cache

creek, and that the permanent monuments referred to were intended to designate the easterly boundary line of the property conveyed.

The claim of title by prescription on the part of the plaintiffs requires but little mention. The record shows that the premises exhibited no visible evidence of possession by any of the plaintiffs, save and except the hauling therefrom of a few loads of sand at same date after 1892, from a place in the creek near what was called the old Mering property, near the mill site. The record shows no inclosure of the premises described in the plaintiffs' complaint, and it is further shown that said premises were never listed for the purposes of taxation, and that no taxes had been paid by the plaintiffs upon the claimed premises. The only occupancy of the disputed premises is that of the alleged use made thereof by the defendants in taking sand and gravel, as the scrapers or machinery operated by the Yolo Orchard Company moved in its course across Cache creek to take sand and gravel from the bed thereof.

In addition to the résumé which we have given of the deeds of conveyance and the sections of the Code, citation of authority seems unnecessary. However, the language of the Supreme Court in the case of *Los Angeles v. San Pedro, etc., R. Co.*, 182 Cal. 652, 189 P. 449, is applicable:

"It may be considered a cañon in American jurisprudence that, where the calls in a conveyance of land are for two corners at, in, or on a stream or its bank, and there is an immediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise.' See, also, *City of St. Louis v. Rutz*, 138 U. S. 226, 11 S. Ct. 337, 34 L. Ed. 941; see, also, *Rose's U. S. Notes; Hardin v. Jordan*, 140 U. S. 371, 11 S. Ct. 808, 35 L. Ed. 428; *Producers' Oil Co. v. Hansen*, 238 U. S. 325, 35 S. Ct. 755, 59 L. Ed. 1330."

[3] Attention is also called in that case to the rule of interpretation that, where the sovereign is the grantor, the instrument is considered most strongly in favor of the sovereign, but, where a private party is the grantor, the grantee is the favored one, in the event of any controversy.

[4] The language of the decision just referred to shows that deeds carrying side lines to the bank of a stream without any limitation by a description of a short line connecting the two side lines as running along the shore or bank of a stream carry the conveyance to the center of the stream—in this case, to the center of Cache creek.

In considering words of limitation, which may appear in the conveyances of lands bordering on streams, the text-writer, in 4 *Ruling Case Law*, page 87, refers to the authorities as follows:

"Other words such as running 'down river,' 'along the shore,' or 'along the bank,' may be

given the same effect and may prescribe a limitation of the boundary line to the shore or bank. For the same reason a boundary which runs 'up the bank' will pass title merely to low-water line. However, in some jurisdictions the courts adhere to a different rule, and when a deed describes the land as bounded by a bank, or as on the west side of a nonnavigable river, or by lines running to a stake or line upon the bank, thence 'up' or 'down' the stream to another monument on the bank, the thread of the stream is the boundary. And the words 'running up a creek' are not treated as a binding call, but merely as indicating the general direction of the line, which must run in a straight direction from boundary to boundary. Accordingly, there are decisions that the title to the center of a stream is granted by a deed describing the boundary line running 'to the river, and thence on the river shore'; or by a description of land as 'lying on the south side' of a nonnavigable river which is also named as a boundary."

As heretofore said, however, none of the deeds to which we have referred contain any words of limitation. We are therefore constrained to hold that the plaintiffs have shown no title by mesne conveyances or by possession, by virtue of which they would be enabled to maintain this action. Not having title to the premises involved in this action, they have suffered no damages.

While not necessary to a decision herein, we will refer to the subject of damages. The court found that the defendant Yolo Orchard Company had removed from Cache creek during the several years of its operations 98,971 tons of sand and gravel, for which it received the gross returns of \$56,618.95, and that the plaintiffs had been damaged in the sum of \$4,000. So far as the findings are concerned, just how and in what manner the \$4,000 damages suffered by the plaintiffs were estimated does not appear. There is no finding that it was impossible to ascertain the amount or approximately the amount of sand taken from the premises alleged to belong to the plaintiffs, nor does it appear whether the damages were or were not allowed from the value of the sand in place at the time of its alleged removal. The record shows that there is testimony from which, if believed by the trial court, the quantity of sand and gravel removed from the premises claimed by the plaintiffs could be estimated. There is no difference shown by the record of the value of sand and gravel taken from either side of the center of Cache creek. The record does show, however, that as sand and gravel were removed from the stream, the recurring floods in Cache creek proceeded to make additional deposits of sand and gravel, and in most cases to cover up and heal whatever wounds or excavations defendants made in the bed of the stream.

[5, 6] Under the rule relating to the confusion of goods caused by the wrongful act of another, it is only when the admixture is such that the true proportions are indistinguish-

able that the injured party may replevy the whole or sue in damages for the value of the whole. The rule in relation to damages in such cases is set forth in section 47, of the Second Edition of 2 Schouler on Personal Property, as follows:

"If the intermixture was caused by one's willful misconduct, the offender must bear the loss; for it has long been settled at common law that, where personal chattels, solid or fluid, are so mingled as to have become undistinguishable by the wrongful act of one owner, he cannot recover for his own proportion, nor for any part of the intermixture, but the entire property vests in him whose right was invaded. Nor is the latter obligated to compensate the former, in such a case, according to our laws, in which respect many have thought that we differ from the civilians; for the gist of the rule appears to be the natural justice, on the one hand, of allowing the intentional trespasser to be the loser by his own wrongful act, and, on the other, the injustice of permitting any innocent owner to be deprived of property without his consent. The intermixture being such, then, that the true proportions are undistinguishable, the injured party may replevy the whole, or sue in damages for its value."

While the burden of proof rests upon the party causing the intermixture, if the testimony shows that the court can approximate the rights of the parties, neither one is entitled to all the proceeds of the value of the whole. In 5 California Jurisprudence, p. 489, § 5, the rule is set forth as we have just stated and the authorities are cited. The text is as follows:

"The rule stated in the preceding section is carried no further than necessity requires. If the goods can be easily distinguished and separated, as articles of furniture, for instance, then no change of property takes place. Also, if the goods mixed together were of equal value, as corn or flour, then the injured party takes his given quantity and not the whole. If exact justice cannot be obtained, an approximation to it must be sought, care being taken that no injury is done to the innocent party. The burden of proof rests with the party causing the mixture."

[7] Likewise, in 5 Ruling Case Law, p. 1057, relative to confusion of goods and the rights of the parties, the rule is stated that whether there has been such a mixture of goods as will prevent a recovery of his proportion thereof by one of the owners is a question of fact for the jury, and it was error for the court to assume to decide that question; that is, in this case, it was a question of fact for the court to decide. In this case, the findings show that the court failed to decide the vital question, which determines whether the rights of the parties, whether the proportions could be determined, whether the innocent party should be given the whole, or the wrongdoer allowed an equitable proportion. Whether the \$4,000 allowed as damages is for the whole value of the sand and gravel in

place or for a proportionate share thereof, or what part thereof, does not appear. The evidence does show that the value of the sand and gravel in place was only nominal.

In addition to the authorities which we have cited, we may also list the note to the case of *Ayre v. Hixson*, Ann. Cas. 1913E, p. 665, where the subject is fully considered.

Other reasons are assigned herein as grounds for reversal, but by reason of the foregoing, and especially the first ground herein considered, further extension of this opinion is unnecessary.

The judgment is reversed.

We concur: FINCH, P. J.; HART, J.

84 Cal. App. 233

MELLO et al. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.
(Civ. 3321.)

District Court of Appeal, Third District, California. June 28, 1927.

1. Master and servant ⇨403—Petitioners have burden to show injury arose out of as well as in course of employment (Workmen's Compensation Act).

In proceedings under Workmen's Compensation Act (St. 1913, p. 279, as amended), burden is on petitioners to show that injury arose out of as well as in course of employment.

2. Master and servant ⇨403—No presumption arises that injury occurring in course of employment arose out of employment.

Fact that injury occurs in course of employment does not give rise to presumption that injury arose out of or because of such employment.

3. Master and servant ⇨405(4)—Finding accident did not arise out of employment held supported by evidence, where prune picker was drowned in pool (Workmen's Compensation Act).

In proceedings, under the Workmen's Compensation Act (St. 1913, p. 279, as amended), for death of prune picker found drowned in pool on employer's premises, lying outside of direct course of travel from deceased's house to point of work, evidence held to support finding of Industrial Accident Commission that accident did not arise out of employment.

Proceedings under the Workmen's Compensation Act by Mary Borba Mello, in behalf of herself and Laura Mello, and others, minors, as their guardian ad litem, for the death of Antonio Mello, opposed by St. John's Park Company, employer, the State Compensation Insurance Fund, and another. Order of the Industrial Accident Commission denying compensation, and claimants apply for certiorari. Affirmed.

Bradford, Cross & Prior, of Sacramento, for petitioners.

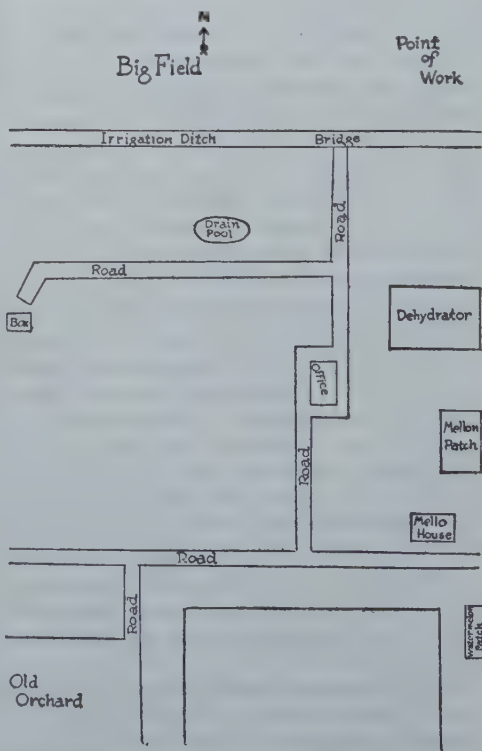
Frank J. Creede and G. C. Faulkner, both of San Francisco, for respondents.

FINCH, P. J. This is an application for a writ of certiorari to review an order of the Industrial Accident Commission denying compensation to the petitioners, the surviving wife and children of Antonio Mello, deceased, who, at the time of his death, was in the employ of St. John's Park Company as a prune picker.

The commission found:

"The deceased was found drowned in a two-foot pool of water on the premises of the employer, * * * and on autopsy examination it was discovered that he also had had a beginning pneumonia. The drowning of deceased was not due to injury arising out of his employment with said employers."

In this opinion no weight is given to the finding that Mello "had a beginning pneumonia." The only question for determination is whether there is sufficient evidence to support the finding that the drowning "was not due to injury arising out of his employment." The evidence bearing upon this question is meager. The record contains a map of the premises, apparently conceded to be drawn according to a scale, but the scale is not given. The following is a copy of such parts of the map as are material to the question under discussion:



[1-3] The places and objects delineated on the map will be referred to by the names appearing thereon. The whole area shown on the map is an orchard. On the day of the accident, two of the Mello children, Lillian and one of her brothers, the latter being sick, remained in the Mello house while Mr. and Mrs. Mello and some of the children went to the "old orchard" to pick prunes. During the forenoon the work in that orchard was completed, and the pickers then went to the place marked "point of work" for the purpose of picking prunes at that place. In going there Mrs. Mello and some of the children followed the road beside which the office is situated. It does not appear by what course Mr. Mello made the trip. Thereafter, about 9:30 o'clock of that forenoon, Mello left, saying that he was going back to the house for a shaking pole, and his wife asked him to give the sick boy some medicine. Louis, another son, asked his father to bring a watermelon for lunch. Mrs. Mello testified that Lillian said that Mr. Mello took the shaking pole and a watermelon from the house, and went back to the field. His body was found in the drain pool about 3 o'clock in the afternoon of that day. The shaking pole and the watermelon were found in the same pool. While the water was shallow, as found by the commission, in the part of the pool in which the body was lying, it was eight feet deep in some other parts. The water in the pool was the drainage from the dehydrator, and contained a small percentage of lye, enough "to make a man's eyes sting," but "it was not strong enough to have any effect on your hands." The position of the body was such as to indicate that the man had fallen into the deeper part of the pool, and had drowned while attempting to crawl out. The record is wholly silent as to why Mello took this roundabout way to go from his house to the place of his work. A witness, who is secretary and one of the managers of the St. John's Park Company, testified that "the prune pickers are supposed not to pick melons, but it is not looked upon in the nature of any particular misdemeanor. They are simply asked not to.

* * * They are not supposed to pick them, but, however, it is very generally done. They all do it." Louis had put the melon in the Mello house the evening before the accident. It is possible that Mello kept away from the road on his return from his house in order to avoid being seen with the melon by any one in the office. Of course, the fact that he took a melon belonging to his employer is wholly immaterial, except as it may explain his purpose in taking the course he pursued through the orchard. The burden was upon the petitioners "to show that the injury arose out of as well as in the course of the employment; and there is no presumption * * * that because an injury

occurs in the course of the employment it arises out of or because of that employment." *G. L. Eastman Co. v. Industrial Acc. Com.*, 186 Cal. 587, 593, 200 P. 17, 19. The evidence does not show that Mello had any duty to perform in the vicinity of the pool, or that it was necessary or even convenient for him to pass by the pool on his way back to work. A justifiable inference from the evidence is that he went out of the usual course for purposes of his own, and not to discharge any duty of his employment. In a case similar in principle it is said:

"An employer cannot be held liable under our compensation act [St. 1913, p. 279, as amended] unless the accident arises out of and in the course of the employment, and of course it devolves on a claimant to establish this fact by evidence from which such a conclusion is fairly inferable." *Casualty Co. v. Industrial Acc. Com.*, 176 Cal. 530, 533, 169 P. 76, 77.

If it be conceded that the evidence is sufficient to support a finding that the accident arose out of the employment it cannot be held that the evidence is insufficient to support the finding made by the commission, especially in view of the fact that the burden of proof was on petitioners.

The order is affirmed.

We concur: PLUMMER, J.; THOMPSON, Justice pro tem.

84 Cal. App. 379

CANN v. PARKER. (Civ. 4431.)

District Court of Appeal, Second District, Division 2, California. July 7, 1927.

1. Judgment $\S$ 163—Generally, on motion to vacate default judgment, only question is whether facts establish case of excusable neglect.

General rule is that only question to be passed on on motion to vacate default judgment is whether facts are sufficient to establish case of excusable neglect.

2. Appeal and error $\S$ 957(1)—Order refusing to vacate default judgment will not be disturbed, in absence of abuse of discretion.

Unless there has been abuse of discretion, order denying motion to vacate default judgment will not be disturbed.

3. Judgment $\S$ 143(8)—Denying motion to vacate default judgment, where defendant did not answer because sheriff, when delivering summons, said it would be unnecessary for her to appear, held not abuse of discretion.

Denying motion to vacate default judgment in claim and delivery action for automobile, where defendant did not answer because sheriff, when delivering summons, told her that, if she delivered automobile, it would be unnecessary for her to appear, and that no judgment could be entered, except for its possession, and where her answer, tendered at same time, admitted plaintiff's ownership and right to possession, but

denied demand had been made, and denied damages, *held* not abuse of discretion.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action of claim and delivery of an automobile by Lora Cann, doing business as Don Cann, against Mrs. William Gilbert Parker Judgment for plaintiff, and from an order denying a motion to vacate the judgment, defendant appeals. Affirmed.

William & Guy Lewis, of Los Angeles, for appellant.

Minor Blythe, of Los Angeles, for respondent.

THOMPSON, J. This appeal is from an order denying the defendant's motion to set aside and vacate the judgment and her default for failure to appear in the action. The complaint in the form of a claim and delivery action upon a conditional sales contract with a claim of \$300 damages for detention was filed on January 5, 1923, and the motion was first noticed for March 21, 1923. The reason assigned by the defendant in her affidavit for not answering is that, when the sheriff demanded possession of the automobile, and served her with a copy of the summons, which was on January 5, 1923, he stated to her that, if she delivered the car to him, it would not be necessary for her to appear; that no judgment could be entered in the action except for its possession. In the same affidavit she averred that, after fully stating the facts to her counsel, she was informed by him that she had a "good legal defense to" the action. She tendered an answer at the same time in which by failure to deny it was admitted that plaintiffs were the owners of, and entitled to the possession of, the automobile, but denied that demand had been made for possession prior to the institution of the action, and denied that she had detained the automobile, and denied damage in the sum of \$300 or any other sum. In response to this affidavit the plaintiff filed two reply affidavits, which contained almost exclusively averments relating to the question of whether plaintiff had demanded possession, and whether defendant had detained possession, and whether plaintiff had been damaged by the detention. There is only one statement in the reply affidavits that may be considered as going to the question of inadvertence or excusable neglect, which is a denial that defendant relied upon the statement of the sheriff. On the first hearing the court, on motion of defendant, granted a continuance for the purpose of allowing her to make a further showing as to the merits of her defense either by way of further affidavits or

by amended answer. Further affidavits were filed to the same effect as previously, but the proposed answer was not amended, nor was the affidavit of merits. The additional statement was made that the defendant did not have the funds with which to employ counsel for advice, and therefore she relied upon the statement of the deputy sheriff. The motion was denied.

[1] The appellant complains that the court considered the reply affidavits for any purpose. Undoubtedly it is the general rule that the only question to be passed upon in such a motion is whether the facts are sufficient to establish a case of excusable neglect. It was never intended that the merits of issues of fact should be passed upon in any such proceeding (*Jergins v. Schenck*, 162 Cal. 747, 124 P. 426; *Rauer's Law & Coll. Agency v. Gilleran*, 138 Cal. 352, 71 P. 445), unless perhaps there is good reason for the court to believe that the defense is sham and frivolous, and intended solely for the purpose of delay.

[2, 3] Without regard to the reply affidavits, however, does it appear that there has been an abuse of discretion on the part of the trial judge? The authorities are numerous to the effect that, unless there has been an abuse of discretion, the order will not be disturbed. It will be noted that, although two and one-half months had elapsed from the service of summons until the motion was made, there is no suggestion of an excuse in the affidavits for not making the motion more seasonably. The excuse for not appearing in the first instance was not of such a character as to appeal wholeheartedly to the conscience of the jurist. The complaint was very simple, and it and the summons plainly showed that appellant would have to appear or suffer judgment for repossession together with damages for the detention of the automobile. There is no suggestion that defendant could not read and understand the significance of the papers served upon her. The affidavit states that defendant had a "good legal defense" instead of saying that she has a good and meritorious defense or a good defense on the merits. This very fact indicates that the denials in the answer, when considered in connection with the fact that there is no denial of ownership or right of possession, may be based not upon the merits, but upon a technical defense. While it is true that a defense on the merits sufficient to defeat any substantial part of plaintiff's claim is sufficient, we cannot find sufficient to warrant us in saying there was an abuse of discretion.

Order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

84 Cal. App. 420

SHECKLES et al. v. CLINTON CONST. CO.
et al. (Civ. 5057.)

District Court of Appeal, Second District, Division 1, California. July 12, 1927.

1. Municipal corporations §821(19)—Whether woman's fall was proximately caused by heel catching on projecting board of sidewalk held for court sitting without jury.

Whether woman's fall was proximately caused by her heel catching on projecting board of temporary sidewalk *held*, under the evidence, for trial court sitting without aid of jury.

2. Municipal corporations §821(6)—Whether temporary sidewalk was negligently constructed held for court sitting without jury.

Whether temporary sidewalk was negligently constructed, in that it contained cracks and projecting boards, *held*, under the evidence, for the trial court sitting without the aid of a jury.

Appeal from Superior Court, Los Angeles County; Benjamin K. Knight, Judge.

Action for damages for personal injuries by Katherine M. Sheckles and another against the Clinton Construction Company and others. Judgment for plaintiffs, and the defendants appeal. **Affirmed.**

Haas & Dunnigan, of Los Angeles, for appellants.

Kemp, Mitchell, Silberberg & Davis and Kemp, Partridge & Kemp, all of Los Angeles, for respondents.

McLUCAS, Justice pro tem. This is an action prosecuted by plaintiffs to recover damages for injuries sustained, due to the alleged negligence of the defendants. The case was tried before the court without a jury. Judgment went for plaintiff Katherine M. Sheckles in the sum of \$500, and for her husband, coplaintiff Walter B. Sheckles, in the sum of \$387. From the judgment entered, the defendants present this appeal.

There is no dispute as to the fact that plaintiff Katherine M. Sheckles was injured while walking on a temporary plank sidewalk constructed by the defendants along the north side of the Lane building, situated at the southwest corner of Spring and Eighth streets, Los Angeles, and that, as a result of falling, plaintiff Katherine M. Sheckles broke one of the small bones of her left ankle.

The findings of the court were:

"That said temporary sidewalk was not even, but was constructed of pieces of rough boards of irregular length, and that the same was so carelessly, negligently, and dangerously constructed as to be dangerous for pedestrians to walk upon. That upon the west end of the said temporary sidewalk, where the same reaches the point opposite the alley in the rear of the said building, the said defendants negligently constructed the said temporary sidewalk in such a manner that

one of the boards at a point where there was a step from the said temporary sidewalk to the public alley extended about one and one-half inches beyond the other boards constituting the surface of the said temporary sidewalk; that the construction of the said sidewalk was carelessly and negligently installed, and that the same was not done in a good and workmanlike manner, and that the defendants did not use the care required of them in the construction of the said sidewalk, and that, by reason of the negligence and want of ordinary care in the construction thereof, the said sidewalk, at the point above mentioned, was dangerous to the life and limb of the pedestrians walking upon the said temporary sidewalk. The (trial) court further finds that on the evening of the 6th day of June, 1922, at about 6:30 o'clock, the plaintiff Katherine M. Sheckles was walking westerly from Spring street upon and along the said temporary sidewalk so constructed and maintained by the said defendants, and that, when said plaintiff reached the end of the said temporary sidewalk where the same reaches the alley on the westerly side of the said property, she stepped down with her left foot, and, in attempting to step with her right foot from the sidewalk, the heel of the shoe of her left foot caught on the projecting board carelessly and negligently left by the defendants projecting from said sidewalk, by which she was tripped and fell in such a manner as to fracture the bones of her left ankle."

[1] The only ground of appeal urged by appellants is that the evidence does not support the findings. It is first urged by appellants that the testimony does not support the finding that plaintiff tripped on the projecting board, and that there is no evidence in the record showing what particular thing caused, or was the proximate cause of, the plaintiff's fall. The evidence is undisputed that one or more of the boards on the step projected somewhat beyond the other boards. It is also undisputed that plaintiff fell while stepping from the step in the sidewalk. While the evidence is not entirely clear as to what caught the heel of plaintiff's shoe, yet we believe that under all the circumstances there was some evidence to support the finding of the trial court that plaintiff's heel caught on the projecting board. Where there is some evidence, though slight, to support the finding of the trial court, the judgment will not be reversed on appeal. Plaintiff was the only witness who testified as to the manner of the fall. She testified:

"Why, I was walking with these friends, as I stated, and, when I reached the end of the board of the boardwalk, I stepped off with my right foot, and my left foot was caught in a manner that it held in such a way that it threw my whole body forwards. * * * My left foot was hung under me in such a manner that I was thrown forward. * * * Something caught my heel and held it firmly, as though it was in a vise. * * * No; I hardly think my foot turned before I stepped. I think that my fall was from being held up, because I had a sensation that I will never forget to my dying day that my

feet just felt as though they were held in a vise, that something was just hanging me there. * * * My heel was caught in such a way that I could not take the step."

Several other witnesses testified to seeing the plaintiff fall as she attempted to step from the sidewalk; also that some of the boards on the sidewalk projected beyond the other boards. Photographs and plats of the projecting board were also introduced in evidence. We conclude from the foregoing that there is testimony sufficient to support the finding of the trial court that plaintiff's heel caught on a projecting board.

[2] It is further urged by appellants that the evidence does not support that portion of the first finding, namely, that the construction of the temporary sidewalk was carelessly and negligently installed; that the same was not done in a good and workmanlike manner; and that the defendants did not use the care required of them in the construction of the said sidewalk. The witness George H. Fruehling, called on behalf of plaintiffs, testified that he measured and made plats of the sidewalk on the morning after the accident. He further testified as follows:

"Q. Now, what condition did you find the ends of those boards in, which constituted the temporary sidewalk, that intersected with the alley of the sidewalk itself? A. They were very irregular. * * * Q. Go on and state what irregularities you found in the ends of those boards. A. I found that the third and fourth boards from the outside of the sidewalk had a projection greater than any of the rest of the boards. * * * Q. Now, you may state to the court what condition you found them in with reference to projections. A. I found that these two boards, that I have mentioned, the third and fourth boards from the outside of the sidewalk, the one—the third board had a projection of nearly one and three-quarters inches beyond the riser, and by the riser I mean—* * * Q. This is Exhibit 2. Mark it one and three-quarter inches at the point you have indicated. Is that correct? A. Yes, sir; and at the inside of the fourth board from the outside of the sidewalk, I found a projection of one and one-eighth inches from the riser. * * * Q. Is that beyond the edge of the other corresponding board? A. No, not exactly. * * * Q. Now, referring to the surface of the boards three and four, which projected the greater distance beyond the riser, what was their condition as to roughness or otherwise? A. As shown on the photograph, you will notice that the board, the first board on the inside, and on the inside edge was split back probably a foot, as I have also indicated on my little drawing. Q. Referring to Exhibit 8? Mr. Dunnigan: That is shown on Exhibit 3, that top view? A. That top view. It shows from both views at this point (indicating). Mr. Kemp: All right. Now, was there any crack between the third and fourth? A. Yes, sir; there was quite a large crack. There was quite a large crack, and a little chip, a knot, right at the corner of the third board. Mr. Dunnigan: Pardon me a second. I move to strike out the statement that

there was quite a large crack. This witness has measured it, and if he has he can give us the exact figures. The Court: Yes. * * * About how wide would you say that crack was? A. About three-quarters of an inch."

Appellants' contention cannot be sustained. It was for the court, as it would have been for a jury, considering all the circumstances and facts shown by the evidence, to declare whether the defendants were or were not negligent. The defendants were called upon to exercise the care which the circumstances required in the construction and maintenance of the temporary sidewalk, and what was ordinary care it was peculiarly the province of the court below, sitting as a trier of the facts, to determine. *Humphrey v. Leonard*, 151 Cal. 375, 90 P. 705; *Wile v. Los Angeles Ice, etc., Co.*, 2 Cal. App. 190, 83 P. 271; *Oliver v. Stoltenberg*, 24 Cal. App. 637, 142 P. 108; *Siegmán v. Fettes*, 59 Cal. App. 115, 210 P. 49. In view of the foregoing authorities and the evidence submitted in the case, we do not believe it can be held in this court as a matter of law that respondent has not established that the proximate cause of her injury was due to the negligent manner of the construction or maintenance of the sidewalk on which she was injured.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

84 Cal. App. 365

WILKES et al. v. BRADY et al. (Civ. 3294.)

District Court of Appeal, Third District, California. July 2, 1927.

Easements § 12(1)—Executed parol agreement for right of way, followed by improvements and use, will be protected.

Executed parol agreement under which pasturage was exchanged for right of way, followed by improvements, expenditures of money, and use of right of way, created equitable title sufficient to sustain suit to restrain interference, notwithstanding that grantor executed deed erroneously describing other land as right of way.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Suit by Alfred G. Wilkes and others against Howard Brady and others to enjoin interference with the use and maintenance of a road. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. H. Carlin, of Marysville, and Lawrence Schillig, of Yuba City, for appellants.

A. H. Hewitt, of Yuba City, and Charles S. Wheeler and J. W. Dorsey, both of San Francisco, for respondents.

PLUMMER, J. This is an equitable action instituted by the plaintiffs seeking to enjoin

the defendants from interfering with the plaintiffs' use and maintenance of a certain road over and across certain lands belonging to the defendant Howard Brady. The plaintiffs' right to the use of said road is based upon an alleged executed parol grant in the year 1918, when the then owner, Thomas Brady, in consideration of the exchange of certain grazing privileges on lands belonging to the plaintiffs, granted to the plaintiffs a right of way across the lands of the said Thomas Brady, leading from a certain public road to the lands belonging to the plaintiffs.

The complaint sets forth the ownership of the roadway belonging to the plaintiffs, the interference of the defendants therewith, and concludes with a prayer that the defendants be enjoined and restrained from in any manner further interfering with either the use or repair of said road.

The record shows that the plaintiffs and defendants were and are the owners of contiguous lands in Sutter county, the plaintiffs and the Field & Tule Gun Club having clubhouses on the lands reached by the right of way herein referred to. In 1918 the plaintiffs and the Field & Tule Gun Club desired to have a road across defendants' lands from the county road to the clubhouse just mentioned, and during the month of March, 1918, one Frank W. Stall, on behalf of both clubs, in negotiating with Thomas Brady, offered to exchange the pasturage for that year on the lands belonging to the two clubs for a right of way; the pasturage being valued at the sum of \$500. This agreement was orally concluded as stated, and thereupon the said Thomas Brady, the then owner of the land, executed a deed for a right of way, as desired by said clubs, and delivered the same to the said Frank W. Stall. This agreement of exchange was, during the month of May, 1918, further ratified by the plaintiffs, on behalf of the club, of which they were members, and some modification made with relation to the value of the grazing privileges, and a certain sum of money passed between the said Thomas Brady and the plaintiffs and the Field & Tule Gun Club. Thereafter, and about the month of June, the plaintiffs proceeded to construct a road across the right of way involved in this action and expended in so doing something over the sum of \$1,000. For three years after the construction of the road over the right of way and the making of the improvement just referred to, the same was used by the plaintiffs and also by the defendant, a gate being maintained thereon for the purpose of preventing egress and ingress of stock. Some time during the year 1922 the defendants locked the gate herein referred to and have attempted to prevent the plaintiffs from using the right of way herein referred to, and otherwise interfering with the use of said right of way by the plaintiffs.

The record shows that the deed referred to

as executed by Thomas Brady, conveying the right of way over land sought by the defendants, did not describe the right of way actually improved and used by the plaintiffs, but described a strip of land situate some distance therefrom. This appears to have occurred by inadvertence in describing the right of way as situate in section 31 instead of in section 30.

The record shows, however, that the actual right of way agreed upon and the lands over which the easement for a right of way was sought was known and understood by the parties; that Thomas Brady, the owner of the land at the time of the making of the agreement herein referred to and the execution of the deed, knew of the location of the right of way and the line along which the road was improved and upon which the expenditures were being made by the two clubs. The court also found that the intended right of way was located on the strip of land described in plaintiffs' complaint. The record further shows that the said Thomas Brady had the benefit of the value of the pasturage referred to, as given in exchange for the right of way set forth in plaintiffs' complaint. The deed which we have referred to, executed by the said Thomas Brady, purporting to convey a right of way, was excluded by the court on the theory that it described a right of way across lands in a different section from that where the road actually constructed and used by the plaintiffs was and is located. It does appear, however, that the grantee in the deed was examined in relation thereto for the purpose of showing a mutual mistake of the parties in the description contained in the deed, and that the grantor intended by the conveyance to give the plaintiffs the right of way or easement over the particular lands where the road was laid out and the improvements made. This testimony was admitted in connection with other testimony for the purpose of establishing an executed parol grant of the easement, and that the same had become effectual by its exercise while Thomas Brady was still the owner of the land, and that, in pursuance of the parol agreement, the plaintiffs had entered into the possession of and had made the improvements of the road leading from the county road or highway to the lands belonging to the two clubs, all during the time that Thomas Brady was the owner of the lands intended to be granted, and that after the building of said road said plaintiffs and the defendants used the same without objection from any one for a period of three years.

Upon these facts, which we have gleaned from the record and from the findings of the court, the court drew its conclusions that the easement for the right of way had become vested in the plaintiffs as an executed parol grant, and that the plaintiffs were the owners of the equitable title to such easement,

and as such were entitled to an injunction restraining the defendants from interfering with the use thereof.

Appellants do not appear to challenge the correctness of the findings of the trial court, but rely upon the contention that an easement for a right of way cannot be acquired in any such manner.

The findings of fact show an agreement of exchange, the entering of the plaintiffs into the immediate possession of the right of way, followed by the improvement and actual use of the road they had built upon such right of way, all with the knowledge and consent of Thomas Brady, the then owner of the premises.

The law is clear that such an equitable title is amply sufficient to sustain an action to restrain interference therewith. As stated in *Flickinger v. Shaw*, 87 Cal. 126, 25 P. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234, where a right of way for the construction of a ditch was involved, possession had been given, and deed unexecuted:

Where "nothing remains to be done except the execution of a conveyance of the right of way. * * * His equity to a deed is perfect (*Morrison v. Wilson*, 13 Cal. 494; 73 Am. Dec. 593); and when such is the case, a court of equity, in accordance with its familiar rules considering that as done which ought to be done, will protect it as readily and as fully as a legal title. If the legal title would be protected by an injunction, a perfect equitable title should also."

In *Rubio Canon, etc., Ass'n v. Everett*, 154 Cal. 29, 96 P. 811, a case where the principle involved is the same as that with which we are here dealing, it was held that an equitable title to an easement might be acquired by parol. The agreement involved in that case referred to a right of way for a pipe line, and in an action to protect such easement, the court held (quoting from the syllabus):

"In such action, evidence of the parol agreement between the original owner of the land and the plaintiff, who erected the pumping plant, is admissible for the purpose of showing that the plaintiff held the equitable title to the easement prior to the conveyance thereof by such owner."

It will be noticed that the agreement in the case at bar relative to the right of way and the pasturage therefor was an agreement of immediate exchange, not of something to take place in the future, that Thomas Brady proceeded to take the benefit of the pasturage and the plaintiffs proceeded with the improvement of the road along the line where the easement was located by the oral agreement. The earliest California cases to which our attention has been called, *McDonald v. Bear River, etc.*, 13 Cal. 234, sustains such agreements and protects rights acquired thereunder as fully and completely as though

a deed had been executed in due form. After considering certain technical defects under which the plaintiff took possession, the court, in its opinion, uses the following language:

"That by force of such agreement, and the possession taken under it, * * * McDonald acquired an equitable estate in the premises, giving him a present right to its full enjoyment we think, clear, and this right, being united with the present possession, enabled him to maintain any action for an interruption of the possession or any injury to the property."

In considering the question of easements acquired by an oral agreement, the text-writer, in 9 California Jurisprudence, p. 949, thus expresses the rule of decision:

"Even an oral agreement, if executed and based upon a valuable consideration, will convey an equitable title to the easement agreed upon," citing *Flickinger v. Shaw*, 87 Cal. 126, 25 P. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234, and *Rubio Canon, etc., Ass'n v. Everett*, 154 Cal. 29, 96 P. 811.

The California cases all hold that an easement may be created by an executed oral agreement. We need only cite the following: *Blankenship v. Whaley*, 124 Cal. 300, 57 P. 79; *Stoner v. Zucker*, 148 Cal. 516, 83 P. 808, 113 Am. St. Rep. 301, 7 Ann. Cas. 704; *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.*, 192 Cal. 4, 218 P. 405; *Id.*, 36 Cal. App. 717, 178 P. 155; *Cairns v. Haddock*, 60 Cal. App. 83, 212 P. 222; *Scott v. Henry*, 196 Cal. 666, 239 P. 314.

In *Scott v. Henry*, supra, the action was one to enjoin the defendant from interfering with the plaintiff's right to maintain and use a certain ditch across the lands belonging to the plaintiff. It was there held that an easement for such ditch was created and acquired by parol. The owner of the servient tenement had made and delivered deeds, by which it was intended to vest title in the easement, and also went upon the lands with the plaintiffs, and the plaintiffs proceeded to immediately make use thereof, etc.

It does not appear in the case at bar whether Thomas Brady went upon the lands intended to be conveyed by the deed referred to, purporting to invest the plaintiff with an easement for a road, but it does appear that all parties had knowledge of the location of the right of way and that immediately after the agreement herein referred to, the plaintiffs proceeded to improve the right of way intended to be conveyed and covered by the easement, and to make use thereof, and that this use was continued for the period of three years without any objection, which presents a state of facts identical in principle with those involved in the case of *Scott v. Henry*, supra.

In *Cairns v. Haddock*, 60 Cal. App. 83, 212 P. 222, this court, where a right to the continuance of an easement created by parol was involved, held as follows:

"A parol license to construct an irrigating ditch over the licensor's land, which is executed by the construction of the ditch by the licensee with the expenditure of a large sum of money, becomes in all essentials an easement upon the licensor's land, continuing for such length of time as the use of the ditch may continue."

A like ruling was held in the case of *Gravelly Ford Canal Co. v. Pope & Talbot Co.*, 192 Cal. 4, 218 P. 405.

In *Stoner v. Zucker*, 148 Cal. 516, 83 P. 808, 113 Am. St. Rep. 301, 7 Ann. Cas. 704, the contention was over the right to maintain an irrigating ditch. It was there held that the easement granted by parol conveyed a title which would be protected.

Our attention not having been called to and not being able to discover from the record any particulars in which the findings are not supported by the evidence, and the law being established by an unbroken line of authorities that a parol agreement for a right of way when executed, followed by improvements and expenditures of money and use, will be protected, the judgment of the trial court must be and the same is hereby affirmed.

We concur: FINCH, P. J.; GLENN, Justice pro tem.

84 Cal. App. 154

WEAVER v. ATLANTIAN CONST. CO.
et al. (Civ. 5487.)

District Court of Appeal, First District, Division 1. California. June 25, 1927.

1. Corporations ⇨—Corporate entity cannot be ignored in action against stockholder, in absence of evidence that two other equal shareholders are trustees for him.

Corporate entity of de jure corporation cannot be ignored in action against stockholder for alleged fraud of corporation and another stockholder, in absence of evidence that two others having equal amounts of stock held the same in trust for him.

2. Corporations ⇨335—Misrepresentations of corporation director cannot make codirector liable unless he knew of and was party to fraud.

Misrepresentations of fact as to corporation's assets and prospects, made by one director to induce investment by third person, cannot make codirector personally liable, without proof that he had knowledge of and was a party to the misrepresentations.

3. Corporations ⇨78—One dealing with corporation as such may not afterward hold stockholders personally liable.

One dealing with corporation as a corporation in buying its stock may not afterwards be permitted to claim more than he bargained for and hold the stockholders personally liable.

4. Partnership ⇨55—Evidence held insufficient to show existence of partnership between stockholders so as to render them individually liable for fraud of one stockholder.

Evidence of only such community of interest between stockholders of de jure corporation as all stockholders in the same corporation have held insufficient to show existence of partnership between stockholders so as to render them individually liable for fraud of one in selling stock of the corporation.

5. Trial ⇨397(3)—Findings are properly silent on defense of settlement not pleaded.

Findings are properly silent on defense of settlement of controversy, where there is no pleading by way of answer on which the defense may be based.

6. Release ⇨53—Release is affirmative defense, which must be pleaded and proven.

A release is an affirmative defense, which must be pleaded and proven.

Appeal from Superior Court, Los Angeles County; Wm. H. Ellis, Judge.

Action to recover money paid for corporate stock by Stella Dee Weaver against the Atlantian Construction Company, J. H. Meyering, William P. Mason, and others. Judgment for plaintiff against the named defendants, and the two defendants first named appeal. Reversed and remanded.

Janeway, Beach & Pratt, S. T. Hankey, and Wood, Janeway & Pratt, all of Los Angeles, for appellants.

Cooper, Collings & Shreve, of Los Angeles, for respondent.

CAMPBELL, Justice pro tem. This is an action brought by respondent against Atlantian Construction Company, a corporation, and J. H. Meyering, William P. Mason, D. H. Naylor, Jr., and A. Y. Jameson, alleged to be the stockholders of the corporation and also alleged to be copartners therein. Judgment was entered against the corporation and two of the directors and stockholders, namely, J. H. Meyering and William P. Mason, in the sum of \$2000, together with interest. Atlantian Construction Company and J. H. Meyering, one of the directors and stockholders, have appealed.

Appellants urge that the judgment cannot be sustained for the reasons:

"(1) There is no warrant either in the facts or the law for a judgment against the appellant J. H. Meyering as a copartner of the defendant William P. Mason; (2) the respondent settled the matter of which she complains by a contract in writing between herself and the appellant corporation."

The Atlantian Construction Company was a building company and was duly incorporated on June 10, 1921, and a copy of the articles of incorporation was duly filed with the county clerk of Los Angeles county, the city of

Los Angeles being the principal place of business of the corporation. The capital stock of the corporation was \$100,000, divided into 5,000 shares of the preferred stock and 5,000 shares of common stock, each of the par value of \$10 per share. The incorporators were W. P. Mason, J. H. Meyering, and W. H. Hicks, who were the first directors, and each subscribed \$500—that is, for 50 shares of stock, or a total of \$1,500. At the first meeting of directors held on June 15, 1921, appellant J. H. Meyering was appointed president and treasurer, W. H. Hicks vice president and general manager, and William P. Mason secretary. Later on negotiations were entered into for an arrangement whereby W. H. Hicks was to retire and the defendants D. H. Naylor and A. Y. Jameson were to become stockholders and directors, but this arrangement was never consummated; and, although on January 4, 1922, W. H. Hicks had signed a conditional assignment of his interests in the corporation to all four individual defendants, that assignment never took effect inasmuch as the condition of its execution was never performed, and therefore, on and up to the 4th of February, 1922, the date of the impugned transaction, there had been no change in the holding of the shares of the three incorporators, who were the only stockholders at that time. The defendant William P. Mason had charge of the office of the appellant corporation, and, although appellant J. H. Meyering was the president, he had his office in a different part of the city.

Respondent testified that she never knew and never talked with the appellant Meyering and that all her dealings were with defendant Mason as secretary and took place in the office of the corporation, first in January, 1922, when her husband was with her, and again on February 4, 1922, when she purchased the stock in controversy and drew her check for \$2,000 in favor of appellant corporation, which she handed to defendant Mason, the secretary, and received from him a certificate for the shares of stock signed by defendant Mason, as secretary, and appellant Meyering, as president.

Defendant Mason testified that there was a proposition on foot that defendant Jameson and his friends would put money into the corporation and that Mr. Jameson had been talking to Mr. Weaver, the husband of respondent, about it. This was corroborated by Jameson himself, who says that he told Mr. Weaver that he contemplated doing so, and the defendant Mason further says that at the time of receiving the check that he told respondent he would protect her in the event of this proposition not going through.

Defendant Jameson testified that when he was told Mason had made a sale of stock to respondent he spoke to defendant Meyering over the telephone and advised him not to sign the stock certificate as Mason was figur-

ing too much on profits, and appellant Meyering's testimony was that when the defendant Mason brought the stock over to his office for him to sign Mason stated to him that he had a special arrangement with respondent that if for any reason the proposition with Mr. Jameson and his friends did not go through, the \$2,000 should be applied to the building of Mr. Weaver's house, which was in progress of construction by the Atlantian Construction Company, and that this arrangement was quite satisfactory to him.

The alleged misrepresentations are set out in the amended complaint and in the findings of the court, and are that defendant Mason represented to respondent that the appellant Atlantian Construction Company was a solvent and going concern; that defendants Jameson and Naylor were putting \$35,000 into the business; and that appellant Meyering and defendant Mason had put large sums of money and valuable rights and contracts into the business of the company and that the company was paying dividends of 8 per cent. and would eventually pay more than 100 per cent. That these representations were false is asserted by respondent and so found by the court, and we will therefore assume them to be false. There is, however, no evidence in the record—at least, we have been unable to find any and none has been called to our attention—to show or tending to show that appellant Meyering had any knowledge whatever of the alleged misrepresentations made by Mason to respondent, nor is there any finding of fact to that effect.

The appellant company was a corporation de jure properly organized and existing under the laws of the state of California and was so found to be and was acting as such. The three incorporators, appellant Meyering, defendant Mason, and W. H. Hicks, who subscribed for 50 shares of stock each, were still the stockholders having the same equal holdings in the corporation. Unless there is evidence in the record to justify the court in disregarding the corporate entity of appellant corporation and treating the stockholders as partners, the appellant Meyering cannot be held liable as a partner on account of the alleged misrepresentations by defendant Mason.

There are no cases to be found in this state nor in any other jurisdiction, so far as we have been able to find, and none has been cited by counsel in their briefs, where the separate entity of a corporation has in a similar case been disregarded. There are a number of California cases holding that an agreement made by persons interested in anticipation of the formation of the corporation are bound by the agreement and that, if necessary to its enforcement, the corporate fiction will be ignored. These authorities are collected in *Conover v. Smith* (Cal. App.) 256 P. 835, recently decided by this division

of this court. Respondent has cited us to sections of California Jurisprudence as upholding her position. On looking up the cases cited in the notes to the text of California Jurisprudence set forth in respondent's brief, we find that in these cases there was some anterior agreement between the parties as to their respective rights in some business or undertaking, which, for the sake of convenience, was carried on in the form of a corporation. The effect of these cases is summed up in *Tower v. Wilson*, 45 Cal. App. 137, 188 P. 92, in which the court says:

"They merely go to the point of holding that, as between the original incorporators, the corporation is a trustee, and the court will dispose of its assets in accordance with the original agreement made between them, they, to that extent, some of the cases holding, being regarded as partners in the concern."

There are three recent cases in California which deal with the subject of ignoring the separate entity of corporations where the interests of third parties are concerned. *Erkenbrecher v. Grant*, 187 Cal. 7, 200 P. 641; *Minifie v. Rowley*, 187 Cal. 481, 202 P. 673; and *Wenban Estate, Inc., v. Hewlett*, 193 Cal. 675, 227 P. 723. In the *Erkenbrecher* Case *Erkenbrecher* was the owner of all outstanding shares of the capital stock of the company, some of them standing in the names of others, but in fact held in trust for him. The court held that there was nothing inequitable in recognizing the separate entities of *Erkenbrecher* and the corporation, in that the organization of the corporation and the transfer of his property to it were not in any manner fraudulent or prompted by dishonesty. In the *Minifie* Case one man, *Rowley*, was the owner and holder of all outstanding stock except one share each held by others for the purpose of qualifying them as directors. *Rowley* personally had given two promissory notes for \$5,000 each, and for the purpose of renewing the notes gave a promissory note for the corporation, which he had formed and called the "*Rowley Investment Company*," for \$10,000, and, there being no dealings with the corporation as distinct from the individual, *Rowley*, the court held that to recognize the corporate entity as distinct from *Rowley* would result in the avoidance of a legal obligation and perpetrate an injustice. In the *Wenban* Case *Mrs. Wenban* was the sole owner of all of the shares of stock of the corporation. The corporation sought to set aside certain bonds of the fruits of which *Mrs. Wenban* had had the benefit on the ground that they were null and void, being issued contrary to the provisions of section 359 of the Civil Code. The court ignored the separate entity of the corporation, holding that not to do so would result in fraud and injustice to a third person. In these three cases the corporation was in effect the alter ego of the individual.

In *Minifie v. Rowley*, supra, the court lays down the rule as follows:

"Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice."

[1] The facts in the case here are widely different from the facts in the cases quoted. The appellant corporation was not the alter ego of the appellant *Meyering*; there were three members of the corporation, all holding an equal amount of the stock, and there is no evidence that *Mason* or *Hicks* held their stock in any way in trust for appellant *Meyering*. Therefore it cannot be said that there was that unity of interest and ownership indicating a cessation of individuality and separateness of the person and the corporation, which the law requires before the corporate entity can be ignored. It further appears that it was the purpose of the incorporators to sell stock; that a permit to do so had been secured from the corporation commissioner; that stock had been sold, and efforts made to sell other stock.

[2, 3] The fraudulent misrepresentations of facts by the defendant *Mason* cannot make his codirector *Meyering* personally liable unless it is proved that he had knowledge of and was a party to such misrepresentations, and of this there is no evidence nor is there any finding to that effect. "There is no reason why parties who have dealt with a corporation as a corporation afterwards should be allowed to claim more than they originally bargained for and to hold the stockholders personally liable. Such is the established rule beyond reasonable doubt." 1 *Cook on Corporations* (6th Ed.) 634. A creditor who deals with a corporation as a corporation cannot hold the stockholders liable as partners. *American, etc., Co. v. Bulkley*, 107 Mich. 447, 65 N. W. 291.

[4] With reference to the finding of the existence of a copartnership between appellant *Meyering* and defendant *Mason*, there is no evidence of the community of interest between them necessary to create a copartnership. There is only the community of interest which all stockholders in the same corporation have and which these three stockholders, *Meyering*, *Mason*, and *Hicks*, as such, may here be said to have had.

[5, 6] As to the other point urged that "the respondent settled the matter of which she complains by a contract in writing between herself and the appellant corporation," and that by reason thereof appellant is re-

leased from liability, there is no merit. There is no pleading by way of answer upon which such defense can be based, and as a consequence the findings are silent thereon. While the writing was received in evidence, it was received over respondent's objection. A release is an affirmative defense which must be pleaded and proven. *Coles v. Soulsby*, 21 Cal. 47; *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 P. 410; *Great Western, etc., v. Chambers*, 153 Cal. 313, 95 P. 151.

The judgment is reversed and the cause remanded.

We concur: TYLER, P. J.; KNIGHT, J.

84 Cal. App. 161

**WEAVER et al. v. ATLANTIAN CONST. CO.
et al. (Civ. 5488.)**

District Court of Appeal, First District, Division 1, California. June 25, 1927.

1. Partnership §55—Evidence held insufficient to show existence of partnership between stockholders so as to render them individually liable for fraud of one.

Evidence of only such community of interest between stockholders of de jure building corporation as all stockholders in the same corporation have held insufficient to show existence of partnership between stockholders so as to render them individually liable for fraud of one in selling stock.

2. Damages §119—Amount of recovery in actions ex contractu must be determined by legal measure of damages.

Amount of recovery in action ex contractu is not left to the sound discretion of the court or jury, but must be determined by application of the legal measure of damages.

3. Mechanics' liens §312—Burden was on property owner suing building contractor to prove amount and validity of mechanics' liens paid by owner.

Burden was on owner seeking to recover damages for building contractor's breach of contract and for permitting filing of mechanics' liens, which the building owner paid, to prove the amount and validity of the liens.

Appeal from Superior Court, Los Angeles County; Wm. H. Ellis, Judge.

Action for damages for breach of contract by B. M. Weaver against the Atlantian Construction Company, J. H. Meyering, and others. Judgment for plaintiff, and the named defendants appeal. Reversed and remanded.

Janeway, Beach & Pratt and S. T. Hankey, all of Los Angeles (Lissner, Roth & Gunter, of Los Angeles, of counsel), for appellants.

Cooper, Collings & Shreve, of Los Angeles, for respondent.

CAMPBELL, Justice pro tem. This action is one brought by respondent against Atlantian Construction Company, a corporation, and against each of the stockholders thereof as copartners. The relief sought is for damages for the alleged breach of a building contract executed by respondent and Atlantian Construction Company, a corporation, the breach complained of being the alleged failure of the defendants to complete the construction of the building and the alleged allowance by defendants of the filing of certain mechanics' and materialmen's liens. From the judgment against the corporation for the sum of \$2,877.57 and against each of the stockholders of the corporation for the full amount thereof Atlantian Construction Company and J. H. Meyering, one of the stockholders, have appealed.

Appellants urge that the judgment cannot be sustained for two reasons: First, "there is no warrant either in the facts or the law for the judgment against the stockholders of the defendant corporation as copartners"; and, second, "the plaintiff wholly failed in making the necessary proof of the amount of damage suffered by reason of the alleged breach of contract."

The Atlantian Construction Company, alleged in the complaint first to be a corporation, is also upon information and belief alleged to be a copartnership consisting of each of the stockholders of the corporation. The allegation of the corporate existence is admitted, but the allegation of copartnership is denied. Upon the issue thus presented the court found:

"That the defendant Atlantian Construction Company, a corporation, is a corporation organized and existing under and by virtue of the laws of the state of California, and having its principal place of business at and within the county of Los Angeles, state of California. * * * That on the 29th day of November, 1921, said corporation was only an instrumentality used by the defendants J. H. Meyering, William P. Mason, and W. H. Hicks, as copartners, in the furtherance of their copartnership business, and that such partnership was on said date engaged in the general construction and building business at and within the county of Los Angeles, state of California. * * * That on the 29th day of November, 1921, each of the defendants, including both the corporation and the stockholders, as copartners, entered into a certain building contract with the plaintiff."

The findings proceed to set out the contract which recites that it is entered into by and between B. M. Weaver, party of the first part, and Atlantian Construction Company, a corporation, party of the second part, and is signed "Atlantian Construction Company by

W. P. Mason, Sec'y," and bears the seal of the corporation.

There is neither allegation, proof, nor finding of fraud, plaintiff relying upon his contention of the existence of the alleged copartnership to sustain his judgment against appellant Meyering.

[1] The first point urged, "that there is no warrant either in the facts or the law for the judgment against the stockholders of the defendant corporation as copartners," is passed upon the case of *Stella Dee Weaver v. Atlantian Construction Co. et al.* (Cal. App. No. 5487) 258 P. 111, a companion case in which the evidence on this point is the same, this day decided, and on the authority of that case the judgment must be reversed.

[2, 3] As to the second point urged, "that plaintiff wholly failed in making the necessary proof of the amount of damage suffered by reason of the alleged breach of contract," the testimony of respondent is that he had paid out certain money to satisfy some four mechanics' liens; that when he came to simmer the thing down and found out what was actually against the place he paid them. Aside from the payment of these liens respondent expended moneys in completing the building. In this respect the evidence shows that he signed a contract under date of July 24, 1922, with one Milton R. Sutton, for the completion of the building after the failure of appellant corporation to complete the same, and that the amount of the contract exceeded the amount remaining unpaid under the appellant corporation's contract. No proof was offered that respondent had received bids for completing the work, that he had given the contract to the lowest available contractor, or that the amount paid was a fair and reasonable value of the work performed. Differing from an action in tort, the amount of the recovery in actions ex contractu is not left upon general principles to the sound discretion of the court or jury. Where there is a legal measure of damages the court or jury must determine the amount as a fact. *Parke v. Frank*, 75 Cal. 369, 17 P. 427; *Weichers v. Dehail*, 41 Cal. App. 547, 183 P. 187. As to the liens the evidence is merely to the effect that respondent paid the liens filed against the property; the liens themselves were not offered in evidence, nor is there any evidence as to their validity. The right to enforce a mechanic's or materialman's lien depends upon a compliance with the requirements of the statutes, and the burden was upon respondent to show that the liens were valid and enforceable liens upon the premises. *Wilson v. Nugent*, 125 Cal. 280, 57 P. 1008.

The judgment is reversed and the cause remanded.

We concur. TYLER, P. J.; KNIGHT, J.

STRAND v. EVERETT. (Civ. 5053.) ★

District Court of Appeal, Second District, Division 1, California. July 2, 1927.

Hearing Denied by Supreme Court Aug. 29, 1927.

1. Appeal and error §1010(1)—Finding of plaintiff's contributory negligence in burning of automobile supported by some evidence will not be disturbed on appeal.

In action for personal injuries and property loss in burning of automobile from overflowing of gasoline tank at filling station, finding that plaintiff, owner of automobile, was guilty of contributory negligence, supported by testimony that her agent driving automobile was negligent in indefinite and uncertain manner in which he ordered quantity of gasoline, will not be disturbed on appeal.

2. Explosives §10—Answer held to put in issue contributory negligence as proximate cause of burning of automobile by filling gasoline tank.

In action for personal injuries and for property damages in burning automobile through negligently filling gasoline tank, answer and amendment thereto setting up that plaintiff's damages were proximately caused by plaintiff's negligence, in driving automobile while overheated to filling station and spilling gasoline on its tank while filling it, held sufficient to put in issue plaintiff's negligence as proximate cause of injuries.

3. Negligence §117—Pleader may charge contributory negligence in general terms, but must show causal connection with injury.

Although pleader may charge contributory negligence in general terms, he must plead facts thereof, which must show causal connection with injury.

4. Appeal and error §882(3)—After trial on theory that contributory negligence was properly alleged, reversal cannot be claimed on appeal because such plea was insufficient.

Where trial is conducted on theory that contributory negligence of plaintiff was properly alleged and was in issue on appeal, reversal cannot be claimed on ground that plea was insufficient.

5. Appeal and error §1011(1)—Finding that plaintiff's concurrent negligence contributed to burning of automobile and injuries, supported by conflicting evidence, held conclusive on appeal.

In action for personal injuries and property loss in burning of automobile through negligently filling gasoline tank, finding that concurrent negligence and carelessness of plaintiff in spilling gasoline on tank contributed to burning of automobile and injuries, supported by conflicting evidence, held binding on appeal.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Action by Mrs. A. A. Strand against P. L. Everett, doing business as the Indio Auto Supply Service Station. From a judgment for plaintiff for less than she asked, she appeals. Affirmed.

E. R. Simon and Harry B. Ellison, both of Los Angeles, for appellant.

Thos. C. Yager, of Indio, and O. K. Morton, of Riverside, for respondent.

McLUCAS, Justice pro tem. Plaintiff brought suit to recover damages for personal injuries and property loss arising from the alleged negligence of defendant in overflowing plaintiff's automobile tank at a gasoline filling station so that the automobile took fire, which caused the loss and injury. The trial court gave judgment for the plaintiff in the sum of \$240, and the plaintiff appeals from the judgment.

Plaintiff's husband, A. A. Strand, testified: That he drove the plaintiff's automobile from Brawley and stopped at the service station of the defendant at Indio. At that time Tyler G. Duff was sitting in the front seat with Strand and to his right. Plaintiff was sitting on the right side, and Mrs. J. F. Warner on the left side of the rear seat of the automobile. Plaintiff's husband got out of the automobile from the left side of the car and went to the right of the front seat and measured the contents of the gasoline tank, while Duff stood on the left side of the car near the front end, and the ladies remained in the rear seat of the automobile. That after measuring the contents of the gasoline tank, he stated to Craig, the defendant's employee who was in charge of the service station, "I want four gallons of gasoline." That he heard no further remark from Craig. That Craig inserted the end of the nozzle into the gasoline tank and began to pump. That shortly after the commencement of the pumping by Craig, the tank overflowed, at which instant he shouted to Craig, "I said four gallons." That Craig thereafter made a half turn of the pump and then said, "Oh, I forgot," and at that instant the portion of the automobile near the gas tank broke out in flames. Duff testified that he stood near the left front fender and Strand measured the gas in the tank and said to Craig, "Four will be enough;" that Craig inserted the end of the hose into the gasoline tank and said, "Well, it will take five, then," but that Strand made no reply; that Craig operated the pump, and he then heard Strand say, "Stop, you are giving me too much—I said four gallons"; that Craig then remarked, "I beg your pardon, I did not——"; and pulled the hose from the gasoline tank while it was running half capacity of the nozzle; that the hose was entirely away from the automobile when the flames broke out from the tank. Mrs. Warner testified that she heard Mr. Strand say, "I want four gallons." Mrs. Strand testified that she heard Strand say, "It will take four gallons," and that she did not hear Craig make any remark after Strand had ordered the four gallons of gasoline. V. W. Lockwood testified for the de-

fense that he was at the service station of the defendant when the Chevrolet automobile was driven to the station by Strand; that he stood in the front door of the service station while Craig went to the gasoline pump, a distance of about 20 feet; that he heard Strand say, "Look out, it is running over"; that at the same time he saw gasoline drip underneath the car, and a few seconds later he saw a ball of fire drop from the engine pan, and then the car took fire; that he did not see any gasoline come out of the end of the hose when Craig threw it to one side; that Craig had stopped pumping when Strand said, "Look out, it is running over." Craig, the defendant's employee, testified that Strand was measuring the gasoline tank when he arrived at the automobile; that Strand withdrew the measuring stick from the tank, and, while looking at the stick, said, "Four gallons;" that he handed the hose to Strand, and said, "Well, it will take five more then, won't it?" that Strand did not answer; that he then started the operation of the pump, which was set at the five-gallon mark; that after he had completed the run of the pump and had stepped away from it to prepare to drain the hose, he heard Strand say, "It is running over," and Strand immediately added, while holding up the nozzle, "I said four gallons"; that he replied, "I beg your pardon, I did not——"; and at that time the gasoline took fire.

It thus appears that the evidence was in sharp conflict as to whether Strand ordered four or five gallons of gas. The trial court's findings were:

"III. That at the said time and place the said plaintiff gave said order for gasoline to plaintiff in a careless, indefinite, heedless, thoughtless and negligent manner, resulting in confusion and misunderstanding as to the amount of gasoline ordered; that plaintiff was careless and negligent in not responding to defendant's inquiry of the amount of gasoline desired; that plaintiff was careless and negligent in not giving proper attention and care to the business then in hand of ordering gasoline for his automobile.

"IV. That at the said time and place, the said defendant negligently placed and attempted to place gasoline in the said automobile in excess of four gallons, thereby causing the gasoline tank on said automobile to overflow and gasoline to be spilled on said automobile and the mechanism thereof, and said automobile shortly thereafter ignited and burned, demolishing and totally destroying said automobile and injuring plaintiff, Mrs. A. A. Strand. That the negligence of defendant was not willful nor deliberate."

"XIII. That it is not true that the said plaintiff, Mrs. A. A. Strand, and A. A. Strand, well knew at the time of the driving of the said automobile to the service station of said defendant that the said automobile and mechanism and machinery thereof was overheated and was extremely hot and in a dangerous condition in which to place gasoline or to permit the fumes and vapor of gasoline to come in contact there-

with, and that it is not true that the said plaintiff, Mrs. A. A. Strand, or her agent, Mr. A. A. Strand, carelessly and negligently drove said automobile to said service station in said dangerous condition.

"XIV. That it is true that whatever injuries and damages the said plaintiff, Mrs. A. A. Strand, sustained was consequent upon, due to, and was proximately caused by the concurrent negligence and want of care of plaintiff's agent, A. A. Strand, and defendant's agent, E. E. Craig; that it is true that the negligence and carelessness of plaintiff contributed to and was concurrent in setting in motion the proximate and direct cause of the injuries and damage sustained by plaintiff; that the mutual carelessness and negligence of plaintiff and defendant was contemporaneous, concurrent, contributory, and continuing down to the very moment of the injury; that the mutual negligence and carelessness of plaintiff and defendant constituted the proximate cause of the injuries and damages sustained by plaintiff and because of the concurrent negligence of plaintiff she is entitled only to nominal damages.

"XV. That it is not true that the said plaintiff, Mrs. A. A. Strand, her agents and the occupants of said automobile drove said automobile to said service station of defendant in an overheated, extremely hot, and dangerous condition constituting contributory negligence. That it is true that the concurrent negligence and carelessness of said plaintiff in spilling gasoline on said tank during the filling of the same contributed to the proximate and direct cause of the injuries and damages suffered by plaintiff."

[1] It is claimed by appellant that Craig's act in overflowing the tank by delivering more gasoline than was ordered is negligence and is the proximate cause of plaintiff's injuries. It was the finding of the trial court that Craig was negligent, and that his negligence was a proximate cause of plaintiff's injury. It was also the finding of the trial court, based upon conflicting evidence, that plaintiff was guilty of contributory negligence. Such finding will not be disturbed on appeal where there was some evidence to support it, as it appears from the testimony heretofore stated that there was some evidence tending to prove that plaintiff's agent, Strand, was guilty of negligence in the indefinite and uncertain manner in which he ordered a quantity of gasoline.

[2] Appellant next contends that finding of fact III is outside the issues, and is not supported by the pleadings nor sustained by the evidence. It is claimed that defendant's pleading does not sufficiently state a defense of contributory negligence, in that the facts alleged did not show a causal connection with the injury. It is alleged in the amendment to defendant's answer:

"That whatever injury and damages the said plaintiff, Mrs. A. A. Strand, sustained, if any, either to herself or to her property, was consequent upon, and due to, and was proximately caused by the negligence and want of care of plaintiff, Mrs. A. A. Strand, her agents and the occupants of said automobile, to wit, A. A.

Strand, Mrs. J. F. Warner, and Tyler G. Duff, and that such negligence and carelessness of said plaintiff, Mrs. A. A. Strand, her agents and the occupants of said automobile, to wit, A. A. Strand, Mrs. J. F. Warner, and Tyler G. Duff, aforesaid, contributed to and was the proximate and direct cause of said injuries and damage, if any. This defendant further alleges that the said negligence and carelessness of the plaintiff and said others consisted in driving said automobile to the said service station of defendant in an overheated, extremely hot, and dangerous condition, and in spilling gasoline on said tank during the filling of the same."

[3, 4] Finding III, as hereinbefore quoted, merely states the manner in which plaintiff spilled the gasoline on the automobile tank as alleged in the amendment to the answer. The rule is settled, as held in *Crabbe v. Mammoth Channel G. Mining Co.*, 168 Cal. 500, 505, that while the pleader may charge contributory negligence in general terms, yet he must plead the facts of such negligence, and the facts pleaded must show a causal connection with the injury. But where, as in the case at bar, the trial was conducted throughout upon the theory that contributory negligence of the plaintiff was properly alleged and that the fact was in issue, the rule prevails that the parties cannot on appeal claim a reversal on the ground that the plea was insufficient. *Busch v. Los Angeles Ry. Co.*, 178 Cal. 536, 539, 174 P. 665, 2 A. L. R. 1607; *Schuh v. R. H. Herron Co.*, 177 Cal. 13, 18, 169 P. 682; *Kelly v. Santa Barbara, etc., R. Co.*, 171 Cal. 415, 421, 153 P. 903, Ann. Cas. 1917C, 67. The defendant does, however, affirmatively plead in his amendment to the answer that the damages to plaintiff were proximately caused by the negligence of plaintiff. This was a sufficient plea to put in issue plaintiff's negligence as the proximate cause of the injuries to plaintiff. *Brkljaca v. Ross*, 60 Cal. App. 431, 437, 213 P. 290. It is also to be noted that the answer itself denies and alleges as follows:

"That the plaintiff, Mrs. A. A. Strand, or A. A. Strand ordered from the said defendants four gallons of gasoline to be put into the tank of said automobile, but defendants allege that the said A. A. Strand did, on said date, order the agent of the defendants to put into the tank of said automobile five gallons of gasoline."

In our opinion, finding III is also supported by the foregoing pleading. Appellant's contention that finding III is not supported by the evidence cannot be upheld in view of the conflicting testimony hereinbefore quoted.

[5] Appellant also urges that the last sentence of finding XV is not sustained by the evidence. This reads:

"That it is true that the concurrent negligence and carelessness of said plaintiff in spilling gasoline on said tank during the filling of the same, contributed to the proximate and direct cause of the injuries and damage suffered by plaintiff."

In view of the conflict of evidence as hereinbefore indicated, we believe this contention to be without merit.

Appellant's further contentions are necessarily disposed of by the foregoing conclusions and for that reason will not be discussed.

We find considerable difficulty, as does appellant, in understanding how the trial court could render a judgment for expenses incurred by plaintiff for medical care, etc., based on the findings that plaintiff was guilty of negligence. However, defendant has taken no appeal, and that question is not before this court for decision.

It is ordered that the judgment be affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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In re KELPSCH'S ESTATE et al.*
(Civ. 5685.)

District Court of Appeal, Second District Division 2, California. July 7, 1927.

Hearing Granted by Supreme Court Sept. 1, 1927.

1. Executors and administrators $\S$ 314(11)—Statute providing for written objections to petition for distribution of estate of deceased person authorizes framing of issues of fact to be tried as are will contests (Code Civ. Proc. § 1668).

Code Civ. Proc. § 1668, providing that any person interested in the estate of a deceased person may appear and contest the petition for distribution by filing written objections thereto, expressly authorizes the framing of issues of fact to be tried as are will contests in accordance with sections 1714, 1716, and 1717.

2. Executors and administrators $\S$ 314(12)—Objections to petition for distribution of estate of deceased person may not be raised for first time on appeal (Code Civ. Proc. §§ 1635, 1668).

Objections to petition for distribution of estate of deceased person, not raised in the trial court, cannot be raised for first time on appeal, under Code Civ. Proc. § 1668, providing that at the time for hearing any person interested in the estate may appear and contest the petition by filing written objections thereto, in view of section 1635.

3. Executors and administrators $\S$ 314(12)—Jurisdiction of probate court distributing property of deceased person to determine that property was community property might be questioned for first time on appeal.

Decree distributing the estate of deceased person might be attacked on ground that probate court had no jurisdiction to determine that the property was community property, although this question was raised for the first time on appeal, since jurisdictional questions may always be raised.

4. Executors and administrators $\S$ 314(11)—Probate court, passing on petition for distribution of estate of deceased, might determine whether it was community property, where executor, as husband, claimed interest in property as community property.

On petition of executor and executrix for distribution of the estate of a deceased person, probate court had jurisdiction to determine whether the property was community property, where the executor claimed one-half of the property as husband of deceased by reason of the fact that the property was community property.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

In the matter of the estate of Christine M. Kelsch, deceased, Joseph A. Kelsch, executor, and Ellen C. Johnson, executrix. From an order approving and settling the final account and directing distribution, Mrs. Inger A. Beckner and others appeal. Order affirmed.

Henshaw, Black & Lyders and Eric Lyders, all of San Francisco, and Rush & McCormick, of Los Angeles, for appellants.

Bradner W. Lee, Jr., and Kenyon F. Lee, both of Los Angeles, for respondents.

THOMPSON, J. Christine M. Kelsch died at Los Angeles in December, 1925, leaving a will in which her husband, Joseph M. Kelsch, and Ellen C. Johnson were nominated executor and executrix. They were appointed such and in their final account reported that the entire property held by the deceased was community property. They inserted a further statement as follows:

"That said estate consists of community property, and therefore one-half thereof goes to the surviving husband, Joseph A. Kelsch, the other one-half is subject to testamentary disposition of the decedent, and if the said third clause of said will is valid, he will be entitled to three-fourths of said estate, and the other one-fourth will be distributed to the nieces and nephews named in said will, whereas, if the third clause of said will is invalid, said Joseph A. Kelsch, as the surviving husband, will be entitled to the entire estate."

After the petition for distribution was filed the appellants here, as the residuary legatees subject only to one-half previously devised and bequeathed to Joseph A. Kelsch, the executor, filed what is denominated in the order settling the final account, "a memorandum and statement of facts," to which the executors replied by "a statement of facts." What the statements were does not appear from the transcript, but it does appear from the briefs that they were not pleadings which raised issues of fact. The court found that the entire property was community property and ordered three-fourths thereof distributed to Joseph A. Kelsch and one-fourth to the

appellants as the residuary legatees and devisees. The appeal is from the order approving and settling the final account and ordering distribution.

[1] The first question must be as to whether the appellants have any standing to urge upon the court a consideration of the appeal. Section 1668 of the Code of Civil Procedure provides, among other things relative to the petition for distribution, that:

"At the time fixed for the hearing, or to which the hearing may be postponed, any person interested in the estate may appear and contest the petition by *filing written objections thereto.*" (Italics ours.)

[2] It has been held that this provision expressly authorizes the framing of issues of fact to be tried as are contests of wills in accordance with sections 1714, 1716 and 1717 of the Code of Civil Procedure. *Carter v. Waste*, 159 Cal. 23, 112 P. 727. It should be noted that the sentence quoted from section 1668 of the Code of Civil Procedure and construed in *Carter v. Waste*, supra, was added by amendment in 1907 (St. 1907, p. 993) so that the Estate of Benner, 155 Cal. 153, 99 P. 715, which was tried in the probate court prior thereto, does not help us to solve the question. The industry of counsel has uncovered no authority directly in point. We are not, however, left without light on the proper construction to be placed upon the effect of the amendment upon the right to raise questions on appeal not raised by pleadings in the court below. Section 1635 of the Code of Civil Procedure is similar to the sentence under scrutiny in so far as it gives to interested parties the right to appear and file written exceptions to an account of the executor or administrator. And we read with reference to this section 12 C. J. 814, that:

"Its object is that an issue shall be made as to the items contested, or with which it is sought to charge the representative. It was intended that he should know the items contested or the matters in regard to which he is claimed to have been delinquent, so that he may come into court with his evidence prepared to meet or explain any exception taken to his account."

It has also been said that the account and report, exceptions (if any) and findings (if any) and order constitute the judgment roll. *Estate of Thayer*, 1 Cal. App. 104, 81 P. 658. Also, that an objection to an item in the account cannot be raised for the first time on appeal. *Estate of Rohrer*, 160 Cal. 574, 117

P. 672, Ann. Cas. 1913A, 479. So in *Estate of More*, 121 Cal. 635, 54 P. 148, it was announced that:

"* * * If a person interested in an estate wishes to contest an account presented for settlement by the executor or administrator, he must file his exceptions in writing to the account, setting out specifically the grounds of his objections; and at the hearing he should be held limited to the exceptions so presented."

Adhering to the same rule in *Estate of Marre*, 127 Cal. 128, 59 P. 385, the court held that where the objections were oral and were made in the presence of the administrator and the court, the administrator should be deemed to have waived the requirement that they be in writing. This last ruling, however, is of no comfort to appellants here for we do not find any record of oral objections. It seems obvious from the line of authority concerning section 1635 of the Code of Civil Procedure that the law should be that where the Legislature has outlined a manner by which the issues may be framed that interested parties who have the opportunity and desire to frame issues should follow that procedure or be precluded from raising their objections for the first time on appeal. It certainly cannot be said that it is conducive to the proper administration of justice to deny to the trial court and the adversary knowledge of the points of assault and wait until the matter is before the appellate tribunal to launch an attack upon the evidence.

[3, 4] Holding, as we do, that objections not raised in the trial court may not be raised for the first time on appeal, does not, however, include the attack of appellants upon the decree on the ground that the probate court had no jurisdiction to determine that the property was community property. Jurisdictional questions may always be raised. However, the recent case of *Bauer v. Bauer*, 256 P. 820, sets at rest a question long in doubt and draws the distinction between those cases where the probate court may try title and where it may not, holding that in those instances where the representative of an estate claims title to property in his individual capacity the probate court may try the question. That is the case here—the respondent, the executor, claimed one-half of the property to be his by reason of the fact that it was community property.

The order appealed from is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

84 Cal. App. 401

MACMURTRY v. FRATIES. (Civ. 5782.)

District Court of Appeal, First District, Division 2, California. July 11, 1927.

1. Pleading $\S$ 64(2)—Complaint commingling causes of action for money lent and money paid held not insufficient.

Complaint commingling cause of action for money lent and cause of action for money paid held not insufficient.

2. Trial $\S$ 396(1)—Finding that all allegations of complaint were true held sufficient to support judgment under complaint commingling causes of action for money lent and money paid, though unsupported by evidence of money lent (Code Civ. Proc. $\S$ 463).

Under complaint commingling causes of action for money lent and for money paid, finding that all allegations were true held sufficient to support judgment for plaintiff, though there was no evidence regarding money lent, since complaint would still be sufficient with that allegation stricken, under Code Civ. Proc. $\S$ 463.

3. Appeal and error $\S$ 169—Issue not presented to trial court will not be reviewed.

Issue which was not presented to trial court by pleadings as framed or otherwise will not be considered on appeal.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Alton B. MacMurtry against George J. Fraties. Judgment for plaintiff, and defendant appeals. Affirmed.

L. A. Kottinger, of Oakland, for appellant.

Forrest M. Pearce, of Oakland, for respondent.

STURTEVANT, J. The trial court awarded a judgment in favor of the plaintiff against the defendant, and from that judgment the defendant has appealed under section 953a of the Code of Civil Procedure.

The first point made by the defendant is that the trial court made a finding which is not sustained by the evidence. The contention is correct, but it is of no benefit to the defendant, as will appear from a consideration of the following matters:

[1, 2] The charging part of the complaint is that the defendant was indebted "to the plaintiff in the sum of \$1,076, on an account for moneys lent by the plaintiff to said defendant and for money paid, laid out and expended by the said plaintiff to and for the use of said defendant as his request." To that complaint a demurrer of the defendant pleaded only that the complaint was insufficient. The complaint was not insufficient. It commingled (1) a cause of action for money lent, and (2) a cause of action for money paid, etc. After the action had been tried, the trial court made findings in which it

found that each and all of the allegations in plaintiff's complaint contained are true. Conceding that there was no evidence regarding "money lent by the plaintiff to said defendant," it is clear that, if that allegation be stricken out, the complaint would still be sufficient. Code Civ. Proc. $\S$ 463. A finding that all the allegations of the complaint are true is a sufficient finding to support the judgment. *Fritz v. Mills*, 170 Cal. 449, 458, 150 P. 375. The findings as made do not present a set of facts similar to the facts before the court in such cases as *Holt Mfg. Co. v. Collins*, 154 Cal. 265, 276, 97 P. 516.

[3] As we understand the defendant, he contends that a partnership existed between the plaintiff and himself, that no accounting has been had, and therefore no judgment should have been rendered in favor of the plaintiff on a cause of action such as the plaintiff had alleged in his complaint. Whatever there may be in the contention, it is sufficient to state that no such issue was presented to the trial court by the pleadings as framed or otherwise.

The judgment is affirmed.

We concur: **KOFORD, P. J.; NOURSE, J.**

In re FULMER'S ESTATE. ★

FULMER v. PACIFIC SOUTHWEST TRUST & SAVINGS BANK et al.

(Civ. 5684.)

District Court of Appeal, Second District, Division 2, California. July 8, 1927.

Hearing Granted by Supreme Court Sept. 6, 1927.

1. Executors and administrators $\S$ 510(11)—Order disallowing items of administrator's account will be upheld, if justified on any ground.

Order of superior court disallowing expenditures and claim for fees of administrator on final account, if justified on any ground, will be upheld.

2. Vendor and purchaser $\S$ 84—Rights of wronged party in case of breach of contract to sell real estate may be fixed by terms of contract itself.

On entering into contract involving purchase or option to purchase real estate, parties have right to anticipate event of breach of contract, and to provide for rights of wronged party arising therefrom.

3. Vendor and purchaser $\S$ 84—Administrator held not bound to make payments under option contract held by intestate, providing that on nonpayment of installments sums previously received by vendors should be retained as consideration for option.

Under contract by which deceased was permitted to purchase real estate at fixed sum to be paid in installments on exercise of option to purchase, and by which all sums received by

vendors were to be retained as consideration, and purchasers' right forfeited in case payments were not made when due, administrator was not legally bound to make further payments; sole result of failure to do so being forfeiture of amounts previously paid.

4. Executors and administrators ⚡506(1)—

Personal representative has burden to show his conduct in administering estate is that of ordinary prudent man having knowledge of business which he has assumed to transact.

Burden is on personal representative to show that his acts in administering estate are those of ordinary prudent man having knowledge of business which he assumed to transact, as no man has right to undertake trusteeship which he is incapable of managing with ordinary skill and wisdom.

5. Executors and administrators ⚡135—Belief of personal representative as to value of land which deceased had option to purchase, unsupported by investigation, does not alone warrant charge against estate.

Belief of personal representative that land which deceased had option to purchase was worth price to be paid is not alone sufficient to base charge against estate for payment of installments of purchase price without investigation as to value.

6. Executors and administrators ⚡135—Disallowance of administrator's expenditures, made without investigation in payment of installments on deceased's land contract, held proper, where administrator was not bound to make payments, price was grossly exaggerated, and vendors could not deliver title.

Under final account of administrator to which creditors excepted, payments made by administrator without investigation under option or purchase contract of intestate, which administrator was not required to make, held to amount to mismanagement of estate, justifying disallowance of items of account, where land was purchased at grossly exaggerated price, vendors could not deliver title, and payment was made of portion which was to have been borne by other parties, as payment showed want of exercise of ordinary prudence in administering estate.

7. Executors and administrators ⚡82—Ex parte orders permitting administrator to pay installments on deceased's land contract held not res judicata of propriety of payments on administrator's final account.

Ex parte orders obtained by administrator authorizing him to make payments under land contract of deceased held not res judicata of question of propriety of payments on administrator's final account, especially where at least one order was secured on erroneous representation that estate was solvent.

8. Executors and administrators ⚡82—Heirs and creditors are not precluded from disputing validity of claims or contesting preferences by ex parte orders obtained by personal representative.

Heirs cannot be deprived of their rights to dispute validity of claims, and creditors can-

not be deprived of right to contest preferences by ex parte orders obtained by personal representative authorizing payments from assets of estate.

9. Executors and administrators ⚡510(9)—On appeal from order disallowing expenditures on administrator's account, it was assumed previous orders permitting expenditures were without notice.

On appeal from order disallowing items of administrator's final account representing certain expenditures, it was assumed on appeal that previous orders which permitted such expenditures were made without notice.

10. Executors and administrators ⚡82—Validity of ex parte orders authorizing payments from assets can be determined only on settlement of administrator's account.

Validity of ex parte orders authorizing expenditures by administrator from assets of estate can be determined only on settlement of administrator's account, on which occasion those interested may appear and be heard.

11. Appeal and error ⚡931(1)—Every intendment is indulged to sustain decision below.

On appeal, every intendment is indulged to sustain decision of trial court.

12. Executors and administrators ⚡236—Claims filed against estate may be allowed only in regular manner.

Court has no authority to allow claim filed against estate except in regular manner.

13. Executors and administrators ⚡241—Court had jurisdiction, on settlement of final account of administrator, to pass on validity of claim not allowed in regular manner.

Where claim was not allowed in regular manner, and order allowing it was therefore unauthorized and void, court had full jurisdiction to pass on claim's validity at time of settlement of final account of administrator.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Final account of Glenn A. Fulmer, administrator of the estate of Luella Fulmer, deceased, opposed by the Pacific Southwest Trust & Savings Bank and another. Order disallowing certain items of the account, and the administrator appeals. Affirmed.

Horace W. B. Smith and P. R. Lund, both of San Francisco, and Francisco O. Hoover, of Modesto, for appellant.

C. Kelley Hardenbrook, of Lompoc, and Fred A. Shaeffer, of Santa Maria, for respondent.

CRAIG, J. On or about July 5, 1918, Luella Fulmer, a resident of Santa Barbara county, together with five other persons, including Glenn A. Fulmer, her son, entered into a contract in writing with the California Farms Company, by the terms of which contract the latter agreed upon receipt of \$36,483.30 "to convey to said purchasers by good and suf-

ficient grant deed sound and marketable title, free and clear of all incumbrances, certain lands in Tehama county. An initial payment of \$5,000 was acknowledged and accepted as "part of said purchase price if the option herein contained is exercised," and it was agreed that Luella Fulmer, James R. Fulmer, and Glenn A. Fulmer should execute three promissory notes for \$5,707.40 each, payable consecutively on the 1st day of December, 1921, 1922, and 1923; and James F. McCloskey and James D. Heron agreed to execute three \$1,200 notes each, maturing on said respective dates. It was further agreed that the total purchase price should be \$60,805.50, and that—

"This receipt and agreement is and shall be construed as an exclusive option until December 1st, 1918, for the purchase of said land, and that, if the further sums above named as being required to be paid by December 1, 1918, December 1, 1919, and December 1, 1920, are not paid when due, or if the notes and mortgages herein referred to are not made and delivered by December 1, 1920, by purchasers all sums received by us shall be retained by us for our sole benefit as a consideration for this option, and all rights of purchasers under this agreement shall at once and forever be at an end without further action on our part."

"It is further understood and provided that, in the event we fail to deliver deed, as provided herein, we can refund to purchasers any sums paid us by purchasers, and the purchasers shall have no further claim against us. Purchasers shall have the right to demand of us any sums paid by them immediately upon our failure to deliver deed, as provided herein; and upon return of said sums the purchasers shall have no further claim against us."

It appears that Luella Fulmer paid \$2,018.61 upon the execution of said contract, and that on December 1, 1918, she paid \$5,044.50, and gave her promissory note for \$5,700; that she died on January 1, 1919; and Glenn A. Fulmer heretofore mentioned was appointed administrator of her estate. On August 15, 1919, the administrator filed a petition reciting that the appraisement showed property of said deceased in Santa Barbara county of the value of \$22,285; that the \$5,700 note with accrued interest then amounted to \$6,869.45, which the California Farms Company demanded, and that, unless paid, the estate would lose the amounts theretofore invested. The superior court thereupon made an order directing "that the administrator pay said note and interest, and any further interest not yet accrued when the same shall become due and payable, unless thereafter for good cause this order shall be set aside or modified by the court upon a similar petition and notice."

On July 26, 1920, the administrator again petitioned the court, averring that he had complied with the preceding order, and that, "since said payment has been made, further sums have accrued, and your petitioner as

such administrator procured from the Lompoc Valley Bank of the City of Lompoc, in said county, \$3,000, at one time, and \$2,400 at another time, and paid the same on payments due on said contract or option to prevent the forfeiture of said option and the money theretofore paid thereon; that your petitioner also paid the sum of \$856.11 as accrued interest, or thereabouts; that in the aggregate there has been paid on said contract or option the sum of \$15,432.59, or thereabouts; and that there is now due on installment long past due \$1,919.55 and also taxes and interest, the amount of which is unknown to petitioner."

The petitioner further represented that property in Santa Barbara county had been sold for the sum of \$26,250; that the debts outstanding and allowed against the estate, and remaining unpaid, aggregated \$19,010.18, and that there would be sufficient funds after paying such claims to satisfy the \$1,919.55 indebtedness. After hearing upon this latter petition, it was ordered that the administrator "pay any installments due and that may hereafter become due and payable," unless such order be set aside or modified. Neither of the foregoing orders was vacated or modified.

On May 1, 1925, the administrator filed his first and final account, which purported to set forth all receipts and disbursements, including the following expenditures, to which the respondents herein, who were creditors of the estate, excepted, and which were disallowed by the trial court: \$6,078.38, \$6,869.49, \$1,991.55, \$2.30, \$342.50, \$60.75, \$304.47 and \$266.55, paid on account of principal and interest under the contract of July 5, 1918; \$2,400 and \$3,000 borrowed from the Lompoc bank; \$40, \$41.67, \$78.13, and \$100, the proportionate shares of moneys paid for the maintenance of the Tehama county property; \$13.20, \$76.35 and \$159.60, paid for repairs; \$1,378.81 of \$11,030.50 deducted by the bank from the proceeds of the sale of certain real property. The claim of the administrator for fees in the sum of \$1,147.96 was disallowed "at this time, as the estate is not yet ready to be closed." From the order disallowing these items the administrator appealed.

In the appellant's final account it was represented that the total receipts amounted to \$39,309.75; that the total expenditures had been \$43,340.30; and that there remained an indebtedness of \$3,030.55. The Tehama county property was not included in said account, and it is conceded that title thereto was never acquired by the contracting buyers. It appears that appellant as administrator instituted a suit for reformation of the contract and for moneys paid to the California Farms Company on account of principal, interest and taxes thereunder, and that a demurrer to the complaint was sustained, and no further proceedings were had therein. Thereafter Mary J. Spooner brought suit against the

California Farms Company, J. D. Heron and others to quiet title to the property, and recovered judgment therein. Appellant apparently had possession and use of the property for about three years at the estate's expense, with no prospect of acquiring title. True, he accounted for the proceeds of a crop of mustard, but he expended and obligated the estate to pay out and dispose of all moneys and assets, leaving an indebtedness of \$3,030.55, to the exclusion of preferred creditors; and, further, appellant credited himself with alleged expenditures aggregating \$3,725, and charged his account with an alleged revenue of but \$2,581, and showed a net loss of \$1,144 in seeding, caring for, and sale of a crop of barley. When asked as to whether or not he had testified at a previous hearing that the estate was solvent, appellant replied that he could not remember, nor could he remember any of the testimony which he gave at that time.

The appellant insistently urges that he acted at all times under the advice of able counsel. Apparently without an order of court he permitted his brother to remove from the premises a horse valued at \$100, merely upon the claim that his mother had borrowed that amount; the whole amounts of such payments as \$6,078.38, \$856.10, \$1,991.55, \$2.30, \$340, \$60.75, \$304.47, \$144, and \$100 were charged to and paid from the funds of the estate, whereas five-twelfths of these claims, if payable at all, should have been borne by the heirs and cocontractors of Luella Fulmer, deceased. Large sums of money belonging to the estate were paid by the administrator without prior sanction of the court, and the lapse of memory of the administrator upon these and other matters at the time of the trial seems at least indicative of gross negligence.

Appellant contends that, when Luella Fulmer made additional payments on the purchase of the Tehama county lands, and executed her promissory note for \$5,700, she committed herself to purchase the property, and that on December 1, 1918, the option ripened into a contract which she became bound to perform and which the administrator in turn became obligated to fulfill; that, notwithstanding the fact that the title failed, he expended all of the amounts paid in that behalf which were disallowed in compliance with a valid binding obligation of the estate in an effort to continue the contract in force, and to preserve valuable property rights which the California Farms Company had theretofore agreed to convey to Luella Fulmer, and hence that the items in question were improperly disallowed.

However, the foundation for appellant's argument falls before the uncontradicted evidence in the record before us. It appears that the California Farms Company was known by appellant to have had no title to the property, but merely an option to pur-

chase it from Mary J. Spooner; and the evidence strongly tends to show that the company could not make payments under such option only as it received moneys under the Fulmer contract. When appellant's administration of the estate commenced, and, of course, before he made the first payment, the court may well have concluded that it had become apparent that the purchase would never be completed and that the estate would therefore lose such money as might be paid thereafter. This might reasonably be inferred from what has been said, and the further fact that all of the other purchasing parties had defaulted. Also appellant admitted on cross-examination that neither he nor any of the cocontractors except Luella Fulmer had paid \$1 of their shares of the agreed purchase price, other than a portion of the initial installment of July 5, 1918. So far as the record discloses, neither of the notes for \$5,707.40 or \$1,200 was ever executed.

[1-3] If the order of the superior court to which exceptions are taken is justified upon any ground, of course it will be upheld. Concerning the contract for the purchase of the Tehama county lands, respondents urge, first, that it was a mere option, not binding upon the estate, and hence that the action of the administrator in making payments based upon its provisions was in truth a purchase of the lands for the estate, and that such an act is outside the authority of an administrator. It may well be argued that, in providing for "an exclusive option until December 1, 1918, for the purchase of said land," it was intended that the option in question should not extend beyond that time, and that, as one installment was made to fall due on that date, it was meant that the mere payment thereof should constitute an exercise of the option. If this theory be accepted, the contract thereafter would assume the status of a contract for the purchase of the land in question, binding upon the parties, and enforceable through the usual proceedings, should either party break it. But we think it is unimportant in this instance to decide whether or not this option ever actually became a contract to complete the purchase by the vendees. This is true, for the contract itself makes full provision as to the remedy of each of the parties should the other thereafter and up to the time for delivery of the deed fail to further carry out its terms. With reference to the remedy of the vendees it is stipulated that "the purchasers shall have the right to demand of us any sums paid by them immediately upon our failure to deliver deed as provided therein; and upon return of said sums the purchasers shall have no further claim upon us." As to the rights of the vendors in case of default by December 1, 1920, on the part of the vendees, it was agreed that all sums received by the vendors should "be retained by us for our sole benefit as a consideration for this option and all rights of

purchasers under this agreement shall at once and forever be at an end without further action on our part." In order that no doubt might exist, it was further set forth that "this receipt and option agreement expresses the entire understanding of the parties hereto." The parties have, as they had a right to do, made their own contract, and in it they anticipated the event of either party failing to fulfill his agreement; and they have provided for and at the same time limited, the rights of the wronged party under such conditions. It cannot be said that, in view of the terms of this contract, the administrator became legally bound to make any payments. The only result of his failure to do so would have been the forfeiture to the vendor of the amounts previously paid.

[4-6] Since the estate was not required to make any payments, the most favorable light in which the action of the administrator can be viewed would be that he expended the money to protect the estate, but the entire transaction is surely such as to uphold the conclusion apparently reached by the trial court, that ordinary prudence would have dictated that good money be not thrown after bad; in fact, that the making by the administrator of any payments amounted to mismanagement of the estate, both because the land was being purchased at a grossly exaggerated price, and also that the vendors could not deliver title. Before expending any money an ordinarily prudent man would have made inquiry as to both of these matters. There is nothing in the record to show that the administrator made any investigation concerning them. The burden is upon him to show that his acts were those of an ordinarily prudent man having knowledge of the business which he assumed to transact, for no man has a right to undertake a trusteeship which he is incapable of managing with ordinary wisdom and skill. The appellant insists that, when these payments were made, he believed that the purchase should be completed in order that the property might be kept for the estate, and that he then thought the land was worth the price contracted to be paid. Assuming this to be true, such belief is not sufficient upon which to base a charge against the estate. If in fact the land was worth only one-half or one-third of the sum to be paid, and this fact might have been ascertained by careful investigation, no evidence was offered or reason given to explain why the inadequacy in value of the land was not as apparent before the administrator made the first payment as at the time when he decided to discontinue the purchase. Again, the payments made by the administrator included, in addition to those provided to be made by Luella Fulmer, the sums required of her associates. No excuse or justification appears for the estate paying not only its own portion of the installments stipulated by the option, but those of all the other par-

ties as well. If the action of the administrator in this behalf be regarded as having been taken for the benefit of the estate, either to complete the purchase, to preserve the assets, or to keep clear a title possessed by the deceased, it is plain that the payments were not justified. *Estate of Knight*, 12 Cal. 200, 73 Am. Dec. 531; *Tompkins v. Weeks*, 26 Cal. 51, and other cases cited by the respondent, are in point as announcing the rule that, while an administrator is to take care of and preserve the estate, he is not authorized to pay off incumbrances resting upon the property because he may believe such action profitable to the estate to save for it the land incumbered. Nor are we constrained to regret the necessity of holding the administrator responsible, as was the Supreme Court in *Estate of Knight*, supra, for in the instant proceeding his actions seem so reckless of the interests of the estate as to suggest incompetency or misconduct. Upon this phase of the case appellant cites *Estate of Armstrong*, 125 Cal. 603, 606, 58 P. 183, 184. The instant case falls definitely within the exception stated in that opinion, where it is said that, "if the circumstances were such that we could not say a reasonably prudent man would have done the same thing, then the circumstances might justify the charging of the loss to the administrator." None of the other authorities cited by appellant are in point, for in each instance the claim allowed was for a payment which the estate was legally bound to meet.

[7-13] Appellant attempts to secure protection under orders of the court directing the payments made August 26, 1919, and July 26, 1920. The record contains no indication of any notice having been given previously to the making of these orders. At least the last one made was secured upon a representation by the administrator to the effect that the estate was solvent, and would pay all claims against it, including the one for which an order was then sought, which representation proved to be erroneous. Heirs cannot be deprived of their right to dispute the validity of claims, nor creditors from contesting preferences, by ex parte orders. The validity of these orders which must be assumed to have been made without notice can only be determined upon the settlement of an account of the administrator, upon which occasion those interested may appear and be heard. *Estate of Smith*, 118 Cal. 462, 50 P. 701; *Estate of Bell*, 142 Cal. 97, 75 P. 679; *Estate of Smith*, 122 Cal. 462, 55 P. 249. We have said that it must be assumed that the orders in question were made without notice. This follows, since on appeal every intendment is indulged to sustain the decision of the trial court. It may be said parenthetically at this point that in this regard the instant case is quite different from many of those cited by appellant, in that they involve appeals from decrees allowing the claims of executors or administrators,

and hence the benefit of the rule to which reference has just been made aided materially in sustaining a number of such decisions. Under the authority of the decisions above cited (Estate of Smith, Estate of Bell, Estate of Smith, *supra*), the orders in question do not constitute matters *res adjudicata*. It is true that a claim was filed and allowed on the \$7,500 promissory note representing a part of the purchase price of the Tehama lands, but the court had no authority to allow this claim except in the regular manner, and, since the order which was made was unauthorized and void, it was a matter open for decision at the settlement of the final account. It was then disallowed. The court had full jurisdiction to pass upon its validity, and may well have concluded that it was not justly and legally due from the estate.

Holding as we do that the Tehama county lands were not an asset of the estate in any sense which required the making of any of the contested payments by the administrator upon the principal of the purchase price or interest, it follows that he had no right to pay taxes upon such property or to advance the cost of repairs thereon or for maintenance thereof, and the claims for such items should have been, and some were, properly disallowed.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

CALDWELL v. WEINER. (Civ. 5055.) ★

District Court of Appeal, Second District,
Division 1, California. July 12, 1927.

Hearing Granted by Supreme Court Sept. 8, 1927.

1. Executors and administrators ⇨221(5)—Finding that deceased never agreed to pay off claimant's mortgage in return for room and care held contrary to evidence, where testimony establishing agreement was uncontradicted.

In action on rejected claim filed against estate of deceased based on deceased's agreement to pay off mortgage for claimant in return for room and board and care, evidence *held* insufficient to support finding that no such agreement existed, where testimony establishing agreement was uncontradicted.

2. Evidence ⇨594—Uncontradicted and unimpeached testimony must be accepted by trial court, unless inherently improbable.

Uncontradicted and admissible testimony of witness tending to establish issuable fact in case must be accepted as proof of such fact by trial court sitting as jury, and cannot be arbitrarily disregarded, unless testimony is so inherently incredible and improbable as to amount to no evidence.

3. Wills ⇨714—Bequest to testator's creditor is not in lieu of debt, unless intention to substitute bequest appears from will.

Fact that creditor of deceased is remembered in deceased's will does not of itself indicate intention of decedent that bequest should be in lieu of debt, unless such intention appears from consideration of will itself.

4. Executors and administrators ⇨443(6)—Complaint alleging agreement of deceased to pay off mortgage in return for care held proper under rejected claim based on reasonable and agreed value of services.

Complaint in action on rejected claim, alleging that deceased entered into agreement with plaintiff to pay amount of mortgage on her home in return for care, room, and support or partial support during his lifetime, *held* not to set up different cause of action than claim presented against estate for room, board, care, nursing, and home, based on reasonable and agreed value of services.

5. Executors and administrators ⇨227(1)—Claim against estate, which indicates nature and amount of demand, enabling executor and judge to act advisedly, is sufficient.

Though plaintiff cannot recover on rejected claim on any other cause of action than that set out in claim, claim against estate need not set forth facts on which it is based with precision and detail of pleading, but is only required to indicate nature and amount of demand so as to enable executor and probate judge to act advisedly.

6. Executors and administrators ⇨227(6)—Claim against estate for care, stating reasonable and agreed value of services, will support action on contract or quantum meruit.

Claim presented to executor for and on account of room, board, care, nursing, and home furnished decedent at his special instance and request, of which reasonable and agreed value was sum of \$6,000, is sufficient to form basis of action on contract or action for reasonable value of services performed.

7. Husband and wife ⇨210(1)—Action on rejected claim for room and care furnished decedent, not claimant's husband, held properly brought in name of wife alone, where concerning earnings from wife's separate property.

Action on rejected claim for room, care, and nursing of deceased, not claimant's husband, *held* properly brought in name of wife alone as concerns earnings from her separate property, where residence on which deceased agreed to discharge mortgage was her property received from first husband.

8. Husband and wife ⇨208—Joinder of husband held not required in wife's action to recover for care of deceased, even if earnings were not derived from separate property (Code Civ. Proc. § 370, as amended by St. 1921, p. 102).

Failure to join husband in wife's action on rejected claim for room, care, and nursing furnished deceased *held* not fatal, though action should be construed as one to recover wife's earnings from other sources than her separate

property under Code Civ. Proc. § 370, as amended by St. 1921, p. 102.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Suit by Flora M. Caldwell against Henry E. Weiner, as executor of the estate of Henry C. Weiner, deceased. Judgment for defendant, and plaintiff appeals. Reversed.

N. B. Nelson, of Los Angeles, for appellant.

Redwine & Redwine and H. G. Redwine, all of Los Angeles, for respondent.

McLUCAS, Justice pro tem. Plaintiff appeals from a judgment for defendant in a suit brought on a rejected claim filed against the estate of the deceased, Henry C. Weiner.

The complaint alleges:

"That on or about the month of November, 1919, at Los Angeles, Cal., the plaintiff herein and Henry C. Weiner, now deceased, entered into an agreement whereby this plaintiff was to furnish said decedent Henry C. Weiner, with a home during his lifetime, including room, such meals as he should desire or request, to care and nurse him when he was ill or indisposed, and to take him into her home and treat him as one of her family, and as compensation therefor said decedent, Henry C. Weiner, promised and agreed to pay this plaintiff the sum of \$25 per month for his room rent, and, in addition thereto, promised and agreed to pay this plaintiff the amount of a mortgage then upon her home, namely, a mortgage in the sum of \$6,000, as soon as he should sell a certain piece and parcel of land then owned by him, and which was located near the city of Long Beach, county of Los Angeles, state of California; that immediately upon the making of said agreement the said decedent, Henry C. Weiner, came to plaintiff's home to live and make his home, and that he resided with plaintiff and her family continuously up to the time of his death, excepting therefrom short period of time when he made occasional visits out of the city of Los Angeles; that during all of the said time that said decedent lived with plaintiff and her family this plaintiff and her family provided a home for said decedent, and treated him in all respects as one of her family, furnished him with room, such meals as he requested or desired, did some of his laundry, nursed and cared for him while he was ill or indisposed, and in all things looked after his welfare and comfort at all times, to the best of her ability; that this plaintiff has fully performed all of the conditions of said contract on her part to be performed; that on or about the month of March, 1922, said decedent, Henry C. Weiner, sold the said parcel of land owned by him in or near the city of Long Beach; that said sum of \$6,000, nor any part thereof, has not been paid."

The answer denies the foregoing alleged agreement, except it is alleged by defendant that "Henry C. Weiner did promise and agree to pay to plaintiff the sum of \$25 per month, and no other sum or amount, for the rent of a room in plaintiff's residence, and for no other purpose."

The court found the following facts:

"That it is not true that on or about the month of November, 1919, or at any other time, at Los Angeles, Cal., or elsewhere, the plaintiff and Henry C. Weiner, now deceased, entered into an agreement whereby the plaintiff was to furnish said Henry C. Weiner with a home during his lifetime, including room, such meals as he should desire or request, to care and nurse him when he was ill or indisposed, and to take him into her home and treat him as one of plaintiff's family; and that it is not true that said Henry C. Weiner promised and agreed to pay the plaintiff the amount of a mortgage then upon her home in the sum of \$6,000, or any other sum, as soon as he should sell a certain parcel of land owned by him, and which was located near the city of Long Beach, Cal., or at any other time; that it is not true that said Henry C. Weiner ever at any time promised and agreed to pay plaintiff the said sum of \$6,000, or any other sum, at any time or in any manner, except the sum of \$25 a month for his room rent, and that the only promise which said deceased made to pay plaintiff any sum of money was to pay her the sum of \$25 per month for his room rent, and this sum was paid by him to plaintiff; and that all the averments and allegations of paragraph No. I of the complaint herein are untrue; that all the allegations and denials of the answer herein are true, and all the allegations of the complaint herein are untrue."

Appellant assigns as error the insufficiency of the evidence to justify the decision of the court as to the above findings. The only testimony offered by the respondent was that of a physician, who testified that he had been intimately acquainted with the deceased for about 12 years, and saw him practically every day; that whenever the occasion required medical counsel the decedent sought it from him; that during the last 3 years of decedent's life he was ill on only two occasions; once from a sunburn that required no other treatment than being sent home, where he was confined to his bed for about a week, and one other time for an acute attack of indigestion requiring but one treatment; that these were the only occasions in the period of 10 or 12 years when decedent needed medical advice. In addition to this testimony, respondent offered the will of the decedent, in which the decedent made bequests to appellant as follows:

"I give and bequeath to my friend Mrs. G. B. Caldwell of Los Angeles one loose diamond contained in my three stone diamond ring now worn by me, also all my picture etchings paintings in the room occupied by me. * * * All my clothing and other personal effects I give and bequeath to Mrs. G. B. Caldwell to be distributed to charity as she sees fit."

Respondent further introduced the inventory and appraisal of the decedent's estate, showing that decedent left an estate of the appraised value of \$28,297.39.

Appellant offered the testimony of four witnesses. Appellant's daughter Wilma Faust, testified to a conversation held in December,

1919, between appellant and decedent, as follows:

"A. Uncle Harry (the decedent) came out to the house—which is the name of Mr. Weiner—and he seemed very much agitated. As soon as he came in the house he said that his rent had been raised again; it had been raised several times since he had lived there, and he said that—we all three discussed the general increase in living at the time, and everything like that. Finally he said that he didn't feel that he could afford to pay this increase in the rent, and he said that—after a great deal of discussion he finally asked my mother if he could come there to live. He told her that he wanted a home; he wanted to feel that he never would have to move again; that he had lived in a hotel all his life, practically all his life; he had been married, even then his wife was an invalid; he had to live in hotels, and he said that he wanted a home, and the home privileges, and he wanted to feel that he had a family, because he was practically alone out here except for his friends, and he said that he had felt that he couldn't pay more than \$25 a month for his room, but he wanted other privileges; he wanted to take his breakfast there always, and what other meals that he cared for, and he wanted my mother to take care of him, and he just simply wanted to be a member of the family; and in consideration of that, when he sold his property in Long Beach, he would then pay off her mortgage of \$6,000. He felt that that would do her more good in a lump sum; and he couldn't pay any more than \$25 at that time; that was simply for his room, and he was going to take care of the mortgage at the time he sold his property. Q. Did he state why he couldn't pay more than \$25? A. Well, he either wasn't working at the time, or he had what he considered a very inferior position. Owing to the country going dry he had lost a very good position and had to take a very minor position at a very small salary, but he didn't even have that position at the time. I don't remember that exactly. Q. What did your mother say to that? A. She told him that wouldn't make any difference. He also said that he might not be able to pay \$25 a month, might not be able to pay it every month, although he did. Mother said that wouldn't make any difference even if he couldn't pay it; he could always have his home there; that was the understanding, that was to be his home."

The witness further testified that the decedent soon thereafter moved into appellant's home and occupied the best room in the house, paying only \$25 per month for room rent, while others were paying \$35 and \$40 per month; that appellant always gave decedent his breakfast, and frequently his dinner; that he was a member of the family; that the appellant took care of his mending, and nursed him when he was ill, once when he was bedfast for ten days or two weeks, and on two or three other occasions when he suffered from heart attacks. The witness further testified that appellant left for six months, but arranged for another lady and daughter to live in the house without paying rent and keep the home open for decedent; that they took care of decedent, but did not

give him his meals. The witness also testified that at different times she heard the decedent say to appellant, "Well, when I sell my land I am going to pay off your mortgage."

Nell Pryn, a witness called on behalf of plaintiff, testified that decedent told her that appellant was giving him a good home; that he was paying only \$25 per month for room rent; that he had sold his property, and said, referring to appellant, "I am going to pay off her mortgage when I get my next payment;" and "Well, I am going to pay the mortgage off, and I am going to give her \$6,000 to pay the mortgage off, as I have agreed to."

Mrs. Dora Koonz testified that she met decedent, and the following conversation was held:

"And then I says, 'Well, how is everything anyhow?' 'Well,' he says, 'I am very happy, Mr. and Mrs. Caldwell are both lovely,' he said, 'Flo and her husband are very lovely to me. I am having a wonderful home. The first time I have had a home since my wife died.' I says, 'Do you think there is any chance of the mortgage being paid off?' I was really interested by my friend's standpoint of view, and he said, 'Well, I am figuring now on the sale of this property,' which I knew he had, and he said, 'As soon as I get that sale through, I am going to do the square thing.'"

J. A. Rominger testified as a witness for appellant that the decedent had listed his property with him for sale, and "he expressed at that time the reason that he wanted to sell, the agreement he had made with Mrs. Caldwell relative to paying off the mortgage that he had agreed to pay for her, and said that he would be willing to reduce the price of the land, if I could make a ready sale for him for cash." Appellant also introduced in evidence a letter from decedent, addressed to herself and family, the general tenor of which tended to show that decedent regarded himself as a member of appellant's family. It further appears that in March, 1922, the decedent sold said parcel of land; that the said sum of \$6,000, nor any part thereof, has not been paid; that the said Henry C. Weiner died about the 12th day of December, 1922; that on the 21st day of February, 1923, respondent was appointed executor of the last will and testament of the decedent, and letters testamentary were thereupon issued to him; that the appellant, pursuant to respondent's notice to creditors, presented to respondent her verified claim on October 2, 1923, upon which this action is founded, for allowance; that said respondent, as such executor, rejected said claim in its entirety on the 10th day of October, 1923.

[1-3] It is readily apparent from the foregoing review of the evidence that appellant's claim that the evidence is insufficient to justify the findings must be sustained. Respondent's evidence was negative and indirect in character, tending to prove that the

decedent had not been ill while living in the home of appellant, therefore not requiring any care; also that decedent had left a will in which he had made certain bequests to appellant. On the other hand, the testimony offered by appellant was positive and direct, and tended to prove the alleged agreement between decedent and appellant, as well as the admission of such agreement by the decedent before several witnesses. Evidently the trial court did not believe appellant's witnesses. This is not sufficient where the testimony is uncontradicted. It is the general rule that the uncontradicted and unimpeached testimony of a witness tending to establish an issuable fact in the case may not be arbitrarily disregarded by the trial court; that, to the contrary, such testimony must be accepted as proof of the fact which it is offered to establish, unless it can be said that such testimony is so inherently incredible and improbable as to amount to no evidence at all. *Shepard v. Shepard*, 65 Cal. App. 310, 223 P. 1012; *Stewart v. Silva*, 192 Cal. 405, 221 P. 191; *Anso v. Anso*, 72 Cal. App. 513, 237 P. 814; *Sun-Maid Raisin Growers v. Papazian*, 74 Cal. App. 231, 240 P. 47; 10 Cal. Jur. p. 1143, § 362. We do not find anything in the record indicating that the testimony of appellant's witnesses which we have set forth is inherently improbable, or that the surrounding circumstances of the case, as disclosed by the record, were such as to render any of the testimony incredible or unworthy of belief. Respondent did not attempt to impeach or contradict the testimony of appellant's witnesses, except as to periods of illness and the bequests given to appellant. The fact that appellant was remembered in the will of decedent does not show that it was the intention of the decedent that such bequest was in lieu of any debt which may have been due from the decedent to appellant. Such intention must be gathered from the will itself. Nothing in the will showed any such intention. *White v. Deering*, 38 Cal. App. 433, 435, 177 P. 516, and cases cited.

[4-6] It is urged by respondent that the complaint sets forth a cause of action different from the one presented to the executor of the estate, in that the claim filed with the executor was based upon a quantum meruit, while the cause of action in the complaint is based upon an entirely different indebtedness, being one upon an express contract. Two causes of action are alleged in the complaint: One upon an express contract, the other upon a stated account. No evidence was introduced

to establish a stated account. The claim presented to the executor was "for and on account of room, board, care, nursing, and home furnished to said decedent during his lifetime, at his special instance and request; that the reasonable and agreed value thereof was, and is, the sum of \$6,000; that no part of which has been paid." We cannot agree with respondent's contention that the cause of action alleged in the complaint is different than that set forth in the claim. While the rule is well settled, as held in the cases cited by respondent, that a plaintiff cannot recover upon any other cause of action than the one set out in the claim which has been presented and rejected, yet the law does not require that a claim against an estate should set forth the facts upon which it is based with the precision and detail of a pleading. *Thompson v. Koeller*, 183 Cal. 476, 484, 191 P. 927; *Warder v. Hutchinson*, 69 Cal. App. 291, 231 P. 563. Further, the claim on its face showed that it was founded upon an agreement between the parties, and stated sufficient facts upon which to base either an action on the contract or one for the reasonable value of the services performed. *Warder v. Hutchinson*, supra. It is only required that the claim sufficiently indicate the nature and amount of the demand to enable the executor and judge in probate to act advisedly upon it. If the claim meets this general requirement, it is sufficient, unless it fails to meet some particular requirement of the Code. *Thompson v. Koeller*, supra; *Warder v. Hutchinson*, supra.

[7, 8] Respondent's further contention is that, if the evidence introduced establishes any cause of action, it is for the recovery of community property, which must be brought in the name of the husband of the plaintiff and not by the plaintiff. This contention cannot be sustained. The testimony clearly shows that the residence of appellant was her separate property, which she had received from her first husband. In so far as this action concerns the earnings from appellant's separate property, she alone is the proper party plaintiff. If this be construed as an action to recover the wife's earnings from other sources, she can maintain such an action without joining her husband. Code Civ. Proc. § 370, as amended in 1921 (St. 1921, p. 102).

For the reasons stated, it is ordered that the judgment be reversed.

We concur: HOUSER, J., Acting P. J.; YORK, J.

84 Cal. App. 375

(258 P.)

MORRIS v. McKESSON. (Civ. 5815.)

District Court of Appeal, First District, Division 2, California. July 7, 1927.

1. Corporations —30(1)—Officer held not entitled to rescind contract to form corporation because not appointed treasurer, where he signed by-laws appointing bank.

Vice president *held* not entitled to rescind contract to form corporation on ground he was not appointed treasurer, where contract provided he should be appointed vice president or treasurer and he signed without objections by-laws designating bank in lieu of member as treasurer.

2. Corporations —30(1)—Officer held not entitled to rescind contract to form corporation because of failure to develop business, where responsibility, if any, was his.

Vice president *held* not entitled to rescind contract to form corporation on ground new business had not been established as agreed, where failure was due to owner of leased building to complete alterations for which the vice president had greater responsibility than other party to the contract.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action for rescission of contract by James Morris against R. F. McKesson. Judgment for defendant, and plaintiff appeals. Affirmed.

Horace M. Street, of San Francisco, for appellant.

James M. Thomas, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued for the rescission of a written contract upon the ground that the consideration as to him had failed. The cause was tried before the court sitting without a jury, and resulted in findings and judgment in favor of the defendant. Plaintiff has appealed upon a typewritten record. The whole attack upon the judgment is based upon the ground that the evidence is insufficient to support it.

On May 15, 1923, the parties entered into a written contract, agreeing to form a corporation for the purpose of conducting a furniture jobbing business, together with a "chair-finishing plant." The respondent was at the time engaged in the furniture jobbing business, the good will of which he agreed to turn into the new corporation in consideration of \$5,000 in stock of the new corporation to be issued to him. This business it was agreed should be continued in the new corporation as the parties deemed advisable. The portions of the agreement of interest in this litigation read:

"In consideration of the foregoing and to promote new business and to continue the business

already started, it is understood that you are to at once cash in your securities, sufficient to invest between nine thousand (\$9,000.00) dollars and ten thousand (\$10,000.00) dollars available June 30, 1923.

"It being our purpose in mind to create and develop a chair-finishing plant, it is understood that *this new business* will come under your direct supervision and also to help promote the sale of chairs or any other part of the business.

"It is understood and agreed you are to receive the salary of \$250.00 per month for the balance of year.

"It is understood that in the new corporation I am to hold the position of president of the corporation and general manager, and that you will hold the office of secretary and treasurer or vice president and secretary, *whichever seems to be the best arrangement.*" (Emphasis ours.)

The corporation was organized in due time, and the appellant was elected one of a board of five directors; the other four having been selected by the respondent. This board met in due order and adopted by-laws and filled the corporate offices designated therein. Article 10 of these by-laws provided that a depositary should be selected in lieu of a treasurer, and this arrangement was assented to by the appellant, and the by-laws were signed by him and the other directors. Some time thereafter the appellant paid into the corporation the sum of \$9,100, for which stock was issued to him, and he continued to serve in the office of vice president and director of the corporation to which he had been elected at the original meeting. In the latter part of the year 1923 he suggested to the respondent that the agreement had provided that he should be elected treasurer, and on December 12, 1923, the respondent's counsel addressed him a letter calling attention to this fact and informing him that, if he still desired to make the change from a bank depositary to an individual treasurer, he should communicate with him so that the directors might amend the by-laws and proceed to have him appointed treasurer. No answer was made to this letter, but the appellant continued to act as before until about March 3, 1924, when, becoming dissatisfied with the financial arrangements, he gave written notice to the respondent of his intention to rescind the contract.

[1] On this appeal it is argued that the respondent did not act in good faith in failing to have the appellant elected treasurer of the company and in failing to establish the chair-finishing plant mentioned in the contract. These are the two grounds of rescission upon which the complaint was based, and the trial court in both instances found adversely to the appellant. As to the first ground urged, it will be noted that the agreement was that the appellant should hold the office of secretary and treasurer or vice president and secretary, "whichever seems to be

the best arrangement." It did not, as alleged in the complaint, provide that plaintiff should hold such office as seemed to him to be the best arrangement, but the plain meaning of the contract is that this arrangement should be made by the corporation in such manner as the parties to the contract should deem best. At the first meeting of the board of directors, by-laws were adopted in which it was provided that a bank should be selected as a depository in lieu of a member of the corporation being selected as treasurer. This arrangement was assented to by appellant, who signed the by-laws, concurred in the selection of the bank as a depository, and concurred in the selection of himself for the office of vice president. No complaint was made by the appellant to this arrangement until he became dissatisfied with the contract some six months later. In support of his appeal, the appellant gives as his only explanation of his conduct the excuse that he was slightly hard of hearing and did not know all that occurred at the directors' meeting. He does not, however, claim any defect of eyesight, nor make any explanation of his signature to the by-laws which eliminated the office of treasurer, nor does he explain why, after this arrangement had been made, he continued to act without objection in the office of director and vice president and paid into the corporation the sum of \$9,100 for corporate stock, which was the full consideration to pass from him under the terms of the contract.

[2] The second ground for rescission urged is that the respondent did not act in good faith in respect to the establishment of a chair-finishing plant as a part of the activities of the corporation. The contract provided that this should be taken on as new business of the corporation in connection with the old business theretofore conducted by the respondent, and that this new business should come under the direct supervision and promotion of the appellant. Throughout the appeal the appellant insists that the establishment and promotion of this new business was a duty imposed upon the respondent, and the failure of the respondent to establish this new business prior to September 1, 1923, is put forward as a breach of the contract on respondent's part. The explanation of the failure to establish this new business is that the corporation had entered into a written lease with the owner of a building which was to be altered to suit the purposes of the corporation. The alterations in this building were delayed through no fault of the corporation, and possession for the purpose of conducting the chair-finishing business was not delivered to the corporation until March, 1924. All the testimony shows unmistakably that this delay was wholly the fault of the owner of the building, and that, if either

party to the agreement is to be charged with culpability in permitting delay in the completion of the building or in failing to establish a chair-finishing business, that charge rests with the appellant, upon whom the duty was imposed under the contract.

The argument is also made that, because of respondent's failure to have the appellant elected treasurer of the corporation and because of his bad faith in failing to establish the chair-finishing business, the appellant's stock in the corporation became valueless. In support of this contention no evidence is cited, and we have been unable to find any in the record. It is said the trial court found that the stock did not have any market value, but this statement is not supported by the record. By inserting a quotation mark in the finding, which does not appear in the original transcript, the appellant has made it appear that the trial court had found that this stock did not have any market value, whereas the original finding in the transcript discloses that the trial court found to the contrary.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

84 Cal. App. 287

CROWE GLASS CO. et al. v. INDUSTRIAL ACC. COMMISSION et al. (Civ. 5857.) *

District Court of Appeal, First District, Division 1, California. July 1, 1927.

Hearing Denied by Supreme Court Aug. 29, 1927.

1. Master and servant § 416—Only one rehearing can be had before Industrial Accident Commission (Workmen's Compensation Act, §§ 64, 65, 67).

Workmen's Compensation Act (St. 1917, p. 832), §§ 64, 65, 67, providing that persons aggrieved by final award of commission may apply for rehearing by Industrial Accident Commission, and providing for appeal to courts from decision on rehearing, contemplates but one rehearing, after which party aggrieved must look to appellate courts for review of proceedings.

2. Master and servant § 416—Second rehearing granted by Industrial Accident Commission after denying award on first rehearing held functus officio (Workmen's Compensation Act, § 64, 65, 67).

Under Workmen's Compensation Act (St. 1917, p. 832), §§ 64, 65, 67, providing that persons aggrieved by final award of Industrial Accident Commission may apply for rehearing by commission, and providing for appeal to courts from decision on rehearing, act of commission in granting second rehearing after denying award of compensation on first rehearing was functus officio, as its jurisdiction was exhausted.

3. Master and servant $\Rightarrow$ 416—Person "may apply" for rehearing in compensation case in accordance with statute (Compensation Act, § 64).

Under Workmen's Compensation Act (St. 1917, p. 832), § 64, providing that person aggrieved by award of Industrial Accident Commission "may apply" for rehearing, words "may apply" are used in procedural sense expressing existence of privilege to be exercised in accordance with act, and after decision on rehearing jurisdiction of commission is exhausted; there being no question of continuing jurisdiction under section 20 (d).

Proceedings under the Workmen's Compensation Act by Carrie Graham for the death of Fred Graham, her husband, claimant, opposed by the Crowe Glass Company, employer, and the Maryland Casualty Company, insurance carrier. From an order of the Industrial Accident Commission granting an award after a second rehearing, employer and insurance carrier bring certiorari. Award annulled.

R. P. Wisecarver, of San Francisco, for petitioners.

G. C. Faulkner and Warren H. Pillsbury, both of San Francisco, for respondents.

TYLER, P. J. Certiorari to review an award of the Industrial Accident Commission. On the 15th day of February, 1926, respondent Carrie Graham filed with the said commission an application for adjustment of claim under the Compensation Act, in which it was alleged that one Fred Graham, her husband, sustained an injury due to straining himself by lifting a heavy crate on Thursday, November 19, 1925, at which time he was employed by Crowe Glass Company. She charged that by reason thereof he died on November 22, 1925, as the aftermath of an operation to cure a rupture. Petitioners herein, as employer and insurance carrier, respectively, contested the application on the ground that the deceased employee had never made any claim of injury, and that in fact his rupture, or hernia, was not caused by the employment, but had, on the contrary, been one of years' standing. Thereafter hearings were regularly had before the commission, at which time testimony of the attending physician and others was taken. It is claimed by petitioners that this evidence showed that deceased had suffered from a hernia for a long time; that on Monday, November 16, 1925, prior to the date of the alleged injury, he was sick from some intestinal trouble which caused vomiting, and which condition continued through the following day. The next day he returned to his duties and worked throughout that day and a part of Thursday morning, at which time he was compelled to quit on account of sickness. He made no complaint to his employer that he had received any injury at this time, but he did in-

form a coemployee that it hurt him to lift the glass cases. He was sick with his ailment for the two days following, when his condition became critical. He called in a physician, who advised an immediate operation, which was performed Saturday, November 20, 1925. The intestines were found to have become strangulated in a large hernia of long standing. The condition had not reached the gangrene stage, but for some unknown reason Graham died on Sunday, November 21st. Thereafter, on April 27, 1926, a hearing was had upon the widow's application, and the commission made and entered its findings of fact, in which it was determined that the evidence did not establish that the death complained of was caused by an injury arising out of the employment, and petitioners' application for relief was denied. Thereafter, and within 20 days, the respondent, Carrie Graham, filed a petition for a rehearing. Petitioners in their answer thereto set forth that the application failed to state any reason for the granting of the same, whereupon a supplemental petition was filed, in which the history of the case was reviewed and request made for an opportunity to show that the old hernia from which deceased suffered had been aggravated by the alleged injury. Subsequently, on June 16th, the commission entered its order granting the application for a rehearing. Hearings were had thereon and further testimony was taken. It appears from medical evidence that deceased had a very large hernia with protrusion of the intestines down into the scrotum; that he suffered from this hernia for a long period, and had many times previously reduced it himself; that on the present occasion he was unable to do so, with result that it became strangulated, necessitating the operation. There was a conflict in the testimony as to whether his employment had any effect upon his condition or not, as it was possible for a strangulation to occur at any time from his condition. It was testified that lifting might crowd the intestines down through the hernia, which might cause an acute condition, and one physician seemed to be of the opinion that this was probably what had happened. Another physician reviewed the evidence and stated that he was of the opinion that the case was one of continual development of intestinal involvement, beginning with the illness of Monday or Tuesday, and that the development of the pathology during the week was simply a culmination of the pathological condition that was chronic, with a strong probability that in addition to the hernia there was some other intestinal involvement of a chronic nature, which was the real cause of death rather than the shock of the hernia operation, as the rapid development of high temperature immediately after the operation could not very well be explained as result-

ing from shock due to the operation. Thereafter, on September 25, 1926, the commission made and entered its decision after rehearing reading as follows:

"It is ordered as, and for the decision after rehearing that the findings and award filed herein on April 27th, 1926, be and they are hereby affirmed."

Both under the original and by this decision petitioners were relieved of any and all liability upon the ground that no injury was shown to have occurred in the course of the employment, or that any such injury caused the disability or death of the employee. Subsequently, on October 14, 1926, the applicant, Carrie Graham, filed a second petition for rehearing, or a petition for rehearing of the decision on rehearing. The matters contained in this petition were a reiteration of the previous facts that had been considered by the commission on its hearing and rehearing. Petitioners herein replied claiming that the case had been finally decided on its merits and prayed that it be summarily denied. On December 3, 1926, the Commission made its order granting a second rehearing. Thereafter, on February 9, 1927, without any further hearing in the matter, the commission reversed its previous original decision and its decision upon rehearing and ordered as and for the decision after the second rehearing:

"That the findings and award made and filed on April 27, 1926, be and the same are hereby rescinded and annulled, and that the following findings and award be and hereby are made and filed herein."

Under these findings the commission determined that deceased was injured November 19, 1926, by having a left inguinal hernia of years' standing subjected to sufficient strain to cause the said hernia to protrude in such manner as not to be reducible, causing strangulation which required an operation, from which death ensued. The commission then entered an award for \$5,150 death benefit, and medical expenses in the additional sum of \$137.75. It is not here contended that the facts are insufficient to justify the award, as no such issue is here presented, the sole question in issue being one of law only. It is petitioners' contention that the Industrial Accident Commission, in entering its order granting a second rehearing to the applicant for compensation, after the original hearing and decision on rehearing had been decided adversely to her, acted without and in excess of its powers; that the commission had no power or authority or jurisdiction to grant a second petition for rehearing; that under and pursuant to the provisions of the Workmen's Compensation Act, the commission is only allowed the right to grant one rehearing, and that after decision upon rehearing any party affected not only may, but must, apply to the appellate

courts for a writ of review. In other words, petitioners claim that the only procedure provided for by the Compensation Act after a decision on rehearing is, if a party feels aggrieved, to apply for a writ of review either to the District Court of Appeal or to the Supreme Court, as the commission cannot sit as a reviewing court on its own final decision. Respondent, on the other hand, contends that as the statute does not expressly prohibit a second application, the commission may entertain one; that the word "may" as applied to the application for certiorari by the appellate courts after decision on rehearing, does not mean "must" in all cases. This issue presents the question of the proper construction to be given to the provisions of the act in question upon this subject. The sections of the act with regard to procedure before the commission on rehearings and in petitions to appellate courts for writs of review are to be found in sections 64, 65, and 67 of the Compensation Act (St. 1917, p. 832). Section 64 provides, in substance, that any person aggrieved by the final award of the commission may apply for a rehearing; that only those questions are raised on rehearing which are set forth and objected to in the petition for rehearing. The section further provides that no cause of action arising out of such original final order, decision, or award shall accrue in any court to any person until and unless such person shall have made application for such rehearing and such application has been granted or denied. The section declares that on such rehearing testimony may or may not be taken; that the commission shall reconsider all the facts and may abrogate, change or modify the original award. Also that:

"An order, decision or award made after such hearing abrogating, changing or modifying the original order, decision or award shall have the same force and effect as an original order, decision or award."

Section 65 provides that the petition for rehearing must be filed within 20 days, and sets forth the grounds upon which it may be based. Section 67 provides:

"Within thirty days after the application for a rehearing is denied, or, if the application is granted, within 30 days after the rendition of the decision on the rehearing, any party affected thereby may apply to the Supreme Court of the state, or to the District Court of Appeal of the appellate district in which such person resides, for a writ of certiorari or review, * * * for the purpose of having the lawfulness of the original order, rule, regulation, decision or award, or the order, rule, regulation, decision or award on rehearing inquired into and determined."

It also provides for the grounds upon which the petition may be made and for the procedure on appeal.

[1] It seems plain to us that the provisions in question contemplate but one rehearing,

and that thereafter, if a party feels aggrieved, he must apply to the appellate courts. If it could be held that an applicant is entitled to more than one rehearing it would follow that the employer and insurance carrier would likewise be so entitled, as the act would have to be given a uniform operation. If such right existed, an employer or insurance carrier, if they felt aggrieved upon a decision on rehearing, could again invoke the commission's jurisdiction to grant a second rehearing and so on indefinitely. On the other hand, where an award had been refused an applicant and a rehearing denied, he could again apply for a rehearing, which could be granted or denied and so on ad infinitum. Under such a practice there would be no end to the litigation, as no time, however great, would operate to bar successive applications provided only that they were applied for in seasonable time. Such a construction would lead to legal chaos. That this condition might be brought about under the claimed construction of respondent demonstrates its unsoundness. Then, again, the construction contended for would defeat the very purposes of the act itself, which contemplates a speedy determination of controversies involved thereunder, and not a vacillating attitude on the part of the commission. We do not consider a further discussion necessary. The question in our opinion has been definitely determined by our Supreme Court. In *Harlan v. Ind. Acc. Com.*, 194 Cal. 352, 228 P. 654, the issue was whether the employer was properly before the Supreme Court, because he had never applied for a rehearing from a decision on rehearing. The original award was entered in his favor and the applicant for compensation petitioned for a rehearing, which was granted, and the decision on rehearing was then made in favor of the applicant for compensation. Within 30 days thereafter the employer applied to the Supreme Court for a writ of review, which was granted. The commission there contended that the court could not entertain the petition for writ of review because of the fact that the employer had never applied for a rehearing with the commission. The learned author of the opinion, in speaking for the court, reviews the provisions of the act and states:

"Only one other question, which is raised by respondent, remains for consideration, to wit, whether petitioner, * * * has lost its right to apply to this court for a writ of review for the reason that it did not apply to respondent Industrial Accident Commission for hearing after rehearing once granted. We think the act furnishes no substantial grounds for the claim

that a second petition for a rehearing is required before an application may be made to this court for a writ of review. The act contemplates a speedy determination of questions involving the right to compensation and the Commission is given broad powers to the end that long delays may be avoided. *It is the policy of the law in general practice to consider but one application for a rehearing and there is less justification for an exception to this rule in proceedings that are somewhat summary in character, as the act under consideration undoubtedly is*" (italics ours), citing *Federal Mut. Liab. Ins. Co. v. Ind. Acc. Comm.*, 190 Cal. 97, 210 P. 628; *Carroll v. Ind. Com. of Colo.*, 69 Colo. 473, 195 P. 1097, 19 A. L. R. 107; *Schrewe v. N. Y. Cent. Ry. Co.*, 192 Mich. 170, 158 N. W. 337.

See, also, *Dorland v. Cunningham*, 66 Cal. 484, 6 P. 135. Respondent claims that what is said in the opinion just quoted from is dicta as the precise question here presented was not in issue in that case. The principle was directly involved as the decision there reached was based entirely upon it.

[2, 3] We are cited by respondents to the action of the Supreme Court in denying a hearing in the recent case of *Van Bilderbeek v. I. A. C.*, S. F. 11532, as opposing this view. A discussion of the facts of that case would answer no useful purpose. It has no relevancy to the instant question. We conclude, therefore, that the act of the commission in granting a second rehearing was functus officio as its jurisdiction was exhausted. The act in question, properly construed, contemplates but one rehearing and the party aggrieved must then look to the appellate courts for a review of the proceeding. The employment in the statute of the words "may apply" being used in a procedural sense, mean, therefore, that when a litigant elects to further proceed with his case after decision on rehearing, he must apply in accordance with the provisions of the act. The words are employed to express the existence of a privilege that may be exercised in the discretion of the applicant and this is the only remedy that a party to such a proceeding has after decision on rehearing, the jurisdiction of the commission being exhausted upon the final disposition of that hearing, there being no question involved concerning the continuing jurisdiction of the commission under section 20 (d) of the Compensation Act, and here it is conceded there is none, the employee having died prior to the time the application for benefits was made.

From what we have said it follows that the award must be and it is hereby annulled.

We concur: KNIGHT, J.; CASHIN, J.

84 Cal. App. 403

LOS ANGELES COUNTY v. RICKERT et al.
(Civ. 5054.)

District Court of Appeal, Second District, Division 1, California. July 11, 1927.

1. Bail $\S$ 74(1)—Bail under indictment after demurrer sustained without leave to amend and resubmission to grand jury held not exonerated, but answerable for defendant's appearance in consolidated proceedings under both indictments (Pen. Code, §§ 997, 998, 1008-1010, 1287).

Bail given pursuant to Pen. Code, § 1287, was not exonerated, but was answerable for appearance of defendant, where demurrer to first indictment under which bail was given was sustained without leave to amend, and the case resubmitted to the grand jury, which returned a new indictment solely on same facts, and cases under both indictments were consolidated with consent of defendant, but without sureties' knowledge, under sections 997, 998, 1008-1010, relating to resubmission to grand jury.

2. Indictment and information $\S$ 16—Proceedings are not barred after demurrer to indictment is sustained and no amendment made, but court may resubmit case to grand jury (Pen. Code, § 1008).

Further proceedings are not barred for offense if after demurrer to indictment is sustained no amendment thereto is made, under Pen. Code, § 1008, but court may resubmit case to grand jury, which may return valid indictment based solely on same facts.

3. Criminal law $\S$ 620(1)—Proceedings under indictment to which demurrer was sustained, and under indictment after resubmission to grand jury, may be consolidated.

Proceedings under indictment to which demurrer was sustained without leave to amend and under indictment returned on same facts after resubmission to grand jury may be consolidated.

4. Bail $\S$ 57—Bail bond need not state that demurrer to indictment was sustained and case resubmitted.

That bail bond did not set forth that demurrer to indictment had been sustained and case resubmitted to the grand jury is not defense on bond; it not being essential that bond set forth the circumstances under which it is taken.

5. Bail $\S$ 58—Bail bond need not describe offense with particularity of indictment.

Bail bond need not describe the offense with the same particularity required of the indictment.

6. Bail $\S$ 75—Sureties on bail bond undertaking to hold defendant amenable to court were not released by defendant's appearance for arraignment under new indictment after resubmission of case to grand jury.

Appearance of defendant for arraignment and plea under new indictment returned after resubmission of case on same facts to grand jury did not release sureties on bail bond given

after demurrer to original indictment had been sustained, where the bond undertaking was that defendant should at all times hold himself amenable to orders of the court.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action on a bail bond by the County of Los Angeles against Evelyn Rickert and another. Judgment for plaintiff, and the defendants appeal. Affirmed.

Woolwine & Geisler, Leonard M. Comegys, and Fred W. Shelley, all of Los Angeles, for appellants.

Edward T. Bishop, County Counsel, Roy W. Dowds and Arthur T. George, Deputies: County Counsel, all of Los Angeles, for respondent.

McLUCAS, Justice pro tem. Action on a bail bond. Defendants appeal on the judgment roll alone.

Appellants concede that all the facts are contained in the findings of the trial court. According to the findings, there was filed on December 9, 1921, in the superior court of the state of California, in and for the county of Los Angeles, an indictment entitled, "People of the State of California v. W. S. Kirby," being case No. 17481, wherein the defendant was charged with the crime of bribery. On said day the court admitted said defendant to bail in the sum of \$10,000, and ordered that he be committed to the custody of the sheriff of Los Angeles county until he give such bail. On December 10th the defendant was duly arraigned on said charge. On the 13th day of December a demurrer to said indictment was duly filed, and on December 14th said demurrer was sustained. The court ordered the said cause to be resubmitted to the grand jury of the county of Los Angeles, and that the defendant be remanded to the custody of the sheriff. Thereafter, on the 17th day of December, the defendants above named made and executed the bail bond sued upon herein. On said date the said bail bond was duly approved by the court and filed with the county clerk. By reason of the execution and filing of said bail bond, defendant Kirby was released from the custody of the sheriff on December 17th. Thereafter, on December 27th, there was filed in said court an indictment No. 17569, wherein the defendant Kirby was charged with the same offense set forth in said indictment No. 17481, to-wit, the crime of bribery. On January 4, 1922, said defendant Kirby being present in court, said court, with the consent of said defendant Kirby, made an order consolidating said case No. 17481 and said case No. 17569, and ordered that said bail bond theretofore given in case No. 17481 should stand as the bail bond in the consolidated case No. 17569.

Said case was duly and regularly continued to January 16, 1922. Upon said day defendant Kirby was duly arraigned in said court upon the said indictment in case No. 17569, and the trial thereon was set down for hearing on May 1, 1922. On said last-named date the trial was continued to May 18th, on which date said defendant Kirby failed to render himself amenable to the order and process of said court. Whereupon the court ordered the forfeiture of said bond, and said forfeiture was duly entered upon the minutes of the court. The defendants herein have failed and refused to pay to the county of Los Angeles the said sum of \$10,000, or any part thereof. The bail bond executed by defendants was executed and filed by the defendants in case No. 17481 after the demurrer to the indictment in said case had been sustained, and before the new indictment, No. 17569, had been returned by the grand jury. After said order of consolidation no further proceedings were had under case No. 17481, and no indictment other than the said indictment No. 17569 was ever returned against Kirby after the demurrer was sustained to said indictment No. 17481. The trial court also found that said Kirby was being tried when he absented himself from court without leave on said new indictment No. 17569, with which case No. 17481 had been consolidated as aforesaid. Neither of the defendants herein knew of or consented to any order or proceeding in either case No. 17481 or case No. 17569 other than the approval of said bail bond and the release of defendant Kirby on said bond. The trial court did not at the time it sustained the demurrer to said indictment No. 17481, nor at any time thereafter, allow an amendment thereto. Said indictment No. 17569 was based solely on the same state of facts as indictment No. 17481. The trial court rendered judgment for plaintiff in the sum of \$10,000 and costs.

[1] Appellants urge the following grounds for reversal: (1) The court erred in overruling defendants' demurrer herein. (2) That the judgment is not sustained by the facts and is against the law. In support thereof, appellants first advance the proposition that the sustaining of the demurrer to the first indictment without allowing an amendment determined proceedings and constituted a bar to further prosecution for said offense and effected an exoneration of bail. The only ruling of the trial court on the demurrer to that indictment was that the demurrer be sustained, and the court then and there ordered the said cause to be resubmitted to the grand jury. In our opinion the following provisions of the Penal Code are determinative of the foregoing proposition (*italics ours*):

"Sec. 1008. An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. Such amendment may be made

at any time thereafter, in the discretion of the court where it can be done without prejudice to the substantial rights of the defendant. An indictment cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination. If a demurrer is sustained and an amendment is not allowed, or if allowed, is not made, within such reasonable time as the court may fix, the court shall give a judgment of dismissal, which shall be a bar to another prosecution for the same offense. The defendant shall thereupon be discharged, *unless the court directs the case to be submitted to the same or another grand jury, or directs a new information to be filed*; provided, that after such order or resubmission, the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases.

"Sec. 1009. If the court does not permit the information to be amended, nor direct that an information be filed, *or that the case be resubmitted*, as provided in the preceding section, the defendant, if in custody, must be discharged, or if admitted to bail, his bail is exonerated, or if he has deposited money instead of bail, the money must be refunded to him.

"Sec. 1010. *If the court directs that the case be resubmitted*, the same proceedings must be had thereon as are prescribed in sections nine hundred and ninety-seven and nine hundred and ninety-eight.

"Sec. 997. The motion [to set aside indictment] must be heard at the time it is made, unless for cause the court postpones the hearing to another time. If the motion is denied, the defendant must immediately answer the indictment or information, either by demurring or pleading thereto. If the motion is granted, the court must order that the defendant, if in custody, be discharged therefrom; or, if admitted to bail, that his bail be exonerated; or, if he has deposited money instead of bail, that the same be refunded to him, *unless it directs that the case be resubmitted to the same or another grand jury, or that an information be filed by the district attorney*; provided, that after such order of resubmission the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases, if before indictment or information filed he has not been examined and committed by a magistrate.

"Sec. 998. *If the court directs the case to be resubmitted, or an information to be filed*, the defendant, if already in custody, must so remain, *unless he is admitted to bail; or, if already admitted to bail, or money has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment or information*; and, unless a new indictment is found or information filed before the next grand jury of the county is discharged, the court must, on the discharge of such grand jury, make the order prescribed by the preceding section."

[2] Appellants' position is, in our opinion, untenable. Appellants claim that section 1008 of the Penal Code lays down an absolute rule that the trial judge must determine at the time if further proceedings are to be had on the original facts, as stated

(defectively) in the original indictment, and, if so, allow an amendment; otherwise further proceedings are barred for the same offense, and that the only order that the court could make thereafter was one of dismissal. In support of the foregoing, appellants rely on the following sentence appearing in section 1008 of the Penal Code:

"If a demurrer is sustained and an amendment is not allowed, or if allowed, is not made, within such reasonable time as the court may fix, the court shall give a judgment of dismissal, which shall be a bar to another prosecution for the same offense."

Apparently appellants have lost sight of the sentence immediately following, which reads:

"The defendant shall thereupon be discharged, unless the court directs the case to be submitted to the same or another grand jury, or directs a new information to be filed."

It has been held in the recent case of *Mitchell v. Superior Court* (Cal. App.) 245 P. 1109, that the foregoing should be read in one sentence, as though it were worded as follows:

"If a demurrer is sustained and an amendment is not allowed, or, if allowed, is not made, within such reasonable time as the court may fix, the court shall give a judgment of dismissal, which shall be a bar to another prosecution for the same offense, and the defendant shall thereupon be discharged, unless the court directs the case to be submitted to the same or another grand jury, or directs a new information to be filed; provided that after such order of resubmission, the defendant may be examined before a magistrate and discharged or committed by him as in other cases."

In that case the petitioner sought to obtain a writ of mandamus directing the trial court to enter a judgment of dismissal, alleging that the grand jury had returned an indictment against him; that he demurred to the indictment and the court made an order "that the demurrer be and it is hereby sustained and that the matter be submitted to the present grand jury"; that thereafter petitioner moved the trial court for an order dismissing the indictment, which was denied. The court said (page 1110):

"The record before us does not disclose what was claimed to be the defect in the first indictment filed against the petitioner. However, from the allegations of the petition, it appears that no amendment was asked or allowed. We may assume, therefore, that the defect, if any, was at least claimed to be one which went to the substantial rights of the defendant. This assumption is fortified by the terms of the order sustaining the demurrer, and which directed the case to be submitted to the grand jury. The court was therefore considering an instance where, in its judgment, a change was necessary, but which change, if made, was one of those changes which must be made with the authority first obtained from the grand jury. The court was

considering a new indictment, not an amendment. To such a change the petitioner would apply that sentence contained in the section which reads as follows: 'If a demurrer is sustained, and an amendment is not allowed, or if allowed, is not made, within such reasonable time as the court may fix, the court shall give a judgment of dismissal, which shall be a bar to another prosecution for the same offense.' That sentence, standing alone, is limited to amendments, and not to new indictments, and is not helpful under the facts of this case. However, we think that the remaining portion must also be applied. It is as follows: 'The defendant shall thereupon be discharged, unless the court directs the case to be submitted to the same or another grand jury, or directs a new information to be filed; provided, that after such order of resubmission the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases.' The whole section must be so interpreted as to give some force and effect, if possible, to each and every clause therein contained. The very purpose of the amendments to the section was to prevent miscarriage of justice—not to create them. The section clearly provides that in a proper case it will be the duty of the trial court to direct the case to be submitted to the same or another grand jury, or to direct a new information to be filed. The contention made by the petitioner will give no force or effect whatsoever to that part of the section just quoted."

The writ was denied. It has been squarely decided in the case of *Copeland v. Superior Court*, 62 Cal. App. 316, 217 P. 573, that a criminal prosecution "is not at an end," under Penal Code, § 1008, when the court rules, "Demurrer to indictment sustained and case ordered resubmitted to the grand jury;" and that a new indictment on the same facts for the same offense is valid. The court said (page 319 [217 P. 574]):

"Indeed, the meaning of the language of the Code section is so clear that it should need no interpretation. It is equally apparent that the discretion and jurisdiction of the superior court does not end with determining whether or not there shall be any further prosecution; the mode of such further prosecution is also indisputably a matter for the court's decision. * * * It has been held that the court may delegate the choice of any one of the modes of prosecution provided in section 1008 of the Penal Code to the district attorney. *Matter of Application of June*, 30 Cal. App. 767, 159 P. 452. This was the effect of the order made in the present instance. By directing that the case be 'resubmitted to the grand jury' the court determined that there should be further action on the part of the people by way of presentation of the matter looking toward an indictment, but permitted the district attorney to elect whether to resubmit the matter to the grand jury which had voted the first indictment or to another grand jury. This the *June Case* holds the trial court had a right to do."

In *People v. Follette*, 74 Cal. App. 178, 240 P. 502, the court said, at page 185 (240 P. 505):

"As to the power of the grand jury to return a second indictment against a defendant for the same offense charged in the first, the rule is stated in *Corpus Juris* as follows: 'It is generally held that a grand jury may find a valid indictment notwithstanding another indictment is pending against accused for the same offense, and the pendency of the other indictment, where there has been no conviction or jeopardy thereon, is not ground for a plea either in abatement or in bar of the second indictment, * * * although as a rule accused can be tried or put in jeopardy only on one. It has been so held, even though defendant has been arraigned and a plea of not guilty entered on the first indictment.' 31 C. J. p. 598. Numerous authorities are cited by the author of the above work in support of this rule, and they appear generally to sustain the text."

[3] Appellants' second proposition is that, the original indictment being out and "the case at an end," no valid order of consolidation could be made. Having seen from the foregoing authorities that the case was not at an end when the court "ordered said case to be resubmitted to the grand jury," we believe the order of consolidation was valid, and that defendants were thereafter bound as sureties on the original bail bond. Section 998 of the Penal Code provides that if the court directs the case to be resubmitted, the defendant, if already in custody, must so remain, unless he is admitted to bail. In the case at bar, defendant was in custody when the court ordered the case to be resubmitted on December 14th, and he was admitted to bail on December 17th, after said order was made. The bond in case No. 17481 recited the filing of the indictment charging the defendant Kirby with the crime of bribery, and further recited that an order of court had been made on December 19th (17th) admitting defendant to bail. The condition of the bond was that the defendant's sureties "undertake that the above named W. S. Kirby will appear and answer the charge above mentioned in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court, and, if convicted, will appear for judgment and render himself in execution thereof." Thereafter the defendant was charged with the identical offense of bribery in case No. 17569, and the cases were ordered consolidated and the defendant held under the original bond. The defendant was released from custody solely by virtue of the executing and filing of the bail bond as provided in section 998. As the case was not at an end, the second indictment was valid and a part of the same proceeding. The only purpose in admitting defendant Kirby to bail as provided in section 998 was to insure the appearance of the defendant to answer a new indictment; otherwise the defendant must be held in custody until a new indictment is returned or the grand jury fails to act.

Section 998 expressly provides that if the defendant is already admitted to bail, where the court directs the case to be resubmitted to the grand jury, the bail is answerable for the appearance of the defendant to answer a new indictment. There can be no other or different purpose in admitting defendant to bail after the case has been ordered to be resubmitted to the grand jury than to insure the appearance of the defendant to answer a new indictment. Defendant Kirby failed to appear to answer the new indictment and defendants became liable as sureties.

In view of the foregoing, we are unable to see in what manner the bond failed to comply with the statute, as contended by appellants, since the bond substantially conformed to the requirements of section 1287 of the Penal Code.

[4, 5] The fact that the preliminary recitals in the bond did not set forth all the facts, to wit, that the demurrer to the indictment referred to had been sustained, and that the case had been resubmitted to the grand jury, can be of no avail as a defense on the bond, as sufficient facts were given to identify the defendant and the action pending against him. The sureties cannot expect or require that every detail connected with the imprisonment of the defendant be set forth in the bond. The bond herein could not have designated the offense any more accurately than it did. It referred to indictment No. 17481, because that was the only indictment pending against defendant Kirby. The new indictment not having been returned and the old indictment not having been dismissed, it was a matter of record that the demurrer to that indictment had been sustained, and that the defendant was in custody to await the action of the grand jury to which the charge mentioned in said indictment No. 17481 had been referred. If the bond when executed was to refer to any indictment at all, it must of necessity have referred to indictment No. 17481, for the reason that the new indictment had not yet been returned. The authorities do not require that the bail bond shall describe the offense with the same particularity as is required of the indictment. *People v. Barnes*, 65 Cal. 16, 2 P. 493. It is not essential to the validity of a bail bond that it recite the special circumstances under which it was taken. *Corpus Juris*, p. 1003, § 244.

[6] Appellants assert that Kirby was in court and in custody when arraigned on the new indictment, and the bond became void. At no time was defendant Kirby in custody after he was released upon the bond executed by the defendants, though he did appear for arraignment under the new indictment and regularly entered his plea thereto. The appearance of the defendant before the court for arraignment and plea did not

release the sureties on the bail bond where the undertaking is that "the defendant will at all times hold himself amenable to the orders and process of the court, and, if convicted, will appear for judgment and render himself in execution thereof." 20 A. L. R. 594, note and cases cited.

For the reasons stated, the judgment is ordered affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

84 Cal. App. 472

WERNER v. BRYDEN. (Civ. 3277.)

District Court of Appeal, Third District, California. July 15, 1927.

1. New trial $\S$ 161(1)—Plaintiff, in breach of promise suit, who makes out case warranting reasonable recovery, is entitled to have damages assessed by jury.

In action for damages for breach of promise of marriage and seduction, plaintiff who makes out case, and is entitled to recover reasonable sum as damages, has constitutional right to demand that such damages be assessed by jury, as respects condition of denying new trial.

2. New trial $\S$ 161(1)—Permitting defendant to stipulate entry of judgment for plaintiff in specified sum in lieu of new trial, in breach of promise suit, held error.

In breach of promise suit, where evidence was insufficient to sustain judgment for defendant, action of court in permitting defendant to consent to entry of judgment in specified sum in lieu of new trial held error, as denying plaintiff's constitutional right to have damages assessed by jury.

3. New trial $\S$ 70—Finding that verdict for defendant, who married another, was not supported by sufficient evidence, held proper.

Conclusion of trial court that evidence was insufficient to sustain verdict for defendant, in breach of promise suit, held proper, where evidence clearly showed defendant's promise of marriage and breach thereof by marrying another.

4. Appeal and error $\S$ 165—Plaintiff's appeal from judgment for defendant, in breach of promise suit, held effective, notwithstanding defendant's consent to judgment for specified sum under court order on plaintiff's motion for new trial.

Plaintiff's appeal from judgment for defendant, in suit for breach of promise, held effective, notwithstanding court had permitted defendant, in determining plaintiff's motion for a new trial, to stipulate for entry of judgment in specified sum, and defendant had filed stipulation in accordance therewith.

Appeal from Superior Court, Yuba County; J. B. Landis, Judge.

Action by Augusta Werner against Charles J. Bryden, also called James C. Bryden. From a judgment for defendant, plaintiff appeals. Reversed.

George A. Connolly, of San Francisco, for appellant.

W. H. Carlin and W. P. Rich, both of Marysville, for respondent.

FINCH, P. J. This is an action to recover damages for breach of promise of marriage and seduction under such promise. The case was tried before a jury, which returned a verdict in favor of defendant. In due time the plaintiff moved for a new trial and the court made and entered the following order:

"The court is constrained to hold that the evidence is insufficient to justify the verdict of the jury; that plaintiff has made out a case and is entitled to recover a reasonable sum as damages; that \$1,500 is a reasonable sum; and that a new trial should be granted, unless defendant shall consent to the entry of judgment in favor of plaintiff for said sum of \$1,500.

"Accordingly it is ordered, adjudged, and decreed that, if the defendant shall, on or before March 21, 1925, file herein a written stipulation consenting to the entry of judgment in favor of plaintiff for the sum of \$1,500 (each party to pay her or his own costs thus far incurred), the motion for a new trial shall be and in such event is hereby denied; and upon the failure of defendant to file such stipulation and consent on or before said date, to wit, Saturday, March 21, 1925, then and in that event said motion for a new trial shall be and the same is hereby granted."

On the day this order was filed the defendant filed his stipulation that:

"Judgment may be forthwith entered in favor of plaintiff and against defendant in this action for the sum of \$1,500, each party to the action to pay her and his own costs incurred to date."

The plaintiff has appealed from the judgment.

[1, 2] The defense set up in the answer is that the defendant never promised to marry the plaintiff. That was his sole defense at the trial. If he made the promise, he undoubtedly broke it, because he married another woman prior to the commencement of the action. It is a necessary inference from the verdict, therefore, that the jury found that the alleged promise was not made. Having so found, of course, the jury did not determine the amount of damage suffered by the plaintiff. In the order disposing of the motion for a new trial, the court states that "the evidence is insufficient to justify the verdict," and that "plaintiff has made out a case and is entitled to recover a reasonable sum as damages." In the absence of any such statement, the facts so stated are necessarily inferred from the mere making of the conditional order. Being convinced that

substantial justice was not done by the verdict, it was the duty of the trial court to make an unconditional order granting a new trial. Having "made out a case" and being "entitled to recover a reasonable sum as damages," plaintiff had the constitutional right to demand that a jury assess such damages. The power of a trial court to make the denial of a defendant's motion for a new trial conditional upon the plaintiff's consent to a reduction in amount of an excessive verdict in his favor has long been upheld in this state. In *Adamson v. County of Los Angeles*, 52 Cal. App. 125, 131, 198 P. 52, it was held that, under the circumstances there stated, it was within the power of the trial court to make the denial of the defendant's motion for a new trial in a condemnation suit conditional upon the plaintiff's consent to increase the amount awarded the defendant for the property taken. Similar orders have been upheld in several other states. In *Eaton v. Jones*, 107 Cal. 487, 491, 40 P. 798, 800, one of the findings was "in direct conflict with the evidence and admission of defendant." The court said:

"That this was a mistake is quite apparent, and when, on the motion for a new trial, the court discovered the error, it very properly called upon defendant to consent to its correction with the alternative of granting a new trial upon a refusal."

But no case has been discovered in which an order such as that in question here has been upheld. In *Shanahan v. Boston & N. St. Ry. Co.*, 193 Mass. 412, 79 N. E. 751, the plaintiffs sued to recover damages for personal injuries. The jury returned a verdict for the defendant and the plaintiffs moved for a new trial. The court made an order "granting the motions unless on or before a certain date the defendant consented to the entry of judgment in favor of the plaintiff in the first case for \$200, and in the second for \$50." The defendant consented to the terms of the order and the plaintiffs appealed. The higher court said:

"The judicial action taken after the determination had been reached to set the verdicts aside substituted for the verdict of a jury a finding by the judge which the plaintiffs were not compelled to accept, nor could they thus be deprived of their constitutional right. * * * These cases are to be distinguished from those in which an adverse verdict having been returned the defendant asks for a new trial, and the option is given to the plaintiff upon filing a remittitur in excess of a certain sum to retain the verdict, or otherwise the motion will be granted. In such cases the question of liability has already been determined in the plaintiff's favor."

In a similar case it is said:

"By annexing a condition that defendant should pay plaintiff \$300, the trial court has made it manifest that in his opinion substantial justice was not done in the premises. We can-

not, however, agree with him as to his right to annex such a condition. It was equivalent to the trial court himself assessing the damages. This is the province of the jury. This court has frequently sanctioned the reduction of verdicts where they were larger than the law would justify, but the right of a trial court to reduce a verdict under such circumstances would not carry with it the right to assess damages where the jury has refused to assess any. The plaintiff has the right to insist that the jury shall assess the damages." *Goldsmith v. Detroit J. & C. Ry.*, 165 Mich. 177, 130 N. W. 647.

[3] The evidence shows, without substantial conflict, that the defendant promised to marry the plaintiff. In the early summer of the year 1921 the defendant was in the vicinity of the Feather River Inn, near Blairsden, Plumas county, where he had charge of his father's flocks of sheep, not as the herder thereof, but rather as general manager and overseer of the herders. The plaintiff was employed as a waitress at the Feather River Inn. The parties met at a dance on June 5th, and an immediate attachment sprung up between them. The plaintiff testified that they became engaged to marry about two weeks later and that the alleged seduction took place about a month after the first meeting. The defendant testified that the sexual relations between him and the plaintiff commenced on the second day of their acquaintance and continued throughout the summer. At the end of the summer season the plaintiff went to San Francisco and at a later time the defendant went to his father's home in Yuba county. The parties occasionally met after the plaintiff had gone to San Francisco and many letters passed between them. The plaintiff kept the defendant's letters, but he testified that he destroyed hers. He testified that each sent the other about 50 letters. His letters and his testimony in relation thereto are too long to be given even in substance, but a few quotations will indicate their general character. On cross-examination he was examined in part as follows:

"Q. I will call your attention to this language * * * in a letter postmarked Marysville, January 13, 1922: 'I am awfully lonesome here, Peg, and God, how I wish that you were here with me for good as my wife and sweetheart in our own little home. I am always thinking and dreaming of it, dear, and I am working for it, too, for I love you.' At the time when you wrote those words to Miss Werner, hadn't you already asked her to be your wife? A. No; not any more than I was asking her or letting her know I wanted to marry her in that letter. * * *

"Q. Were you working to bring that about? A. I suppose I had that end in view. * * *

"Q. I am reading now from plaintiff's Exhibit No. 24, contained in an envelope postmarked Honcut, January 23, 1922. * * * The latter commences: 'Friday night, Dearest Peg, your letters of Tuesday night and Wednesday night

arrived to-day, dear, and I have just finished reading them again. You have clearly outlined my idea of Heaven, Peg, when you said you would like to be here to clean me up, feed me, and put me to bed after a hard day's work.' Had Miss Werner written a letter to you in which she used the substance of those words? A. I think she had; yes.

"Q. Mr. Bryden, at the time that you wrote that letter, were you intending to make Miss Werner your wife? A. I think so.

"Q. I now call your attention to the reference to your father contained in this same letter: * * * 'I can't say whether Dad knows that I am in love with you, dear, for he never says a word about my personal affairs, but he *will* know it before another year goes by.' * * * Had Miss Werner asked you shortly before you wrote this letter whether or not your father knew that you were in love with her? A. I think so.

"Q. And what did you mean when you said to her, 'But he will know it before another year goes by?' A. I felt sure she would marry me later on when financially so that I could ask her. * * *

"Q. You further say, 'Of course, he don't know you love me; how could he? I can hardly believe it myself.' Had you told your father by this time whether or not Miss Werner loved you? A. I never discussed love, my love for her or her love for me, with him. * * *

"Q. I will call your attention to the following portion of the * * * letter (dated January 28, 1922): 'You could make me very happy, dear, if, as you say, you could enjoy me most that way. That is the only way to a real, true, lasting happiness for me, and, if I could make you happy also, our happiness would be insured.' * * * I wish you would state to the jury now what you referred to. * * * A. I don't remember exactly. I think it was some reference that led me to understand that we might be married. * * * A lot of my letters made no direct reference to marriage, but hinted at it, in other words, but I think it was probably some favorable answer to my previous letter that brought that out. * * *

"Q. I now call your attention to a letter * * * which I have taken from an envelope postmarked Honcut, I think, February 10, 1922, 7 p. m., and I draw your attention to the following language: * * * 'I am just as lonesome as ever, dear, and I am sure now that I will never stop wanting you and longing for you. God, how I would like to have a place I could call home and to have it feel like home with you there, dear, to make it so. I want that above everything else in my whole world, because, dearest, I will never stop loving you as long as you will let me.' * * * When you wrote those words, were you intending, or hoping, or wishing, or expecting to make Miss Werner your wife? A. Yes; all of those. * * *

"Q. I call your attention to the last paragraph in that letter (February 22, 1922): 'I love you, dear, with all my heart. Do you? You never said one single thing in your last letter about it, if you do, and it made me feel rotten, dear.' I want you to tell the jury now whether or not, if Miss Werner did not state to you in every letter that she wrote that she loved you, that you felt badly about it? A.

That is what I would write back and tell her I suppose; I felt badly; yes. * * *

"Q. You spent Christmas afternoon with Miss Werner, on Christmas Day in 1921, in the company of your mother, your sister, and your sister's husband, in Oakland, at the home of your mother and sister, did you not? A. Yes, sir. * * *

"Q. (Quoting from letter of May 11, 1922): 'Yes, Peg, old dear, you are going to see lots of me this summer, and I am wishing all the time that the time were here, for I am very lonesome for you.' When you wrote that language to Miss Werner, did you mean it? A. Well, I meant it; yes. I meant it in a certain way. * * * I mean I was anxious to be with her. * * * I wanted to go on as we had gone on in the summer before. * * * I never intended to make her my wife after that time. * * *

"Q. Did she not go with you to Sacramento after you wrote that letter to her? A. I think so. * * *

"Q. Did she not, after you had written that letter to her, Mr. Bryden, go with you to Sacramento and live with you as your wife? * * * A. Yes.

"Q. When was it you ceased to hope or expect to make Miss Werner your wife? A. It was very soon after March 17th. * * * I felt a little different towards Miss Werner and I think she felt a little different towards me after that time. And my father's death had a good deal to do with it, too. It made me look at things in a little different light. * * *

"Q. Your father's death on April 10, 1922, made you realize more and more you didn't love Miss Werner? Is that it? A. That's it; yes."

The defendant's deposition was taken prior to the time of the trial. The following appears therein:

"Q. Did you ever promise to marry Miss Werner? A. No.

"Q. You never promised nor agreed to marry her? A. Well, that is a kind of a hard question to answer. Will you let me answer it the way I want to? Q. Certainly, answer it in your own way. A. She never asked me to marry her, consequently I never agreed to marry her."

Not only from the testimony of the plaintiff, but from that of the defendant and from references in his letters to statements contained in hers, it appears that her expressions of love for him were as ardent as his for her. The statements in his letters and his admissions as a witness at the trial so clearly established the engagement of the parties to marry that his mere assertion on the witness stand that they were not so engaged does not create a substantial conflict in the evidence. It clearly appears that the trial court could have come to no other rational conclusion than that the evidence is insufficient to justify the verdict. The question is not whether the amount fixed by the court is a reasonable sum to be allowed as damages, but the plaintiff has the constitutional right to have such damages assessed by a jury.

[4] Respondent makes the point that the appeal is ineffective. The contention is so utterly devoid of merit that it is deemed unnecessary to discuss it.

The judgment is reversed.

We concur: PLUMMER, J.; GLENN, Justice pro tem.

84 Cal. App. 387

COPP v. MULCAHY. (Civ. 3244.) *

District Court of Appeal, Third District, California. July 9, 1927.

Hearing Denied by Supreme Court Sept. 6, 1927.

1. Corporations $\S$ 657(7)—In action on note by assignee of nonresident corporation, defense based on void forfeiture of corporation's license held without merit (St. 1917, p. 373, $\S$ 3).

In action on note by assignee of foreign corporation, defense that corporation was not competent to assign note or to collect it through plaintiff by reason of forfeiture of its license to do business in the state for nonpayment of license tax required by St. 1917, p. 373, $\S$ 3, held without merit; where attempted forfeiture of corporation's license was in fact void and of no effect.

2. Bills and notes $\S$ 523—Corporations $\S$ 411—Plaintiff held authorized to collect note either as assignee or agent of nonresident corporation.

Evidence held to warrant finding that plaintiff was authorized to collect note either as assignee of nonresident corporation or as corporation's agent.

3. Bills and notes $\S$ 525—Defense that execution of note was obtained by false representation as to payee held not sustained by evidence.

In action on notes by assignee of foreign corporation, evidence held insufficient to sustain defense that execution of note was obtained by false representations to defendant that corporation rather than its agent individually was named payee therein.

4. Landlord and tenant $\S$ 230(9)—In action on rental note, defendant's asserted wrongful ouster through unexplained foreclosure proceedings held immaterial, absent any plea for affirmative relief.

In action on rental note by assignee of foreign corporation, defendant's claim of wrongful ouster by particular bank as a result of some unexplained foreclosure proceeding involving the leased property held immaterial, in absence of any plea by defendant for affirmative relief.

5. Assignments $\S$ 34—Parol assignment of notes by foreign corporation to resident manager held valid.

A thing or chose in action arising out of an obligation may be assigned verbally or without a writing, and hence parol assignment of notes due foreign corporation to its resident agent was valid.

6. Assignments $\S$ 34—Parol assignment of notes if made in Massachusetts held valid, in view of presumption affecting law of Massachusetts and absence of contrary showing.

Parol assignment of notes sued upon if assumed to have been made in state of Massachusetts held valid, in view of presumption affecting law of foreign state and absence of any showing that rule in Massachusetts differed from that in California.

Appeal from Superior Court, San Joaquin County; J. C. Needham, Judge.

Action by Fleet F. Copp against James Mulcahy. Judgment for plaintiff, and defendant appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant.
Berry & Watson, of Stockton, for respondent.

HART, J. This action is by plaintiff to recover on two several promissory notes. The complaint is in two counts, in the first of which it is alleged that defendant, on the 11th day of July, 1924, made, executed, and delivered to plaintiff his promissory note for the sum of \$297, payable three months after date, together with interest thereon at the rate of 7 per cent. per annum. Said note is set out in *hæc verba* in said count. The second count or cause of action is founded on a note for the sum of \$58, dated July 19, 1924, and payable, with interest at the rate of 7 per cent. per annum, on or before three months after date. Said note is also set out in full in the complaint. Each of said notes provided for the payment by the maker (defendant herein) of reasonable attorney's fees in case action was instituted to enforce the payment thereof. The complaint alleges that no part of the principal sums, nor any interest accruing thereon, has been paid, and that the said notes "are now due, owing and unpaid," and that, as to the first cause of action, the sum of \$75 is a reasonable amount to be awarded as attorney's fees, and that, as to the second cause of action, the sum of \$25 is a reasonable amount to be allowed for such fees.

The defense interposed by defendant may the better be understood by reciting a brief history of the transactions culminating in the making and delivery of the notes in suit by defendant to the plaintiff before referring to the allegations of the answer. This statement may be taken from the findings, from which it appears that for some time prior to the date of the making of said notes a corporation known as the New England-California Corporation, organized under the laws of the state of Massachusetts and having its principal place of business at Worcester, Mass., filed with the secretary of state of California a certified copy of its articles of incorporation and other papers required to be so filed by foreign corporations desiring to transact intrastate

business within this state (Stats. 1917, pp. 371-377); that thereafter said corporation proceeded to carry on its business in this state, with the plaintiff herein as the managing agent thereof; that during the period of time in which it thus transacted business in California the defendant rented from it a certain number of acres of land in San Joaquin county at a certain specified rental and also from time to time purchased hay from it; that after these transactions, and on the 3d day of March, 1923, the right of said corporation to transact business in California was (officially declared to be) forfeited because of its failure to pay the annual tax which the state attempted to exact from foreign corporations as one of the conditions upon which they are permitted to transact intrastate business therein. It further appears from the findings that one George M. Wright was at all times the president of said New England-California Corporation and resided at said city of Worcester, Mass.; that, previous to the execution of the notes in controversy, said corporation was indebted to the plaintiff for salary as managing agent thereof in a sum in excess of \$2,000 and that after the right of the corporation to transact business in California was (officially declared to be) forfeited for the reason above stated, the plaintiff was duly authorized by said George M. Wright, the president of said corporation, to collect and apply certain debts due said corporation from certain persons in California, including the indebtedness of defendant to said corporation, upon and in satisfaction of the moneys due plaintiff from the corporation on account of the salary due him.

The answer alleges that the defendant was not indebted to the plaintiff on account of the notes set out in the complaint or on any other account and that the defendant did not knowingly or intentionally make, execute, or deliver to plaintiff either of the promissory notes set out in the complaint, that (referring to the first count of the complaint) in the years 1922 and 1923 the defendant rented from said corporation certain real property, belonging to it and situated in the county of San Joaquin, for the sum of \$150 per year, which was payable at the end of each year thereof, that "on the 11th day of July, 1924, the plaintiff, who was then and there acting as a servant of said corporation falsely and fraudulently represented and stated to defendant that he (defendant) was then indebted to said corporation in the sum of \$297, for and on account of the rental of said corporation's real property, and that said corporation was then demanding the said rental money from him, and that he had prepared the said promissory note in the amount specified in said note, and had made the same payable to the said corporation in order that it might be forwarded to it, and thereby save the expense of a suit at law for the collection of

said rent, when in truth and in fact the defendant was not indebted to either plaintiff or the said corporation in the said sum of \$297, or any other or different sum, on account of the rental of said real property, or for any other matter or thing whatsoever, and that the said corporation was not then demanding, and never had demanded, the money from the plaintiff for said rental, and the latter had not made the said promissory note payable to the said corporation, and the said note was not asked for or secured for the purpose of being forwarded to said corporation or for the purpose of saving the expense of a lawsuit, and that the plaintiff then and there well knew that defendant was not indebted to said corporation or to him in the said sum of \$297, or any other or different sum, on account of the said rental or any other matter or thing whatever, and that said corporation was not then demanding and never had demanded the said rental money from plaintiff (which had already been paid as aforesaid), and that plaintiff had not made said promissory note payable to said corporation but to himself, and that the same was not asked for or secured from defendant for the purpose of being forwarded to said corporation, or for the purpose of saving the expense of a lawsuit, and that plaintiff made each and all of the foregoing false and fraudulent representations and statements to the defendant for the purpose of inducing and forcing him to unknowingly and unintentionally give said promissory note to him individually and not to said corporation, and thereby of defrauding defendant out of the amount thereof; that defendant believed and relied upon each and all of the aforesaid false and fraudulent representations and statements, and in consequence thereof and of his belief that the note was made payable to said corporation, he signed said promissory note, and not otherwise; "that defendant never had any personal dealings or business with plaintiff, and never at any time owed him money or other obligation, and that for the purpose of securing defendant's signature to said note to himself, the plaintiff falsely and fraudulently represented and stated to defendant at the time said note was executed, that it was made payable to the said corporation, and that defendant then believed it was so written, and now believes that it was not then made payable to plaintiff, and that the payee's name was left blank, and that plaintiff afterward fraudulently filled said blank by writing his own name therein, for the purpose of defrauding defendant out of the amount thereof."

The allegations of the answer replying to the second count of the complaint are substantially, if not precisely, the same as those contained in the answer responding to the first count as above herein set forth. Defendant filed a cross-complaint, in which it is alleged that the plaintiff (cross-defendant) is indebted

to cross-plaintiff (defendant) on an open, mutual, and current account, in the sum of \$450, "for and on account of moneys loaned by him to said cross-defendant, at his special instance and request, which the said cross-defendant then and there promised and agreed to pay cross-plaintiff long prior to the commencement of this action, together with the interest to accrue thereon at the legal rate"; that said cross-defendant has not paid cross-plaintiff said sum of \$450 or any part thereof and that the same with interest, etc., is now due and owing from cross-plaintiff to the cross-defendant. The plaintiff answered the cross-complaint specifically denying each of its allegations.

The defendant, by leave of the court, filed an amendment to his answer, alleging that the corporation referred to "was a foreign corporation created under the laws of the state of Massachusetts and which was licensed to do business in this state prior to the 3d day of March, 1923, and which forfeited that said right in this state on that date by reason of its failure to pay its taxes theretofore due the state of California, and that in consequence thereof the aforesaid promissory notes are null and void."

The court found, in addition to the findings from which is taken the general statement of the facts hereinabove given, that the defendant at all times well knew the relations existing between the plaintiff, the said New England-California Corporation, and said George M. Wright, "and acquiesced in and fully understood the circumstances under which said promissory notes were executed and also knew that said New England-California Corporation had forfeited its right to transact business within the state of California, by reason of the forfeiture of its charter within the state of California, as aforesaid, which forfeiture was and is at all times since said 3d day of March, 1923, a matter of public record within the state of California; that it is not true as alleged in the defendant's answer herein that the plaintiff made any false or fraudulent representations to the defendant whatsoever with reference to said promissory notes, and the court finds that all matters set forth in said answer not expressly covered by the foregoing findings are untrue."

It is further found that:

"Each of the allegations of the cross-complaint was, and is, untrue; that no evidence has been introduced showing or tending to show that within four years previous to the commencement of this action, or at all, the cross-defendant, plaintiff herein, has been, or ever was, indebted to cross-plaintiff, defendant herein, upon an open, mutual and current account, or any account, in the sum of four hundred fifty dollars (\$450), or any sum, for or on account of moneys loaned to him by said cross-plaintiff, or at all."

Plaintiff, upon the findings and the conclusions of law following therefrom, was awarded judgment in the total sum of \$510, which includes the aggregate of the sums for which, respectively, the notes counted upon were given, together with the interest accruing thereon.

The defendant appeals from the judgment in accordance with the provisions of section 953a of the Code of Civil Procedure.

It is admitted that, prior to the making and delivery of the notes in question by defendant to plaintiff, the New England-California Corporation failed to pay the annual tax to the state, as required by the statute of 1917, supra, and had not paid such tax at the time of the commencement of this action, and that the secretary of state of said state duly and regularly made a record in his office of that fact.

The point primarily made by the defendant for a reversal of the judgment is that the forfeiture of the right of said corporation to transact business in California "disqualified it from collecting any claim or account by suit or otherwise." It is hence contended that "if the corporation could not legally make such collection or maintain such action against the defendant herein, its agent or servant could have no greater or better right than it had." There are other points urged by the defendant. One of these is that the corporation "never gave plaintiff any assignment of the claim, and never at any time authorized him to take notes to himself for any of its demands against its debtors." This last stated proposition involves the question whether or not a verbal assignment by the corporation to plaintiff of the debts of which the promissory notes in suit purport to be evidence, is legal or valid.

[1] Section 3 of the statutes of 1917 regulating the right of corporations to transact business in the state of California contains precisely the same provisions as are contained in the corresponding section of the act of 1915, and acts amendatory thereof and supplementary thereto, passed by the legislature subsequent to its session of 1915 and relating to the same subject. See Deering's General Laws 1923, p. 548. Said section, after providing that a foreign corporation shall file with the secretary of state an authenticated copy of its charter, together with the payment of a specified filing fee, and also filing an affidavit disclosing its authorized capital stock on January 1st of the current year, etc., provides as follows:

"Sec. 3. Except those corporations herein-after specified, every corporation incorporated under the laws of this state, and every corporation incorporated under the laws of any other state, territory, or foreign country now doing intrastate business within this state, or which shall hereafter engage in intrastate business in this state, shall procure annually from the secretary of state a license authorizing the trans-

action of such business in this state, and pay therefor the license tax prescribed herein.

"For the purpose of measuring said tax the secretary of state shall examine all articles of incorporation and all documents on file in his office relating to an increase or decrease in the authorized capital stock of corporations which are subject to said tax, and determine the amount due from each corporation by the following rule."

Following which is the prescribed amount of the tax, which amount is graduated according to or upon the basis of the authorized capital stock of such corporation.

In the very recent case of *Perkins Manufacturing Co. v. Jordan*, as Secretary of State, 254 P. 551, the Supreme Court had before it the above-named section, or the same section as it appears in the statute of 1917, *supra*, in a proceeding in mandate to compel the secretary of state, notwithstanding that the corporation, petitioner, refused to pay the annual license tax purporting to be required by the statute in such case, to accept and file a copy of the charter of said corporation tendered, with other documents mentioned in said section, to said officer by the petitioner for filing in his office. The ground upon which the petitioner refused to pay the annual license tax upon presenting a certified copy of its charter and other documents for filing with the state officer named was that the provision of section 3 of the statute in question, attempting to fix a graduated license or excise tax upon the basis of the amount of the authorized capital stock of a foreign corporation (meaning a corporation of a sister state) is invalid, in that at least the effect of its necessary operation would be an unlawful interference with interstate commerce, the regulation of which is solely the function of Congress, and, further, would involve the attempted performance of an act inconsistent with the due process clause of the federal Constitution (Amend. 14, § 1), since the imposition of such tax would be upon the property of a foreign corporation, when neither the corporation nor the property taxed was located or used within the borders of the state of California. Our Supreme Court, in that case, in a well-considered opinion by Mr. Justice Preston, sustained the contentions of the petitioner therein and ordered the writ of mandate, as prayed for, to be issued. Obviously the effect of that decision was to set at naught as illegal and void section 3 of the act of 1915 (St. 1915, p. 424), and, consequently, the same section of the act of 1917. It is not necessary to present herein excerpts from the opinion of Judge Preston. It is enough to say, as already enough has been said to indicate, that under that decision, and the existing statute as it is thereby interpreted, it is at the present time obligatory upon the secretary of state to file, upon application therefor, the certified copy of the charter and any other documents required by the statute

of 1917 to be filed by any foreign corporation desiring and intending to transact intrastate business within the limits of the state of California, without the payment by such corporation of the annual license tax which said statute purported or attempted to exact from foreign corporations as one of the conditions upon which their right to transact intrastate business in California was made to depend.

It is manifest that, under the decision in the case named, the attempted forfeiture by the state of California of the right of the New England-California Corporation to transact intrastate business within its borders because of the failure of said corporation to pay its annual license tax according to the terms of section 3 of the statute of 1917 is wholly nugatory and void, and that said corporation, if it has complied with the other conditions prescribed by said statute and which are necessary to be observed and which are not within or subject to the objections sustained in *Perkins Manufacturing Co. v. Jordan*, etc. (as to which matter the record makes no disclosure), was, when the transactions herein concerned took place, entitled to enjoy and exercise, in this state, any rights, privileges or perform any corporate acts within the scope of its powers as a corporation. It of necessity follows that, if for no other reason than that furnished by the result reached in the case named, the point made by defendant that the corporation involved herein had been rendered legally incompetent to assign to plaintiff or through him collect any claims accruing to it before the asserted forfeiture of its right to do intrastate business in California is wholly without a legal foundation for its support. We are not to be understood as expressing an opinion on the question whether or not the effect of a forfeiture, as prescribed by the statute, of a foreign corporation's right to do intrastate business in California, for any reason for which the right of such a corporation to transact business in this state might, under the statute, be forfeited, would be to debar it of the right, subsequent to such forfeiture, of enforcing in the courts of this state the payment of any debts or claims accruing to it prior to such forfeiture.

The findings, other than that purporting to find that the New England-California Corporation had forfeited its right to do business in the state of California by reason of the nonpayment of its taxes, are afforded sufficient evidentiary support. The plaintiff testified that from November, 1919, to the time (March 3, 1923) of the alleged forfeiture of the right of said corporation to transact business in California, he was in the employ of said corporation as an expert and manager; that at the time of the purported forfeiture, the said corporation was indebted to him (plaintiff) in a sum approximating \$6,000 for personal services rendered by him for the

corporation as such expert and manager; that, on the date of the alleged forfeiture, there were owing to the corporation certain debts, among which was the debt of the defendant to the corporation and which latter was evidenced by the notes in suit; that, in the year 1924, and prior to the time that said notes were executed and delivered by defendant to plaintiff, the latter held a conversation with the former, in the course of which the plaintiff stated to the defendant that the corporation was indebted to him (plaintiff) in a large sum of money for the services theretofore performed by him for the corporation; that defendant then said to plaintiff that he knew the corporation was indebted to him (plaintiff); that, subsequently and before the making and the delivery of the notes in controversy, he (plaintiff) went to the state of Massachusetts, and discussed with George M. Wright, president of the corporation, the situation in California with respect to the affairs of the corporation and also the matter of the indebtedness of the corporation to plaintiff on account of wages or salary due the latter from the former; that said Wright, as such president, verbally vested plaintiff with full authority to superintend and wind up the affairs of the corporation in California, and to that end, collect the debts due the corporation, and pay such indebtedness as existed against the corporation in this state, including the indebtedness of the corporation to plaintiff for salary; that said Wright at that time verbally assigned to plaintiff the moneys due the corporation from defendant; that, on returning to California, he (plaintiff) called on the defendant and requested him to settle the amounts due from him to the corporation for hay purchased by the former from the latter and also for rent money, as explained in the findings; that he then told the defendant that the corporation, through its president, Mr. Wright, had assigned to him the moneys due from him (defendant) to the corporation and that the same were to be in satisfaction of the corporation's indebtedness to plaintiff; that the defendant again said that he knew the corporation was indebted to plaintiff and that the latter ought to have the money that he (defendant) owed the corporation—in fact, so plaintiff testified, the defendant then stated that he would rather pay plaintiff what he owed the corporation than to pay the corporation itself; that plaintiff thereupon suggested that defendant give him in his (plaintiff's) name the promissory notes for the two several sums owing from defendant to the corporation, and that defendant thereupon made and delivered to the plaintiff and in his name the first of the notes, the latter having previously prepared it, and that some days later defendant executed and likewise delivered to plaintiff the second note, which is the basis of the second cause of action stated in the complaint. A

letter dated at Worcester, Mass., June 18, 1924, was addressed to plaintiff by the "New England-California Corporation, George M. Wright, Agent," and in due course was received by plaintiff, in which it was stated:

"Confirming our talk we hereby acknowledge that you are still in the employ of the New England-California Corporation and are to carry on the work as superintendent under the direction of their agent, George M. Wright, and that it is understood that you are to continue in the employ of the company, as above stated, until either you or the company indicate their desire to terminate the arrangement by writing."

The defendant testified that he was in possession of and used a tract of land consisting of 21 acres under a lease from the corporation during the years 1920, 1921, 1922, 1923, "and parts of the year 1924," said lease by its terms to expire with the expiration of the last-named year; that in the negotiations leading to the making of the lease, the plaintiff acted for and on behalf of the corporation; that during the term of the lease he "once in a while" bought hay from the corporation. He admitted that plaintiff, prior to the date of the making of the first of the notes in suit, told him of the corporation's indebtedness to him on account of salary or wages for personal services performed for the corporation. He testified that plaintiff stated that the notes were to be made to the corporation; that he agreed to give the notes on condition that threatened foreclosure proceedings against the property of the corporation which embraced the acreages under lease by him did not result in dispossessing him of the land demised to him before his fruit crops were gathered; that plaintiff replied that "it was only a matter of form that they wanted the notes, and they wasn't going to foreclose if I made the note to the New England Corporation." He added that, after he made and delivered the notes, the "Stockton Savings and Loan Bank foreclosed and they put me off the property," and as a result he was prevented from gathering and so securing the benefit of his fruit crops growing thereon. Defendant stated that he did not examine either note before he signed it "to see who the note ran to," but, on cross-examination, admitted that, if he had known that the notes were to be made to the corporation, as he assumed they had been, he would have signed them, as he knew that he was indebted to the corporation in some amount.

[2, 3] There has now been given in substance all the testimony regarding the transactions resulting in the execution and delivery of the notes in suit to plaintiff. It is thus readily to be seen that there is evidence warranting the conclusion that the plaintiff was authorized to collect, either for himself as assignee or for the corporation as its agent, the moneys due the corporation from defendant and represented by the notes in suit. But, at

all events, if it were necessary to admit that there is, as a proposition of law, any force to the defense, interposed by defendant to plaintiff's action, to the effect that the plaintiff falsely represented to him (defendant) that the corporation was made the payee of the notes and upon such representation alone he signed and executed the instruments, nevertheless, the finding that such defense was or is unfounded in fact is fully sustained by the testimony of the plaintiff.

[4] Although we have referred herein to the testimony of the defendant that he was wrongfully ousted from the premises by a Stockton bank as a result of some unexplained foreclosure proceeding involving the property under lease by the defendant, it should be stated that that testimony is of no importance whatever under the issues of the case, since the defendant has not claimed here nor asked for any affirmative relief by way of damages for his asserted wrongful eviction from the premises and asserted consequent loss of crops.

As to the allegations of the cross-complaint to the effect that the plaintiff (cross-defendant to said cross-complaint) was indebted to the defendant upon an open, mutual and current account in the sum of \$450, there was not, as the court expressly found, any evidence whatever introduced in support thereof. There was an attempt by defendant to show that he had paid the debts evidenced by the notes. Some checks given by defendant to the plaintiff for the corporation were introduced in evidence. These checks, however, were shown to have been for an indebtedness accruing in favor of the corporation from defendant prior to the time that the indebtedness evidenced by the notes was created. At any rate, the court was well within its discretion in so finding from the evidence upon that subject.

[5, 6] The objection to the rulings of the court permitting the plaintiff to prove by parol that the corporation assigned to him the claims it held against the defendant on the ground that such assignment is not valid or of any legal force because it was not reduced to writing is untenable. In this state, a thing or a chose in action, arising out of an obligation, may verbally or without a writing be transferred by assignment by the owner to another. Civ. Code, §§ 954, 1052, and 1624; *Dingley v. McDonald*, 124 Cal. 90, 94, 56 P. 790. And, if it is to be assumed that the verbal assignment by the corporation to plaintiff of the claims existing in favor of the corporation against the defendant was effectuated entirely in the state of Massachusetts, then the validity of the assignment may, under the circumstances of this case, be sustained upon the presumption, which obtains in this state, that, in the absence of proof that the law of a sister or foreign state upon any subject is

different from our own law upon the same subject, the law of such sister or foreign state is the same as our law on such subject. *O'Sullivan v. Griffith*, 153 Cal. 502, 95 P. 873, 96 P. 323; *Wills v. Wills*, 166 Cal. 529, 532, 137 P. 249; *McCormack v. McCormack*, 175 Cal. 292, 165 P. 930; *Estate of Pusey*, 177 Cal. 367, 373, 374, 170 P. 846; *Fox v. Mick*, 20 Cal. App. 599, 129 P. 972; 5 Cal. Jur. pp. 430 and 431, and cases named in the footnotes. There was no evidence received, nor, indeed, any attempt to prove, in this case, that at the time the assignment in question here was made, the law of the state of Massachusetts regarding the requisites of a valid assignment of a chose in action was not the same as our law upon that subject. The presumption, therefore, is that, as in this state so it is or was true in the state of Massachusetts, a thing in action may legally be transferred by assignment verbally by the owner to another or without committing such assignment to writing.

There are no other points requiring notice herein.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

PEOPLE v. ELY. (Cr. 1489.) *

District Court of Appeal, Second District, Division 2, California. July 5, 1927.

Hearing Granted by Supreme Court. Sept. 1, 1927.

1. Criminal law §696(3)—Evidence of condition of bumper after striking deceased held not inadmissible because bumper was not shown to be in same condition before accident.

In a prosecution of an automobile driver for failing to stop and render aid to one struck by his automobile, refusal to strike testimony that there were marks on the bumper such as would be made by striking clothing like that worn by deceased, on the ground that there was no testimony that the bumper was not in the same condition before the accident, *held* not error; objection going solely to the weight of the testimony.

2. Criminal law §388—Testimony respecting experiments rests largely in court's discretion and substantially same conditions must be shown.

The reception or rejection in a criminal case of testimony respecting experiments rests largely within the discretion of the trial court, but it must be shown that substantially the same conditions existed and the evidence must be of such a character as to aid the jurors, rather than to confuse their minds with collateral matters.

3. Criminal law §388—Excluding testimony as to experiment held not error, in absence of showing similarity of conditions.

In a criminal case where there was no attempt to show that the circumstances sur-

☞ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★ Superseded by opinion of Supreme Court, 265 P. 818.

rounding an experiment were similar to those which existed at the time of the accident, resulting in death of deceased when struck by defendant's automobile, it was not error to exclude testimony as to what witness had found by an experiment respecting the impression that would be made upon automobile bumpers by corduroy.

4. Criminal law — 1172(6)—Refusal to instruct to acquit driver of failing to aid one struck by his automobile unless he had guilty knowledge held harmless error, where absence of guilty knowledge was beyond credence (Vehicle Act, § 141).

In a prosecution of an automobile driver for failing to stop and render aid to one struck by his automobile, as required by Vehicle Act, § 141 (Deering's Gen. Laws 1923, Act 5128), refusing to instruct that the prosecution must establish beyond reasonable doubt that defendant knew he had struck a person, and if not satisfied thereof beyond reasonable doubt to find defendant not guilty, held harmless error, where it was beyond credence that defendant did not know that he had struck a person, or that the jury did not believe that defendant knew that he had struck a person.

5. Municipal corporations — 707 — Conviction of automobile driver failing to aid one struck held sustained by evidence (Vehicle Act, § 141).

In a prosecution of an automobile driver for failing to stop and render aid to one struck by his automobile, as required by Vehicle Act, § 141 (Deering's Gen. Laws 1923, Act 5128), evidence held sufficient to sustain conviction as against contention of uncertainty in name of deceased.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

R. H. Ely was convicted of failing to stop and render aid to one struck by an automobile driven by him, under Vehicle Act, § 141, and he appeals. Affirmed.

Honnold & Hubbell, of Escondido, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, and John D. Richer, Deputy Attys. Gen., for the People.

THOMPSON, J. Defendant was charged by information with failing to stop and render aid, as required by section 141 of the California Vehicle Act (Deering's Gen. Laws 1923, p. 1852, Act 5128), to one struck by an automobile driven by defendant. A verdict of guilty was returned against him, and he appeals from the judgment pronounced thereon and from an order denying his motion for a new trial.

The essential facts are that on the evening of September 21, 1926, at about 10:30 p. m. the defendant was traveling west on University avenue, in the city of San Diego, in company with two young ladies in a red Buick roadster without a top. Miss Boatman and

Miss Hill, the young ladies in the car, testified that shortly after they turned into University avenue from another street they ran over something, and Miss Boatman asked what it was, and the defendant jokingly replied, "A man on a bicycle." Miss Boatman testified that, although she had noticed a noise in the motor before the time of the accident, it became worse thereafter and when she arrived home she observed that the motor meter was broken. Both of the young ladies suggested to the defendant that he stop and investigate, to which he replied that he had seen the man pick himself up and that he could do nothing. He did not stop. The defendant admitted the remarks attributed to him by these witnesses and said that, while they had struck what he thought was a sewer drain, they had been joking all evening and he made this remark in jest, laughing about it. He said that earlier in the evening some one must have backed into him and broken his motor meter, a part of which was found at the place where the man was struck, and that they had also dented the radiator and pushed it back until the fan arms were striking against it; that this was the cause of the noise referred to by the other witnesses.

Other testimony established that a man was struck by a red roadster with its top down or off, and that on the car driven by defendant there were, in addition to the damage to the radiator and motor meter, marks on the bumper indicating that they had been made by striking corduroy clothing, such as that worn by the man who was struck and killed. Hair and pieces of thread were also found under the car on the battery box.

[1] The appellant bases his appeal upon several grounds, the first of which is that the court erred in refusing to strike out the testimony that there were marks on the bumper such as would be made by striking clothing like that worn by the deceased. The ground urged by defendant as the reason for requesting his testimony be stricken at the time of trial was that there was no testimony to show that the bumper was not in the same condition prior to the time of the accident. Such objections run solely to the weight to be attached by the jury to the testimony, and is not a ground for its entire exclusion.

[2, 3] The next objection is somewhat related to the one just mentioned. During the examination of the defendant he was asked by his counsel if he had made an experiment on dusty bumpers with a piece of corduroy, and, this question being answered in the affirmative, he was asked to tell the jury what he had found out about the impression that would be made upon the bumper by corduroy "when it was pressed lightly or when it was struck a heavy blow." An objection was interposed and was sustained on the ground that the proffered testimony was incompe-

tent, irrelevant, and immaterial. We find no error in the ruling. The testimony comes within the class of testimony designated as experiments, which, when shown to have been made under the same conditions as those existing in the case itself, are admitted. The reception or rejection of such testimony lies largely within the discretion of the trial court, with this limitation—that it must be shown that substantially the same conditions existed, and, further, that the evidence shall be of such a character as to aid rather than to confuse the minds of the jurors with collateral matters. *People v. Woon Tuck Wo*, 120 Cal. 294, 52 P. 833; *Western S. B. Co. v. O'Brien*, 49 Cal. App. 707, 194 P. 72. It is apparent that the experiment could not well have been conducted under similar conditions with those of the accident without danger of a homicide; furthermore, there was no attempt to show that the surrounding circumstances were similar.

[4] The appellant next complains of the refusal of the trial court to give the following instruction:

"The prosecution must establish beyond a reasonable doubt that the defendant knew he had struck a person. The guilty knowledge of defendant is as material to the prosecution as any other element of the offense charged, and if you are not satisfied beyond a reasonable doubt that defendant had such knowledge you must find the defendant not guilty."

Undoubtedly such an instruction would have been proper. It cannot be asserted with any degree of seriousness that it was ever intended that a person should be convicted of failing to stop and give aid to one whom he had no reason whatever to believe had been struck by him. Yet the evidence in this case establishes the fact that the person struck died shortly after the accident; other evidence which was evidently given full weight by the jury was to the effect that the radiator of the automobile was driven back so that it came in contact with the arms of the fan, and that the motor meter was broken. It is beyond comprehension that the defendant did not know that he had struck the deceased. The jury apparently did not believe that he was joking when he made the statements to the two young ladies that he had hit a man on a bicycle. It is beyond credence that they would have convicted had they not believed (as they were fully justified by the evidence) that defendant knew he had struck a human being. As was indicated in *People v. Graves*, 74 Cal. App. 415, 240 P. 1019, and said in *People v. McKee* (Cal. App.) 251 P. 675, we cannot appreciate how the failure to give the instruction prejudiced the defendant.

[5] The other reasons assigned for the reversal of the judgment are, in effect, that the evidence is not sufficient to sustain the verdict, and particularly in this: That uncer-

tainty exists as to the name of the deceased, and that the circumstantial evidence is consistent with the theory of innocence. From the recital of the facts heretofore, it is patent that the jury were fully justified in coming to the conclusion arrived at by them, and we are not authorized under the circumstances to do other than abide by their determination. In so far as the name is concerned, Officer Lindsey testified that after the injury he discovered the man's name to be Pipkin, which he later corrected to Pupkin. Under the rule announced in *People v. Foster*, 198 Cal. 112, 243 P. 667, the correct name of the injured person may not be of serious consequence, but, regardless of that rule, we think the name of the deceased was sufficiently supplied in the case at bar.

The judgment and order are affirmed.

We concur: WORKS, P. J.; CRAIG, J.

84 Cal. App. 325

BEDIG v. SOUTHERN PAC. CO. et al.
(Civ. 3262.)

District Court of Appeal, Third District,
California. July 1, 1927.

1. Commerce ⇨8(12, 13)—State laws governing bills of lading and liability of carriers do not affect interstate transportation of grapes governed by Interstate Commerce Act (Interstate Commerce Act [U. S. Comp. St. § 8563 et seq.]; Const. U. S. art. 1, § 8).

Interstate transportation of grapes by carrier is included within Interstate Commerce Act (U. S. Comp. St. § 8563 et seq.), enacted by Congress pursuant to Const. U. S. art. 1, § 8, and hence state laws governing effect of bills of lading and fixing liability of transportation company for failure to deliver freight do not apply to such transportation.

2. Commerce ⇨8(1)—Congress has exclusive authority to regulate interstate commerce (Const. U. S. art. 1, § 8).

Under Const. U. S. art. 1, § 8, Congress has exclusive authority to regulate interstate commerce.

3. Commerce ⇨8(12)—Straight bills of lading and transfers thereof used in interstate commerce are governed by federal law, not local statutes (U. S. Comp. St. §§ 8604aaaa, 8604cc, 8604dd, 8604e, 8604ee, 8604kk).

Straight nonnegotiable bills of lading, so marked on their face and used in interstate shipment, are governed by Act Cong. Aug. 29, 1916, §§ 2, 6, 8, 9, 10, 22 (U. S. Comp. St. §§ 8604aaaa, 8604cc, 8604dd, 8604e, 8604ee, 8604kk), and bills and transfers thereof cannot be governed by local statutes.

4. Commerce $\hookrightarrow$ 10—Transfer or assignment of bills of lading in interstate commerce is assumed to be authorized where federal law does not prohibit same (U. S. Comp. St. §§ 8604aaaa, 8604cco, 8604dd, 8604e, 8604ee, 8604kk).

Where Congress under Act Aug. 29, 1916, §§ 2, 6, 8, 9, 10, 22 (U. S. Comp. St. §§ 8604aaaa, 8604cc, 8604dd, 8604e, 8604ee, 8604kk), has fully legislated on subject of effect of bills of lading used in interstate commerce and has omitted to prohibit transfers or assignments of bills, it will be assumed that transfer or assignment, either by principal or agent, is authorized.

5. Carriers $\hookrightarrow$ 94(3) — Finding that plaintiff, suing carrier for conversion, did not own property and was not entitled to possession at time of alleged conversion held supported by evidence.

In action by original consignee against carriers for conversion of shipment, finding that plaintiff was not at time of alleged conversion either owner of goods shipped or entitled to its possession held supported by evidence that plaintiff authorized seller to bill cars for other purchasers in plaintiff's name and thereafter assigned bill of lading.

6. Sales $\hookrightarrow$ 202(6)—Title to grapes sold held intended to pass on delivery of bill of lading, under memorandum not specifying time of delivery and requiring final payment on presentation of bill.

Memorandum of contract to sell grapes reciting that grapes were sold to plaintiff accompanied by deposit, without specifying grapes from any particular field or time of delivery and providing for final payment on presentation of bill of lading to plaintiff, together with surrounding circumstances, showed that parties intended title to grapes to pass on delivery of bills of lading to purchaser.

7. Sales $\hookrightarrow$ 228—Seller's conduct in delivering duplicate bills of lading to original purchaser and accepting purchase price held not to affect title which had already passed by authorized assignment of bill to another.

Where seller assigned bill of lading and delivered it to customer under authority of original purchaser, conduct of seller in subsequently procuring duplicate copies of bills of lading and delivering them to original purchaser and accepting balance of purchase price for shipment did not affect title which had already passed.

8. Carriers $\hookrightarrow$ 52(1), 70—"Bill of lading" is receipt for goods by carrier and presumptive evidence of ownership of goods.

"Bill of lading" is in nature of receipt of goods by carrier and is only presumptive evidence of ownership thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill of Lading.]

9. Carriers $\hookrightarrow$ 51—Bill of lading is impeachable for mistake, error, or false statements therein, as between parties.

As between parties to bill of lading, bill is impeachable for mistake, error, or false statements contained therein.

10. Carriers $\hookrightarrow$ 53—Bill of lading may become contract between carrier and shipper for delivery of goods to owner or consignee.

Bill of lading may become contract between shipper and carrier for transportation and delivery of goods to owner or consignee.

11. Evidence $\hookrightarrow$ 427—Oral evidence showing seller's authority to bill cars in original consignee's name and transfer bill of lading to others held admissible in consignee's action against carrier for conversion.

In action by original consignee of shipment against carrier for conversion of goods by delivery to another, oral evidence, received solely to establish agency by seller to bill cars on plaintiff's bond and in his name and to transfer bills of lading to others, not offered to vary terms of bill of lading, held competent.

12. Carriers $\hookrightarrow$ 56—Federal law does not prohibit consignee orally authorizing seller to bill shipment in his name and transfer bill of lading to others.

Parol authority to seller by original consignee to bill cars on bond of original consignee and in his name and to transfer bills of lading to other purchasers held not prohibited by federal law.

13. Pleading $\hookrightarrow$ 93(2)—Answer admitting sale to plaintiff, suing carrier for conversion, denying other allegations, and alleging ownership of goods by another did not set up inconsistent defenses.

In original consignee's suit against carrier for conversion of shipment by delivery to others, answer admitting agreement to sell goods to plaintiff and denying all other material allegations of complaint, and alleging that another was owner of goods claimed to have been converted did not set up inconsistent defenses.

14. Carriers $\hookrightarrow$ 94(3)—Finding that plaintiff, suing carrier for conversion, did not employ carrier and authorized transfer of bill of lading to person receiving goods held supported by evidence.

In action by original consignee against carrier for conversion of goods by delivery to another, finding that plaintiff did not employ defendants to transport goods and that property belonged to another, who was authorized by plaintiff to transfer bills of lading to others to whom goods were delivered, held sufficiently supported by evidence.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by O. Bedig, doing business as the Bedig Produce Company, against the Southern Pacific Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Edward Schary, of Fresno, for appellant. Power & McFadzean and J. Thos. Crowe, all of Visalia, for respondents.

THOMPSON, Justice pro tem. This is an appeal from a judgment for defendants, in

an action for alleged conversion of two carloads of grapes, shipped from Kings county, over the Southern Pacific Railroad, and originally consigned to the Bedig Produce Company, at Chicago. The defendants deny that plaintiff was the owner of the grapes, and upon the contrary allege that they were owned by the Reliance Fruit Company, and were billed in the name of plaintiff by agreement as a matter of accommodation, and re-consigned to the purchaser, California Growers & Shippers, of Fresno, by H. J. Ellis, as the agent of plaintiff, and delivered to John A. Eck Company, at Chicago.

The plaintiff contends that the findings and judgment are not supported by the evidence; that the court erred in admitting oral evidence of the authorization for the transfer of the bills of lading; and that inconsistent defenses are not separately stated in the answer.

In part, the court found:

"That the plaintiff did not hire or employ defendants * * * to transport * * * either of the carloads of grapes mentioned in plaintiff's complaint. * * * That it is not true that said carloads of grapes were * * * the property of plaintiff, but on the contrary were the property of said Reliance Fruit Company, composed, owned, operated and managed by said H. J. Ellis, * * * and that said request that said bills of lading should be issued in plaintiff's name, as aforesaid, was made through the said H. J. Ellis, and was made in pursuance of an agreement or understanding theretofore entered into between said Reliance Fruit Company and said H. J. Ellis on the one hand, and said plaintiff on the other. * * * That said H. J. Ellis was authorized and empowered to indorse, transfer, and deliver said bills of lading. * * * That the said Reliance Fruit Company and H. J. Ellis did sell said carloads of grapes to * * * the California Growers & Shippers; and that said H. J. Ellis did indorse, transfer, and deliver said bills of lading to said California Growers & Shippers, which in turn sold said carloads of grapes, while the same were in transit * * * to a certain concern in Chicago known as John A. Eck Company, * * * and said defendants did deliver both of said carloads of grapes at their destination * * * to said John A. Eck Company. * * *

During the season of 1921 the plaintiff was engaged as sole owner, in buying and shipping grapes in the county of Kings, under the firm name of Bedig Produce Company. At the same time H. J. Ellis was also engaged at Fresno in the same business, as sole owner, under the firm name of Reliance Fruit Company. Ellis had a contract to furnish the California Growers & Shippers with 20 carloads of muscat grapes. At the same time he was under contract to supply plaintiff with 10 carloads of the same variety of grapes. The last-mentioned 10 carloads were covered by two written agreements in the following language:

"Fresno, Cal., September 22, 1921.

"This is to certify that the Reliance Fruit Company has sold, and the Bedig Produce Company has bought 5 cars of first crop muscats out of the Lamoore district, at \$54 per ton loaded. A deposit of \$150 a car is hereby acknowledged—total \$750, balance to be paid upon presentation of bill of lading to O. Bedig at Fresno, Cal. [Signed] Reliance Fruit Company, by H. J. Ellis, Agt. Bedig Produce Company, O Bedig."

In fulfillment of these contracts, Ellis obtained the cars of the Southern Pacific Company and loaded them, procuring the bills of lading to be issued in the names of the purchasers. Usually the grapes intended for plaintiff were billed in the name of Bedig Produce Company, as consignor, and directed to the same firm, as consignee, at Chicago. The carloads which were delivered to the California Growers & Shippers were similarly billed with this purchaser's name appearing in the bill of lading as both consignor and consignee. Standard bills of lading were issued by the transportation company in triplicate, the first copy being termed the original, the second was called a duplicate, and the third was a mere memorandum, which was retained by the railroad company. Both the original and duplicate bills of lading were given to Ellis and turned over to the purchaser upon delivery of the grapes when the cars were ready to roll. Plaintiff had nothing to do with the loading or billing of these cars.

The rule of the railroad company required the prepayment of freight charges, but in lieu thereof a bond was required of the shipper guaranteeing the payment of freight before the cars were supplied. The plaintiff had such a bond deposited with the defendant railroad company covering the Lamoore station from which the grapes in question were shipped. Pursuant to an oral agreement the 10 carloads of grapes for which plaintiff contracted were to be loaded and delivered to him at Lamoore at the rate of 1 carload every day, or every other day, at request. In this manner 8 of the cars were loaded and delivered to plaintiff, and are not involved in this action. Although a conflict of evidence exists, there is substantial testimony to the effect that some of the carloads of grapes which were sold to purchasers other than the plaintiff, as a matter of accommodation, were billed in the name of Bedig Produce Company, for the reason that the Reliance Fruit Company had no sufficient bond on file with the railroad company. And it appears that the plaintiff had authorized this practice together with the necessary indorsement of transfer, and the signing of his company name on the bills of lading, when the carloads were delivered or re-consigned in transit. This agreement was not in writing, and evidence of this oral agreement was received over plaintiff's objection.

Mr. Ellis, the owner of the Reliance Fruit Company, testified that after 8 carloads of grapes had been loaded and delivered to the plaintiff, he was told by plaintiff that he was delivering the grapes too fast, and that he wished him to hold the remaining shipments back somewhat; that the last 2 carloads involved in this suit were loaded and billed to the Bedig Produce Company; that the bills of lading were delivered to him (Ellis) by his representative, Alexander, and that on account of said instructions from plaintiff, he (Ellis) had thereupon diverted and transferred the carloads of grapes to the California Growers & Shippers, and had assigned the bills of lading in his own handwriting, indorsing them, "Bedig Produce Company, by H. J. Ellis."

With relation to this authority to load and bill the grapes in the name of Bedig Produce Company and thereafter assign the bills of lading, Mr. Ellis testified:

"I informed Mr. Bedig we had no shipper's bond on the Southern Pacific lines, and would like very much to use his bond for the shipment of fruits over the Southern Pacific in that district for that season. He stated that that would be perfectly all right, as he had no shipments going forth from that section. * * * He told me I could indorse the bills of lading, Bedig Produce Company by myself, and that would be perfectly all right. * * * We loaded the cars and billed the cars under Bedig Produce Company, and presented the bills of lading to Mr. Bedig, and received his check for them as loaded, less deposit. * * * We commenced delivery of the second series immediately after the first 5 were filled, and he came to our office at one time and said that we were shooting them a little too fast for him. * * * We had one particular car of fruit * * * he stated it was too heavy for him to use, and I turned that car over to a broker to dispose of. * * * We were also filling Mr. Satrakian's order at the same time. * * * We supplied him 2 cars on an old Bedig bond, same being indorsed, 'Bedig Produce Company, by myself,' * * * under authority received by Mr. Bedig, and witnessed too."

About October 18th or 20th, Ellis had a conversation with plaintiff about this matter, regarding which he testified:

"Mr. Bedig came in and stated that we had delivered two bills of lading to the California Growers & Shippers, and he didn't want (them) to have any cars whatever billed on his bond. Any one else was perfectly all right, but Mr. Satrakian, the manager, * * * and himself were not on speaking terms, and were not good friends, and consequently they could not have any fruit billed on his bond."

On cross-examination, the following occurred:

"Q. Well, his authority to you was unqualified, was it, that you could take whatever cars he had, consign them by him to himself, have the bill of lading issued to Mr. Bedig, and you could indorse his name on the back of it, by yourself,

and it would be perfectly all right? A. Absolutely.

"Q. And you did that? A. Yes.

"Q. In two instances, is that right? A. In three instances."

Two other witnesses, namely, Condry and Augustus, corroborated the claim of Mr. Ellis that plaintiff had authorized the billing of cars in the name and under the bond of plaintiff. After assigning and transferring the bills of lading of the 2 carloads involved in this action, to the California Growers & Shippers, the last-mentioned company re-consigned them and they were forwarded and delivered to John A. Eck Company, at Chicago. Some three days after Ellis delivered the bills of lading of these 2 cars to the California Growers & Shippers, plaintiff came to see Ellis and registered a vigorous protest against this particular sale. The plaintiff was very angry, and in order to placate him Ellis procured a return of the duplicate bills of lading and delivered them to him without telling him that the California Growers & Shippers had already diverted and re-consigned the cars to purchasers at Chicago. Upon delivery of these two duplicate bills of lading, the plaintiff offered, and Ellis accepted, his check for \$1,165.55, the balance of the purchase price of the 2 carloads of grapes. Somewhat later, Ellis offered to supply plaintiff with two other carloads of grapes in lieu of these 2 in question, which the plaintiff refused to accept. Ellis also offered to repay plaintiff the entire purchase price of said 2 carloads of grapes, which was likewise refused. After receiving the duplicate bills of lading from Ellis, plaintiff tried to divert and re-consign the 2 carloads of grapes to a purchaser at Jersey City, but was unsuccessful, for they had been delivered under the transferred original bills of lading to John A. Eck Company, at Chicago. Thereupon this action was commenced, and defendants had judgment in the court below.

The chief question involved in this case is whether the defendant railroad company was guilty of conversion for failure to deliver the 2 carloads of grapes at their destination to the original consignee named in the bill of lading. If the title to the grapes had not passed to plaintiff, and Ellis had the authority to bill these cars in the name of plaintiff and transfer the bills of lading as the agent of plaintiff, then the defendant is not liable.

[1, 2] Appellant relies upon certain sections of the Civil Code of California, which, it is claimed, governs the effect of bills of lading and fixes the liability of transportation companies for failure to deliver freight. But, since this case clearly involves a transaction governed by interstate commerce, these sections of the state law do not apply. The transportation of grapes by a carrier from

Kings county, Cal., to Chicago, Ill., is clearly within the Interstate Commerce Act (U. S. Comp. St. § 5563 et seq.), enacted by Congress pursuant to the provisions of article 1, § 8, of the federal Constitution. 5 R. C. L. 713, § 25; 12 C. J. 22, § 22. Congress has exclusive authority to regulate interstate commerce under the federal Constitution. 1 Const. & Courts, 447, 449, 459; 5 R. C. L. 715, §§ 26, 27; 12 C. J. 86, § 114. "The power of Congress to subject every carrier engaging in interstate commerce to the regulations which it has adopted is undoubted. Such regulations as Congress may lawfully prescribe or authorize, and which may properly be deemed in regulation of interstate commerce, are paramount. * * * The states have no power to present any obstacle or lay any burden upon interstate transportation (except when the) subject-matter is a proper police regulation." 5 R. C. L. 715. "* * * The liability of a common carrier for loss, damage, or injury to an interstate shipment, as well as the validity of a stipulation in the contract of carriage relating to liability, is exclusively a federal question to be determined by reference to the federal statutes and decisions." 12 C. J. 86. "Commerce, which consists of the transportation of persons and property between the states, is a subject of national character, and requires uniformity of regulation. Congress, alone, therefore, can deal with such transportation; its nonaction is a declaration that it shall remain free from the burdens imposed by state legislation. Otherwise there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products, and against those of the other states." 1 Const. & Courts, 449; Gloucester Ferry Co. v. Penn., 114 U. S. 204, 5 S. Ct. 826, 29 L. Ed. 158; Welton v. Missouri 91 U. S. 280, 23 L. Ed. 347.

[3] The bills of lading involved in this action and the transfer thereof must be governed by the federal laws, and not by our local statutes. They were "straight, nonnegotiable bills of lading," and were so marked upon their face. Having been consigned to specified persons, these bills were what Congress has termed "straight bills," as distinguished from "order bills."

By an act of Congress adopted August 29, 1916, c. 415, Supp. of 1918, Fed. St. Ann. 73, (U. S. Comp. St. § 8604aaa et seq.), it is provided, in part:

"Sec. 2. A bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill." (U. S. Comp. St. § 8604aaaa.)

Section 6 of that act provides:

"A straight bill shall have placed plainly upon its face by the carrier issuing it, 'nonnegotiable,' or 'not negotiable.'" Section 8604acc.

Section 8 holds that:

"A carrier in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is an order bill, * * *," etc. Section 8604add.

Section 9 provides that:

"A carrier is justified, * * * in delivering goods to one who is (a) A person lawfully entitled to the possession of the goods, or (b) The consignee named in a straight bill for the goods, or (c) A person in possession of an order bill. * * *" etc. Section 8604ae.

Section 10 provides that:

"Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to any one having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section, * * *" Section 8604ee.

And section 22 of that act provides that:

"If a bill of lading has been issued by a carrier or on his behalf by an agent * * * the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu, or (b) the holder of an order bill, * * *" etc. Section 8604kk.

[4] It will be observed that there is nothing in the foregoing act which prohibits the transfer or assignment of a bill of lading. Since Congress has fully legislated on the subject of the effect of bills of lading, and has omitted to prohibit such transfers, we must assume that a transfer or assignment of bills of lading, either by a principal or agent is authorized. "Where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulations of the subject by the states, except in matters of local concern only, is repugnant to such freedom." 1 Const. & Courts, 459.

From the foregoing portions of the federal bill of lading act it appears that a carrier is justified in delivering goods (a) to the person lawfully entitled thereto, or (b) to the consignee named in a straight bill of lading; and where a carrier delivers goods to one who is not lawfully entitled to them, he is liable only to (a) the owner of the goods, or (b) the one having the right of possession of the goods.

[5] The record in the instant case furnishes substantial evidence to the effect that plaintiff, at the time of the alleged conversion, was neither the owner of the 2 carloads of grapes in question, nor entitled to their possession. Appellant relies upon the fact that having contracted with Ellis for 10 carloads of grapes, since the last 2 cars were actually loaded by the vendor and billed in

plaintiff's name, therefore title had passed to him and he thereby became the owner. However, it appears that at the same time Ellis was loading similar grapes at the Lamore station and billing them to other buyers. He had been informed by plaintiff that he was delivering the cars too fast. Substantial evidence indicates that Ellis was authorized by plaintiff to load and bill cars for other purchasers on plaintiff's bond and thereafter assign the bills of lading. Plaintiff had no part in either the loading or the billing of the cars.

[6, 7] The contracts of purchase were very meager, indeed, and furnish little evidence as to when the parties intended title to the grapes in question to pass. These memorandums recited that "Reliance Fruit Company has sold, and Bedig Produce Company has bought," 10 carloads of grapes. A deposit of \$150 per car was made on this purchase. No grapes from any particular field were specified, and no time for delivery was mentioned. The final payment was to be made "upon presentation of the bill of lading to O. Bedig." Considering this memorandum of purchase in connection with all the other facts and circumstances surrounding the transaction, it appears to have been the intent of the parties that the title to the grapes was to pass upon the delivery of the bills of lading to the purchaser. On account of plaintiff's instructions to Ellis that he was delivering the cars too fast, he assigned the bills of lading and delivered them to his other customer, the California Growers & Shippers, who, in turn, sold and reconsigned them to John A. Eck Company, at Chicago. Whatever may have been the motive or purpose of Mr. Ellis in subsequently procuring the duplicate copies of the bills of lading, and delivering them to plaintiff, and accepting the balance of the purchase price for the 2 remaining carloads of grapes which he had agreed to furnish plaintiff his conduct in no way affected the title to the grapes which had already passed.

But appellant contends that oral evidence of the alleged authority of Ellis to transfer the bills of lading from plaintiff to another customer, under the provisions of section 2309 of the Civil Code, was incompetent.

[3-10] Primarily, a bill of lading is in the nature of a receipt for goods on the part of the carrier, and is presumptive evidence, only, of the ownership thereof. As between the parties it is impeachable for mistake, error, or false statements contained therein. 4 Elliott on Railroads [3d Ed.] 497, § 2135; St. Louis, I. M. & S. R. Co. v. Citizens' Bank of Little Rock, 87 Ark. 26, 112 S. W. 154; 4 Jones Comm. on Evidence, 3030, § 1652. But a bill of lading may also become a contract between the shipper and the carrier for the transportation and delivery of the goods to the owner or the consignee. 4

Elliott on Railroads, 497, § 2135. The last-mentioned citation contains this statement:

"In so far as it is merely a receipt, either party may explain or contradict it by parol, but as a contract it must be construed according to its terms."

And on page 527 of the last authority cited, it is said:

"Bills of lading are not negotiable at common law as commercial paper. * * * They are, however, assignable, and in a larger than usual sense in so much as their assignment ordinarily constitutes a complete legal delivery of the goods." Dodge v. Meyer, 61 Cal. 405.

[11, 12] The oral evidence objected to in the instant case was not offered to vary the terms of the written bill of lading, nor was it offered to show the authority to sell and convey property, but it was received solely to establish an alleged agency to load and bill cars on plaintiff's bond and in his name, and to transfer the bills of lading therefor. We are of the opinion that parol evidence is competent for this purpose. There is no inhibition of the federal law to this effect. It was held in Kemper Mills, etc., Co. v. Hines, 293 Mo. 88, 103, 239 S. W. 806, that the agency of a consignee authorizing him to receive delivery of goods need not be in writing. It is there said:

"In such case would the consignor's authority to his agent to receive the delivery of the goods be required to be in writing? * * * We think not. We know of nothing in the act of Congress or other statutes so requiring. The fact that the bill of lading itself is required to be in writing does not require the authority of the agent receiving the property thereunder to be in writing."

In 4 Jones Comm. on Evidence, 2847, § 1557, it is said:

"Notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that an agent who made a contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction. * * * Agency may always be proved for the purpose of binding the principal, or for the purpose of giving the principal the benefit of the contract."

And in 4 Elliott on Railroads, 505, § 2139, the following language is used:

"Bills of lading are only prima facie evidence between the original parties that the goods have actually come into the carrier's custody, and like other receipts are open to explanation or contradiction by parol."

[13] Nor does the answer set up inconsistent defenses. After admitting the agreement to sell plaintiff 10 carloads of muscat grapes, defendants categorically deny all the other material allegations of the complaint,

and allege that the Reliance Fruit Company, and not the plaintiff, was the owner of the particular carloads of grapes involved in this action.

[14] The findings are sufficiently supported by the evidence, and no reversible error appears in the record. For the foregoing reasons the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

In re SPAULDING'S ESTATE.*

MONTGOMERY v. CHAPMAN.

(Civ. 5686.)

84 Cal. App. 371

District Court of Appeals, Second District, Division 2, California. July 6, 1927.

Rehearing Denied, with Modifications, Aug. 5, 1927. Hearing Denied by Supreme Court Sept. 1, 1927.

1. Wills $\S$ 476—Will and codicils are to be read as constituting one document, under statutes (Civ. Code, $\S$ 1320, 1321).

Will and codicils are to be read together as constituting one document under Civ. Code, $\S$ 1320, 1321, providing that testamentary instruments are to be taken together and all parts construed in relation to each other.

2. Wills $\S$ 476—"In consequence of" referring to death of executor held equivalent to "in event of," so that codicil naming substitute executor was inoperative.

Provision in codicil that "in consequence of" the death of an executor named in the will another should be executor held equivalent to provision "in the event of" the named executor's death, so that letters would issue to the originally named executor, and the provision be inoperative.

[Ed. Note.—For other definitions, see Words and Phrases, In Consequence of.]

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Application by M. C. Chapman and others for the probate of the will of Elizabeth Churchill Spaulding, deceased. From a decree admitting the will to probate appointing the named applicant as one of the executors and declaring a codicil to be inoperative, John R. Montgomery, named as substitute executor in the codicil, appeals. Affirmed.

John Perry Wood, of Los Angeles, for appellant.

Eugene Daney, of San Diego, and Eugene E. Trefethen, of Oakland, for respondent.

John J. Barrett, of San Francisco, amicus curie.

CRAIG, J. This case comes before us upon a stipulated record. The trial court decreed that the codicil of April 12, 1921, was inoperative and of no effect, and ordered the is-

suance of letters testamentary to Union Trust Company and respondent Chapman, which was according to the direction of the testatrix, as stated in the will. The codicil was dated the same day as the will. It is admitted that it was holographic, and that it provided as follows:

"I hereby make this codicil to my last will and testament April 12th, 1921. In consequence of the death of M. C. Chapman named as executor and trustee under said will, I hereby nominate, appoint and substitute John R. Montgomery in his place and stead as such executor and trustee, with the same power and authority by me conferred in my said will upon M. C. Chapman as such executor and trustee and likewise without bonds. Elizabeth Churchill Spaulding."

The parties stipulated that upon the hearing for probate of the will and codicils the trial court took no evidence, and that none was offered, in support of the finding that the codicil above quoted was inoperative and of no effect, except to show that Chapman was alive at the time the first codicil was made and was one of the petitioners for the probate of the will. The findings recite, in part as follows:

"The court further finds that both M. C. Chapman and John R. Montgomery were alive at the time of the making of each of the said instruments, and are alive at this time; that each is competent to act as executor or trustee; and that each consents to act as such. The evidence, however, that M. C. Chapman was alive when said instruments were executed was received over the objection of counsel for John R. Montgomery that such evidence was irrelevant, incompetent, and immaterial, and an attempt to vary the terms of the will of said decedent.

"It is therefore ordered, adjudged, and decreed that said instruments are and constitute the last will and testament of said decedent, and that the same be, and hereby are, admitted to probate as the last will and testament of said decedent, but that the holographic codicil dated April 12, 1921, is inoperative and of no effect upon the ground and for the reason, solely and not otherwise, that said M. C. Chapman therein mentioned was, upon the date said codicil was made, and still is, living, and one of the petitioners herein as aforesaid, and that said codicil by its terms is conditional on the death of M. C. Chapman."

Appellant contends that under the foregoing codicil he should have been appointed executor of the estate of said deceased. Upon this appeal the finding above set forth is assailed, as is also the court's construction of the provision that "In consequence of the death of M. C. Chapman * * * I hereby nominate, appoint and substitute John R. Montgomery in his place and stead," and this is the sole question presented for our determination.

[1, 2] It is argued by appellant that his appointment as executor was not made conditional upon the death of respondent, but that

the language of the codicil is clear and unambiguous and that it merely states the reason or occasion for making it; also, that the expression in controversy cannot be interpreted in the sense that appellant should be appointed "in the event of the death of M. C. Chapman." Both sides agree that standing alone the expression "In consequence of" means because of, or by reason of, and this we will assume to be true. Although the testatrix said, by reason of the death of M. C. Chapman, etc., John R. Montgomery should be substituted, in that connection, using the words, "I hereby nominate appoint and substitute John R. Montgomery," as we understand the import of this language she did not intend to state that Chapman's death had then occurred. In effect she merely provided that whenever his death might occur, if before the probating of the will and the taking effect of the other provisions therein contained in that behalf, Montgomery should be appointed executor in Chapman's place and stead. Such a consequence she directed should follow by reason of and as a result of the latter's death. But he had not died when the will was offered for probate, and so no occasion arose for putting into effect the codicil dated April 12, 1921. The will and both codicils are to be read together and as constituting one document. Estate of Ladd, 94 Cal. 670, 30 P. 99; Civ. Code, §§ 1320, 1321. The second codicil was made more than three years after the one here in dispute. The testatrix, of course, knew at the time the last codicil was executed that Chapman's death had not occurred, for he attested that instrument as a witness. It is unthinkable that the language employed should be understood as stating that M. C. Chapman had died when, in republishing the entire will in 1924, the testatrix did so in the presence of Chapman himself, who signed as a witness at her request and in her presence. Under these circumstances such a construction would be illogical in the extreme. On the other hand, to interpret the words "in consequence of," used in this context, to mean "in the event of," comports with reason as well as giving effect to the true meaning of the language employed by the testatrix.

Interpreting the words of the codicil as we have, it becomes unnecessary to consider the discussion in the briefs upon the interesting question which would be presented were we to adopt the construction contended for by appellant that the language in question amounts to a statement that M. C. Chapman's death had occurred, and that by reason thereof the testatrix then appointed Montgomery as executor. Of course, the question would then arise as to whether or not such a statement, constituting as it would an erroneous recital of a nonexistent fact as a reason for an unconditional devise, would be regarded as conditional when encountered in a codicil,

although it would be absolute if found in the original will. But we are not permitted to pass upon this question, for we hold that not only was it the intention of the testatrix to appoint Montgomery executor solely in the event that Chapman's death might occur before that of the testatrix and the probating of the will, but that such is the plain meaning expressed by the words of the codicil itself when taken in conjunction with the circumstances, no doubt considered by the trial court, that M. C. Chapman must have been known to the testatrix to have been alive in 1924, because at that time, in her presence, he witnessed the republication of her will.

The decree appealed from is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

84 Cal. App. 272

GREER v. LOS ANGELES ATHLETIC CLUB. (Civ. 4480.)★

District Court of Appeal, Second District, Division 2, California. June 30, 1927.

Rehearing Denied, with Modifications, July 29, 1927. Hearing Denied by Supreme Court Aug. 29, 1927.

1. Innkeepers ⇐11(1)—Detached portion of envelope in which club member deposited valuables held "receipt" within statute limiting liability of lodging house keeper (Civ. Code, § 1860; Code Civ. Proc. § 1962, subd. 3).

Detached portion of envelope in which club member deposited valuables containing number identifying it with envelope, as supplemented by printed matter on the envelope directing the manner of its use, held a "receipt" within meaning of Civ. Code, § 1860, limiting liability of lodging house keeper for valuables deposited, "unless he shall have given a receipt in writing therefor," particularly in view of Code Civ. Proc. § 1962, subd. 3, relating to conclusive presumptions.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Receipt.]

2. Appeal and error ⇐1012(1)—Appellate court will not weigh evidence either to justify or discredit trial court's findings.

Appellate court will not attempt to weigh evidence with a view either to justify or discredit findings of trial court.

3. Clubs ⇐5—Club accepting deposit of valuables by member for safekeeping, without requiring statement of value, and giving receipt, held liable as bailee for hire for full amount of actual value (Civ. Code, § 1840).

Where club, as part of service rendered its members, received deposit of valuables by club member without requiring any statement by member of value of the deposit, and gave receipt, it was liable as a bailee for hire for full amount of such deposit, notwithstanding Civ. Code, § 1840, providing "liability of a depository for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth."

4. Clubs ⇨12—Finding that club was liable as lodging house keeper for deposit of valuables by member held not inconsistent with finding that it was liable as bailee for hire.

Finding that club accepting deposit of valuables by member for safekeeping was liable as a lodging house keeper held not inconsistent with finding that it was liable as a bailee for hire.

5. Clubs ⇨12—Club, failing to return valuables deposited by member for safekeeping, has burden of showing absence of negligence.

Club, failing to return to member his valuables deposited for safekeeping, has burden of showing that negligence cannot fairly be imputed to it.

6. Clubs ⇨12—Evidence held to warrant finding of negligence of club in keeping member's valuables deposited for safekeeping.

In member's action against club for value of package deposited for safekeeping, and not returned, evidence held sufficient to warrant finding of negligence on part of club.

7. Clubs ⇨12—Evidence held insufficient to show negligence of club member in making deposit of valuables for safekeeping.

In member's action against club for value of package deposited for safekeeping, and not returned, evidence held insufficient to show negligence on part of plaintiff in making deposit.

8. Clubs ⇨12—Club, failing to return member's valuables deposited for safekeeping, is liable for interest from date of demand (Civ. Code, § 3287).

Under Civ. Code, § 3287, club liable to member for loss of valuables deposited for safekeeping is liable for interest from date of demand for return of deposit.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by P. H. Greer against the Los Angeles Athletic Club. Judgment for plaintiff, and defendant appeals. Affirmed.

O'Melveny, Millikin, Tuller & MacNeil, Sayre MacNeill, and Paul E. Schwab, all of Los Angeles, for appellant.

Nell S. McCarthy, of Los Angeles, for respondent.

MURPHEY, Justice pro tem. This is an appeal by the Los Angeles Athletic Club from a judgment in favor of the plaintiff in an action for damages for failure to return to plaintiff a package deposited with the defendant. Judgment was for the sum of \$1,253.83, with interest at 7 per cent. per annum. The defendant is a social organization used by the members and their guests. In addition to the ordinary facilities furnished by it, the club maintained sleeping rooms, which were rented to members of the club, for which a consideration in addition to the regular dues of the club was required. The plaintiff was a member in good standing in the club, and had resided in one of the rooms of the club

from the early part of 1919 until after the incident resulting in this litigation. Defendant also kept a fireproof safe in the clerk's office on the main floor for the safekeeping of packages deposited therein by lodgers or other members of the club, for which no special charge was made.

The court found in favor of the plaintiff, and bases its conclusion in that regard upon: (1) The fact that the defendant was a lodging house keeper; and (2) that in accepting the package to be deposited in its safe it was a bailee for hire. The appellant contends that the judgment should be reversed primarily upon two specifications: (1) That appellant, as a lodging house keeper, was not liable for more than \$250, not conceding, however, that it was liable for anything; (2) if it was a bailee for hire, the liability would be limited to the amount the defendant was informed by the depositor was contained in the deposit package, or what it had reason to suppose the deposit to be worth, and that in no event could the liability exceed the sum of \$250.

Taken in the order in which they have been above named, the defendant contends that, since the relationship between the plaintiff and defendant was that of lodger and lodging house keeper, and since the defendant kept a fireproof safe, and gave notice to plaintiff, as contemplated in section 1860 of the Civil Code, it follows that the liability of the defendant, if any, is governed by that section which provides:

"If an innkeeper, hotel keeper, boarding house or lodging house keeper, keeps a fireproof safe and gives notice to a guest, boarder or lodger, either personally or by putting up a printed notice in a prominent place in the office or the room occupied by the guest, boarder, or lodger, that he keeps such a safe and will not be liable for money, jewelry, documents, furs, fur coats and fur garments, or other articles of unusual value and small compass, unless placed therein, he is not liable, except so far as his own acts shall contribute thereto, for any loss of or injury to such articles, if not deposited with him to be placed therein, nor in any case for more than the sum of two hundred and fifty dollars for any or all such property of any individual guest, boarder, or lodger, unless he shall have given a receipt in writing therefor to such guest, boarder or lodger."

Appellant insists that no receipt was given to respondent.

[1] Many cases, and definitions by text-writers and lexicographers, are cited to determine the meaning of the word "receipt," as used in the foregoing section of the Code, all of which in our judgment are fully answered and disposed of by supplementing the detached portion of the package envelope hereinafter referred to, with the printed matter remaining on said envelope and being part thereof, printed on the body thereof in the words following:

"Directions for Using this Envelope. After the depositor has placed his money or valuables in the envelope and sealed it, have him sign his name in full on check A, and then tear off and give him check B, to keep as a receipt. When he calls for his deposit, cause him to put his signature on check B, and then compare it with that on check A; if the result is satisfactory, deliver the envelope, and date and file the two checks as receipts."

The portion of the paper referred to above was delivered to the defendant at the time of making his deposit and was in words and figures as follows:

"Check B. Date ———, 192—, Los Angeles Athletic Club. No. 304. Los Angeles, Calif. Depositor is to sign here only when he withdraws his deposit ———. Deliverable to the owner only."

The evidence shows that at the time the plaintiff deposited his package with one of the clerks in the office of the defendant there was delivered to him the above slip of paper which was detached from the envelope into which the deposit was placed.

Section 1962 of the Code of Civil Procedure, subdivision 3, reads as follows:

"The following presumptions, and no others, are deemed conclusive: * * * 3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

This writing was regarded and considered as a receipt by all parties to the action. The directors evidently so considered it when they authorized and directed the preparation of the envelope to be used by persons depositing money or valuables in its safe. The plaintiff and the employees of the club constantly in their testimony referred to the writing as a receipt. The portion of the envelope taken by the defendant bore a duplicate number corresponding to the number on the portion of the deposit envelope retained by the officers of the club, and when returned, signed and dated by the depositor, entitled him to the envelope and its contents. Nothing on the envelope requires the depositor to state the amount of money or the value and character of valuables, if such there were. This presumably was the intention of the officers of the club, and it was probably their purpose for good reasons not to have disclosed to its employees the amount or value of the contents of these deposit packages. They evidently regarded it as unnecessary, and probably concluded that it would avoid temptation. Certainly, it would have served no good purpose to have disclosed to the clerk or clerks at the desk the contents and value of packages, as it is not disclosed in the record that they or any of them were or was clothed with any discretionary powers to refuse a

package because in amount or value it was in excess of any stipulated limitation, and it cannot fairly be said, and the record does not disclose the fact to be, that such information, had it been given, would have caused the employees or officers of the club to exercise any greater degree of care in its safekeeping. The receipt as given was such as a matter of law. A receipt in its common use is nothing more than a bare acknowledgment of having received something. In the case of *California Packers Co. v. Merritt Fruit Co.*, 6 Cal. App. 507, 510, 92 P. 509, 510, this court says:

"It was as to defendant a mere receipt for money. The fact that it stated that the money received was in full of all claims and demands must be held to mean the claims and demands for which the money was given in satisfaction. A receipt may always be explained, and even the amount of money stated in the receipt to have been paid may be shown by parol evidence to have been a different sum. If the amount or sum mentioned in the receipt may be contradicted by parol, there is no reason why the words, 'All claims and demands,' may not also be contradicted or explained. One word in a receipt is no more sacred than another. A receipt is not intended to be an exclusive memorial, and for this reason the authorities all hold that the facts may be shown. A receipt is only a written admission of a transaction independently existing, and, like other admissions, it is not conclusive. It is evidence—and often very convincing evidence—against the party who gives it, but it is not conclusive."

In *Hickox v. Naugatuck R. R. Co.*, 31 Conn. 281, 83 Am. Dec. 143, the court says:

"The check is in the nature of a receipt, and may be given and received at any time when the convenience and custom of the company dictate. It is not the contract, but evidence of the ownership, delivery and identity of the baggage."

There are many other cases holding to the same effect. *Greenleaf on Evidence*, § 305, says:

"In regard to receipts, it is to be noted that they may be either mere acknowledgments of payments or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it is merely prima facie evidence of the fact and not conclusive, and therefore the fact which it recites may be contradicted by oral testimony."

In the *Interstate Commerce Act*, § 20k (4 Fed. Stats. Ann. 506 [U. S. Comp. St. § 8640a]) the following language appears:

"That any common carrier, railroad, or transportation company subject to the provisions of this act receiving property for transportation from a point in one state or territory or the District of Columbia to a point in another state, territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the law-

ful holder thereof for any loss, damage, or injury to such property. * * *

In commenting upon this language the Supreme Court of the United States in *Boston & Maine R. R. v. Hooker*, 233 U. S. 97, 121, 34 S. Ct. 526, 532, 58 L. Ed. 868, 879 (L. R. A. 1915B, 450, Ann. Cas. 1915D, 593), speaks as follows:

"We do not think the requirement of the Carmack Amendment, that a railway company receiving property for transportation in interstate commerce shall issue a receipt or bill of lading therefor, required other receipts than baggage checks, which it is shown were issued when the baggage was received in this case. When the amendment was passed Congress well knew that baggage was not carried upon bills of lading, and that carriers had been accustomed to issue checks upon receipt of baggage. We do not think it was intended to require a departure from this practice when the matter was placed under regulation by schedules filed and subject to change for unreasonableness upon application to the commission. Such checks are receipts, and there is no special requirement in the statute as to their form."

It is self-evident that a receipt of the character here disclosed would not be required to measure up to the formalities and specifications of a warehouse receipt. In such receipts a description is essential in order that the negotiable character of the instrument may be effectuated. They are more than receipts—they are contracts. In view of the printed matter on the package envelope and the function the slip of paper was designed to accomplish, we are strongly of the opinion that, had it, when given to the defendant, borne simply the duplicate number with a direction to return the same and identify it as required by the package envelope, it would have measured up to all of the requirements of a receipt.

[2] There is some discussion that the deposit was returned and some doubt expressed as to the sufficiency of the evidence to support the trial court's finding as to the amount of the deposit. The trial court's conclusions on both of these matters is adverse to the appellant. It found that the package had never been returned to the plaintiff and that the amount contained in the package was a definite and specific sum, to wit, \$1,253.80. As to the first contention, the evidence is contradictory, and as to the second point the contention is largely based on inference as against the direct and positive testimony of the plaintiff together with certain corroborative circumstances. Under such circumstances the rule is too well settled to warrant discussion that the appellate court will not attempt to weigh the evidence with a view either to justifying or discrediting the findings of the trial court.

[3, 4] It is next contended by the defendant that, if it is a bailee for hire instead of a lodging house keeper, the liability is limited

to the amount the defendant was informed by the depositor or had reason to suppose the deposit to be worth, and in any event not in excess of the sum of \$250. In support of this position, section 1840 of the Civil Code is quoted, as follows: "The liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth," it being the defendant's contention that there was no evidence whatever that the defendant was informed by the plaintiff or any one, at the time of the deposit, of the amount contained in the package, nor is there any evidence from which it can be concluded that the defendant had reason to suppose that the package was worth more than \$200 or \$250, and that therefore the finding of the trial court that the defendant knew the package contained a large amount of money, and that the defendant had reason to suppose it contained as much as \$1,253.80, is not sustained by the evidence. Furthermore, it is the contention of the appellant that, the court having found that it was a lodging house keeper, the contention of the plaintiff that it was a bailee for hire is inconsistent with such finding. We are unable to agree with this contention. The plaintiff was a member of the club, and incidentally a roomer in the clubhouse. In either of these capacities he was entitled to all the privileges and benefits it afforded. He was not required, in making his safety deposit, to indicate in what capacity he was acting, and we are unable to see any inconsistency in invoking every instrumentality recognized by law in asserting his right to recover his property. As a member of the club, the law afforded him the right to recover as a bailor. As a renter of a room, it afforded him the right to recover as a pay guest in a lodging house. If he fails in one and makes good in another he has established a cause of action. If he succeeds in establishing both he has likewise accomplished the single purpose of recovering the property he has deposited. It may be stated that there was no special charge for the service rendered by the club to its members in keeping a safe for the safekeeping of the valuables and money belonging to its members. This service, if paid for at all, was a portion of the service for which the members paid dues to the club, and in this connection the respondent calls attention to the fact that the superintendent of the club testified that the acceptance of the packages and the caring for them was a part of the service which was rendered to the members of the club in consideration of the dues paid by them. Mr. Hall, the assistant secretary, testified that this depositary service was a part of the service rendered to members, partly paid for from dues, and on cross-examination he testified:

"The club has not given the members everything that they have wanted. It has given them

what it has thought would be necessary to run a decent club."

The superintendent testified to the same effect. It is further evident from a direction printed on the back of the deposit envelope as follows:

"Below are directions for using this envelope. After the depositor has placed his money or valuables in the envelope and sealed it, have him sign his name in full on check A and then tear off and give him check B to keep as a receipt."

It is apparent, therefore, that a part of the service to be rendered by the club in consideration of the dues of the members was caring for money and valuables when deposited with it in the proper manner and in failing to provide any blank or space on the envelope where the character or amount of the deposit was to be designated, it is apparent that it was the intention of the club officers to receive such amounts and such valuables as a member might in his discretion see fit to deposit. This it no doubt had a right to do, and in doing so assumed the responsibilities necessarily consequent thereon. In the case of *Cussen v. Southern California Savings Bank*, 133 Cal. 534, 65 P. 1099, 85 Am. St. Rep. 221, the Supreme Court of this state, having discussed the conduct and liability of depositaries for hire in a manner that is very enlightening in determining the questions involved in this appeal, said:

"It was required to use that degree of care in the protection of this property from thieves without and thieves within, and it was required to use that same degree of care in the selection of its employees, and in the supervision of their conduct after they were employed. It is said in *Preston v. Prather*, 137 U. S. 604 [11 S. Ct. 162, 34 L. Ed. 788]: 'Persons, therefore, depositing valuable articles with them expect that such measures will be taken as will ordinarily secure the property from burglars outside and from thieves within, * * * and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of such measures would in most cases be deemed a culpable negligence so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor.' See also *Gray v. Merriam*, 148 Ill. 179, 190 [35 N. E. 810, 32 L. R. A. 769, 39 Am. St. Rep. 172]. In this case it was established by plaintiff's evidence that his money was abstracted from the vaults of defendant while on deposit. Under these circumstances the burden was cast upon defendant of showing that it used proper care in the safekeeping of the plaintiff's property. In *Lockwood v. Manhattan Storage Co.*, 28 App. Div. 68, 50 N. Y. S. 954 [974], it is said: 'The ordinary rule established by numerous authorities is, that when plaintiff has proved the deposit of his goods, and a failure of the defendant to produce the same on demand, he has established a prima facie case, and the defendant must excuse his failure to produce, by bringing himself within one of the recognized excep-

tions.' See, also, *Claffin v. Meyer*, 75 N. Y. 262 [31 Am. Rep. 467]. * * * Section 1840 of the Civil Code declares: 'The liability of a depository for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth.' Defendant relies upon this section of the Code, but in its provisions we see no relief for it. Here, plaintiff did not inform defendant as to the value of the deposit. Neither does defendant claim that it had reason to suppose the thing deposited was of less value than it was in fact. Indeed, the very manner of conducting this somewhat peculiar line of business contemplates that the bailee shall not know the value of the thing deposited. In substance, he closes his eye to the value and character of the deposit, and this fact seems to be one of the controlling features in the transaction of this character of business. Under the circumstances, it is apparent that section 1840 of the Civil Code can have no application to the facts of this case."

In the case of *Sulpho-Saline Bath Co. v. Allen*, 66 Neb. 295, 92 N. W. 354, 1 Ann. Cas. 21, the Supreme Court of Nebraska says:

"In *Woodruff v. Painter*, 150 Pa. St. 91 [24 A. 621], 16 L. R. A. 451 [30 Am. St. Rep. 786], a retail dealer in clothing was sued for the value of a watch which, at the direction of a clerk, he had placed in a drawer while trying on a suit of clothes. The court said (page 452): 'When the defendants opened a retail clothing store they thereby invited the public to come into their place of business and purchase clothing in the usual manner; and when they extended this invitation they assumed some duty to the people who should respond to it. Even the householder who permits the use of a path leading to his house is deemed to hold out an invitation to all people who have any reasonable ground for coming thither to pass along his pathway, and is therefore held responsible for neglecting to fence off dangerous places. 1 Addison, Torts, 203. So, too, a shopkeeper is liable for neglect on leaving a trap-door open without any protection by which his customers receive injury. *Parnaby v. Lancaster Canal Co.*, 11 Ad. & El. 223, 39 E. C. L. 54. In like manner it cannot be doubted that, if these defendants had maintained or permitted a danger of any kind in their store, and by reason of it the plaintiff had sustained bodily injury, they would have been answerable to him for the consequences. In such case they would be said to have been guilty of negligence—guilty of a neglect of duty which they owed to the customer; but I apprehend that the duty neglected would arise from an implied contract that, if customers would come to their store, no harm that could reasonably be averted should overtake them, and the consideration for such promise would be the chance of profits from their patronage. * * * The principles which govern that relation are briefly and clearly stated by Judge Story, in his work on Bailments, thus: 'When the bailment is for the benefit of the bailor, the law requires only slight diligence on the part of the bailee, and of course makes him answerable only for gross neglect. When the bailment is for the sole benefit of the bailee, the law requires great diligence on the part of the bailee, and makes him responsible for slight neglect. * * * Manifest-

ly the bailment, in a case like the present, is of the latter class, for, while the customer pays nothing directly, or eo nomine, for the safe-keeping of his effects, the dealer receives his recompense in the profits of the trade of which the bailment is a necessary incident. It was upon this principle that Lord Holt said, in *Lane v. Cotton*, 12 Mod. 473, 483, an action was sustainable against an innkeeper for the loss of a guest's goods, and that the Court of Appeals affirmed the judgment of the court of common pleas of the city of New York in *Bunnell v. Stern* [122 N. Y. 539, 25 N. E. 910, 10 L. R. A. 481, 19 Am. St. Rep. 519], supra."

The court further says:

"Having received the property as bailee, the burden was on the defendant alone to show that it was lost, if such was the case, without negligence upon its part."

[5, 6] These cases are clear expressions of the law applicable to the situation developed in the instant case where any depositary accepts property as incidental to services rendered by the depositary, holding that the relationship between the parties is one of mutual benefit, and the depositary is a bailee for hire. In its pleadings the plaintiff raises no issue of negligence; that issue having for the first time been injected into the case by the answer of the defendant. The logic of the foregoing cases under such circumstances requires the defendant to assume the burden, having failed to return to the plaintiff his package, of showing that negligence may not be fairly imputed to it. The case of *Perera v. Panama-Pacific Int. Exposition Co.*, 179 Cal. 63, 175 P. 454, cited by appellant, is readily distinguished from the case at bar and the cases hereinbefore discussed. In that case it is conceded by the plaintiff that he must establish the negligence of the defendant. The defendant received jewelry from the plaintiff in locked showcases furnished by the plaintiff which defendant was to sell for the plaintiff on a commission. Plaintiff's representatives at all times knew of the conditions under which the property was being cared for. The locks on the showcases were not of the accepted type, and were easily opened. The case has more the aspect of a joint venture than a bailment for hire. The facts are so entirely divergent from the facts in the instant case as to serve no purpose in the solution of the problem. There is no satisfactory evidence either way as to the knowledge of the club or as to its supposition touching the amount of money likely to be deposited by the plaintiff. There is evidence in the record to the effect that the plaintiff was a business man in the city of Los Angeles; that during the year preceding this transaction his firm had done business to the extent of over \$7,000,000, and that he himself had an allowance of \$30,000 per year as president of the corporation, and that he fre-

quently carried in excess of \$1,000 upon his person, and had upon a previous occasion deposited a large amount of money with the club. This issue was tendered by the defendant, and no evidence was offered in support of the issue so tendered. The conduct of the defendant in failing to require any specification on the deposit envelope may fairly be construed to mean that a member might deposit any amount or value at his discretion. When it failed to return the deposit, it was prima facie guilty of negligence, and it at once devolved upon the defendant to meet the issue. In the absence of any showing in this regard, and in the absence of any limitation on deposits, we are not prepared to say that from all the circumstances of the case and the presumptive knowledge attributable to the officers of the club the court was not justified in finding that the defendant knew that plaintiff deposited a large amount of money in said package, or had reason to suppose that the amount of said deposit was as much as claimed by respondent. There is evidence in the record independent of what has been heretofore said upon which a finding of defendant's negligence may fairly be predicated. The club itself kept from \$1,000 to \$3,000 in cash in a safety box in the safe, which the evidence discloses was always kept locked. On the other hand, the compartments in which the safety deposits were kept were generally open, as was the door to the safe. The degree of care which is necessary to avoid the imputation of bad faith is estimated by the degree of care which the depositary would use toward its own property of a similar kind. In 4 A. L. R. 1215, note, it is said:

"Presumptions Arising from Fact that Depositary Used the same Care as to his own Property. The degree of care which is necessary to avoid the imputation of bad faith is estimated by the carefulness which the depositary uses toward his own property of a similar kind. *Lloyd v. West Branch Bank* (1850) 15 Pa. 172, 53 Am. Dec. 583, 1 Am. Neg. Cas. 574; *Ray v. Bank of Kentucky* (1874) 10 Bush (Ky.) 344. It will be difficult to presume fraud where the bailee was equally a loser with the bailor. *McLean v. Rutherford* (1843) 8 Mo. 109. A gratuitous bailee is bound to the exercise of good faith; and if he keeps the goods intrusted to him with less care than he keeps his own of the same kind, this is a circumstance from which a jury might well infer a want of good faith; but the keeping of them as his own is an argument of his honesty. *Griffith v. Zipperwick* (1876) 28 Ohio St. 383, 1 Am. Neg. Cas. 545. * * * It is not enough that a bailee takes the same care of the property bailed as he does of his own, the conduct of men of common sense, as a class, in the care of their own property, being the standard. *Merchants' Nat. Bank v. Guilmarin* (1893) 93 Ga. 503, 21 S. E. 55, 44 Am. St. Rep. 182."

[7] In this behalf the appellant contends that the respondent was negligent, and in

support of this contention quotes from the testimony of respondent as follows:

"The clerk then tore off the receipt and handed it to me, took the envelope, and I saw him place it in the large compartment in the safe. It was not locked, and the safe doors were open. There was another door to this compartment within the large safe. The large safe doors were opened. I do not think that I ever saw them closed. The large safe doors were always open when I went to the club, but the small doors were closed."

It would seem that this testimony fails to support the contention of the appellant. No one questions the fact that these safety packages were deposited in the small compartments in the safe, and, of course, the plaintiff would have no means of knowing whether they were or were not locked. He did know, apparently, that the large door to the safe was left open during business hours, and during the time that he was in and about the club. In the case of *Dieterle v. Bekin*, 143 Cal. 683, 77 P. 664, the plaintiff pleaded the delivery of property to defendant for storage, a demand for possession, and the refusal to comply with the demand. Defendant, in addition to the denials, pleaded that the property was without fault or negligence of the defendant destroyed by fire. The trial court found that the goods were destroyed by fire, the origin of which was unknown, and gave judgment for the defendant, which was reversed on appeal. In that case the court said:

"The plaintiffs made out their case when they established to the satisfaction of the court the allegations of their complaint. It was then for the defendant to establish the allegations of his affirmative defense if he could do so. The court has found that he was grossly negligent in the matter of exposing the property to loss by fire, and that the property was destroyed by fire of an unknown origin. The facts found suggest at least a probability that the fire came from the same source from which emanated the 'more than ordinary risk' under which the property was so negligently placed by the defendant. Under the circumstances disclosed by the findings, the burden which the defendant had assumed in his affirmative defense was upon him to satisfy the court that the fire did not come from this source."

This principle is further elucidated in the case of *Wilson v. California, etc., R. R. Co.*, 94 Cal. 166, 172, 29 P. 861, 864 (17 L. R. A. 685), where the Supreme Court says:

"Had the defendant been sued as a tort-feasor, and charged in the complaint with negligence whereby plaintiff's goods were destroyed by fire, the burden of proving the alleged negligence would have been upon the plaintiff (*Wilson v. Southern Pac. R. R. Co.*, 62 Cal. 171); but not so where, as in this case, the action is upon the carrier's contract to carry and deliver goods; the alleged breach being a failure to carry and deliver according to the contract, and the defense being that the goods were destroyed by fire, without the carelessness or negligence of

the defendant. As a general rule, the burden is on the defendant to prove new matter alleged as a defense (*Osborn v. Hendrickson*, 8 Cal. 31; *Piercy v. Sabin*, 10 Cal. 22 [70 Am. Dec. 692]; *Kuhland v. Sedgwick*, 17 Cal. 124; *Bryan v. Maume*, 28 Cal. 244; *Mulford v. Estudillo*, 32 Cal. 136), even though it requires the proof of a negative. 'It makes no difference, therefore, whether the actor is plaintiff or defendant, so far as concerns the burden of proof. If he undertake to make a case, whether affirmative or negative, this case must be made out by him, or judgment must go against him. Hence it may be stated, as a test admitting of universal application, that whether the proposition be affirmative or negative, the party against whom judgment would be given as to a particular issue, supposing no proof be offered on either side, has on him, whether he be plaintiff or defendant, the burden of proof, which he must satisfactorily sustain. If there is a case made out against a defendant, on which, if the plaintiff should close, a judgment would be entered against the defendant, then the defendant has on him the burden of proving a case by which the plaintiff's case will be defeated.' *Wharton on Evidence*, § 357, and authorities cited."

[8] There is some contention that the property was stolen. No evidence was offered from which a finding to that effect could be sustained. The further disposition of this property after leaving the clerk's hands has never been accounted for. The trial court awarded to the plaintiff interest from the date of the demand for the return of the deposit. Appellant contends that, in awarding damages for the amount deposited the court exhausted its power to award anything beyond that amount. This matter appears to be clearly covered by section 3287 of the Civil Code, which reads as follows:

"Person Entitled to Recover Damages May Recover Interest Thereon. Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

No doubt a different rule applies in replevin cases where damages are allowed for the value and wrongful detention. The cases cited by appellant are to this effect, and, as we view the matter, have no application to the situation involved in this litigation.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

On Petition for Rehearing.

PER CURIAM. The petition for rehearing points out that there is an erroneous statement in the opinion in this cause, and it is manifest that the assertion is correct. In order to cure the inadvertence through which the erroneous statement was made, the opinion is now corrected by striking therefrom the following:

"No one questions the fact that these safety packages were deposited in the small compartments in the safe, and of course the plaintiff would have no means of knowing whether they were or were not locked. He did know, apparently, that the large door to the safe was left open during business hours, and during the time that he was in and about the club."

We think the erroneous statement contained in the opinion does not affect the merits of the appeal.

Rehearing denied.

84 Cal. App. 460

RIDDLE v. ETLING. (Civ. 3020.)

District Court of Appeal, Third District, California. July 15, 1927.

1. Chattel mortgages ⇨278—Testimony held sufficient to support finding as to amount of unsecured indebtedness, in suit to foreclose chattel mortgage.

In action to foreclose a chattel mortgage, plaintiff's testimony to items of defendant's unsecured indebtedness aggregating greater sum than that found by court *held* sufficient to support finding that unsecured indebtedness was certain sum.

2. Payment ⇨39(6)—Chattel mortgagee receiving proceeds of unauthorized sale of mortgaged property may apply proceeds to unsecured indebtedness.

Where property covered by chattel mortgage was sold without mortgagee's knowledge, and proceeds paid to mortgagee, she was not required, without direction by mortgagor, to apply them to satisfaction of note secured by mortgage rather than to unsecured indebtedness.

3. Chattel mortgages ⇨218—Mortgagee need not bring action to recover mortgaged property after unauthorized sale.

Where property covered by chattel mortgage is sold without authority of mortgagee, she is not required to bring action for recovery of property.

4. Chattel mortgages ⇨227—Chattel mortgagee has no lien on money received by mortgagor in unauthorized sale of mortgaged property.

Where property covered by chattel mortgage was sold without authority of mortgagee, she had no lien on money in mortgagor's hands received from buyer of such property.

5. Chattel mortgages ⇨227—Chattel mortgagee has no lien on proceeds of sale of mortgaged property, where sale is authorized or ratified.

Where chattel mortgagee authorizes or ratifies sale of mortgaged property by mortgagor, lien on property is extinguished and is not transferred to proceeds in hands of mortgagor.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Mrs. Laura Riddle against C. W. Etling. Judgment for plaintiff, and defendant appeals. Affirmed.

W. E. Davies, of Marysville, for appellant.
A. H. Hewitt and Lloyd Hewitt, both of Yuba City, for respondent.

FINCH, P. J. This is an action to foreclose a chattel mortgage given by defendant to plaintiff on a crop of barley and an automobile to secure the payment of a promissory note for \$1,000. Plaintiff was given judgment for \$300 and interest and also the sum of \$100 as attorney fees, and the automobile was ordered sold to satisfy the judgment. The defendant has appealed. The court found:

"That the crop of barley * * * was sold by the defendant for the sum of \$1,922.35, and defendant paid to plaintiff the sum of \$1,722.35 from the proceeds of said sale.

"That at the time said plaintiff received said sum defendant was owing plaintiff, and there was due and payable from defendant to plaintiff, in addition to the amount due on the promissory note set forth in said complaint, the sum of \$1,113, which said sum represents money borrowed from said plaintiff by defendant, money paid by plaintiff for defendant at his request, and wages due plaintiff from the defendant.

"That, at the time said defendant paid the plaintiff the sum of \$1,722.35, plaintiff and defendant had no accounting between themselves, and neither of them knew to a certainty how the account stood.

"That, from said sum of \$1,722.35, plaintiff immediately on receipt of the same applied the sum of \$735 to the payment of the amount due on said note, \$700 of which was applied in payment on the principal thereof, and \$35 thereof was applied by her to the payment of interest accrued on said note to the 27th day of August, 1924, and she applied the balance thereof, the sum of \$987.35, on the amount due her from the defendant in addition to the amount represented by the promissory note, to wit, the sum of \$1,113.

"Defendant, at no time prior to the time she made application of said money as above set forth, directed plaintiff to apply all of the said sum of \$1,722.35, or any part thereof, to the payment of said note or interest thereon. * * * The said sum was given to plaintiff in two installments. The payment or installment of \$501 on the 12th day of August, 1924, and the other installment of \$1,221.35 on the 18th of August, 1924.

"That there is now due and unpaid from the defendant to plaintiff on account of the principal of the promissory note set forth in the complaint herein, the full sum of \$300, together with interest thereon from the 27th day of August, 1924, at the rate of 7 per cent. per annum, and also the sum of \$1,256.65 as balance due on unsecured indebtedness of defendant to plaintiff, which said sum of \$1,256.65 the plaintiff waives."

[1] Appellant contends that the evidence is insufficient to support the finding that the un-

secured indebtedness of defendant to plaintiff was the sum of \$1,113. Plaintiff testified to items of indebtedness aggregating a greater sum than that found by the court. Such testimony is sufficient to support the finding, even though some of the items were disputed by defendant. Appellant tabulates the items of indebtedness testified to by the plaintiff as involved in the account and then attempts to show that she testified to payments aggregating a greater sum. He entirely ignores, however, her testimony to the effect that some of these payments were made upon debts of previous years, which did not enter into the accounting at all. In his tabulation he credits the defendant with a payment of \$650, but omits to charge him with \$600 loaned to him by the plaintiff and in satisfaction of which the payment of \$650 was made.

The finding that the balance of the unsecured indebtedness of defendant to plaintiff was \$1,256.65 is clearly a clerical error. A mere computation from the specific facts found shows that such balance was \$125.65. That finding is wholly immaterial except for the purpose of showing that the plaintiff had not applied a greater sum upon the unsecured indebtedness than was due her thereon.

[2] Appellant's main contention is that, because the payments made to the plaintiff were the proceeds of the sale of a part of the mortgaged property, it was her duty, without direction by defendant, to apply the same first to the satisfaction of the note secured by the mortgage. The following testimony stands uncontradicted:

"In the summer of 1924, the crop was harvested by the defendant, and, instead of being turned over to the plaintiff, was retained in possession of defendant until sold by him, without the knowledge of the plaintiff. The first installment of the barley was sold by defendant and after this sale he paid the plaintiff \$500, * * * and subsequently, and before August 13, 1924, defendant sold the remainder of the barley without the knowledge or consent of the mortgagee, and on August 13th, defendant handed plaintiff a check for \$1,221.35, the proceeds of the second installment of the barley."

Plaintiff testified that the defendant told her to apply the amount of the check first on the unsecured indebtedness and the remainder on the mortgage note. The defendant denied this and testified that:

"The check for \$1,221.35 was delivered with the intention of having it applied to the payment of the mortgage."

[3-5] It is clear that the defendant made an unauthorized sale of the barley. Whether or not such wrongful sale had the effect of extinguishing the lien of the mortgage on the barley depends upon circumstances not shown by the record. *Crosby v. Fresno Fruit Growers' Co.*, 30 Cal. App. 308, 158 P. 1070. In any view of the case, out of the several remedies opened to the plaintiff by the unauthorized

sale, she was not required to bring an action for the recovery of the property. When the proceeds of the sale came into the hands of the defendant, it was within his power to appropriate the same to any purpose of his own choosing. While, depending upon the circumstances, the lien of the mortgage may have continued on the barley, the plaintiff had no lien upon the money in defendant's hands which was paid for the barley. If the plaintiff had authorized or ratified the sale made by the defendant, the result would be the same. The lien on the barley in that case would be extinguished and would not be transferred to the proceeds in the hands of the defendant. *Maier v. Freeman*, 112 Cal. 8, 44 P. 357, 53 Am. St. Rep. 151.

The defendant having failed to direct the application of the payments to any particular debt, no more reason appears for requiring the application thereof to the mortgage debt than if the moneys had been derived from a different source. In case of foreclosure or sale by the mortgagee under authority given him by the mortgage, it has been held uniformly that the proceeds of the sale must be applied first to the mortgage debt. The decisions are in conflict as to the rule applicable to payments made by the mortgagor out of moneys derived from his sale of the mortgaged property when he does not direct the application thereof. The decisions holding in accordance with appellant's contention do not consider whether there is a distinction to be made between such a case and one where the sale is involuntary as to the mortgagor, as upon foreclosure or sale by the mortgagee. Such a distinction is clearly pointed out and what appears to be the logical rule is stated in *Cain v. Vogt*, 138 Iowa, 631, 116 N. W. 786, 128 Am. St. Rep. 216, where it is said:

"Of course, if the creditor forecloses his mortgage, the proceeds of the sale will be applied upon the debt thereby secured, because the very purpose of the foreclosure is to convert the security into money for the payment of that specific debt. But if the mortgagor voluntarily sells the property, and turns the money thus realized over to the creditor without direction for its application, the right of the latter to apply it to the unsecured debt is, in our judgment, a logical deduction from the propositions of law to which we have already given our adhesion. The books are not wanting in authority bearing upon the point here presented. * * * Rules which bind the mortgagee who sells upon foreclosure, or takes possession of and sells and converts the security, have little application to a case where the payment is made from money obtained by a voluntary sale by the mortgagor. In the latter case the lien of the mortgage does not follow or attach to the money, and the mortgagee has no recourse upon any other person to whom such moneys have been paid. In the hands of the mortgagor they have no different character than moneys derived from a wholly different source; and when paid over to the mortgagee in the absence of agreement or direction as to their application, the latter has

the right to credit them upon the unsecured debt without regard to the source from which they were obtained by the debtor."

The judgment is affirmed.

We concur: PLUMMER, J.; GLENN, Justice pro tem.

84 Cal. App. 425

**BURGE et al. v. MUNICIPAL COURT OF
CITY OF LOS ANGELES et al.***
(Civ. 5652.)

District Court of Appeal, Second District,
Division 1, California. July 12, 1927.

Hearing Denied by Supreme Court Sept. 8, 1927.

1. Courts ⇐160—Statute relating to jurisdiction of municipal courts held not unconstitutional (St. 1925, p. 648; Const. art. 6, §§ 5, 11a).

St. 1925, p. 648, relating to jurisdiction of municipal courts and giving them concurrent original jurisdiction with superior court of all cases arising within county held not in violation of Constitution, in view of Const. art. 6, §§ 5, 11a.

2. Courts ⇐172—Municipal court of city of Los Angeles held entitled to exercise jurisdiction in action against resident of county living outside city's boundaries (Const. art. 6, §§ 5, 11a; Municipal Court Act, § 29).

Municipal court of city of Los Angeles has jurisdiction of action at law involving less than \$1,000 brought against resident of county of Los Angeles residing outside city's boundaries, under Const. art. 6, § 11a, Municipal Court Act, § 29 (St. 1925, p. 658) Const. art. 6, § 5, providing process of municipal court shall extend to all parts of county in which city having court is situated.

3. Constitutional law ⇐206(1)—Constitutional provisions for establishment of municipal courts in cities with population of over 40,000 held not to violate privileges and immunities of citizens for nonuniformity (Const. Cal. art. 6, §§ 5, 11a; Municipal Court Act; Const. U. S. Amend. 14).

Const. Cal. art. 6, §§ 5, 11a, and Municipal Court Act (St. 1925, p. 648), relating to optional establishment of municipal courts in cities having over 40,000 inhabitants, held not in violation of Const. U. S. Amend. 14, as abridging privileges and immunities of citizens of United States on account of lack of uniformity as to operation in all cities of state.

4. Statutes ⇐73(2), 93(4)—Classification of municipalities by population to effect benefits or correct evils arising from congestion of population does not violate Constitution (Const. art. 1, §§ 11, 21).

Classification of municipalities by population with view to legislation effecting benefits or mitigating evils arising from congestion of population is not in violation of Const. art. 1, §§ 11 and 21, which requires laws of general nature to have uniform operation and prevents unequal granting of privileges or immunities.

Application by B. Q. Burge and another for writ of prohibition, prayed to be directed to the Municipal Court of the City of Los Angeles, to prevent further proceedings in an action in which Mary R. Dietterich, as executrix of the estate of Martha Rawson, is plaintiff, and petitioners are defendants. Writ discharged.

Charles E. Salisbury, of Los Angeles, for petitioners.

Everett W. Mattoon, County Counsel, and R. C. McAllaster, Deputy County Counsel, both of Los Angeles, for respondent Municipal Court.

Henry O. Wackerbarth, of Los Angeles, and Oliver P. Ensley, of Hemet, for respondent Dietterich.

HOUSER, J. Prohibition. Petitioners seek to prevent the respondent municipal court of the city of Los Angeles from proceeding further in an action pending in said court, in which action respondent Dietterich is the plaintiff and petitioners herein are the defendants.

Other than that the action was brought in the municipal court of the city of Los Angeles, in the county of Los Angeles, the facts material to this decision are that each of the defendants is a resident of the city of South Pasadena, in the county of Los Angeles, and that the amount involved in the action is the sum of \$800.

[1] As related to the Constitution of the state of California, petitioners attack generally the constitutionality of the statute under which the action was brought (Stats. 1925, p. 648), and cite many authorities in support of their contention. In view of the fact, however, that since each of the cases to which the attention of this court is directed was decided, by appropriate amendments to the Constitution of this state, the Constitution was specifically amended for the very purpose of providing for the creation of municipal courts, and that the statute in question was enacted by the Legislature pursuant to such constitutional authority, it becomes apparent that the authorities to which petitioners refer are inapplicable to the present situation and that the contention of petitioners in regard to the constitutionality of the statute cannot be sustained.

[2] It is further urged by petitioners that no territorial jurisdiction exists in the municipal court of the city of Los Angeles outside the boundaries of said city of Los Angeles.

Section 11a of article 6 of the Constitution, among other things, provides that:

"In any city and county and in any city which is governed under a charter framed and adopted under the authority of this Constitution containing a population of more than forty thousand inhabitants, * * * a municipal court may be established as in this article provided, anything in this Constitution to the contrary

notwithstanding. * * * Municipal courts shall have original jurisdiction, * * * in all cases at law in which the demand, exclusive of interest, * * * amounts to one thousand dollars or less, * * * and in all criminal cases amounting to misdemeanor * * *."

Said section also provides in part that:

"The Legislature shall provide by general law for the constitution, regulation, government and procedure of municipal courts, and for the jurisdiction thereof. * * *"

And section 29 of the Municipal Court Act (Stats. 1925, p. 648) contains the following language:

"Each municipal court shall have concurrent original jurisdiction with the superior court or the justices' courts of all such cases arising within the county in which such court is situated. * * *"

Section 5 of article 6 of the Constitution provides, in part, that:

"The process of any municipal court shall extend to all parts of the county or city and county in which the city is situated where such court is established. * * *"

Construing such constitutional provisions in the case entitled *In the Matter of the Application of Luna* (Cal. Sup.) 257 P. 76, where the authorities are cited, it is held that the jurisdiction of the municipal court in misdemeanor cases extends to all parts of the county of Los Angeles. While some language may be found in other adjudications by the Supreme Court, notably in the case of *Bakkenon v. Superior Court*, 197 Cal. 504, 241 P. 874, which indicates that so far as the civil jurisdiction of municipal courts is concerned it may be limited to the area defined by the boundaries of the municipal corporation, nevertheless, from the reasoning in the *Luna* Case we are constrained to hold that the principles there announced are directly applicable to the facts in the instant case. Considering the phraseology of the constitutional provisions to which reference has been had, it is clear that if the municipal court has jurisdiction over all misdemeanor cases arising in any part of Los Angeles county, such court also has jurisdiction of the basic action in the instant case, it being an action at law, in which the demand, exclusive of interest, amounts to less than \$1,000, and brought against a resident of the county of Los Angeles.

[3, 4] Petitioners also suggest that the constitutional provisions affecting the question are violative of article 14 of the Constitution of the United States, in that they abridge the privileges or immunities of citizens of the United States for the reason that the provisions of our Constitution and the statute in question, each respectively providing for the optional creation of a municipal court in any city of the state having a population of more than 40,000 inhabitants, do not act uniformly

as to all citizens of the state and are not general in their operation. The case entitled *In re Brady*, 65 Cal. App. 345, 224 P. 252, is cited as an authority in the premises. It was there held, in effect, that a statute which provided for a session of the superior court solely in and for the county of Los Angeles in each city therein having a population of 50,000 inhabitants was unconstitutional in that such statute was special and local, not uniform in its operation; that it conferred special privileges upon a class of citizens not granted to all citizens; and that a general law could have been made applicable in the premises. With the possible exception of the specifications that the provisions here under consideration are not uniform in their operation, but confer special privileges upon a class of citizens not granted to all citizens it is apparent that none of such reasons is applicable to the facts in the instant case. No authority other than the *Brady* Case, directly bearing upon the facts herein, is cited by petitioners to sustain their contention in this regard. On the other hand, the classification of municipalities by population, with a view to legislation effecting benefits or evils to be corrected arising from congestion of population has long been recognized as proper within constitutional provisions of this state (section 11, art. 1; section 21, art. 1), which, in effect, are similar to that part of the constitutional provisions of the United States which are here invoked by petitioners.

In the case of *Martin v. Superior Court*, 194 Cal. 93, 227 P. 762, one of the questions involved was the validity of a statute by which the manner of the selection of trial jurors in counties and cities and counties having a population of 90,000 inhabitants or over was sought to be regulated. It was there held that such statute was not violative of the one constitutional provision requiring that all laws of a general nature shall have a uniform operation (section 11, art. 1), or of the other constitutional provision (section 21, art. 1) which inhibits the granting of privileges or immunities to any citizen or class of citizens which upon the same terms shall not be granted to all citizens. It thus becomes apparent that, because of the similarity of the provision in the state Constitution with the provision in the Constitution of the United States with reference to privileges and immunities, the ruling in the case just cited is most persuasive, if not conclusive; from which it would follow that neither the statute nor the constitutional provision here in question is in conflict with the constitutional provision of the United States to which reference has been had.

Several reasons for the denial of the writ for which petitioners pray are assigned by respondents, but because of the authorities hereinbefore cited, it is considered unnecessary to devote further attention to the questions thus suggested.

A demurrer having been interposed to the petition herein, it is ordered that the demurrer be and it is sustained; further, that the alternative writ issued herein be and it is discharged, and that petitioners take nothing by this proceeding.

We concur: CONREY, P. J.; YORK, J.

201 Cal. 639

BLODGETT v. DARBY et al. (PACIFIC-SOUTHWEST TRUST & SAV. BANK, Intervener). (L. A. 8337.)

Supreme Court of California. July 23, 1927.

1. Quieting title §39—In action to quiet title, cross-complaint and complaint in intervention held to allege causes of action to determine adverse claims to real property (Code Civ. Proc. § 738).

In action to quiet title to land, cross-complaint of defendants and complaint in intervention held to state causes of action to determine adverse claims to real property as authorized by Code of Civ. Proc. § 738.

2. Appeal and error §907(3)—On appeal on judgment roll alone from judgment determining various claims, it must be assumed that case was tried as one to determine adverse claims.

Where appeal from judgment in action to quiet title determining various claims and interests in and to lot and enjoining certain parties from asserting claim adverse to use thereof as public highway or adverse to private easements of other parties was on judgment roll alone, it must be assumed that case was tried on theory that cause was one to determine adverse claims to real property.

3. Pleading §64(2)—If pleadings alleged facts constituting two or more causes of action, causes of action defectively averred could be discarded as surplusage (Code Civ. Proc. § 452).

If pleadings alleged facts which might constitute cause of action to abate public nuisance, and also causes of action to determine adverse claims and to quiet title, under Code of Civ. Proc. § 452, causes of action to abate nuisance defectively averred could be discarded as surplusage, and causes of action to determine adverse claims and to quiet title could be given full application as predicate to determination of rights of parties.

4. Municipal corporations §665—Abutting owners might have their private easements established, although same obstruction might also constitute obstruction to their public right of travel.

Abutting owners had right to have their private easements established in lot regardless of fact that same obstruction existing or threatened might also constitute an obstruction to their public right of travel.

5. Appeal and error §907(2)—Where evidence is not before appellate court, it must be assumed that evidence supported findings.

Where evidence is not before appellate court, it must be assumed in support of judgment that evidence was sufficient to support findings.

In Bank.

Appeal from Superior Court, Los Angeles County; M. S. Sayre, Judge.

Action by A. M. Blodgett against J. S. Darby and wife and Bert Hanneman, as administrator of the estate of A. W. Hanneman, deceased, to quiet title, in which the Darbys filed cross-complaint and the Pacific-Southwest Trust & Savings Bank intervened. From the judgment Bert Hanneman, as administrator of the estate of A. W. Hanneman, deceased, appealed. Affirmed.

R. W. Clapp, of Los Angeles, for defendant, cross-defendant, and appellant Bert Hanneman.

Emmet H. Wilson, of Los Angeles, for plaintiff and cross-defendant.

H. T. Morrow, of Los Angeles, for defendants, cross-complainants, and respondents and intervener and respondent.

SHENK, J. Plaintiff brought this action to quiet his title to lot A of the North Long Beach tract in Los Angeles county. The complaint is in the usual form. The defendants, J. S. Darby and Beulah K. Darby, his wife, answered, denying the plaintiff's title, admitting that they claim an interest in said property and as a separate defense alleged that they are the owners of an acre of land abutting on the entire west side of lot A; that said lot A has been a highway, openly, continuously, and notoriously used by the public and by abutting property owners as a public highway for more than ten years prior to the commencement of this action; and that said lot A is subject to a private easement on behalf of abutting property owners for highway purposes. The Darbys also filed a cross-complaint to the same effect as the separate defense set up in their answer. Appended to each pleading was a prayer that their easement in said lot A be quieted, and that the cross-defendants, of which the defendant A. W. Hanneman was one, be barred from asserting any interest in said lot A adverse to their easement rights. The defendant A. W.

Hanneman, also answered, denying plaintiff's title, and as a special defense set up sole ownership and title in himself. He died prior to the trial of the action, and the defendant Bert Hanneman, as administrator of his estate, was substituted in his place and stead. The Pacific-Southwest Trust & Savings Bank, by leave of court, filed a complaint in intervention in which it alleged that it is the owner of lots 1 and 25 of said North Long Beach tract; that said property immediately adjoins lot A; that the intervener claims an interest in lot A in the nature of a private easement thereon as an abutting owner; that the plaintiff Blodgett and defendant Hanneman threaten to erect obstructions on lot A which will prevent its use as a public street; and that their claims adverse to the intervener's easement over it have greatly diminished the value of the intervener's property. The intervener prayed that all adverse claims in and to said lot A be determined by the court and a decree entered accordingly; that the intervener's easement over the same be quieted; and that the assertion of the claims of all parties adverse to said easement be forever barred.

Issue was joined on all the pleadings, and after trial the court found that the plaintiff has no right, title, or interest in or to said lot A; that the defendant administrator of the estate of A. W. Hanneman, deceased, is the sole owner in fee simple and entitled to the possession of lot A, subject to the easement of the public to use the same as a public street and subject also to the private easements thereon and thereover of the defendant J. S. Darby and the intervener. A judgment thus determining the various claims and interests in and to said lot A and enjoining the plaintiff and the defendant administrator of the estate of Hanneman from asserting any claim in or to said lot A adverse to the use thereof as a public highway or adverse to the private easements of the defendant Darby and the intervener was accordingly entered. From the judgment the defendant administrator of the estate of Hanneman only has appealed. The appeal is on the judgment roll alone.

The appellant makes no attack on the sufficiency of the judgment itself, nor does he claim that the findings do not support the judgment, nor that the findings are defective, inconsistent, or outside the issues raised by the pleadings. The sole contention of the appellant is that the cross-complaint of the Darbys and the complaint in intervention do not state facts sufficient to constitute causes of action to abate a public nuisance. It is insisted that such is the nature of such pleadings and that the same are defective for the reason that under the law a private person may not maintain an action to abate a public nuisance when the injury he suffers is the same in kind as that sustained by the general

public, and that there is no allegation in either of said pleadings that the highway in question constitutes the only mode of ingress and egress to or from the lands of the Darbys and the intervener. The appellant cites *Hitch v. Scholle*, 180 Cal. 467, 181 P. 657, as authority to the effect that said pleadings do not state a cause of action to abate a public nuisance. If it be granted that said pleadings may be construed as including an attempt to allege the existence or threatened creation of a public nuisance, and that there is no sufficient allegation of special injury therein, it may also be said that they likewise may be construed as setting up interests in and to lot A in the nature of private easements on behalf of abutting property owners.

[1-3] In their essential averments said pleadings may properly be construed as causes of action to determine adverse claims to real property as authorized by section 738 of the Code of Civil Procedure. The original complaint of the plaintiff was framed on that theory. The pleading of the appellant was framed on that theory, and all subsequent pleadings were intended to and do conform in all their essential characteristics to the same theory. Since the appeal is on the judgment roll alone it must be assumed that the case was tried on the theory that the cause was one to determine adverse claims to real property. The fact that the pleadings might be considered as broad enough to constitute an attempt to abate an existing or to prevent a threatened obstruction in a public street, and therefore defective under the doctrine of the *Hitch Case*, still, if the pleadings allege facts which might constitute two or more causes of action a liberal construction of the pleadings directed by section 452 of the Code of Civil Procedure would impel the conclusion that the causes of action defectively averred may be discarded as surplusage and the causes of action to determine adverse claims and to quiet title to private easements be given full application as a predicate to the determination of the rights of the parties. *Cushing-Wetmore Co. v. Gray*, 152 Cal. 118, 122, 92 P. 70, 125 Am. St. Rep. 47; *German-American Sav. Bank v. Gollmer*, 155 Cal. 685, 687, 102 P. 932; *Townsend v. Driver*, 5 Cal. App. 581, 583, 90 P. 1071.

[4] Assuming that the alleged injury to the public right of the Darbys and of the intervener would afford them no right to maintain an action for damages or for an injunction without an allegation of special damages, nevertheless, as abutting owners, they have the right to have their private easements established regardless of the fact that the same obstruction, existing or threatened, might also constitute an obstruction to their public right of travel. *Williams v. Los Angeles Ry. Co.*, 150 Cal. 592, 594, 89 P. 330.

[5] From the record it is obvious that the trial court proceeded on the theory that said

pleadings were sufficient to present issues for the determination of private rights, and, as the evidence is not before us, it must be assumed in support of the judgment that the evidence was sufficient to support the findings.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

MOORE v. FIDELITY & CASUALTY CO. OF NEW YORK. (S. F. 11500.)★

Supreme Court of California. July 30, 1927.

Rehearing Granted Aug. 29, 1927.

1. Insurance ☞455—Nurse's death from blood poisoning contracted from patient held not through "accidental means," within disability and accident policy; "accident."

Death of nurse, caused by blood poisoning contracted from patient, held not through "accidental means," within disability and accident policy of insurance, though policy was labeled "Business Women's Disability Policy" and insurer knew insured was nurse; "accident" being something out of usual course of events, happening suddenly and without any design of person injured.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accident—Accidental; Accidental Means.]

2. Insurance ☞646(6)—One suing under accident policy must show death of insured was from "bodily injury sustained through accidental means."

In action by beneficiary on disability and accident policy of insurance, burden is on plaintiff to show that death ensued from "bodily injury sustained through accidental means," within policy.

3. Insurance ☞146(3)—Rule that Insurance policy should be liberally construed for assured cannot be applied where language is certain and unambiguous.

Though disability and accident policy of insurance should be liberally construed in favor of assured, such rule cannot be applied where policy is certain and unambiguous in its terms.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Fannie Moore against the Fidelity & Casualty Company of New York. Judgment for plaintiff, and defendant appeals. Reversed.

Chickering & Gregory, of San Francisco, for appellant.

W. C. Sharpsteen and Hartley F. Peart, both of San Francisco, for respondent.

SHENK, J. This is an appeal from a judgment in favor of the plaintiff on a disability and accident policy of insurance. On November 17, 1920, the defendant company issued to Mary Evelyn Moore an insurance policy containing the following caption:

"Business Women's Disability Policy, Providing for (1) Bodily Injury Sustained Through Accidental Means and Resulting in Disability, Dismemberment, Loss of Sight, or Death; (2) Illness From Any Disease Resulting in Disability to the Extent Herein Provided."

In the insuring clause, the policy, among other things, and as far as material here, insured the said Mary Evelyn Moore, hereinafter called the assured, against (1) bodily injury sustained * * * through accidental means, * * * and resulting directly, independently and exclusively of all other causes, in—(a) total disability; * * * (b) partial disability; * * * (c) specific injury; * * * (d) death; (2) illness or sickness * * * which necessarily results in (a) confining disability; * * * (b) nonconfining disability. * * * Article 9 provides:

"Blood poisoning resulting directly from a bodily injury shall be deemed to be included in the said term, bodily injury."

The policy is a combined disability and accident policy. In brief, indemnity is provided therein for bodily injury suffered through accidental means and resulting in disability or death, and illness resulting in disability. We are here concerned only with the effect of the provisions of the policy providing for indemnity for bodily injury through accidental means resulting in death, when said provisions are considered in the light of the evidentiary facts.

Mary Evelyn Moore, at the time of her application for the policy, was an unmarried woman of the age of 29 years. She was 6 feet 1 inch in height, weighed 205 pounds, and was a graduate nurse by profession. On the 4th day of February, 1922, and while said policy was in force, she was employed as a nurse to attend one Walter J. Hesse, referred to herein as the patient, and who was confined on said day in the University of California Hospital in San Francisco. The patient had been removed from Oakland to the San Francisco hospital on February 3d. He was suffering from an infection of the blood technically known as streptococcus hemolyticus beta, or streptococcus septicæmia, and commonly known as blood poisoning. The assured was employed to attend and did attend the patient on the 4th, 5th, and 6th of February. On the day last mentioned she was attacked by the same malady and was herself placed under the care of a nurse. The patient died on February 6th, and the assured died on February

16th. The beneficiary under the policy, the plaintiff herein, made demand on the defendant for the payment of the \$5,000 death indemnity, and upon refusal of payment this action was brought.

It was alleged in the complaint that the nature of the infection is such that the said virulent organisms are generated in the tissues of the body, including the respiratory tract, and are capable of being exhaled from the mouth and nostrils of the patient and of being inhaled by a person in close proximity, and are capable of producing blood poisoning when so inhaled; that while the assured was acting in the performance of her duties the said organisms "were unexpectedly to said assured exhaled by said patient and were unconsciously inhaled by said assured, by reason whereof said assured became infected with said organisms in consequence of which blood poisoning supervened which resulted directly, independently and exclusively of all other causes in the death of the assured," and "that nursing a person infected as aforesaid is not manifestly dangerous, and such service is ordinarily performed without injurious consequences to the nurse." The foregoing allegations were denied by the defendant. The court found them to be true and concluded that the plaintiff was entitled to judgment.

For the purpose of simplifying the record on appeal, it was stipulated that at the time he entered the University of California Hospital the patient was suffering from said infection and that he subsequently died at said hospital by reason of said infection; that the assured contracted said infection from the patient at the hospital, and that only by reason of said infection so contracted the assured died on February 16, 1922. It is contended, however, by the defendant that the evidence was insufficient to support the finding and conclusion of the court that there was any such element of unexpectedness or unintentional surprise as to make out a case of bodily injury sustained through accidental means as contemplated by the policy of insurance.

The evidence is contained in a bill of exceptions and consists entirely of the evidence adduced on behalf of the plaintiff, supplemented by a further stipulation as to certain facts hereinafter alluded to. It appears from this record that when the patient was received in the San Francisco hospital he was placed in a private room about 10 feet in length; that streptococcus hemolyticus beta is a well-known and fairly common form of an infectious organism; that in the month of February, 1922, the bacteriologist at said hospital developed cultures of this organism in nine different cases; that there are periods of three and four months at a time when no patients are at said hospital afflicted with said infection, and there are times when there

are at the hospital at the same time several persons so afflicted; that the atmosphere surrounding the patient within a radius of about 10 feet may, by his coughing or sneezing, be permeated with these virulent germs; that anywhere within the patient's room is considered a zone of danger; that when the patient entered and was in the hospital he had a brain abscess, was semiconscious a considerable part of the time, had convulsions of his arm and leg, had inflammation of the ear, a severe sore throat, bronchial pneumonia, inflammation of his frontal sinuses, and that he coughed a great deal; that a night nurse, as well as the assured, attended the patient; that a sister and also the fiancée of the patient were in constant attendance at the bedside; that the personal physician of the patient and several hospital physicians were in and out of the room during the patient's illness; and that no person who had been in the room during the time contracted the infection other than the assured. It also appeared that the assured was fully aware of the danger of infection in such cases and always took precautions against contracting the same; that in this particular case, while in attendance upon the patient, the assured stated to another nurse, who was her roommate, that she was afraid of the case she was on, the Hesse case; that, in addition to her own knowledge of the danger, she was advised by the personal physicians of the patient that the infection was readily communicable and suggested to her the wisdom of taking precautions to prevent the contraction of the same. One of the hospital physicians testified that in such cases the contraction of the infection is something which is expected at all times and something to be guarded against as carefully as possible. One form of guarding against the infection is the wearing of a gauze mask. It was stipulated at the trial that none of the physicians, internes, or nurses in attendance on the patient and none of the relatives or friends who visited him wore masks, and that none of the persons mentioned became infected from the patient except the assured. This stipulation was proposed by counsel for the plaintiff during the course of the trial and was later confirmed by exchange of letters. It was agreed to by counsel for defendant, subject, however, to the objection that the facts so stipulated were incompetent, irrelevant, and immaterial and therefore not admissible in evidence. We deem these facts of no controlling consequence for the reason that it was in evidence, uncontradicted, that while masks were some protection against infection, "they are not a good protection." From the evidence it may be reasonably, if not necessarily, inferred that while the wearing of gauze masks is a protection to some extent, the infection may be contracted, notwithstanding the wearing of such masks.

[1, 2] From the foregoing epitome of the record, appearing without conflict, it is now to be determined whether the showing thus made by the plaintiff was sufficient to establish that the assured suffered death by reason of "bodily injury sustained * * * through accidental means" as provided in the policy. It will be assumed for the purposes of this case that the contraction of the infection by the assured was a bodily injury, but we are unable to conclude that such injury was caused by accidental means. The term "accident" as used in similar policies has been given a definition in this state that is uniform and without substantial deviation. No difficulty is encountered with reference to the definition, but problems arise in applying the definition to particular and varying states of fact. The term "accident" is defined as "a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured." *Richards v. Travelers' Ins. Co.*, 89 Cal. 170, 26 P. 762, 23 Am. St. Rep. 455; *Price v. Occidental Life Ins. Co.*, 169 Cal. 800, 147 P. 1175; *Southwestern Surety Ins. Co. v. Pillsbury*, 172 Cal. 768, 771, 158 P. 762; *Olinsky v. Railway Mail Ass'n*, 182 Cal. 669, 189 P. 835, 14 A. L. R. 784. The burden is on the plaintiff to show that death ensued from a bodily injury sustained through accidental means. *Postler v. Travelers' Ins. Co.*, 173 Cal. 1, 6, 158 P. 1022; *Mah See v. North American Acc. Ind. Co.*, 190 Cal. 421, 213 P. 42, 26 A. L. R. 123. It must be borne in mind that the policy in question does not insure against accidental death, but against death through accidental means. "A differentiation is made, therefore, between the result to the insured and the means which is the operative cause in producing this result. It is not enough that death or injury should be unexpected or unforeseen, but there must be some element of unexpectedness in the preceding act or occurrence which leads to the injury or death." *Rock v. Travelers' Ins. Co.*, 172 Cal. 462, 465, 156 P. 1029, 1030 (L. R. A. 1916E, 1196).

In the case at bar the means through which the fatal malady was contracted by the assured was neither unusual nor unexpected. There was no element of surprise in coming in contact with the virulent organisms. In fact, such contact was foreseen and expected. The assured knew and realized the dangers incident to the performance of her duties as an attending nurse, and by gargling, washing her hands, etc., took precautions to guard against the effect of the incident exposure. The fact that others similarly exposed did not contract the disease is not sufficient to prove that the assured contracted the same by accidental means. If the other persons present in the room from time to time (the sister and fiancée of the patient were more constantly at his bedside than the assured) had

contracted the malady, there would have been no element of surprise or unexpectedness or of the unusual in so contracting the same, or they were all advised and warned of the dangers of their presence in the room. That such other persons did not fall a prey to what was an expected and anticipated attack from the germs would show no more than that their resistance was greater and the attack unsuccessful. Effect must be given to the plain language of the policy, and a distinction must be made between the result to the assured and the means by which that result was brought about. It may properly be said that the result to the assured, namely, illness and death, was unexpected and unintentional, but that is far from saying that the means that produced the illness and subsequent death were unexpected, unusual, or not anticipated.

The plaintiff places great reliance on the case of *Horton v. Travelers' Ins. Co.*, 45 Cal. App. 462, 187 P. 1070. But there is nothing in that case at variance with the conclusions herein expressed. It was there recognized that the term "accidental means" is descriptive of "means which produce effects which are not their usual and probable consequences," citing *Western Commercial Travelers' Ass'n v. Smith* (C. C. A.) 85 F. 401, 40 L. R. A. 653. It was held in the *Horton* Case that the injection into the body of the insured of virulent death-producing germs was not the natural and probable consequences of the contemplated use by the dentist of uninfected dental instruments. The use of infected instruments was unexpected, unforeseen, and unusual and constituted the "accidental means" through which death was produced. In the present case the means through which death resulted were known, expected, and foreseen, but were unsuccessfully guarded against. We conclude, therefore, that the death of the assured was not through "accidental means," and the finding and conclusion of the trial court to the contrary effect are without support in the evidence.

[3] It is contended by the plaintiff that, as the defendant knew at the time the policy was issued that the assured was a trained nurse by occupation, it should be held that the defendant should be bound to indemnify against risks it knew it was the assured's duty to incur in the course of her occupation. It is pointed out that the policy is headed as above indicated, and it is urged, in effect, that it must have been contemplated by the parties to the contract that death caused as a result of risks incident to the occupation of the assured should be indemnified against, and also as matter of law that policies of insurance should be liberally construed in favor of the assured, citing *Berliner v. Travelers', etc., Co.*, 121 Cal. 458, 53 P. 918, 41 L. R. A. 467, 66 Am. St. Rep. 49. The rule of law asserted cannot be disputed, but there must,

be an opportunity for its application. Here it may not be contended that the policy in one of its two main characteristics is not a business women's disability policy. The caption does not in terms or effect enlarge, detract from, modify, or restrict the insuring clause for bodily injuries resulting in death by accidental means. The clause providing indemnity for death appears to be not unusual in form. It is certain and unambiguous, and in the light of the decisions in this state this court has no recourse but to enforce it as it finds it in the policy.

It is deemed unnecessary to discuss the many authorities cited by the plaintiff from other jurisdictions. It is enough to say that the effect of the clause of the policy vital to this case has become well established by adjudications in this state, and counsel for the plaintiff has cited none of our own cases to the contrary.

The judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; SEAWELL, J.; CURTIS, J.

201 Cal. 664

In re MAILHEBUAU'S ESTATE.

MAILHEBUAU v. RUSS BLDG. CO.

(S. F. 12370.)

Supreme Court of California. July 25, 1927.

1. Courts ⇨202(5)—Order in probate, though void, will not be reviewed by Supreme Court, where no appeal is provided (Code Civ. Proc. § 963, subd. 3).

Order in probate, though void, will not be reviewed by Supreme Court, to ascertain or declare its validity, where no appeal from such order is provided by Code Civ. Proc. § 963, subd. 3.

2. Courts ⇨202(5)—Order permitting filing and foreclosure of mechanic's lien against property of estate held not appealable as attempted action in equity conducted by court of probate (Code Civ. Proc. § 963, subd. 3).

Proceedings in probate court, by which owner of property adjoining that of estate was permitted to file and foreclose mechanic's lien for expenditures made in supporting estate's building, held not to constitute attempted action and judgment in equity, such as to permit appeal from order, where appeal was not provided for by Code Civ. Proc. § 963, subd. 3.

3. Courts ⇨202(5)—Order of superior court, permitting filing and foreclosure of mechanic's lien against estate's property, held "order in probate," not reviewable by appeal (Code Civ. Proc. § 963, subd. 3).

Order of superior court, permitting filing of mechanic's lien against real property belonging to estate, and authorizing proceedings to foreclose, for expenditures made by adjoining owner in supporting estate's building, held "order in probate," not reviewable by appeal

to Supreme Court, because not made so by Code Civ. Proc. § 963, subd. 3.

In Bank.

Petition by the Russ Building Company for leave to file a mechanic's lien against certain property belonging to the estate of Camille Mailhebauu, deceased, resisted by Eugenie Bouscal Mailhebauu, executrix. From an order permitting the filing of a mechanic's lien and authorizing proceedings to foreclose the same, the executrix appeals. On petitioner's motion to dismiss. Appeal dismissed.

J. J. Dunne, of San Francisco, for appellant.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondent.

PRESTON, J. At the time of submission of this cause on the merits there was also submitted a motion to dismiss the appeal, which is from an order, purporting to be one in probate, giving to the respondent the right to assert and file a mechanic's lien against certain real property belonging to the estate, and to authorize the institution of proceedings to foreclose such lien.

The claim of respondent is that appeals from orders in probate are controlled by subdivision 3 of section 963 of the Code of Civil Procedure, and that no provision can be found therein authorizing the appeal here attempted. Appellant, on the contrary, makes the claim that, although the order given was made by the probate court, it was in reality a proceeding in equity and a final judgment therein, and, inasmuch as said judgment was rendered by a court sitting in probate, it was beyond the jurisdiction of said court, nevertheless reviewable on appeal. The position of respondent seems perfectly sound, and disposition of this motion will thereby conclude the whole proceeding.

The facts, briefly stated, are that Camille Mailhebauu died testate in San Francisco on December 3, 1924. His widow, Eugenie Bouscal Mailhebauu, thereafter, and on December 29, 1924, duly qualified as executrix of his last will and testament. The estate owns a lot, together with improvements thereon, situated in the city and county of San Francisco, and known as No. 441 Pine street. Respondent owns a large area in the same block which adjoins the property above referred to. In the year 1926, some time after the death of decedent, respondent filed a petition in the said estate, in which it asserted that on or about the 24th day of March, 1926, it commenced the construction of a 30-story class A building on its said adjoining lot; that prior to the commencement of said building it duly served on the executrix of said estate the notice required by section 832 of the Civil Code, wherein petitioner gave to said executrix reasonable notice of its intention to commence construction of said building, and to make

excavations on its said property for the purpose of such construction, and notified said executrix to underpin and support said building located on the property of said estate; and that thereafter and on the 17th day of June, 1926, said executrix, through J. J. Dunne, her attorney, who was also the attorney for said estate, advised petitioner that the estate had no funds with which to pay the charges for underpinning or supporting said building, and requested petitioner to underpin said building, agreeing to execute and deliver to petitioner the promissory note of said executrix covering the cost thereof, with interest at 6 per cent. per annum; that petitioner duly accepted said offer, and did thereafter underpin and support the said building belonging to said estate, and spent for that purpose the sum of \$6,732.30; that neither said executrix nor said estate have paid said sum, or any part thereof; and that it had no means of securing reimbursement for said outlay, other than by filing a mechanic's lien upon said estate and foreclosing same in the manner provided by law.

The said estate and the executrix thereof duly filed an answer to said petition, and denied all the material allegations thereof, pleading, among other defenses, lack of jurisdiction of the probate court to grant an order permitting the filing or foreclosure of a mechanic's lien against said property. After a consideration of said petition and the answer thereto, the court duly gave and made its order permitting respondent herein to make and file its mechanic's lien in the manner provided by law by the chapter of the Code of Civil Procedure on that subject, and to thereafter, if so advised, institute proceedings to foreclose the same. Thereupon the executrix, in behalf of herself and also in behalf of said estate, duly perfected an appeal from said order, and caused to be prepared and authenticated a bill of exceptions thereto. Respondent in due time filed its motion to dismiss said appeal, alleging failure of the Legislature to provide for an appeal from such an order.

[1] Only such appeals in probate as are allowed by subdivision 3 of section 963 of the Code of Civil Procedure can be entertained by this court. *Estate of Cahill*, 142 Cal. 628, 76 P. 383; *Estate of Allen*, 175 Cal. 356, 165 P. 1011; *Estate of Funkenstein*, 170 Cal. 595, 150 P. 987; *Estate of Seng*, 52 Cal. App. 149, 152, 198 P. 809. If it be conceded that said order is void, nevertheless, as long as it is an order in probate, from which no appeal is provided, it will not be examined by this court to ascertain or declare its validity or invalidity. *Harper v. Hildreth*, 99 Cal. 265, 269, 33 P. 1103; *Estate of Overton*, 13 Cal. App. 117, 119, 108 P. 1021.

Appellant, however, makes several contentions, all of which seem to us to be beyond the issues involved in this proceeding. For example, the well-known principle that the fore-

closure of a lien is an action in equity, and not within the jurisdiction of the probate court, is asserted. But this principle has no bearing upon the proceeding before us, as no proceeding in equity took place or was attempted. The utmost that can be claimed in that direction by this order was that the court gave its consent to the future institution of an action in equity. As above intimated, it may well be doubted whether the court under the facts of this case could make a valid order authorizing the filing of a mechanic's lien, in the absence of a pre-existing contract made with the estate upon order of court. *Chappius v. Blankman*, 128 Cal. 362, 60 P. 925; *S. F. Paving Co. v. Fairfield*, 134 Cal. 220, 66 P. 255; *L. A. v. Winans*, 13 Cal. App. 234, 254, 109 P. 640; *Fresno Co. v. Manning*, 20 Cal. App. 766, 769, 130 P. 196.

But this question is also beside the issue. If respondent should seek to exercise the permission granted to it, and ask to foreclose its alleged lien, then in that case appellant could urge all the infirmities, if any there be, in this order made by the court; or appellant herself, in behalf of said estate, may institute an action to remove the cloud from or quiet the title to said property, and in such proceeding may attack the validity of this order, or she may invoke other remedies; but none of these methods of relief may be secured by appealing from a nonappealable order.

[2] There is likewise no merit in the suggestion that the petition and order here under consideration themselves constitute an attempted action and final judgment therein in an action in equity conducted by a court of probate. The order relates to the property in probate, and, whether valid or not, it is clearly within the general purview of the powers of a probate court, and it bears none of the indicia of an action in equity. This appears conclusively, not alone from the very nature of the control of the property by the probate court, but from the principles announced in the very cases relied upon by appellant to show that the purported lien is invalid, in the absence of a contract entered into by authority of the probate court, for if, under a contract authorized by the probate court, a mechanic's lien may be asserted against property of the estate, then it must follow that an order allowing the filing of a lien thereon, whether valid or invalid, is an order in probate, as distinguished from an order exercised under the general jurisdiction of the superior court.

[3] In reality the legal effect of the order here under consideration was to give respondent permission to sue in a case where the property was in custodia legis, and is akin to the permission to sue required in actions against receivers and other trustees of property under the control of the court; and such permission is not referable to any other jurisdiction than that in control of the property. Counsel has indulged in much research to

show us the history of the probate jurisdiction and the limits thereof, but in our view the order remains a simple one in probate, made by the probate court, an order to which the Legislature has not attached the right of appeal.

Appeal dismissed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

201 Cal. 683

PAOLINI v. SULPRIZIO. (S. F. 11572.)

Supreme Court of California. July 29, 1927.

1. Appeal and error ⚡607(1)—Where trial court granted relief from default, objection that notice to clerk to prepare transcript was filed too late was without merit (Code Civ. Proc. § 473).

Plaintiff's objection to consideration of appeal on ground that notice to clerk to prepare transcript was filed too late was without merit, where defendant in proceeding under Code Civ. Proc. § 473, had obtained order from trial court granting relief from his default.

2. Fraud ⚡31—Defrauded purchaser may rescind or affirm contract and sue for deceit.

Where purchaser is defrauded in contract for purchase of real estate, he may rescind, whereby, upon discovery of fraud, he repudiates contract, offers to return what he received, and seeks restoration to original position claiming damages for conduct of vendor, or he may affirm contract, return what he has received, and sue for damages in action for deceit.

3. Fraud ⚡34—Purchaser need not perform contract as condition to action for deceit.

One induced by fraud to enter into contract for purchase of real estate is not required to perform on his part as a condition to maintaining his action for deceit.

4. Fraud ⚡60—Unpaid part of purchase price must be deducted from award for fraud.

Where purchaser defrauded in executory contract for purchase of real estate affirms contract and sues for damages for deceit, any unpaid part of purchase price must be deducted from any award made because of fraud.

5. Vendor and purchaser ⚡310—Purchaser defrauded in land contract may set up vendor's fraud as partial defense, without offering restitution, and recoup damages.

Where purchaser is defrauded in contract for purchase of real estate, he may set up vendor's fraud as partial defense or counterclaim, without any offer of restitution, and recoup his damages in action brought by guilty party to contract.

6. Vendor and purchaser ⚡168—Where purchaser is defrauded he may withhold payments under contract to recoup damages which may be recovered.

Where purchaser is defrauded in contract for purchase of real estate, he may withhold

payments under contract to recoup damages which may be recovered.

7. Vendor and purchaser ⚡314(2)—Purchaser affirming contract and seeking damages for collateral fraud need not allege willingness and ability to perform to maintain defensive relief.

Purchaser affirming contract for purchase of real property and seeking damages for collateral fraud in counterclaim, in action on contract by vendor, need not allege willingness and ability to perform terms of contract in order to maintain action or defensive relief.

8. Vendor and purchaser ⚡314(3)—In action by vendor on land contract, purchaser's evidence of collateral fraud held improperly excluded, though purchaser did not allege readiness and willingness to perform.

In action to recover money due under executory contract for sale of real property, in which purchaser filed cross-complaint for damages for misrepresentations as to nature and quality of land sold, evidence of purchaser's damages held improperly excluded even though purchaser did not allege that he had rescinded contract or had complied or was ready and willing to comply with its provisions.

In Bank.

Appeal from Superior Court, Fresno County; J. El. Woolley, Judge.

Action by G. Paolini against D. Sulprizio to recover money due under executory contract for sale of real property, in which defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals. Reversed.

Arthur Allyn and Edward F. Peters, both of Fresno, for appellant.

Stanley Moffatt, of Fresno, for respondent.

WASTE, C. J. [1] Judgment was entered in this case in favor of the plaintiff for the balance due under an executory contract for the sale of real property. Defendant's motion for a new trial being denied, he has appealed. The objection of the respondent to the consideration of the appeal, on the ground that the notice to the clerk to prepare a transcript was filed too late, is without merit. In a proceeding under section 473 of the Code of Civil Procedure, the defendant obtained an order from the trial granting relief from his default.

Respondent sold a vineyard to the appellant at the agreed price of \$12,000. The appellant assumed a mortgage against the property in the sum of \$7,000, paid \$3,000 in cash, and agreed to execute promissory notes for the balance. A deed of the land was executed and delivered to appellant, and he went into possession, but failed to complete the payments required, or to execute notes for the amount as promised. After waiting some eight months the vendor brought this action to recover the balance due, with interest. The vendee made specific denial of the allegations of the complaint, and by way of a separate

defense and counterclaim against the respondent alleged that he had been damaged to the extent of \$2,000 by reason of misrepresentations of the respondent as to the nature and quality of the land sold. He subsequently filed an amended answer and a cross-complaint, alleging the amount of damages to be \$5,000. He did not allege in his answer, or in the cross-complaint, that he had rescinded the contract, or that he had affirmed it and was willing and able to perform according to its terms.

When the case came on for trial, the respondent testified to the transaction between himself and the appellant, and to the unpaid balance of the purchase price of the land. Appellant thereupon admitted that "\$1,232 more" was to be paid under the contract, but claimed that his damages, by reason of the alleged misrepresentations, were greater than the balance due, and sought to prove the allegations of his cross-complaint. On the objection of the plaintiff and in apparent reliance on an expression of this court in *Hines v. Brode*, 168 Cal. 507, 515, 143 P. 729, the trial court refused to permit the introduction of any evidence on the subject of damages upon the ground that it was not alleged in the cross-complaint that defendant had rescinded the contract or had complied, or was ready and willing to comply, with its provisions. As a result of the court's ruling the defendant was deprived of any opportunity to support his claim that he had been damaged in the transaction, and judgment was entered for the plaintiff for the unpaid balance due on the sale of the vineyard.

[2-4] Notwithstanding the language of the court in *Hines v. Brode*, supra, which seems to lend support to the position of the court below, and to the contention of the respondent on this appeal, that it was incumbent on the appellant to allege his willingness and ability to perform the terms of the contract, we are of the view that the court erred in sustaining the objection to the introduction of appellant's evidence. Three remedies are open to a party defrauded in a contract for the purchase of real estate. One is rescission, whereby, upon the discovery of the fraud, he repudiates the contract, offers to return what he has received, and seeks a restoration to his original position, claiming whatever damage he may have suffered by reason of the unconscionable conduct of the other party; or, two, he may affirm the contract, retain what he has received, and sue for his damages in an action for deceit. It is a principle of universal application that a right of action for damages for a fraud arises immediately upon the consummation of the fraud, which may arise in a contract executed or executory, and which may be asserted at once upon the discovery. The action is not upon the contract, but is collateral to it, and is on the case (*Hines v. Brode*, supra), and one induced by fraud to enter into a contract for

the purchase of real estate is not required to perform on his part as a condition to maintaining his action for deceit (*Moran v. Tucker*, 40 R. I. 485, 101 A. 327, L. R. A. 1918A, 99; *Stearns v. Kennedy*, 94 Minn. 439, 103 N. W. 212; *Pierce v. Hellenic, etc., Co.*, 76 Misc. Rep. 473, 135 N. Y. S. 605). In many cases it would be unjust to hold that the party defrauded shall lose the advantage which attaches to a tort action, unless he makes further venture in a transaction into which he has been induced by fraud to enter. He affirms the contract, but not as one made in good faith. He consents to be bound by the provisions of the agreement, but does not thereby release or waive his claim for damages arising from a fraud collateral to the agreement. He must, himself, be willing and able to perform on his part, and it must be conclusively taken that he stands ready and willing to pay the full consideration called for by the contract. If the contract remains executory, the damages which he is entitled to recover are no other and no greater than those which would be awarded to a party who has fully executed his contract. From any award which may be made because of the fraud must be deducted any unpaid part of the purchase price. *Hines v. Brode*, supra, page 515, 143 P. 729.

[5, 6] In harmony with this principle, which permits the buyer to retain the property and bring suit for the recovery of the damages which he has sustained, there is a third course open to a defrauded vendee. He may set up the seller's fraud as a partial defense or counterclaim without any offer of restitution, and recoup his damages in the action brought by the guilty party to the contract. *Field v. Austin*, 131 Cal. 379, 382, 63 P. 692; *Hunter v. McKenzie*, 197 Cal. 176, 184, 239 P. 1090; *Palladine v. Imperial Valley, etc., Ass'n*, 65 Cal. App. 727, 749, 225 P. 291. This remedy has been styled "defensive relief," whereby the fraud is set up by way of defense to defeat an action brought to enforce an apparent obligation or liability. *Toby v. Oregon Pac. R. R.*, 98 Cal. 490, 499, 33 P. 550. The fraud, given in evidence as a defense, "will be an answer to the whole demand, or in abatement of the damages, according to the circumstances of the case. This is the true as well as a salutary rule, and well calculated to do final and complete justice between the parties, most expeditiously and least expensively." *Field v. Austin*, supra, page 382 (63 P. 693). It may also be taken to be well settled in this jurisdiction that in such cases the defrauded party may withhold payments under the contract, to recoup the damages which may be recovered. *Pembroke v. Houston*, 41 Cal. App. 54, 181 P. 828; *Palladine v. Imperial Valley, etc., Ass'n*, supra. But in any event the party guilty of the deceit is entitled to have the damages mitigated to the extent of the nonperformance of the other party to the contract.

[7, 8] We therefore see no good reason why a party affirming a contract for the purchase of real property, and seeking damages for a collateral fraud, must allege willingness and ability to perform the terms of the contract in order to maintain his action, or defensive relief. The language of the court in *Hines v. Brode*, supra, on which respondent relies, was used in a case in which the plaintiff, claiming to be defrauded, had paid only a trifling part of the purchase price, and expressly averred that he was only willing to complete it up to the time of the discovery of the fraud. The court held that he neither pleaded in rescission nor for damages after affirmance, and in reversing the case said that leave should be given to him to amend his complaint so as to state in understandable terms the position upon this all-important question which he elected to take, which, the court said, would be only one of two—damages after rescission or damages after affirmance, “with alleged and proved willingness and ability to perform the terms of the contract.” The authorities cited in the opinion do not support the quoted expression. In the light of a clear understanding of the real question there involved, and of the theory on which actions for deceit are based, the quoted language does not lay down a correct legal proposition. Correctly understood, the court, in *Hickman v. Johnson*, 36 Cal. App. 342, 178 P. 145, also relied on by the respondent, merely applies the rule announced in *Hines v. Brode*, supra, that the pleader in such case must elect and stand squarely either upon rescission, or upon affirmance, and not, as in that case, show an unwillingness to perform. Whatever may appear to be the effect of the language (quoted, supra), its application as contended for by respondent cannot be approved. In denying a petition for hearing in this court after decision by the District Court of Appeal in *Hullinger v. Big Sespe Oil Co.*, 50 Cal. App. 6, 194 P. 742, this court said (page 10, 194 P. 743):

“We do not approve those portions of the opinion [of the District Court of Appeal] which declare that it is essential for a plaintiff in an action for damages on the contract, whereby the contract is affirmed, to allege or prove his willingness and ability to perform the contract according to its terms. The law as to the amount that may be recovered in such an action and what must be set off against any damage proved is sufficiently declared in *Hines v. Brode*.”

See, also, *Pembroke v. Houston*, supra; *Foster v. Gorham*, 63 Cal. App. 601, 604, 219 P. 476; *Webb v. Emerson, etc., Co.* (Tex. Civ. App.) 227 S. W. 499.

The objection to the introduction of any evidence in the trial court on the question of appellant's damages rested solely on the lack of an allegation that the appellant had complied, or was ready and willing to comply,

with the terms of the contract. No exception was taken at any time, in so far as we are informed by the transcript, to any other alleged insufficiency of the pleadings. They appear to have been deemed by the parties as otherwise sufficient to raise the issue here considered, and the objection to the introduction of appellant's evidence should have been overruled.

The judgment is reversed.

We concur: SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

201 Cal. 587

MIDWEST AIR FILTERS PACIFIC, Inc., v. FINN, Sheriff, et al. (S. F. 12375.)

Supreme Court of California. July 13, 1927.

1. Corporations ⇨28(1)—Corporation de facto arises where there is charter or general law authorizing incorporation, bona fide attempt to organize, and user of corporate franchise.

Requisites to constitute corporation de facto are charter or general law under which corporation might be lawfully organized, bona fide attempt to organize thereunder, and actual user of corporate franchise.

2. Corporations ⇨28(3)—Entity organized in compliance with law and conducting business under franchise becomes de facto corporation, though it failed to file copy of articles in county where principal business is to be transacted (Civ. Code, § 296).

Where requirements of law as conditions precedent to organization of corporation have been fully complied with and stockholders and directors have proceeded to act under corporate franchise, the entity becomes de facto corporation, notwithstanding its noncompliance with Civ. Code, § 296, requiring as condition precedent to transaction of business filing of copy of articles of incorporation in county where principal business of corporation is to be transacted.

3. Corporations ⇨18—Requirement that articles be filed in county where corporation transacts principal business is not condition precedent to corporate organization, though it may be ground for forfeiting charter (Civ. Code, § 296).

Requirement of Civ. Code, § 296, that copy of articles of incorporation be filed in county wherein corporation is to transact its principal business is not condition precedent to organization, but condition subsequent, noncompliance with which does not affect corporate existence, though it may be ground for proceeding by state to forfeit charter or franchise.

4. Corporations ⇨25—Conditions precedent to right to engage in business are conditions subsequent, not affecting corporate existence.

Conditions precedent to right to engage in business after corporation has been formed are

conditions subsequent, which do not affect legal existence of corporation.

5. Corporations ⇨28(2)—Corporation making bona fide attempt to incorporate under general law held de facto corporation when entering into contract subsequent to receiving certificate (Civ. Code, § 296).

Where bona fide attempt was made to organize corporation under general law authorizing its incorporation, and officers thereof exercised powers under corporate franchise, presumption being in favor of honest intention to form corporation, such corporation was at least de facto corporation when it entered into contract for purchase of automobile subsequent to receiving certificate of incorporation from secretary of state, though it failed to file copy of articles in county where its principal business was to be transacted, as required by Civ. Code, § 296.

6. Corporations ⇨29(2)—Legal existence of de facto corporation cannot be called into question collaterally (Civ. Code, § 358).

Where corporation making bona fide attempt to incorporate under general law was at least de facto corporation, its legal existence cannot be called into question collaterally, in view of Civ. Code, § 358.

7. Corporations ⇨25—De facto corporation is not precluded from asserting property rights acquired prior to filing copy of articles required as condition precedent to doing business (Civ. Code, § 296).

Corporation becoming at least de facto corporation by bona fide attempt to organize under general law and acts of user under franchise is not precluded from asserting any property rights acquired by it prior to filing copy of articles, as required by Civ. Code, § 296, as condition precedent to doing business.

8. Frauds, statute of ⇨90(1), 95(1)—Contract for sale of automobile paid for in part and delivered to purchaser satisfied statute (Civ. Code, § 1624, subd. 4).

Where corporation paid part of contract price of automobile purchased and accepted delivery of automobile through its authorized agent, provisions of Civ. Code, § 1624, subd. 4, providing that written contract or memorandum shall not be required where there has been either part payment or delivery under agreement of parties, were satisfied and rendered unnecessary consideration of question whether contract was properly executed.

9. Fraudulent conveyances ⇨147(1)—Purchase by corporation of automobile from owner to whom it had been returned by original purchaser and delivery to corporation from owner held valid against creditors of original purchaser (Civ. Code, § 3440).

Where original purchaser of automobile under conditional sales contract returned same to legal owner for inability to pay installments and automobile was purchased by and delivered to corporation while in possession of legal owner, purchase of automobile by corporation did not violate Civ. Code, § 3440, as against creditors of original purchasers.

10. Corporations ⇨1—Equity will look behind corporate entity, when necessary to promote justice, and law will follow equity.

In proper cases, equity will look behind corporate equity and consider who are real and substantial parties in interest, whenever it becomes necessary to promote justice, or obviate inequitable results, and law will follow equity in this respect.

11. Corporations ⇨1—Corporation formed by individual held distinct entity, in absence of showing of bad faith, or that stock was not actually paid for.

Where copartners were agents for eastern company requiring formation of corporation to handle their business, formation of corporation by one partner was separate and distinct entity, and not same as individual, where record showed nothing to challenge good faith in forming corporation, or to contradict testimony that incorporators subscribed and paid for shares of stock in corporation.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Midwest Air Filters Pacific, Inc., against Thomas F. Finn, Sheriff of the City and County of San Francisco, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Simeon E. Sheffey, of San Francisco, for appellants.

James C. Espey, of San Francisco, for respondent.

PER CURIAM. This appeal has been prosecuted by the defendants from a judgment of the superior court in and for the city and county of San Francisco. The cause was taken over by this court after decision by District Court of Appeal, First Appellate District, Division 2. 51 Cal. App. Dec. 458. We adopt the following portion of the opinion of that court as containing a correct statement of the facts giving rise to this litigation.

"This case was tried before the court sitting without a jury and resulted in a judgment in favor of plaintiff and against both defendants in the sum of \$428.05, from which both defendants have appealed on a typewritten record, under section 953a of the Code of Civil Procedure. * * *

"The defendant William Warren recovered two judgments, aggregating \$300, in the justice's court of the city and county of San Francisco against one Walter B. Lomax. On January 2, 1924, execution was issued on these judgments and placed in the hands of the defendant sheriff of the city and county of San Francisco, with instructions to levy upon a certain King 8 automobile, then in the possession of Walter B. Lomax. The sheriff seized and took into his possession the automobile on or about January 24, 1924, in pursuance of said instructions. A third party claim was immediately filed with the sheriff on behalf of the plaintiff and respondent,

Midwest Air Filters Pacific, Inc., a corporation, demanding that said car be released, and alleging that said respondent was the owner and entitled to the possession of said automobile. Upon receipt of this third party claim, the sheriff informed said William Warren that, unless a bond was filed to indemnify him against damages for holding said automobile, the same would be released to claimant, Midwest Air Filters Pacific, Inc.; whereupon the attorney for Warren and the attorney for said corporation entered into a stipulation by which they agreed to, and did deposit, with the said sheriff the sum of \$428.05, being the amount agreed upon to be necessary to satisfy said two judgments against the said Walter B. Lomax. They further stipulated that the money was to be held by the sheriff in lieu of the automobile, and that the automobile should be immediately released, and that a court of competent jurisdiction should thereafter determine the ownership of the automobile. Pursuant to this stipulation, the automobile was thereafter returned to Walter B. Lomax, acting for said corporation, and thereafter the said sum of \$428.05 was paid by the said sheriff to the said Warren. Thereupon plaintiff commenced this action against the sheriff and Warren for the recovery of said sum of \$428.05.

"On July 6, 1922, the said Walter B. Lomax purchased this same automobile from the Kings Coast Parts Distributing Company, under a conditional sales contract, in which the Kings Coast Parts Distributing Company retained the title. The car was duly registered for the year 1922 in the name of H. S. Smith, of San Francisco, as legal owner, and Walter B. Lomax as registered owner. Lomax took possession of the car, used it in his business for some months, and made certain payments under the contract, but being unable to keep up the payments, suit was instituted to recover possession of the car, but before judgment was entered in this action, Lomax, in the early spring of 1923, surrendered the car to Max Arnold, who was supposed to be the agent of the legal owner. Mr. Lomax had an understanding with Mr. Arnold that the car would be sold by Arnold, and if it brought in excess of the amount due on the car, then the excess was to be paid to Lomax. Lomax at that time signed his name on the registration certificate as registered owner. Arnold kept the car in his garage, or the garage of the Kings Coast Parts Distributing Company, without any attempt to re-register the car with the motor vehicle department, until about the 25th of August, 1923, when he sold it again under a conditional sales contract to plaintiff, Midwest Air Filters Pacific, Inc., a corporation, but all of the business pertaining to this second sale and purchase was had with Lomax, and in the second transfer a new registration was issued by the motor vehicle department and registered in the name of the Kings Coast Parts Distributing Company as legal owner, and Midwest Air Filters Pacific, Inc., as registered owner, and the car turned over again to Walter B. Lomax, who continued to keep it in his possession, and use it in his business as traveling salesman until taken by the sheriff on or about the said 24th of January, 1924. Between the time that Lomax returned the car to Max Arnold, in default of payments on the first purchase, and the time he received it back on or about the 25th of August, 1923, he had incorporated the plaintiff cor-

poration, under the laws of the state of California, and on the 22d day of July, 1923, received a certified copy of the articles of incorporation from the secretary of state. At this point it is well to state that Midwest Air Filters Pacific, Inc., was almost entirely, if not wholly, governed and controlled by Walter B. Lomax; he was a stockholder and its general manager. The other stockholders and officers were his wife and a lady by the name of Luce, who lived in the Lomax family, but apparently had no knowledge of the affairs of the corporation. Lomax had been the agent of certain Eastern manufacturers on the Pacific Coast before this corporation was formed, and continued to represent the same manufacturers through this corporation after its incorporation.

"Defendants contend that the conditional sales contract from Max Arnold, as seller, to the plaintiff, Midwest Air Filters Pacific, Inc., a corporation, buyer, dated August 25, 1923, under which the plaintiff claims to own the car in question, is illegal and void for the reason that the said plaintiff was not at that time authorized to transact any business.

"This contention is based upon that portion of section 296 of the Civil Code which provides that no corporation shall be authorized to transact any business until it shall have filed, in the office of the county clerk of the county in which its principal business is to be transacted, a copy of the articles of incorporation, certified by the secretary of state.

"It will be remembered that the plaintiff corporation received its certificate of incorporation from the secretary of state on the 22d day of July, 1923, and that its principal place of business, as stated in the articles of incorporation, was the city and county of San Francisco, and that the certified copy of the articles of incorporation were not filed in the office of the county clerk of the city and county of San Francisco until the 29th of January, 1924, just a short time prior to the commencement of this present action. Therefore, at the time the contract in question was entered into for the purchase of the car, to wit, August 25, 1923, the plaintiff corporation had not complied with all the provisions of said section 296 of the Civil Code. Thus we have a situation where the statute expressly prohibits a corporation from transacting any business until a certified copy of its articles of incorporation are filed with the county clerk of the county where its principal business is to be transacted, but does not prescribe a penalty for a violation thereof. Neither does it state that any contract made in the transaction of any business before the requirement is fulfilled is void."

[1] We cannot accede to the appellants' contention, which contention was sustained by the District Court of Appeal, supra, that the contract under which the respondent corporation asserts title to the automobile in question is illegal and void for the reason that respondent had failed to seasonably comply with the provisions of section 296 of the Civil Code. In our opinion the respondent must be deemed to have been at least, a de facto corporation at the time of its execution of said contract. The requisites to constitute a corporation de facto are three: (1) A char-

ter or general law under which such a corporation as it purports to be might lawfully be organized; (2) a bona fide attempt to organize thereunder; and (3) an actual user of the corporate franchise. *Tulare Irr. Dist. v. Shepard*, 185 U. S. 1, 13, 22 S. Ct. 531, 46 L. Ed. 773; *Westlake Park Inv. Co. v. Jordan*, 198 Cal. 609, 613, 614, 246 P. 807; *Vallejo, etc., R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 560, 147 P. 238; *Newcomb-Endicott Co. v. Fee*, 167 Mich. 574, 133 N. W. 540, 542; 6 Cal. Jur. 656, § 66.

[2] The particular question presented in this action has arisen upon numerous occasions in other jurisdictions having statutes substantially identical in form with our section 296 of the Civil Code. Research of the authorities has disclosed that, where the requirements of the law as conditions precedent to organization have been fully complied with and the stockholders and directors have proceeded to act under the corporate franchise, the entity becomes a de facto corporation, notwithstanding its noncompliance with a statute requiring, as a condition precedent to the transaction of business, the filing of a copy of the articles of incorporation in the county where the principal business of the corporation is to be transacted. *Newcomb-Endicott Co. v. Fee*, supra; *Tisch Auto Supply Co. v. Nelson*, 222 Mich. 196, 192 N. W. 600, 602; *Swofford Bros. Co. v. Owen*, 37 Okl. 616, 133 P. 193, 196, L. R. A. 1916C, 189; *Whitney v. Wyman*, 101 U. S. 392, 397, 25 L. Ed. 1050; *Inter-Ocean Newspaper Co. v. Robertson*, 296 Ill. 92, 129 N. E. 523, 524; *The Joliet v. Frances*, 85 Ill. App. 243, 249, 250; *American University v. Wood*, 216 Ill. App. 189, 194.

Newcomb-Endicott Co. v. Fee, supra, was an action to recover the price of certain goods. The statute therein involved likewise required, as a condition precedent to the transaction of business by a corporation, that a copy of its articles be filed in the county where the principal business of such corporation was to be transacted. At the time the indebtedness was incurred the corporation had not complied with said statute, though, as here, it subsequently made the necessary filing. It was held in that case that the entity constituted a de facto corporation, notwithstanding its failure to file a copy of its articles of incorporation prior to the commencement of business.

In *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050, the court, after referring to the point made by counsel that the corporation at the date of the order was forbidden to do any business, not having then filed its articles of association as required by the statute, said:

"The restriction imposed by the statute is a simple inhibition. It did not declare that what was done should be void, nor was any penalty prescribed. No one but the state could object. The contract is valid as to the plaintiff, and he

has no right to raise the question of its invalidity."

[3, 4] The requirement of section 296 of our Civil Code that a copy of the articles of incorporation be filed in the county wherein the corporation is to transact its principal business is not a condition precedent to corporate organization. Provisions in general incorporation laws, prescribing conditions precedent to corporate existence, must be distinguished from provisions merely prescribing conditions to be complied with after acquiring corporate existence. Noncompliance with such a condition subsequent does not affect the existence of the corporation, although it may be ground for a proceeding by the state to forfeit the charter or franchise. *Mokelumne Hill Min. Co. v. Woodbury*, 14 Cal. 424, 426, 73 Am. Dec. 658. Conditions precedent to the right to engage in business after the corporation has been formed are conditions subsequent, a noncompliance with which, while it may give the state a right to maintain proceedings to forfeit the franchise, does not, in the absence of such proceedings, in any way affect the legal existence of the corporation.

[5-7] Prior to the respondent's filing of a copy of its articles of incorporation in the county of its principal place of business and at the time it contracted to purchase the automobile in question, there existed the three necessary elements to constitute it a de facto corporation, viz.: A general law authorizing its incorporation, a bona fide attempt to organize thereunder, and a user of the corporate franchise. No other objection than the one under consideration has been urged by the appellants as to the respondent's corporate existence. It is undisputed that there was a bona fide attempt to organize a corporation under our statutes. The presumption, in view of such circumstance, is strongly in favor of an honest intention to form a corporation. It follows, therefore, both from principle and by the great weight of authority, that the respondent at the time it contracted for the acquisition of the automobile in question was, at least, a de facto corporation. Had a copy of its articles of incorporation been filed with the clerk of the county wherein its principal business was to be transacted, it would have been, so far as the record before us discloses, a de jure corporation. The copy not having been seasonably filed, the right of the then de facto corporation to act within the scope of its corporate authority and to bind and be bound by its acts was none the less effective. This being so, the then legal existence of the respondent corporation cannot now be called into question collaterally. Section 358, Civ. Code. Nor is the respondent now precluded from asserting any property rights acquired by it prior to the filing of a copy of its articles as provided in section 296 of the Civil

Code. *Utah L. & T. Co. v. United States (C. A.)* 230 F. 343, 346.

It is stated in *Westlake Park Inv. Co. v. Jordan*, *supra*, that:

"The philosophy upon which the courts of practically every state and of the United States have gone far toward upholding the existence *de facto* of corporations which have colorably attempted to organize under statutes permitting incorporation for the general purposes which the persons forming the same seek to incorporate, and which have thereafter in good faith proceeded to function as such corporations, is that the law encourages and shares in the universal desire for the stability of business transactions, and that, where such an organization has thus attempted to be created and has in fact organized and entered upon the transaction of business in good faith, the validity of its existence ought not to be inquired into collaterally."

[8] The appellants next urge that the contract, under which the respondent asserts title to the automobile, was not properly executed. In support of this contention it is asserted that said contract does not comply with the provisions of subdivision 4 of section 1624 of the Civil Code, in that the duplicate copy of the purchase order, introduced in evidence as "Plaintiff's Exhibit No. 1," does not bear the signature of either the purchaser or seller. It is expressly provided in subdivision 4 of section 1624 of the Civil Code that a written contract or memorandum thereof covering the sale of personal property at a price in excess of \$200 is not required when there has been either a part payment or delivery under the agreement of the parties. The record in the instant case discloses that the respondent corporation had not only paid a part of the contract price of the automobile but had accepted delivery of said vehicle through its authorized agent. The provisions of the statute of frauds (subdivision 4, § 1624, Civ. Code) were therefore satisfied. This conclusion renders unnecessary any discussion as to whether the original copy of the contract, which was not introduced in evidence, bore the signatures of the parties thereto, as asserted by the respondent.

[9] We are unable to agree with the appellants' further contention that said contract is void as being in violation of section 3440 of the Civil Code. The record discloses that Walter B. Lomax, the original purchaser of the car under a conditional sales contract, had returned the same to the legal owner after the latter had procured a judgment or was about to procure a judgment

against him in an action instituted to recover the unpaid installments of the purchase price. Some months thereafter, and while the car was still in the possession of the legal owner, it was purchased under the contract in question by the respondent corporation and delivery thereof was then made by the legal owner. In view of these circumstances, it cannot be said that the purchase of the automobile by the respondent corporation violated in any manner the provisions of section 3440 of the Civil Code. There was, in fact, a change of possession from the legal owner to the respondent corporation, thus distinguishing this case from *Abrahams v. Hammel*, 40 Cal. App. 11, 180 P. 41, and *Joseph Herspring Co. v. Jones*, 55 Cal. App. 620, 203 P. 1038, cited by the appellants. Moreover, "Defendant's Exhibit 2," appended to the transcript, reveals that the division of motor vehicles had on August 27, 1923, and prior to the levy of execution, issued its certificate of registration designating the respondent corporation as the registered owner of the automobile in question.

[10, 11] It is next urged by the appellants that the respondent corporation did not constitute a separate and distinct legal person from Walter B. Lomax, and that the corporation and the individual should be treated as identical. In proper cases, equity will look behind the corporate entity and consider who are the real and substantial parties in interest, whenever it becomes necessary to promote justice, or obviate inequitable results, and the law will follow equity in this respect. *Erkenbrecher v. Grant*, 187 Cal. 7, 10, 200 P. 641. In this case it appears that Walter B. Lomax and John R. Steffens, copartners, were agents for certain eastern companies, which required the formation of a corporation in order to handle their business. Steffens retired from the partnership and Lomax formed the corporation, now the plaintiff here. There is nothing in the record to challenge the good faith of the parties in the formation of the corporation, or to contradict the testimony that the incorporators, other than Walter B. Lomax, subscribed and actually paid for shares of stock in the corporation. Mrs. Lomax appears to have been its financial backer. No issue was tendered by the pleadings in the court below on the question now raised by appellants. The evidence is insufficient to support the contention now raised and the findings are silent on the subject.

The judgment is affirmed.

201 Cal. 502

(258 P.)

PRICE et al. v. SIXTH DIST. AGRICULTURAL ASS'N et al. (L. A. 8448.)

Supreme Court of California. June 30, 1927.

1. Judgment $\hookrightarrow$ 720—Issue determined in former suit is conclusively settled by judgment as between parties (Code Civ. Proc. §§ 1908, 1909).

Fact or question actually in issue in former suit and there judicially passed on by court of competent jurisdiction is conclusively settled by judgment as concerns parties under Code Civ. Proc. §§ 1908, 1909.

2. Judgment $\hookrightarrow$ 720—Judgment holding lease valid in mandamus action held res judicata of validity of subsequent lease covering identical subject-matter in injunction suit involving same parties.

Where same parties were involved, judgment in mandamus action against mayor and chairman of board of supervisors of county, holding lease agreement from city to community development association, in consideration of erection of stadium, valid, held res judicata of question of validity of later contract covering same subject-matter, in suit to enjoin erection of stadium under such contract.

3. Judgment $\hookrightarrow$ 725(6)—Adjudication as to written instrument is binding between parties when identical issue is again raised, notwithstanding subject-matter of second action is different.

Where contract, lease, conveyance, or other obligation has been adjudicated as to its existence, validity, or construction in one action, judgment is res judicata when identical issue is raised in another action between same parties, though immediate subject-matter of two actions is different.

4. Judgment $\hookrightarrow$ 713(2)—Previous determination of issue held binding on parties notwithstanding possible omission to urge matters which might have produced opposite result.

Where issue as to validity of lease contract was determined by judgment in former action, such judgment was binding in subsequent action between same parties litigant, notwithstanding parties may have omitted to urge for or against it matters which, if urged, would have produced opposite result.

5. Judgment $\hookrightarrow$ 713(2)—Inquiry respecting issue litigated is foreclosed between identical parties as to all matters urged or which might have been urged.

When issue has been litigated, all inquiry respecting such issue is foreclosed as between identical parties, not only as to matters urged, but also as to matters which could have been urged in support of or in opposition thereto.

6. Judgment $\hookrightarrow$ 702—Joinder of other defendants in suit against city and county to enjoin improvement under lease similar to that previously upheld held not to prevent application of rule that parties are deemed the same (Code Civ. Proc. § 1910).

Joinder of other parties with city and county as defendants, in suit to enjoin construction

of stadium on ground of invalidity of lease given development association by city and county, held not to prevent application of Code Civ. Proc. § 1910, under which it is assumed same parties were involved as in former suit to require city and county officers to execute lease, making former decision as to validity of similar lease conclusive.

7. Judgment $\hookrightarrow$ 702—Judgments against municipal corporation or its officers on matters relating to public interest are binding on citizens.

Judgment for or against municipal corporation, county, town, or other local governmental agency or district or its officers is binding on residents, citizens, and taxpayers in respect to matters adjudicated which are of public and general interest.

8. Judgment $\hookrightarrow$ 702—Public interest in suit in which municipality is interested may be represented by mayor or chairman of board of supervisors.

Where fraud and collusion are absent, public interest may be represented by mayor or chairman of board of supervisors of county as well as by set of taxpayers, so as to render judgment in suit in which city or county is so represented binding on taxpayers or residents.

9. Judgment $\hookrightarrow$ 702—Suit by taxpayers against city and county and others to enjoin improvement under alleged invalid lease held to involve same parties as former mandamus action by city and county against officers to require execution of similar lease (Code Civ. Proc. §§ 1908, 1909, 1910).

Injunction suit by citizens and taxpayers against city and county and others to enjoin construction of stadium under alleged invalid lease from city and county held to involve same parties as former mandamus action brought by city and county against mayor and chairman of board of county supervisors to require execution of previous lease contract covering same subject-matter, under Code Civ. Proc. §§ 1908, 1909, 1910, rendering former adjudication binding on parties to second suit.

10. Judgment $\hookrightarrow$ 552—Doctrine of res judicata applies to judgments in mandamus proceedings, if rendered on merits.

Doctrine of res judicata is not impaired because former suit in which judgment was rendered was mandamus proceeding, provided judgment was on merits.

11. Action $\hookrightarrow$ 8—Implied finding in mandamus action by city and county against officers that action, though friendly suit, was not collusive held supported, where litigation was carried to highest court.

Implied finding of court, in mandamus proceedings previously brought by city and county to require officers to execute lease to development association for erection of stadium, that proceedings were not collusive, held supported in injunction suit to prevent such erection, notwithstanding litigation constituted friendly suit, where it was fought in good faith through District Court of Appeal and carried to Supreme Court.

12. Judgment ⚡725(6)—**Binding decision in former action as to validity of contract held to apply to lease under which contract was executed.**

Adjudication of validity of contract between city and county and development association for erection of stadium *held* to involve question of validity of lease of property to city making lease's validity *res judicata* in subsequent action between same parties involving identical issue.

13. Municipal corporations ⚡1000(1)—**Taxpayers suing to enjoin construction of improvement held barred by laches from attacking validity of lease of speedway to city (St. 1880, p. 62).**

In suit by taxpayers to enjoin construction of stadium on property leased to development association by city, plaintiffs *held* barred by laches from attacking validity of lease of speedway from agricultural association organized under St. 1880, p. 62, to city under original trust created in property, where lease was entered into with plaintiffs' knowledge eight years previous.

14. Pleading ⚡380—**Facts to be relied on must be pleaded.**

Facts cannot be relied on at trial unless pleaded.

In Bank.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Suit by Charles C. Price and others against the Sixth District Agricultural Association and others. Judgment for defendants, and plaintiffs appeal. *Affirmed.*

Kiggins & Hoffman, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for respondent Sixth District Agricultural Ass'n.

Edward T. Bishop, Co. Counsel (1924), Everett W. Mattoon, Co. Counsel, and Albert Leeds, Deputy Co. Counsel, all of Los Angeles, for respondent County of Los Angeles.

Jess E. Stephens, City Atty., Lucius P. Green, Asst. City Atty., Charles MacCoy, Deputy City Atty., and Jerrell Babb, Deputy City Attorney, all of Los Angeles, for respondent City of Los Angeles.

Flint & MacKay, and William A. Bowen, all of Los Angeles, for respondent Community Development Ass'n.

Everett W. Mattoon, Co. Counsel (1927), and Pierce Works, Deputy Co. Counsel, both of Los Angeles, for respondent County of Los Angeles.

PRESTON, J. This is an appeal from a judgment of the trial court in favor of defendants in an action brought by plaintiffs as citizens and taxpayers of the city and county of Los Angeles to enjoin the construction of a public improvement known as a stadium, or "Coliseum," in Exposition Park, Los Angeles, and to have canceled and set

aside certain lease agreements relative thereto. Sixth District Agricultural Association will be referred to hereinafter as "Sixth District," Community Development Association as "Association," city of Los Angeles as "City," and county of Los Angeles as "County."

In the year 1885 the territory known as Exposition Park was conveyed to Sixth District, a public corporation organized under the Act of April 15, 1880 (Stats. 1880, p. 62), to be held by it in perpetuity upon the following trusts:

"* * * In trust nevertheless for the following uses and purposes, to wit: That is to say that the said lands first hereinbefore described shall be held in perpetuity as a place for holding agricultural exhibitions or fairs, and shall be managed and controlled by the party of the second part for that purpose; and also for the purpose so far as consistent therewith of leasing or otherwise managing the same so as to raise a revenue for meeting the expenses of holding such exhibitions or fairs; and especially so far as consistent with the above purposes, for the purpose of holding exhibitions of horses, cattle and other stock, and of the agricultural, horticultural, viticultural, mechanical, manufacturing and domestic products of Agricultural District No. 6, with a view to the improvement of all the industries in the same. * * *"

That portion of the tract lying outside the race track or speedway is referred to as parcel A, that portion lying within the speedway is referred to as parcel B, and the third portion is designated as the speedway itself.

On February 23, 1910, the city leased a portion of this territory from Sixth District for a term of 50 years. This lease was supplanted by a subsequent agreement, dated May 21, 1912, by the terms of which Sixth District leased to the city parcels A and B for a period of 50 years running from date of the first lease, February 23, 1910, with a right of renewal on the part of the city for a second 50 years. Certain reservations were made in favor of the lessor. The city agreed to lay out and improve the land as and for a public playground and athletic field, under the direction of the playground commissioners, subject to approval of the lessor. It was also agreed that the premises should at all reasonable times be open to the public as a place for exhibiting agricultural, horticultural and botanical products and for the recreation and enjoyment of all persons.

On December 31, 1914, the Sixth District leased to the city the third portion of said tract, to wit, the speedway, grandstand, and stables, thus making the city the lessee of practically the entire territory known as Exposition Park.

On June 21, 1920, a lease agreement was drawn up and approved by Sixth District, whereby the city agreed to lease parcel B to

Community Development Association, a "non-profit co-operative corporation duly organized and existing under and by virtue of the laws of the state of California, with the power and for the purpose of holding and maintaining industrial exhibitions, agricultural fairs, street pageants, athletic exhibitions, and other performances designed to foster, promote, and promulgate the industries and industrial welfare of the people of the state of California, and to lease and rent lands and construct buildings thereon for any or all of said purposes, and to lease out such buildings when constructed." By the proposed convention, the "principal consideration" passing from the association to the city was the erection and construction of a certain stadium; the lease was to terminate February 23, 1960, but the interest of the association after ten years was to be merely nominal; upon construction the stadium was to be leased to the city and county at certain stated periods, subject to certain reservations in favor of Sixth District, and in consideration of such lease of the structure the city and county each agreed to pay rentals to the association as follows: \$50,000 within six months after commencement of construction; \$62,000 within thirty days after its completion; \$68,000 one year after date of the last preceding payment; \$65,000 two years after that date; \$62,000 three years after that date; \$59,000 four years after that date; \$56,000 five years after that date; and \$53,000 six years after that date—or the total sum of \$475,000 from each of said bodies politic, a total of \$950,000 from the two together.

It further provided that at the expiration of ten years the association should vacate the demised premises and deliver possession to the city and county.

This proposed agreement was approved and accepted by the board of supervisors of the county and the council of the city, but Jonathan S. Dodge, as chairman of said board, and Meredith P. Snyder, as mayor of the city each refused to execute the instrument. Mandamus proceedings were instituted against each of these officials; the two cases were tried together, and a decision was handed down upholding the validity of the stadium lease agreement and ordering its execution by the respective officers on behalf of said city and county, whereupon said instrument was duly executed. *County of Los Angeles v. Dodge and City of Los Angeles v. Snyder*, 51 Cal. App. 492, 197 P. 403, petition for hearing in this court denied, April 23, 1921.

Subsequent to the above decision, however, said lease agreement was redrafted, and a new instrument, dated November 15, 1921, was duly executed to replace the former agreement of June 21, 1920. But three slight changes were made, however, altering de-

scription of the property and amounts of rental payments and adding a clause releasing officers and members of the association from personal liability. It is upon said agreement of November 15, 1921, attempting to ignore the prior contract of June 21, 1920, that this action is based. At the time of the trial the stadium was far on the road to completion and the race track had been repaired and substantially restored to its former good condition.

The court in this behalf, on undisputed evidence, found as follows:

"That thereafter, said lease agreement was amended by changing the date thereof, by changing the sums of money to be paid thereunder by the defendants, the county and the city, to the defendant Community Development Association, by changing the description of the property referred to in said lease agreement, and by adding the provisions set forth in lines 20 to 31, page 25 of plaintiffs' complaint, by reference to the personal liability of the officers and members of the Community Development Association.

"That said lease agreement as amended was in substance the same as the lease agreement set forth in said petitions, and contained in substance the same terms, conditions and provisions, and described in substance the same property. That so amended said lease agreement was duly re-executed by the respective parties thereto, and is the agreement referred to in paragraph XIII in said complaint on file herein.

"That said lease agreement as amended was approved by the city counsel of the city of Los Angeles, and by the board of supervisors of the county of Los Angeles, and the mayor of said city was by said city council and the chairman of said board was by said board of supervisors duly ordered to execute said lease agreement as so amended, and the same was duly executed in accordance with said authority.

"That there was made or could properly have been made in said proceedings had before said District Court of Appeal, each and every contention or claim made in the above entitled action, that the said lease agreement referred to in paragraph 13 of said complaint is illegal or that any or all of the terms and conditions thereof is or are unlawful or unenforceable, or that it is unlawful or wrongful to construct the stadium referred to in said lease agreement, or that it is illegal or wrongful for the county of Los Angeles and the city of Los Angeles to pay to the Community Development Association any or all of the moneys agreed in said lease agreement to be so paid by the county of Los Angeles and the city of Los Angeles.

"That plaintiffs in the present case were represented by the respective parties in those certain actions entitled *City of Los Angeles v. Meredith P. Snyder* and *County of Los Angeles v. Jonathan S. Dodge* [197 P. 403], filed in the District Court of Appeal of the State of California, Second Appellate Division, No. 2, on the 21st day of June, 1920.

"That in and by the pleadings of the respective parties in said cases, all of the questions and issues, both of fact and of law, which are now presented to this court for determination, were or could have been in said cases presented to said District Court of Appeal, and the

Judgments of said court in said cases rendered on the 23d day of February, 1921, are binding and conclusive upon the parties hereto."

[1, 2] Respondents assert that the foregoing findings show that the cause of action in the former suit and in the present suit are identical and that under section 1910 of the Code of Civil Procedure the parties are likewise identical, and that such facts compel the application of the rule announced in 23 Cyc. 1215, as follows:

"A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies, in the same court or in any other court of concurrent jurisdiction, upon the same or a different cause of action."

This rule is similarly stated in 34 Corpus Juris, § 1162, p. 750, where it is said:

"A judgment rendered by a court of competent jurisdiction on the merits is a bar to any future suit between the same parties or their privies, upon the same cause of action, in the same or another court, so long as it remains unreversed and not in any way vacated or annulled."

It is stated in 15 Ruling Case Law, § 429, pp. 950, 951, as follows:

"Briefly stated, this doctrine is that an existing final judgment or decree rendered upon the merits, and without fraud or collusion, by a court of competent jurisdiction, upon a matter within its jurisdiction, is conclusive of the rights of the parties or their privies, in all other actions or suits in the same or any other judicial tribunal of concurrent jurisdiction, on the points and matters in issue in the first suit."

In sections 1908 and 1909 of the Code of Civil Procedure this rule has likewise been announced. It has also been adhered to in scores of cases in this court which need not here be cited. Appellants, admitting the general rule, however, seek to avoid the effect thereof by asserting that the causes of action are not the same; that the contract of June 21, 1920, made the subject of judgment by the District Court of Appeal on February 23, 1921, is not the basis of the cause of action here involved predicated upon the contract of November 15, 1921. But it is undisputed that the latter contract is but a recast of the former and that the subject-matter covered by the two contracts is the same. The issue tendered by both agreements is as to the power of the city or county to contract in the same way respecting identical subject-matter. In that sense the causes of action are identical. Appellants make no attack upon the contract of November 15, 1921, because of the amendments thereto. They assert no infirmity in the latter contract that is not like-

wise applicable, if correct, to the former. In order to overthrow the latter contract, it is necessary to overturn in toto the former. Indeed, it is axiomatic that if the former contract is legal and valid, the latter is valid also. We have no hesitancy, therefore, in concluding that the causes of action are substantially the same and that the rule of law above announced is applicable, provided always that the parties are identical.

[3] Moreover, it is immaterial under the peculiar facts of this case whether the causes of action be the same or not. Appellants in this connection cite Freeman on Judgments (5th Ed.) pp. 1416, 1417, as follows:

"* * * A former adjudication may be used for two different purposes, namely, either as a complete bar to the relitigation of the same cause of action, or as conclusive evidence of some fact or issue common to different causes of action."

See, also, Horton v. Goodenough, 184 Cal. 451, 461, 194 P. 34.

But the fact is that the issue determined by the former suit is the only issue presented by the present suit. Quoting again from Freeman on Judgments (5th Ed.) § 672, p. 1418:

"If the existence, validity or construction of a contract, lease, conveyance or other obligation has been adjudicated in one action it is res judicata when it comes again in issue in another action between the same parties, though the immediate subject-matter of the two actions be different."

The principle above announced has been sustained in numerous cases before this court, some of which are the following: Koehler v. Holt Mfg. Co., 146 Cal. 335, 337, 80 P. 73; Borland v. Borland, 56 Cal. App. 638, 206 P. 478 (rehearing denied by Supreme Court). Federal cases: Southern Pacific v. United States, 168 U. S. 1, 18 S. Ct. 18, 42 L. Ed. 355, 357; Bissell v. Spring Valley Township, 124 U. S. 225, 8 S. Ct. 495, 31 L. Ed. 411, 413; Mason Lumber Co. v. Buchtel, 101 U. S. 638, 25 L. Ed. 1072; Fitch v. Stanton Township (C. C. A.) 190 F. 310. These cases are, of course, to be distinguished from a case where a cause of action arises out of the same subject-matter, but upon a new set of facts not obtaining at the time of the former judgment. This principle is illustrated by the case of Silva v. Reclamation Dist. No. 1001, 41 Cal. App. 326, 329, 182 P. 786. See, also, Jones v. Petaluma, 36 Cal. 230; Shanklin v. Gray, 111 Cal. 88, 43 P. 399; People v. Rodgers, 118 Cal. 393, 46 P. 740, 50 P. 668.

[4, 5] Appellants, however, apparently have a misconception of this rule. They seem to contend that an issue heard and determined in a former case is binding only as to such grounds supporting or opposing said issue as were actually urged and litigated. But an issue may not be thus split into pieces. If it

has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. In other words, when an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto. This rule has been aptly stated as follows:

"It is important to note in this connection, however, that even though the causes of action be different, if the second action involves a right, title or issue as to which the judgment in the first action is a conclusive adjudication, the estoppel so far as that right, title or issue is concerned must likewise extend to every matter which was or might have been urged to sustain or defeat the determination actually made." Freeman on Judgments (5th Ed.) § 677, p. 1432.

To the same effect see *Sullivan v. Triunfo Gold, etc., Min. Co.*, 39 Cal. 459. Numerous California cases may be found where this rule has been applied.

This principle also operates to demand of a defendant that all his defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them. The rule has been stated as follows:

"The defendant in an action is ordinarily required to set up all his defenses which do not constitute separate causes of action, and if he neglects to do so is concluded by the judgment rendered in such action. The judgment operates as *res judicata*, not only in regard to the existence of the plaintiff's cause of action, but as to the nonexistence of the defense which was not pleaded. The reason for this rule lies in the principle that there must be an end to litigation, and, where a party has an opportunity to present his defense and neglects to do so, the demands of the law require that he should take the consequences." 15 Ruling Case Law, § 446, pp. 969, 970.

This principle is illustrated in our California decisions by such cases as *Bingham v. Kearney*, 136 Cal. 175, 177, 68 P. 597, where it is said:

"It is not the policy of the law to allow a new and different suit between the same parties, concerning the same subject-matter, that has already been litigated. Neither will the law allow the parties to trifle with the courts by piecemeal litigation. When plaintiff was brought into court by defendant in the former case, she certainly knew her rights. If she wished to rescind the contract, or if she had rescinded it, as she said in her answer she had done, then and there was the time to present her pleadings and evidence, and insist upon all rights to which she was entitled under the law. If she could not get the award of the law upon the facts in the lower court, she could have appealed. She did not do so. She is now met by the presumption that all the facts and matters in controversy were disposed of in the

former suit, and the further presumption that the judgment in the former suit is correct. If she failed to assert her claim properly, or to present the proper evidence in the first suit, she will not now be permitted in a second to litigate it. The principles herein stated are elementary. They are stated in the late case of *Quirk v. Rooney*, 130 Cal. 510 [62 P. 825]."

In said case of *Quirk v. Rooney*, 130 Cal. 505, 510, 62 P. 825, 827, it was said:

"The facts stated are substantially the same, and the object sought precisely the same. The court below evidently thought that the letter of May 1, 1892, was sufficient to establish and charge appellant as trustee of the lands for the plaintiff as one of the heirs of Bryan Lynch. If so, it is unfortunate for plaintiff that the letter was not introduced in evidence in the former suit; but the plaintiff had her day in court, her case was tried upon the evidence she then had, and a final judgment reached. If a new action could be commenced and a case retried because of the discovery of new facts, after the case had been finally disposed of, there would be no end of litigation, and a case could be kept in court forever."

Practically the whole contention of appellants may be summed up in this: They contend that the causes of action are different, and because of such fact they may litigate the entire subject-matter of the contract on November 15, 1921, without regard to the fact that the objects sought are precisely the same as those sought by the defendants in the former actions, to wit, to have it declared that the city or county may not contract in the manner proposed respecting the construction of a public improvement such as a stadium; and, furthermore, they assert that if the above stated position be not sound, nevertheless, they should be allowed to urge any point going to the validity of the contracts of 1920 and 1921, which was not specifically urged as a defense to said former suits. The rules of law and the authorities above set forth conclusively show appellants to be mistaken as to both these propositions. We therefore conclude without hesitation that if the parties be assumed to be identical, every issue raised by the pleadings in the present cause has been conclusively adjudicated against the contention of appellants, and they and each of them are bound by such adjudication. And this is true in the case whether or not the causes of action are in fact the same.

[6, 7] This brings us to the question as to whether or not the parties are the same. The fact that there are defendants and respondents other than the city and county does not prevent the application of the rule that the parties are deemed to be the same. Code Civ. Proc. § 1910; *Suisun L. Co. v. Fairfield School Dist.*, 19 Cal. App. 587, 594, 127 P. 349.

"In the absence of fraud or collusion, a judgment for or against a municipal corporation, county, town, school or irrigation district, or other local governmental agency or district, or

a board or officers properly representing it, is binding and conclusive on all residents, citizens, and taxpayers in respect to matters adjudicated which are of general and public interest, such as questions relating to public property, contracts, or other obligations." 34 Corpus Juris, § 1459, p. 1028.

See, also, 23 Cyc., p. 1269.

The principle above announced is of universal application, and appellants occupy no different position than other taxpayers of the city or county and in the absence of fraud or collusion there appears no valid reason for denying application of the rule to them.

[8, 9] Appellants make the point that, inasmuch as the former suits were in reality County of Los Angeles v. Chairman of the Board of Supervisors and City of Los Angeles v. Mayor, the rule should not apply. If, however, fraud and collusion be absent, the public interest may be as well represented by the mayor or chairman of the board of supervisors as by any set of taxpayers. For example, the fact that a man has been elected mayor of the city is no reason to suspect that he will not properly represent the public interest, and when such officer defends an action relating to a public contract, no reason can be found why he may not be a suitable, if not the most suitable, representative of the public interest in the matter. This very question was raised in *State ex rel. Davis v. Willis*, 19 N. D. 209, 124 N. W. 706. There the estoppel by judgment was made to rest upon the case of *State ex rel. McCue v. Blaisdell*, 18 N. D. 31, 119 N. W. 360, which was a suit by the Attorney General applying for a writ of certiorari against the Secretary of State, and in this connection the court, in disposing of the contention that the taxpayer was not a party to the suit, said:

"Appellant urges, however, that he is not bound by any of the facts adjudged in that proceeding, for the reason that he was not a party thereto, and that the record of that proceeding nowhere discloses any connection of his with that case. It is apparent, however, that plaintiff, acting as he does in a representative capacity, is, constructively at least, a party to any action or proceeding in which the same interest was plaintiff. * * * Standing as he does as representative in a matter of general interest to all of the citizens of Ward county, he is concluded with reference to any state of fact which was or might have been adjudged against that interest in a former action in which the same interest was plaintiff or defendant."

See, also, *Floersheim v. Board of Commissioners*, 28 N. M. 330, 212 P. 451, where the court said:

"Where a suit is brought to determine a public right, involving a matter of general interest, as, for example, the suit of *Martinez* as a resident and taxpayer in behalf of himself and all others similarly situated, to enjoin the issuance of courthouse and jail bonds by Harding county, all citizens and taxpayers of the county

are parties to the proceeding by representation, and are bound by the judgment, not only as to matters which were litigated, but also as to matters which existed at the time and which could have been litigated in the case, the same as the actual formal parties on the record, regardless of whether they had actual notice of the pendency of the suit or not [citing many cases]."

See, also, *Pear v. East St. Louis*, 273 Ill. 501, 113 N. E. 60.

[10] This doctrine is not impaired because the former suits were judgments in mandamus proceedings so long as the judgments were on the merits.

"It is well settled that a final judgment rendered upon the merits of an application for a peremptory writ of mandamus comes within the principle of *res judicata*, and is a bar to another application for the same writ by the same party under the same circumstances, or to another action involving the same issues and in which the same relief is sought." 34 Corpus Juris, p. 760, § 1173.

See *Visher v. Smith*, 92 Cal. 60, 28 P. 94; *Santa Cruz Gap Turnp. Joint-Stock Co. v. Santa Clara County*, 62 Cal. 40; *Cohn v. Isensee*, 45 Cal. App. 509, 188 P. 278; *Sauls v. Freeman*, 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190; *Ashton v. Rochester*, 133 N. Y. 187, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619; *Montgomery v. Walker*, 154 Ala. 243, 45 So. 586, 129 Am. St. Rep. 54; *Shanahan v. South Omaha*, 2 Neb. (Unof.) 466, 89 N. W. 285. In *Sauls v. Freeman*, supra, the court said:

"If the judgment in mandamus was not as effectual, upon the principle of *res adjudicata*, against the inhabitants of the county as it is against the county commissioners, there would be no end to litigation in such cases or in any cases against county officials as such."

This doctrine is likewise recognized by California in the case of *Suisun L. Co. v. Fairfield School Dist.*, supra. The cases relied upon by appellants such as *Price v. Gwin*, 144 Ind. 105, 43 N. E. 5; *People ex rel. Graff v. Chicago, B. & Q. R. Co.*, 247 Ill. 340, 93 N. E. 422; and *No. Pac. R. Co. v. Snohomish County*, 101 Wash. 686, 172 P. 878, are cases where either this question is not discussed, or where the taxpayer had a special interest in the litigation, or where the party did not represent the public interest. In other words, in all said cases where the question was discussed, special circumstances were present making inapplicable the rule above announced, but in no case cited is the existence of the rule denied. In the case of *In re Central Irrigation District*, 117 Cal. 382, 49 P. 354, the statement made is obiter, and, moreover, the doctrine of the law of the case is there confused with the doctrine of estoppel by judgment. Furthermore, that case is not followed in any of the later cases on this subject.

[11] Appellants, in an apologetic manner, also raise the question of collusion between

the parties to the aforesaid mandamus proceedings. The court impliedly found against this contention and, we think, properly so. It may well have been that the mayor of the city and the chairman of the board of supervisors would have liked to see this public improvement carried out; nevertheless, it is a fact found by the court and warranted by the evidence that these officers doubted the legal validity of the contract and the power of the city and county to enter into it. It is also true that reputable counsel of high standing representing the interested parties denied the validity of the contract and the power of the city and county to enter into it and the interests financing the construction of the improvement refused to proceed until the validity of the contract had been determined. The litigation was thereupon fought in good faith with fairness and earnestness, not only through the District Court of Appeal, but through to the Supreme Court of the state, and upon such a showing the conclusion must be that the court's implied finding that collusion was absent, is supported. In *Floersheim v. Board of Commissioners*, supra, speaking of this contention, the court said:

"It will be seen from an examination of the allegations of the reply, heretofore quoted, that the substance and effect of the allegations is that the suit was a friendly suit, and the plaintiff was, in fact, desirous that the validity of the bonds should be established. If a real controversy existed, as it evidently did in this case, as to the validity of these bonds, the action of a qualified person in behalf of himself and others represented by him is not condemned by the law merely because the suit is a friendly suit, but, on the other hand, the law commends such action. 1 C. J. p. 974; *Parker v. State*, 132 Ind. 419, 31 N. E. 1114; *State v. Dolley*, 82 Kan. 533, 108 P. 846; *Ex parte Steele* (D. C.) 162 F. 694; *Adams v. Union R. R. Co.*, 21 R. I. 140, 42 A. 515, 44 L. R. A. 273. The personal desires of the parties as to the result of the litigation are of no moment provided no fraud or collusion is resorted to."

We therefore, conclude that not only was the cause of action in the prior litigation the same as in the present, but that the parties were likewise the same and that the judgments entered in said former proceedings are

conclusive upon appellants here as to the validity of the contract of November 15, 1921.

[12, 13] Further attacks are made directly against the agreements known as the lease of May 21, 1912, and the lease of December 31, 1914. The lease of May 21, 1912, was made an exhibit to the former proceedings. Indeed, it furnished the very basis upon which the contracts of 1920 and 1921 were executed. The validity of this lease was necessarily involved in said prior actions and, therefore, what was adjudicated therein with respect to said contracts is equally applicable to this lease. The contract of December 31, 1914, was given by Sixth District to the city and comprised, as above noted, the so-called speedway, stables, grandstand, and other equipment connected with the race track on said property. The city agreed to maintain the property in first-class condition at its own expense and to use it to the fullest extent "in encouraging horse raising, training, speeding exhibits and contests." This contract, as shown by its date, was made 8 years prior to the commencement of the present action, and it is conceded by appellants that the city and county have been maintaining at considerable expense the speedway, grandstand, and barns thereon, and the court found that all injury done to said speedway by the construction of said stadium has been substantially repaired and the race track restored to practically its original condition. Under such facts a court of equity should not hesitate to declare the existence of laches on the part of appellants, whom the court also found to have had knowledge of said contract of lease from the time of its execution. The court concluded that appellants were guilty of laches and denied equitable relief to them. We think the court was amply authorized by the evidence in the case in so holding.

[14] Appellants' theory that they are suing also in the capacity of members of Sixth District is likewise without support in the pleadings or evidence. This fact must be pleaded, if true, before it can be relied upon. *Pennie v. Hildreth*, 81 Cal. 127, 132, 22 P. 398.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

84 Cal. App. 465

BORGNIS v. CALIFORNIA OREGON POWER CO. (Civ. 3268; Sac. 3794.)★

District Court of Appeal, Third District, California. July 15, 1927.

Hearing Denied by Supreme Court Sept. 12, 1927.

1. Electricity ⇨17—Power company, in lawful possession of right of way on which accident occurred, must be treated as owner in considering negligence.

In action against power company for personal injuries, defendant, which was in lawful possession of right of way on which accident occurred, must be treated as owner in so far as question of negligence is concerned.

2. Electricity ⇨15(1)—One fishing on hotel company's land, injured while crossing power company's right of way, was mere "licensee," and cannot recover.

One who is not patron of hotel but fishing on its land, who was injured while crossing power company's right of way, held "licensee" rather than invitee, and cannot recover for such injuries.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Licensee.]

3. Innkeepers ⇨10—Hotel owes guest's guest same degree of care as guest.

Hotel ordinarily owes to its guest's guest same degree of care as to guest himself.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

Action by Frank Borgnis against the California Oregon Power Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Preston & Duncan, of San Francisco, Henry McGuinness, of Dunsmuir, and J. P. McNamara, of Yreka (Robert E. Hatch, of San Francisco, of counsel), for appellant.

Morrison, Dunne & Brobeck, of San Francisco, and Taylor & Tebbe and H. V. Ley, all of Yreka, for respondent.

FINCH, P. J. This is an action to recover damages for personal injuries sustained by plaintiff when a steel fishing rod, which he was carrying, came in contact with a sagging wire of the defendant's power line. The jury returned a verdict in favor of defendant, and judgment was entered accordingly. The plaintiff has appealed from the judgment.

The action is based upon the alleged negligence of the defendant in allowing the power wire to remain in such sagging condition. Respondent contends that the plaintiff was a mere licensee on the defendant's right of way, and that the judgment, therefore, must be affirmed; there being no proof or claim that the defendant willfully or wantonly injured the plaintiff. Appellant contends that

he was an invitee of the defendant, for whose safety the latter was bound to exercise ordinary care, commensurate with the dangerous character of the agency under its control.

The accident occurred while plaintiff was on a fishing trip along Shovel creek, near Klamath Hot Springs, in Siskiyou county, on land owned by the Klamath Hot Springs Hotel Company. The company there owns about 2,000 acres of land, through which Shovel creek flows for about 2½ miles. "Fishing is one of the attractions of the place." No objection has been made "to the public coming in and fishing on this property." "The public has availed itself of the opportunity to fish in this stream on this property for the past 5 or 6 years. * * * Fishing was encouraged so far as guests were concerned." "There is lots of people from around the county here that goes up on Sundays that never patronize the hotel, that camp on the creek and along the river there. Of course, people coming from any distance, why they usually stay at the hotel. Probably about 75 per cent. of the fishermen are guests of the hotel and 25 per cent. not guests." The plaintiff was not a guest at the hotel and had no business dealings there. He testified:

"I did not stay at the hotel because I am camping outside every time when I go out. * * * I used to go up Shovel creek several times each season. I always saw lots of people up there fishing. * * * I have seen lots of people fishing in this stream near the place where I was hurt at previous times. * * * Nobody told me I couldn't fish or forbade it on these premises. * * * You can fish all along the stream. There are no fences. I did not stay at or take any meal at or have any business dealings at the hotel the time I was hurt."

The defendant has acquired a right of way 75 feet wide through the lands of the hotel company, and the power line in question was on and along this right of way. The grant of the right of way contained the following provision: "The party of the second part agrees not to erect any adjoining fences along its right of way."

The accident occurred during the afternoon of May 12, 1923. The defendant introduced evidence tending to show that shortly before 8 o'clock in the morning of the same day an insulator near the scene of the accident was struck by lightning and broken, thereby causing the wire attached to the insulator to drop to a point within 8½ feet of the ground, and that the defendant was not negligent in failing to discover the sagging condition of the wire prior to the accident.

[1] The defendant was in the lawful possession of the right of way upon which the accident occurred, and, "so far as the question of negligence is concerned, was clothed

with the rights of the owner, and must be treated as such." *Lindholm v. Northwestern Pac. R. Co.* (Cal. App.) 248 P. 1033; *Waller v. Smith*, 116 Wash. 645, 200 P. 95. The view most favorable to the plaintiff is to assume that the defendant was bound to exercise the same degree of care for his safety as the hotel company would have been required to exercise if it had owned and controlled the power line on its own land. This assumption will be indulged throughout the discussion of the case. Respondent contends that it occupied a more favorable position than that so assumed.

[2] Where one "expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." *Cooley on Torts* (3d Ed.) p. 1259. On page 1265 of the same work it is said:

"One is not invited into danger when his entrance upon dangerous premises is simply not opposed and prevented. Thus, one whose unenclosed grounds people cross without objection is not liable to one who falls into an unguarded cistern there."

"An invitation to use the premises of another is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using them." *Bush v. Weed Lumber Co.*, 63 Cal. App. 426, 432, 218 P. 618, 620.

"Mere permission, or a habit, * * * of an owner of allowing people to enter and use a certain portion of his premises is indicative of a license merely, and not of an invitation." *Herzog v. Hemphill*, 7 Cal. App. 116, 119, 93 P. 899, 900. "Simple permission does not make one an invitee. Permission and community of interest are necessary." *Kinsman v. Barton & Co.* (Wash.) 251 P. 563. "To come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant." *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; *Coburn v. Village of Swanton*, 95 Vt. 320, 115 A. 153.

An implied invitation "arises in the case of customers who for the purpose of trade or other business enter a store, or other place of business, and in the case of persons attending public places of amusement, or other places where persons have paid for the privilege of being or placing their property." 29 Cyc. 455. All are invitees who are expressly invited, regardless of any question of benefit or advantage to the inviter, even though the invitation be not individual, but

to the public generally. *Chafor v. City of Long Beach*, 174 Cal. 478, 163 P. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106; *Richmond & M. R. Co. v. Moore's Adm'r*, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258; *Peckett v. Bergen Beach Co.*, 44 App. Div. 559, 60 N. Y. S. 966. "Merchants invite the public to enter their stores to buy wares. It cannot be said that they invite the entrance of those who accompany them, but who have no intention of purchasing; such persons are mere licensees." *Fleckenstein v. Great Atlantic & Pacific Tea Co.*, 91 N. J. Law, 145, 102 A. 700, L. R. A. 1918C, 179.

In *Means v. Southern California Ry. Co.*, 144 Cal. 473, 477, 77 P. 1001, 1002 (1 Ann. Cas. 206), the plaintiff was injured while sitting in defendant's freight house, waiting to see a person about a matter in which the defendant had no interest. The evidence showed:

"That numerous persons, having no business to transact with the defendant company, had been, for years, permitted to be around and about such freight platform, and were not ordered away by the officers of defendant."

The court said that the plaintiff—

"was not upon the premises by the invitation express or implied, of the defendant, nor for any business purpose connected with defendant, nor in relation to any business for which the freight house, * * * was used. * * * As a mere licensee, the defendant owed him no legal duty, except that while upon the premises no wanton or willful injury should be inflicted upon him."

In *Hafey v. Dwight Mfg. Co., and Hafey v. Turners Falls Power & Electric Co.*, 240 Mass. 155, 133 N. E. 107, the power company maintained a power line across the land of the manufacturing company, such land including a "large portion" of Caleb's island. The court said:

"Caleb's Island, including the part owned by the Dwight Manufacturing Company, had been used for many years for playing baseball and other games. * * * There was a well-beaten path on the island, and the evidence showed that the plaintiff's intestate was walking on this path when his fishing pole came in contact with the uninsulated wire which had been allowed to sag within 10 feet of the ground, thereby causing his death. In order to reach the island, the plaintiff's intestate had to cross the Boston & Maine Railroad bridge, on either side of which there was a sign which forbade trespassing. There was no evidence that any invitation, expressed or implied, was at any time given by either defendant to the plaintiff's intestate to go upon the land or use the premises for any purpose. * * * The mere fact that the owner of the land did not take active measures to prevent its use, in the way shown on this record, did not amount to an inducement or invitation to use the premises."

It was held that the plaintiff's intestate was not an invitee of either company, but

a mere licensee. Two facts were there proved which do not appear in this case: The injury occurred on a "well-beaten path" and trespass signs were posted on either side of the railroad bridge. It does not appear whether such signs referred to the island or to the bridge.

In *Douglas v. Bergland*, 216 Mich. 380, 185 N. W. 819, 20 A. L. R. 197, the plaintiff was injured while fishing from defendant's wharf or rollway. Plaintiff had fished from the same place for nine seasons. The court said:

"The testimony shows that plaintiff, his wife, and others fished off these rollways. On one occasion defendant pointed out to plaintiff's wife where he thought she could catch a fish. We think this testimony established license at most and did not establish that plaintiff was an invitee."

The reason for holding that mere acquiescence in cases such as this does not imply an invitation is well stated in *Long v. Pacific Ry. & Nav. Co.*, 74 Or. 502, 144 P. 462, 145 P. 1068, L. R. A. 1915F, 1151, where it is said:

"The right of way of the defendant was used by residents of that vicinity as a walkway for foot travel. * * * It is a matter of common knowledge that such rights of way and the tracks are commonly used by foot passengers wherever they are more convenient than the ways constructed by public authorities. It goes without saying that such use is not desired or encouraged by the railway authorities, but merely suffered because of the difficulties of preventing it. Such use is never of any advantage to the transportation companies. * * * The deceased was a mere licensee."

[3] A trout stream is a valuable adjunct to a hotel or pleasure resort. "Fishing is one of the attractions of the place" here in question. Doubtless many guests are attracted to the hotel by the fact that "Shovel creek is a good fishing ground." It certainly would be of no advantage to the hotel company for campers who do not patronize the hotel to deplete the stock of trout and thereby diminish or destroy one of the principal attractions of the place. "It goes without saying" that proprietors of pleasure resorts, through whose lands trout streams flow, do not desire or encourage fishing therein by persons who do not patronize the resort, but merely suffer it "because of the difficulties of preventing it" and there is nothing in this case to indicate that the hotel company desired or encouraged campers to occupy the premises or fish in the stream, but at most the evidence shows a mere passive acquiescence therein. A hotel or pleasure resort of the character here in question is not a "public place" in the broad sense, but in the sense only that it is open to such part of the public as patronize the place or seek to do so. Its implied invitation is no more extended to the person who goes there

for reasons merely personal to himself than is that of a store or other place of business. It is true that a hotel ordinarily owes to its guest's guest the same degree of care as to the guest himself, but for reasons which are wholly absent in this case. *Goldstein v. Healy*, 187 Cal. 206, 210, 201 P. 462. Appellant says:

"There was a distinct benefit, even if it was no more direct than advertising. Thus, should Mr. Borgnis, for instance, find the fishing good, he would naturally tell his friends about it; they would in turn patronize the resort, and consequently more people would visit the resort."

The same line of reasoning might be applied to one who enters a store or other place of business for purposes having no relation to such business. In such a case there is no mutuality of interest. There is an implied invitation to prospective purchasers to enter places where goods are kept for sale, but the courts have never gone further than to hold this implied invitation broad enough to include one who "entered the store with a vague purpose of buying something if she saw anything that she took a fancy to." *MacDonough v. F. W. Woolworth Co.*, 91 N. J. Law, 677, 103 A. 74. The evidence in this case does not show that the plaintiff had even a vague purpose of patronizing the place. He was a mere licensee as shown by the uncontradicted evidence and by his own testimony. Since this fact precludes a recovery, it would be idle to consider the alleged errors of which complaint is made and which have no bearing upon the question of whether the plaintiff was an invitee or a licensee.

The judgment is affirmed.

We concur: PLUMMER, J.; GLENN, Justice pro tem.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for hearing herein is denied. In denying the same, however, we withhold our approval of that portion of the opinion of the District Court of Appeal wherein it is decided that the plaintiff herein was a mere licensee of the owner of the premises upon which the accident and the resulting injuries to him occurred, since, whether the plaintiff was a licensee or an invitee upon said premises, it was for the jury to determine whether the defendant had failed to exercise the degree of care which the circumstances of the situation required. The jury, upon the evidence in the case, resolved that question in favor of the defendant. It follows that the judgment upon such verdict was properly affirmed.

Mr. Justice PRESTON, being disqualified, does not participate in the consideration of the above petition.

84 Cal. App. 337

HOFFMAN v. SOUTHERN PAC. CO. et al.
(Civ. 3257.)★

District Court of Appeal, Third District, California. July 1, 1927.

Hearing Denied by Supreme Court Aug. 29, 1927.

1. Railroads $\S$ 351(2)—Automobile driver's attempt to cross railroad in fog without stopping furnished evidence requiring instructions on contributory negligence, whether pleaded or not.

In action for injuries sustained in collision of train with automobile at crossing, proof that plaintiff driving between 25 to 30 miles per hour through dense fog attempted to cross tracks without stopping after seeing train 100 feet away when he was 5 or 6 feet from nearest rail furnished substantial evidence of lack of ordinary care in approaching railroad crossing, and required proper instructions to be given jury on question of contributory negligence, whether pleaded or not.

2. Appeal and error $\S$ 171(1)—Record showing plaintiff's counsel questioned jurors on contributory negligence showed that case was tried on theory that contributory negligence was proper issue.

In suit for injuries sustained in collision between train and automobile at crossing, record showing plaintiff's counsel questioned jurors on knowledge of plea of contributory negligence showed that cause was tried on theory that contributory negligence was proper issue in case.

3. Trial $\S$ 105(2)—Trial court must instruct jury on contributory negligence as requested, where case was tried on theory that pleadings presented issue, and evidence supported same.

Where case was tried by parties on theory that pleadings present an issue of contributory negligence, and no objection has been made to form of pleading, and there is substantial evidence to support such issue, it becomes duty of trial court to give jury such appropriate instructions on subject as have been offered by defendant.

4. Negligence $\S$ 117—Contributory negligence must be specially pleaded, but may be relied on, where appearing from complaint or plaintiff's evidence.

Generally, contributory negligence of plaintiff must be specially pleaded by defendant in order that defendant may rely on defense; but, where plaintiff's contributory negligence appears from allegations of complaint, or from evidence introduced in plaintiff's behalf, plea of contributory negligence is available to the defense, though not pleaded in answer.

5. Negligence $\S$ 117—Facts of each case determine allegations necessary for plea of contributory negligence.

Allegations sufficient to constitute adequate defense on plea of contributory negligence depend on particular facts of each case.

6. Negligence $\S$ 117—Plea of contributory negligence must allege facts showing want of ordinary care contributing to injuries, though specific term need not be used.

In pleading contributory negligence, it is not necessary to use specific term, though con-

cise statement of facts indicating commission or omission of acts which would be required of one under similar circumstances in exercise of ordinary care and which would appear to directly contribute to injuries must be alleged.

7. Pleading $\S$ 8(17)—Allegation in form of conclusion that acts complained of were due to negligence of plaintiff is not sufficiently pleaded contributory negligence.

In pleading contributory negligence, it is not sufficient to merely allege in form of conclusion that acts complained of were due to negligence or carelessness of plaintiff.

8. Negligence $\S$ 117—Doctrine of contributory negligence is not plea of "confession and avoidance."

Doctrine of contributory negligence is not plea of "confession and avoidance," and does not require defendant to confess negligence on his own part before he can set out plaintiff's negligence as defense.

[Ed. Note.—For other definitions, see Words and Phrases, Confession and Avoidance.]

9. Pleading $\S$ 94—Defendant may set up inconsistent defenses, if separately stated (Code Civ. Proc. $\S$ 441).

Under Code Civ. Proc. $\S$ 441, defendant may set forth in answer as many defenses as he may have, so long as they are separately stated, and separate defenses may be absolutely inconsistent.

10. Railroads $\S$ 344(10)—Answer alleging plaintiff, knowing danger, negligently drove over railroad crossing without stopping, looking, or listening, sufficiently pleaded contributory negligence.

In action for injuries sustained in collision between train and automobile at crossing, answer particularly specifying in separate, affirmative cause of defense that plaintiff, knowing of danger of crossing, negligently drove his automobile over crossing without stopping, looking, or listening for approaching train, constituted sufficient statement for special defense of contributory negligence.

11. Negligence $\S$ 141(2)—Refusal of instructions on contributory negligence held reversible error, where issue was raised by pleading and evidence.

In action for injuries sustained in collision of train with automobile at crossing, refusal of requested instructions that negligence constituting cause of action requires injured party to be free from contributory negligence, defined as want of ordinary care by injured party contributing to injury, and to deny recovery, if plaintiff was guilty of such contributory negligence, held reversible error, where pleading and evidence properly raised issue of contributory negligence.

12. Railroads $\S$ 351(16)—Instruction on duty to look and listen, given with modification requiring railroad to be free from negligence, held error.

In action for injuries sustained in collision of train with automobile at crossing, requested instruction that person approaching railroad crossing must look and listen for approaching

trains, especially if view of track is obstructed, and that fact of injury raises presumptions that person did not take precautions, if he would have seen or heard train by exercising care, given with modification requiring defendant to be free from negligence, *held error*.

13. Railroads ⚡328(8)—Traveler must use greater caution in fog and cannot recover, if he fails to use caution in looking and listening for train.

Where plaintiff is familiar with railroad crossing, and has reason to expect passing of train momentarily, and his view is greatly obstructed by dense fog, he should use greater caution in approaching track, and cannot recover damages for injuries sustained in collision with train, if he carelessly attempts to cross tracks without exercise of due caution and use of faculties to carefully look and listen for approaching train.

14. Railroads ⚡350(26)—Person crossing railroad in dense fog may be negligent in failing to stop automobile; question being for jury.

Where view of railroad track is obscured by dense fog, and train is momentarily expected, person prevented from listening for approaching train by noise of his automobile may be negligent in failing to stop automobile, so that he could listen to better advantage which question is for jury.

15. Railroads ⚡347(11)—Testimony that person riding with plaintiff stated plaintiff was going at pretty good clip before struck by train should have been admitted on issue of contributory negligence.

In action for injuries sustained in collision of train with automobile at crossing, deposition of witness that person riding with plaintiff had stated to stranger at scene of accident immediately after it occurred, who was engaged in taking number of automobile, that "train was going a pretty good clip, and so were we," was improperly excluded to impeach plaintiff's companion, but should have been submitted to jury on question of contributory negligence.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by R. A. Hoffman against the Southern Pacific Company and another. Judgment for plaintiff, and defendants appeal. Reversed.

Levinsky & Jones, of Stockton, for appellants.

Ostrander & Ostrander, of Merced, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment and the verdict of a jury awarding plaintiff \$16,175 damages for personal injuries sustained in a railroad crossing accident. Appellants seek a reversal of the judgment on practically all of the statutory grounds, but rely chiefly upon the refusal of the trial court to charge the jury with respect to the doctrine of contributory negligence.

The injuries complained of were the result of a collision between a Buick automobile driven by plaintiff and the passenger train of defendant Southern Pacific Company, at a railroad crossing 5 miles northerly from Merced, which accident occurred about 7:30 o'clock on the morning of January 5, 1924. The Oakdale branch of the Southern Pacific Railway runs from Merced to Stockton through an open and flat country. From Merced northerly to and beyond the crossing where the accident occurred the Cox Ferry highway extends parallel with and adjacent to the railroad right of way. Upon this highway and about one mile southerly from the point of the accident toward Merced the plaintiff had lived for about a year and was perfectly familiar with the crossing in question, with the entire surroundings, and in a general way was familiar with the train schedule on that branch of the railroad. He knew that the morning train was due to leave Merced for Stockton and would reach the crossing in question about 7 or 7:30 o'clock every morning. At the point where the accident occurred a roadway crossed this Cox Ferry highway and the railroad track at right angles. There was a slight elevation from the Cox Ferry road to and across the railroad track. This crossing was open, and the view was entirely unobstructed by buildings, trees, or other obstacles both up and down the track as far as one could see, except for a dense fog that prevailed that morning. The train was due to leave Merced at 7 o'clock a. m., was 25 minutes late, and, because of the heavy fog, it was running with the headlight turned on. There was the usual sharp conflict of evidence as to whether the warning whistle of the engine was blown or the bell rung upon approaching the crossing. The witnesses differ materially as to the distance at which the approaching train could be seen through the fog. This distance varied from 100 feet to 200 yards. There is no substantial evidence to the effect that the train was running at an unusually high rate of speed. All witnesses agree that a heavy fog prevailed and that the headlight was turned on.

Plaintiff was engaged in drilling a well westerly of the railroad track at a point in the vicinity of the crossing where the accident occurred. About 7:20 or 7:30 o'clock in the morning, in company with his associate, E. B. Hawkins, the plaintiff drove his open Buick car from his home at the rate of 25 or 30 miles an hour along this Cox Ferry highway within 50 or 60 feet of the railroad track. The train was approaching from his rear, but he neither heard it nor saw it, nor did he look for it. He admits that he never thought of it nor paid any attention to it. Plaintiff operated the car, and Hawkins sat upon his right in the front seat. When they reached the crossroad leading at right angles

over the railroad track, plaintiff claims that he slowed down his machine and turned abruptly to his left to cross the track. Neither of the occupants of the automobile had seen or heard the approaching train. When the machine was within 5 or 6 feet of the nearest rail, they discovered the train about 100 feet distant bearing down upon them. Both saw it about the same instant. Plaintiff then slipped his clutch into the intermediate gear and without stopping attempted to cross the track ahead of the approaching train. The left hind wheel of his machine was struck by the engine, and the occupants of the automobile were hurled from the vehicle, which was completely demolished. Hawkins was practically unhurt, but the plaintiff sustained serious injuries. His right hand was lacerated, his body was severely bruised, and a triangular fracture of the frontal bone of the skull occurred, which penetrated to the brain and exposed the cerebrum. He was taken to the hospital, where his wounds were treated, and the fractured skull was trephined. In the course of a number of months his recovery appeared to have been practically complete.

With respect to the manner in which plaintiff approached and attempted to cross the railroad track, the following evidence is pertinent in determining whether the trial court was warranted in refusing defendants' instructions on the question of contributory negligence. E. B. Hawkins, who was called in behalf of the plaintiff, testified in part as follows:

"Q. * * * Where was the front of your machine * * * at the time you first saw the train? A. Well, when he turned to go on the road, turning in to his left here, to approach the railroad, I looked down behind him, I looked right that way down the railroad, and we must have seen the train just at that same instant. * * * I say I must have been 5 feet from the track, from the front wheel, as near as I could guess at it. * * *

"Q. You were very close to the rail? A. Yes, sir.

"Q. Practically on the rail? A. Yes; that is what I thought at the time.

"Q. How far would you judge * * * the train was away from you? A. Well, * * * I think somewhere in the neighborhood of 100 feet.

"Q. Was the headlight burning? A. Yes, sir. * * *

"Q. But he shifted from high into second? A. Certainly.

"Q. At about what time did he do that? A. Well, just as he seen the train, he just turned to me, and he said, 'Look there,' and just as he said that, he shifted his machine down that way into second."

On cross-examination Mr. Hawkins testified that they drove down that Cox Ferry road about 25 or 30 miles an hour, but slowed down as they turned to their left onto the crossing. He testified that he did not know

exactly when the train came by there, but he did know that it "came along there a little after 7." Then he testified:

"When I first looked * * * his machine was turning in the crossing; I was looking down the track like that * * * behind Mr. Hoffman. I never turned my head; I was still looking that way when I seen the train. Just as I seen it, he seen it at the same instant. * * * I have seen the train go by there many times; assuredly I have. * * * I never heard any sound until I seen the train. * * * I was not thinking anything about the train."

During their ride to the crossing Mr. Hoffman had not mentioned the train to Hawkins. There were no buildings, fences, or trees to obscure the view.

The plaintiff testified that they drove down the Cox Ferry road about 25 or 30 miles an hour; that there was about as heavy a fog that morning as they had had that winter. He said that they made the turn onto the crossing road about 10 or 12 miles an hour, and he further testified as follows:

"Q. As you came along the road, approaching that crossing from your house, were you looking, or expecting the approach of any train? A. I never looked back at all; I was looking straight ahead. * * *

"Q. You say you did not turn around and look back? A. No, sir; I did not. * * * I was driving an open car, with a one-man top; * * * no curtains were on the car. * * * As soon as I turned the corner, I looked for the train, to see if any train was coming from toward Merced. * * * I could see no train. * * * I could hear no noise of an approaching train. * * *

"Q. Did you see any train before the accident? A. I heard it and saw it about the same time. I saw the headlight first. * * * It was about 80 or 100 feet distant. * * * I was almost on the track when I first saw the train; * * * about 5 feet away, I should say. * * * As soon as I saw the train I shifted on the second. If I had stepped on the gas, on high, I would have killed my engine * * * so I shifted into intermediate."

The witness Violet Gray, called for defendants, testified that she looked out from her window that morning and saw the train through the fog and observed the Hawkins automobile going down the Cox Ferry road "about two lengths of a car ahead of the train."

[1] From the foregoing it may be fairly inferred that the plaintiff, knowing that it was about time for the morning train from Merced on its way to Stockton, drove his open Buick automobile down the Cox Ferry highway a distance of over half a mile parallel with and adjacent to the railroad track through a dense fog, which obscured the view for a distance beyond 100 feet, running his machine at from 25 to 30 miles per hour; that upon reaching the crossing he slowed down materially, turning to his left some 50 or 60 feet directly onto the railroad crossing

without attempting to stop his machine; that when he reached a point about 5 or 6 feet from the nearest rail he discovered the train about 100 feet away with its headlight turned on and bearing down upon him; that he then shifted his clutch into the intermediate gear and attempted to cross ahead of the engine. The plaintiff admitted that he did not turn around or look back for the train as he drove down the highway by the side of the railroad track. His associate, Hawkins, said that he never turned around and was not thinking about the train on their ride to the crossing. The train was not mentioned by either of them until it was discovered by both of them about the same time when they were within 5 or 6 feet of the rail. It must be said that this furnishes substantial evidence of a lack of ordinary care in approaching a railroad crossing which under appropriate pleadings, or even in the absence of a plea of contributory negligence, would require proper instructions to be given to the jury with relation to the application of that doctrine.

After specifically denying plaintiff's charges of negligence contained in the complaint, the defendants, "further answering said complaint, as and for a further, separate, and distinct defense to the alleged cause of action therein set forth," pleaded:

"That the accident referred to in said complaint was caused solely and wholly by, and was the proximate result of, the carelessness, recklessness, and negligence of said plaintiff in this, that said plaintiff, at the time and place set forth in the complaint, prior to, and at the time of said accident, did not exercise due, or any, care, and was negligent, careless, and reckless in this, that although said plaintiff well knew that he was about to cross a railroad crossing, over which crossing many trains pass in both directions at all hours of the day and night, said plaintiff drove his automobile up to, upon, and over said railroad crossing without stopping, or looking, or listening for any approaching train; nor did he take warning from the stationary warning sign at said crossing, but, notwithstanding all of the aforesaid, said plaintiff negligently, carelessly, and recklessly drove up to, on, and upon said crossing."

[2] From the record it appears that this cause was tried upon the theory that contributory negligence was a proper issue in the case. In the course of the examination of Carrie A. Wall, a juror, on her voir dire the following occurred. Mr. Ostrander, examining the juror in behalf of the plaintiff, asked:

"Q. Mrs. Wall, are you familiar with what is known as the plea of contributory negligence? A. No.

"Q. Well, that means where one person is charged with injuring another by reason of his negligence, he replies to this effect. 'Well, I was guilty of negligence, but the other party was guilty of negligence, too, that contributed to the injury,' that is what is meant by contributory negligence. It is the confession of negligence on the part of the person charged

with negligence, but, for the purpose of the pleading, it confesses negligence, but alleges contributory negligence; in other words, where both are negligent, neither can recover.

"Mr. Levinsky: I object to the question, and move the court that it be stricken out; it is a statement and not a question.

"Mr. Ostrander: Here is an attempt to plead contributory negligence, because it is further and separate and distinct defense. Now, we have the right to assume from this they are going to plead contributory negligence. Now, if they don't plead contributory negligence, if that is so understood, then there is no purpose in my asking these questions at all, if it is so understood.

"Mr. Levinsky: There is no understanding at all; I don't have to announce anything other than from the pleadings.

"The Court: Well, the statement is made in the presence of the jury, so that is all right; we may as well go on.

"Mr. Levinsky: The pleadings speak for themselves.

"Mr. Ostrander: Does the jury understand you have stated you don't plead contributory negligence?

"Mr. Levinsky: I say the pleadings stand for themselves.

"Mr. Ostrander: Q. Now, assuming that the defense of contributory negligence is made in this case, and the court should instruct you that the burden is upon the defendant to prove that fact, you would be guided by that instruction, would you not? A. Yes, sir."

[3] Where a case is tried by the respective parties on the theory that the pleadings present an issue of contributory negligence, and where no objection has been made to the form of the pleading, and there is substantial evidence to support this issue, it becomes the duty of the trial court to give to the jury such appropriate instructions on this subject as have been offered by the defendant. 14 R. C. L. 785, § 50; Kelly v. Santa Barbara R. Co., 171 Cal. 415, 153 P. 903, Ann. Cas. 1917C, 67; Schuh v. Herron Co., 177 Cal. 13, 169 P. 682; Busch v. Los Angeles R. Co., 178 Cal. 536, 174 P. 665, 2 A. L. R. 1607; Perry v. Angelus Hospital Ass'n, 172 Cal. 311, 156 P. 449; Kofoid v. Beckner, 70 Cal. App. 624, 234 P. 113.

[4] As a general rule the contributory negligence of the plaintiff must be specially pleaded by the defendant in order that he may rely upon this defense. 19 Cal. Jur. 681, § 104. But where plaintiff's contributory negligence appears from the allegations of his complaint or from the evidence introduced in his behalf, this plea is available to the defense, although it is not pleaded in the answer. 19 Cal. Jur. p. 681, § 104, p. 697, § 119; 20 R. C. L. 182, § 151; 20 Standard Enc. of Proc. 317; Green v. S. P. Co., 132 Cal. 254, 64 P. 255; Kenny v. Kennedy, 9 Cal. App. 350, 99 P. 384.

[5-7] Where neither the allegations of the plaintiff's complaint nor the testimony adduced in his behalf show that the plaintiff is guilty of negligence which directly contrib-

utes to the injuries which he sustains, the defendant may not avail himself of the plea of contributory negligence in the absence of a special defense setting up the facts upon which he relies. It has been a perplexing question upon which the courts have differed widely as to just what allegations would be sufficient to constitute an adequate defense upon a plea of contributory negligence. It is apparent that no fixed rule in this regard can be assigned which will fit all classes of cases; each case will depend upon the particular facts involved. It is not necessary to use the specific term of contributory negligence, although a concise statement of the facts indicating the commission or omission of acts which would be required of one under similar circumstances in the exercise of ordinary care and which would appear to directly contribute to the injuries complained of must be alleged. It is not sufficient to merely allege in the form of a conclusion that the acts complained of were due to the negligence or carelessness of the plaintiff. 20 R. C. L. 183, § 152; 29 Cyc. 582; 5 Elliott on Railroads, 813, § 2805. In the case of *Crabbe v. Mammoth Channel G. M. Co.*, 168 Cal. 500, 143 P. 714, it is said:

"Contributory negligence in this state is an affirmative defense which must be pleaded. While the pleader may charge the contributory negligence in general terms, yet he must plead the facts of such negligence, and the facts pleaded must show a causal connection with the injury. *Smith v. Buttner*, 90 Cal. 95, 27 P. 29; *Stephenson v. Southern Pac. Co.*, 102 Cal. 144, 34 P. 618, 36 P. 407."

[8, 9] Among the authorities in California and in some other states the careless use of a familiar term has occasionally led to the inaccurate statement that the doctrine of contributory negligence is a plea of confession and avoidance. This has led to much confusion, and a common impression exists that however innocent the defendant may believe himself to be, before he may accuse the plaintiff of negligence, which caused his injuries, the defendant must first confess negligence on his own part. Upon a careful examination of every case in California involving this doctrine which has been called to our attention we are convinced not only that this is an erroneous statement of the law, but that similar language used in each and every one of these cases is mere dicta, either because in each instance the form of pleading declared a mere conclusion, or because the case was really decided upon some other issue. This objectionable language was unnecessary to the determination of the appeals in question. This error may have been aided because of the rule which prevails to the effect that, where there is no negligence shown on the part of the defendant, he is, for that reason alone, free from liability. 19 Cal. Jur. 647, § 76. But under the statute of California

and in nearly all Code states the defendant may set forth in his answer as many defenses as he may have, so long as they are separately stated. Code Civ. Proc. § 441. And these separate defenses may also be absolutely inconsistent. *American Nat. Bank v. Donnellan*, 170 Cal. 9, 148 P. 188, Ann. Cas. 1917C, 744; *Shepherd-Teague Co. v. Hermann*, 12 Cal. App. 394, 107 P. 622; *Calexico Lumber Co. v. Emerson*, 54 Cal. App. 239, 201 P. 612.

It is quite apparent that to hold that a defendant must first confess his own negligence before he will be permitted to charge the plaintiff with contributory negligence is in direct conflict with the clear declaration of the Legislature and the uniform decisions of our courts with respect to the right to set up various conflicting defenses. Moreover, that doctrine would appear to be a denial of justice and would often preclude one from making a meritorious defense to a charge of actionable negligence. Can it be said that a defendant who is charged with negligence and who conscientiously believes himself to be innocent of that charge, but who is also possessed of facts which lead him to believe that the injuries of which the plaintiff complains were sustained as a direct result of his own lack of ordinary care, must first stultify himself by verifying his answer and swearing that he is guilty of negligence, believing in his own heart that that statement is false, before he will be permitted to set up a valid defense of contributory negligence? Surely this cannot be the law.

In 29 Cyc. p. 582, the rule is thus stated:

"A general denial and plea of contributory negligence do not constitute inconsistent defenses and may be pleaded together, and negligence on the part of the defendant is not admitted by a plea of contributory negligence following a general denial."

Similarly the text found in 6 Current Law, at page 768, is stated as follows:

"While a denial of negligence and an allegation of contributory negligence are verbally inconsistent, they are not so in practice, and a defendant need not elect between the two defenses; nor does the plea of contributory negligence, when properly pleaded, admit the negligence as charged in the petition."

So also in 1 Thompson on Negligence (2d Ed.) 375, § 390, it is said:

"In Louisiana it is held that a plea of contributory negligence admits an issue of negligence on the defendant's part. But if this means that the plea of contributory negligence is in the nature of a plea of confession and avoidance, admitting the negligence of the defendant and avoiding it by showing that the plaintiff was also negligent, then it is unsound and incorrect, unless in a special application to rules of pleading peculiar to particular states. The pleading of contributory negligence as a special defense is not inconsistent with a denial of the negligence of the defendant. * * * Hence the defendant cannot be required to elect

between two separate paragraphs of his answer, one of which denies any negligence on his part, while the other sets up contributory negligence on the part of the plaintiff. A defendant may then both traverse the complaint and plead contributory negligence; but as the defenses are distinct and different, they should be set out in separate paragraphs of his answer."

It is interesting to note that upon a rehearing of the Louisiana case above cited by the author of Thompson on Negligence as an authority for the statement that contributory negligence is a plea of confession and avoidance that court in *Bomar v. Louisiana N. & S. R. Co.*, 42 La. Ann. 1206, 9 So. 244, says:

"We have not held, and we are far from holding, that the plea of contributory negligence by a defendant sued for negligence operates as an admission of the negligence charged. * * * The admission that there is an issue of negligence is very different from, and indeed contradictory of, an admission of the negligence itself, which latter admission would eliminate and destroy the issue of negligence."

In 5 Elliott on Railroads (3d Ed.) 811, § 2805, the rule with respect to pleading contributory negligence is stated as follows:

"In jurisdictions where contributory negligence is regarded as an affirmative defense to be specially pleaded, it is generally held that the pleading should state the facts upon which the conclusion of contributory negligence is predicated. It is not enough to merely state that the plaintiff or person killed or injured was guilty of negligence contributing to his injury, as that would be a conclusion of law. A plea is too general which merely charges that the injuries occurred from the plaintiff's own carelessness and negligence. In a jurisdiction in which the burden is upon the defendant it has been held that the defendant must plead contributory negligence if he relies on that defense, though the plaintiff alleges freedom from contributory negligence in the complaint. * * * The general denial and the plea of contributory negligence are not generally regarded as inconsistent. The authorities hold that a case may be tried upon either or both defenses. The allegation of contributory negligence is not considered an implied admission of negligence on the defendant's part so as to dispense with proof of such negligence by plaintiff. *McDonald v. Montgomery*¹ St. Ry. Co., 20 So. 317; *Fowler Co. v. Brooks*, 70 P. 600; *Charping v. Towsaway Mills*, 70 S. C. 470, 50 S. E. 186; *Wright v. Southern Ry. Co.*, 155 N. C. 325, 71 S. E. 306; *Weingartner v. Louisville & N. R. Co. (Ky.)* 42 S. W. 839; *Wallace v. Portland Ry. L. & P. Co.*, 103 Or. 68, 204 P. 147; *Day v. Kelly*, 50 Mont. 306, 146 P. 930."

The last two cases cited contain vigorous challenges to the mistaken doctrine that the defense of contributory negligence constitutes a plea of confession and avoidance or requires the admission of guilt on the part of the de-

fendant before he may avail himself of the defense. The last case cited contains a list of authorities of considerable length, which decisions are opposed to this doctrine. In accordance with our view that the California cases in which it has been held that the defense of contributory negligence was inadequately pleaded are not out of harmony with the doctrine that the defense of contributory negligence is not a plea of confession and avoidance, the following brief statement of the essential facts determined is made. These cases do not refer to the doctrine of confession and avoidance, but merely hold that the pleadings were defective. *Meindersen v. Meyers*, 188 Cal. 498, 205 P. 1078, was a suit for damages for injuries sustained by plaintiff's wife in falling into an excavation left in the street. In affirming the judgment for plaintiff the Supreme Court said:

"No offer or attempt to plead it [contributory negligence] was made by appellant. * * * Consequently the appellant was not in a position to, and apparently did not, urge the point in the court below and certainly may not do so here."

In the case of *Western States Co. v. Bay-side L. Co.*, 182 Cal. 140, 187 P. 735, judgment for damages for the death of plaintiff's intestate was recovered. In affirming the judgment the court said:

"The court instructed the jury that the contributory negligence, if any, of the deceased, was not a defense in the action. This instruction was evidently based upon the fact that contributory negligence was not pleaded as a defense. The answer alleged that the injury was wholly the result of the negligence of the deceased which amounted to nothing more than a denial of negligence on the part of the defendant."

In *Hughes v. Warman Steel Casting Co.*, 174 Cal. 556, 163 P. 885, in affirming a judgment for plaintiff, in which the defendant had alleged as a special defense "that any injury sustained by plaintiff was the proximate result of his own negligence and carelessness, particularly in standing in front of the casting which he was trimming instead of standing at the side, where, defendant alleged, he was ordered to stand; and, second, that the plaintiff entered upon the work of cutting said nails with knowledge of the dangers, and hence assumed the risk incident to such work," the court said:

"It is contended by defendant under its special defense interposed in that regard that the evidence shows that the injury to plaintiff was entirely caused by his own negligence. This, of course, is not a plea of contributory negligence on the part of plaintiff. Such a defense is an affirmative one, and must be pleaded. No attempt to plead it appears in this case."

In *Starck v. Pacific Elec. Ry. Co.*, 172 Cal. 277, 156 P. 51, L. R. A. 1916E, 58, in reversing a judgment against defendant for negligence, the court said:

¹ Reported in full in the Pacific Reporter; not reported in full in 65 Kan. 861 Reports.

"Plaintiff filed a memorandum * * * to the effect that appellant might not complain of the instructions upon contributory negligence because that defense was not affirmatively set up in the answer. The respondent is in error. The defense of contributory negligence was pleaded as 'a further, separate, and distinct answer and defense,' and not merely in denial of the allegations of the complaint. The issue was tendered, we think, sufficiently and in form."

In *Kofoid v. Beckner*, 70 Cal. App. 624, 234 P. 113, affirming a judgment for plaintiff, this court said:

"In the answer filed by the defendants, it appears that, coupled with a paragraph denying negligence on the part of the defendants, there are these words: 'And, by way of further and separate defense, allege that the injury and collision in said complaint described, if any there was, was solely and proximately caused by the fault and negligence of the plaintiff, himself, and without any fault on the part of said defendants, or either of them. * * * It is elementary that a defense of new matter should be pleaded. * * * Such defense of new matter must necessarily be complete and single, as much so as each cause of action, and should be separately stated in a plea by itself.'"

In *Dover v. Archambeault*, 57 Cal. App. 659, 208 P. 178, affirming a judgment for plaintiff, the court approved striking out from defendant's answer the following language:

"And in that behalf this defendant avers that, if the plaintiffs or either of them was injured at the time and place as stated in their complaint, it was by and through the negligence of [plaintiff] who at said time and place negligently drove his said automobile on to the automobile of this defendant, which was rightfully standing still in said highway, and not moving at all in any direction, at the time of said accident."

The court added:

"The language above quoted added nothing to that denial. * * * Where the defense is not pleaded, and where the facts in support of such defense have not been developed by the evidence presented by the plaintiff, it is not error for the court to ignore that defense in presenting the case to the jury."

And in *Off v. Crump*, 40 Cal. App. 173, 180 P. 360, a judgment for plaintiff was affirmed, and the court says:

"The only matter in the answer suggesting a defense of contributory negligence is that, after controverting the allegations of the complaint charging negligence of defendant in driving his automobile, it is denied 'that the plaintiff was struck by said automobile from any cause other than his own negligence,' and it is alleged that, 'on the contrary, the collision with the plaintiff, and any injuries which the plaintiff may have received therefrom, were wholly and solely due to the negligence of the plaintiff.'"

In that case the trial court found that no negligence of the plaintiff contributed to or was the proximate cause of the accident.

It is quite clear that the foregoing cases were very properly decided upon the facts and pleadings presented, and that in every instance the attempt to set up contributory negligence on the part of the defendant failed because the allegations were mere conclusions. In none of these cases is it said that the defense failed because defendants did not first confess their own negligence.

In the following three cases the court did say in effect that contributory negligence was predicated upon the existence of negligence on the part of the defendant. But in these cases the language used in an effort to plead contributory negligence consisted also of mere inadequate conclusions, and the employment of the characterization of the defense of contributory negligence as a plea of confession and avoidance was unnecessary to the determination of the cases and was therefore dicta.

In *Crabbe v. Mammoth Channel G. Min. Co.*, 168 Cal. 500, 143 P. 714, affirming a verdict for plaintiff, where the answer merely affirmatively declared that the death was "caused by his own gross negligence and failure to exercise and use ordinary care for his own protection," the court said:

"Appellant's plea is therefore not a plea of contributory negligence, but consists of a denial of negligence upon the part of the pleader and an assertion of gross negligence upon the part of the deceased."

In *Gett v. Pacific Gas & Elec. Co.*, 192 Cal. 621, 221 P. 376, affirming a verdict for plaintiff solely upon the sufficiency of the evidence to support the findings of the defendant's guilt of negligence and the plaintiff's freedom from negligence, the court *ex industria* used the term "confession and avoidance." But the question of the pleadings was not involved in that case, and the statement was clearly dictum. The judgment was properly affirmed and would be just as firmly established if this statement were eliminated from the opinion. Finally, the case of *Bauman v. Edgar*, 72 Cal. App. 448, 236 P. 943, affirmed a judgment for plaintiff in an automobile collision case solely upon the evidence, wherein the court says:

"The plea of the defendant that the plaintiff could have avoided the accident after he saw the danger is nothing more than a plea of contributory negligence on the part of the plaintiff. This plea raises the question whether the facts are such as to constitute contributory negligence in law, or whether the issue is one to be left to the court or jury on the evidence."

The pleadings were therefore not questioned. In *Lemmermann v. Pope & Talbot*, 42 Cal. App. 192, 183 P. 467, the appeal was from a judgment of nonsuit, which was affirmed upon the specific ground that "the facts disclosed by the evidence sustained the affirmative defense pleaded by defendant." The court said:

"The defense here pleaded is neither that plaintiff assumed the risk of his employment, * * * nor is it a pleading of contributory negligence on the part of plaintiff, which assumes negligence on the part of defendant, but is a charge that the accident was caused solely by the plaintiff's negligence."

In spite of the foregoing statement and regardless of defendant's effort to plead affirmatively contributory negligence, this case was affirmed upon the ground that the record presented no substantial evidence of negligence of the defendant, and therefore the statement with relation to the confession and avoidance rule was also dicta.

[10] Assuming from the foregoing that it is therefore unnecessary for a defendant to first confess the negligence with which he is charged before he may plead contributory negligence, we are of the opinion that the special defense in the instant case entitled the defendant to the benefit of that plea, for he particularly specified in a separate, affirmative cause of defense that knowing of the danger of the crossing in question the plaintiff negligently "drove his automobile up to, upon, and over said railroad crossing without stopping or looking or listening for any approaching train." We are of the opinion that this constitutes a good and sufficient statement of the special defense of contributory negligence.

[11] All instructions on the subject of contributory negligence were refused. At the conclusion of the evidence the defendants offered the following instructions, among others, which correctly stated the law on the subject of contributory negligence, and which under the pleadings and the evidence should have been given to the jury and the refusal to give which constituted reversible error, to wit:

"Negligence constituting a cause of civil action consists in the omission by one to use that degree of care which it is his or her legal duty to use with respect to another to protect such other from injury, by which omission, as the proximate cause thereof, such other, without contributory negligence on his or her part, sustains injury to his or her person or property.

"It is a well-settled rule of law that, if the negligence of plaintiff contributed proximately to the injury of which the plaintiff complains, he cannot recover. And if you so find from the evidence, then your verdict must be against the plaintiff and in favor of the defendants.

"Contributory negligence is the want of ordinary care and prudence on the part of the person injured contributing directly and proximately to the injury."

[12] The following instruction offered by defendants also correctly stated the law, but was erroneously modified by the trial judge adding the last two lines which are here italicized and which addition affirmatively directed the jury that the principle there announced was not applicable to the law of the case and would not exempt the defendants

from liability unless the evidence indicated that they (the defendants) were not negligent. This instruction read:

"The railroad track of a steam railway must itself be regarded as a signal of danger, and one intending to cross must avail himself of every reasonable opportunity to look and listen for approaching trains. If the view of the track is obstructed, he should take greater pains to listen. If taking these precautions he would have seen or heard the approaching train, the very fact of his injury will raise a presumption that he did not take the required precaution, and in such circumstances if defendants were not negligent, plaintiff cannot recover."

[13] Where a plaintiff is familiar with a crossing and has reason to expect the passing of a train momentarily and his view is greatly obstructed by a dense fog, he should use greater caution in approaching the track. Under such circumstances a person will not be absolved from negligence and may not recover damages for injuries sustained, if he carelessly attempts to cross the track without the exercise of due caution and the use of his faculties to carefully look and listen for an approaching train. 22 Cal. Jur. 318, § 68, p. 335, § 80, p. 342, § 84; Heitman v. Pacific Elec. Ry. Co., 10 Cal. App. 397, 102 P. 15. Where the view of the track is obscured by physical objects, dense fog, or a cloud of dust, greater care should be used in attempting to cross the track. Flemming v. Western Pac. Ry. Co., 49 Cal. 253; Hager v. Southern Pac. Co., 98 Cal. 309, 33 P. 119. In Young v. Southern Pacific Co., 182 Cal. 378, 190 P. 40, it is said:

A traveler is "bound to look and listen, and, if necessary, * * * stop * * *," and that obligation [is] increased rather than diminished by his knowledge that * * * a train was approaching."

[14] Where the view of a track is obscured by a dense fog and a train is momentarily expected and on account of the noise created by the operation of his automobile one is prevented from listening for the approach of the train, it might amount to negligence, if under such circumstances one failed to stop his vehicle so that he could listen to better advantage.

All these are questions which the jury had a right to consider under appropriate instructions upon the subject of contributory negligence.

In the supplement to Thompson on Negligence, p. 56, §§ 425 and 427, the rule is thus stated:

"It is a restatement of a familiar principle to say that, if there is any doubt as to whether the plaintiff was guilty of contributory negligence, the question is not one of law for the court, but is one of fact for the jury. It is the province of the jury to determine the question whenever there may be reasonably a difference of opinion as to the inferences and conclusions

from the facts. * * * It is always for the jury where the evidence is conflicting. 29 Cyc. 631; Kelly v. Santa Barbara R. Co., 171 Cal. at page 423, 153 P. 903, Ann. Cas. 1917C, 67."

[15] The exclusion of the following testimony was also error. During the examination of the witness Edward B. Hawkins, for the purpose of laying the foundation for impeachment of the witness, the following proceedings were had:

"Mr. Levinsky: Did you make this remark to them (Mrs. Gray and Mrs. Wyatt): 'I consider myself lucky; that train was going like hell, and so were we?' A. No, sir; I did not.

"Q. And nothing like that? A. Nothing like that."

Later in the reading of the deposition of this Mrs. Gray the following occurred:

"Mr. Levinsky: Q. State whether or not at the scene of the accident you heard a conversation between Mr. Hawkins and some man who was taking the number of the car in which that man said, 'The train was going pretty fast,' and Hawkins said, 'I will say it was going a good clip, and so were we.' A. That is what he said exactly.

"Q. Who said that? A. Mr. Hawkins; that is the only remark I ever heard him make."

To this the court sustained plaintiff's objection on the ground that the conversation was with a different person. The time was fixed at the scene of the accident soon after it occurred, and the incident was referred to as the time when a man was taking down the number of the machine of plaintiff which had been demolished. Later, over the objection of defendant, the witness Hawkins was permitted to deny this statement in spite of the fact that the evidence of Mrs. Gray had been ruled out as follows:

"Mr. Ostrander: Q. Now, Mr. Hawkins, did you have a conversation with Mrs. Gray, or when Mrs. Gray was present, with a man who may have looked at the number of the automobile, at any time during that day * * * in which conversation you made a statement to this effect, that upon being asked by the man, 'Well, the train was going pretty fast, at a pretty good clip, wasn't it?' and you replied, 'I will say it was, and so were we.' A. I did not make that statement."

It was apparently an issue in the trial of the case on the part of defendant as to whether plaintiff with his associate, Hawkins, did not drive down upon the crossing at a reckless rate of speed without stopping at the crossing. The witness Mrs. Gray had said in her deposition that Hawkins had stated to a stranger at the scene of the accident immediately after it occurred, who was then engaged in taking the number of the demolished machine: "The train was going a pretty good clip, and so were we."

This court is neither deciding nor inferring that the evidence disclosed by the record in

this case conclusively establishes the fact that plaintiff was guilty of contributory negligence, but is merely holding that those facts furnish substantial evidence, which under the special defense pleaded and the evidence developed from plaintiff's witnesses should have been submitted to the jury for its consideration under appropriate instructions which were offered with relation to the subject of contributory negligence.

It is unnecessary to pass upon other grounds urged by defendants for reversal.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

84 Cal. App. 434

HITTSOON v. STANICH. (Civ. 4736.)

District Court of Appeal, Second District, Division 1, California. July 14, 1927.

1. Trial $\Leftrightarrow$ 388(2)—Where judgment was by default, court's refusal to sign findings of fact and conclusions of law held proper.

In action on notes, where judgment was by default and no issues were joined, refusal of court to sign findings of fact and conclusions of law prepared by plaintiff and presented for signature held proper.

2. Arrest $\Leftrightarrow$ 15—Statute providing for defendant's arrest, where obligation sued upon was incurred by fraud, held to authorize arrest only on mesne process and not after default (Code Civ. Proc. §§ 482, 483, 486, 715; § 479, subd. 4).

Code Civ. Proc. § 479, subd. 4, providing for the arrest of a defendant who is guilty of fraud in incurring the obligation sued upon, held to authorize remedy only on mesne process, in view of sections 482, 483, 486, and 715, and hence not to authorize issuing process ordering defendant's arrest on default judgment in action on notes alleging fraud.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action upon promissory notes by W. J. Hittson against Elid Stanich, also known as Saint Millard. From the judgment, plaintiff appeals. Affirmed.

William Lewis and Guy Lewis, both of Los Angeles, for appellant.

YORK, J. This is an action to recover judgment for nonpayment of several promissory notes and attorneys' fees, and for the arrest of defendant, and his confinement in the county jail in Los Angeles county, etc., on the alleged ground that the defendant obtained from plaintiff the moneys for which said notes were given by false and fraudulent representations.

The defendant was personally served with summons and complaint in Los Angeles county. He failed to appear, and his default was duly entered.

On a hearing in the superior court, judgment was entered for plaintiff for the amounts due plaintiff on the promissory notes and for attorneys' fees, but not for the arrest of defendant. Plaintiff appeals from the judgment and "from the whole and every part thereof." The judgment recites that the case came on for trial on the 26th day of December, 1923, "and evidence, both oral and documentary," was introduced, and "the court, having filed its findings of fact and conclusions of law, ordered the entry of the judgment." But no findings of fact or conclusions of law were made. In support of his appeal, plaintiff prepared what is designated a bill of exceptions. It recites the filing of the complaint, which it sets forth in *hæc verba*, the entry of the defendant's default; that it was difficult to locate the defendant, and that it took nearly three months to do so; that a warrant was out for his arrest on various charges, and that the plaintiff asked the court for a judgment for the arrest of defendant, and his confinement in the county jail; that the court denied the motion and entered the judgment on January 7, 1924, for the amount prayed for in the complaint with attorneys' fees; that plaintiff prepared findings of fact and conclusions of law and presented them to the court for signing, and that the court refused to sign them or to sign any findings of fact whatsoever, and then follows in said proposed bill of exceptions a copy of the proposed findings of fact so prepared and presented to the court. The fact that the plaintiff did not waive findings of fact, and the court refused to sign any findings, is clearly embodied in the record before us.

[1] The first question raised by appellant is that the court should have signed findings of fact and conclusions of law prepared by him and presented to the court for signature. This was a default action, and no issues were joined, and the matter clearly is within the rule stated in 24 California Jurisprudence, § 191, p. 950. "The court cannot properly make findings of fact and conclusions of law unless issues are joined and a trial had thereon. Accordingly, findings need not be made where judgment is rendered by default because of a failure to file an answer." In the case of *Waldecker v. Waldecker*, 178 Cal. at page 568, 174 P. 37, the court says:

"On the contrary, our conclusion is that in divorce cases, * * * findings are required only upon a trial of issues of fact raised by the pleadings of the respective parties, and only then in cases where findings have not been waived by the parties as provided in section 634 of the Code of Civil Procedure. It follows that in the instant case findings were not required to be filed by the court upon a denial of the divorce."

In *Hamblin v. Superior Court*, 195 Cal. at page 370, 233 P. 339, 43 A. L. R. 1509, the court says:

"It is to be noted, however, that the taking of testimony in the present case did not constitute the holding of a trial in the strict sense of the word. There were no issues of fact upon which a trial was required. The default of the defendant admitted all of the allegations of the complaint. Upon the entry of such default the court might have rendered judgment for the plaintiff without the taking of any evidence (Code Civ. Proc. § 585; *City of Los Angeles v. Los Angeles F. & M. Co.*, 150 Cal. 647, 89 P. 615), except for the requirement of section 130 of the Civil Code, which forbids the granting of a divorce upon the default of the defendant or upon the uncorroborated admissions of the parties. This section * * * is not to be construed * * * as requiring written findings of fact and conclusions of law (*Waldecker v. Waldecker*, 178 Cal. 566, 174 P. 36)."

In *Shepard v. Shepard*, 65 Cal. App. at page 314, 223 P. 1014, the court says:

"We are satisfied that the judgment must be reversed, and, inasmuch as no findings were required by reason of the default, * * * the reversal should carry directions to the trial court to enter judgment in favor of the appellant."

It was held in *Re Cook's Estate*, 77 Cal. 230, 17 P. 923, 19 P. 436, 1 L. R. A. 567, 11 Am. St. Rep. 267, that under the provisions of section 670 of the Code of Civil Procedure in cases of default findings are not necessary and form no part of the judgment roll.

[2] As to the second point raised that the court upon demand should have ordered judgment for execution against the person of defendant, we note that the complaint in the instant case requests only:

"Fifth. That the defendant be arrested and confined in the county jail of Los Angeles county, state of California, under the provisions of subdivision IV of section 47a of the Code of Civil Procedure of the state of California et seq."

There being no such section as 47a, we conclude that appellant was attempting to refer to section 479 of the Code of Civil Procedure, which is the only section that we can find that deals with an order of arrest for fraud in a civil action after judgment except after execution issued. However, this section appears under title 7, headed "Provisional Remedies in Civil Actions." Subdivision 4 of section 479 in chapter 1 of title 7 provides for arrest—

"as hereinafter prescribed. * * *

"4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property for the taking, detention, or conversion, of which the action is brought."

The following provisions of chapter 1 provide that it is necessary that an affidavit of plaintiff or some other person make it appear to the judge that sufficient cause of action exists, and that the case is one of those men-

tioned in section 479, and it provides that, if an order of arrest be made, the affidavit must be filed with the clerk of the court. Section 482 provides that, before making the order, the judge must require a written undertaking on the part of the plaintiff, with sureties in an amount to be fixed by the judge, which must be at least \$500, to the effect that plaintiff will pay all costs which may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, and that the undertaking must be filed with the clerk of the court. Section 483 provides that the order may be made at the time of issuing of the summons or at any time before judgment, and section 486 provides for discharge of the defendant at any time before execution, either upon giving bail or depositing the amount mentioned in the order of arrest. And it appears from title 7 that part of the Code refers only to provisional remedies. Under chapter 2 of part 2, title 9, are found as shown by the heading of that chapter, "Proceedings Supplemental to Execution"; and under section 715 is provided: "Proceedings to compel debtor to appear. In what cases he may be arrested. What bail may be given." Therefore, we conclude that the remedy requested by the plaintiff in his complaint herein is one that could be used only on *meane* process and is not a process to be issued on final judgment. We note that in support of his said second ground of appeal no cases have been cited by appellant, decided since our Code has been in existence. The judgment of the trial court is therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.

84 Cal. App. 430

HALE v. GIESEA et al. (Civ. 5817.)★

District Court of Appeal, First District, Division 2, California. July 13, 1927.

Hearing Denied by Supreme Court Sept. 8, 1927.

1. Partnership $\S$ 216(1)—Defendants' assertion of being joint adventurers held without allegations, where, after complaint alleging copartnership, they appeared and filed answer as such.

Where defendants, in action wherein complaint alleged that defendants were copartners, appeared as copartners, filed an answer as such, and did not deny that they were copartners, subsequent assertion that they were joint adventurers was entirely without allegations of pleadings, and did not present issue on that subject to trial court.

2. Partnership $\S$ 267—That copartnership ceased to produce entertainments for which it was organized on certain date did not show dissolution.

Mere fact that copartnership ceased to produce entertainments for which it was organized

on certain date did not in itself show a dissolution on that date.

3. Partnership $\S$ 146(2)—Manager of copartnership had authority to execute notes to take up duebills given to creditors (Civ. Code, $\S$ 2429).

Under Civ. Code, $\S$ 2429, manager of copartnership, with full power to hire and discharge, collect receipts, pay bills and employees, held to have had power to execute notes in name of partnership to take up duebills executed by him to creditors.

4. Husband and wife $\S$ 267(2)—Assignee of notes by wife without husband's consent had right to sue thereon (Civ. Code, $\S$ 954; Code Civ. Proc. $\S$ 370).

Assignee of notes assigned by wife without consent of husband had right to sue thereon, in view of Civ. Code, $\S$ 954, and Code Civ. Proc. $\S$ 370, authorizing wife to sue alone on such claim.

5. Bills and notes $\S$ 523—Notes were properly admitted in action thereon by assignee, where his testimony regarding title was uncontradicted.

Where in action on notes by assignee, plaintiff testified regarding his title to notes, and no evidence was introduced contradicting his testimony in that regard, the notes were properly received in evidence.

6. Pleading $\S$ 380—Trial $\S$ 396(3)—Complaint pleading note authorizing attorney's fees and praying for reasonable attorney's fee authorized proof thereof without so pleading in each count and sustained finding of \$250 attorney's fee.

Complaint, in action on notes, pleading each note in *hæc verba*, with clause providing for reasonable attorney's fees, with prayer for a reasonable attorney's fee to be allowed in premises, held sufficient to admit proof thereof, though not pleading reasonable attorney's fee in each count, and finding separate amount of principal and of interest on each note, "plus \$250 attorney's fee," was sufficient to sustain judgment.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Theodore Hale against F. A. Giesea and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Silverstein, Collier & Silverstein, of Oakland, for appellants.

Theodore Hale, Barry J. Colding, Wm. M. Abbott, and K. W. Cannon, all of San Francisco (Enid Childs, of San Francisco, of counsel), for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants to recover on six separate promissory notes. All defendants answered, and a trial was had before the trial court sitting without a jury. The trial court made findings of fact in fa-

vor of the plaintiff, and, from a judgment based thereon, the defendants have appealed under section 953a of the Code of Civil Procedure.

Each note was dated March 26, 1923; each note was for a different amount; each note was payable to a different payee; but otherwise each note was in the same general form and was a demand note bearing interest at the rate of 6 per cent., payable in San Francisco, and contained a provision for an attorney fee if suit were brought, and each note was signed, "Cosmopolitan Producing Company, by Dick Wilbur, Manager."

[1-3] It is contended by the defendants that they were not copartners. It was alleged in the complaint that they were copartners, and the defendants appeared as copartners, filed an answer as copartners, and did not deny that they were copartners. The denial that was interposed was a denial as to what business, if any, the partnership undertook. The defendants assert that they were joint adventurers. That assertion is entirely without the allegations of the pleadings. No issue on that subject was presented to the trial court. The last contention made by the defendants is that, if the relationship of the defendants was that of copartners, the defendant Dick Wilbur had no power to execute the notes. In this connection it may be stated that all of the individuals are actors. Prior to the month of November, 1922, they entered into a plan and arrangement to produce certain entertainments at different places in the state of California. Commencing in about the month of November they proceeded to carry out the plan. Mr. Rusco acted as advance agent and proceeded ahead of the theatrical troupe, making arrangements, etc. Mr. Wilbur acted as manager, and as such had full power to hire and discharge, to collect the receipts, pay the bills and pay the employees. Each week he rendered accounts to each of his four partners. The enterprise was a failure, and came to an end about the 17th of March, 1923. At that time Mr. Wilbur executed to each of the creditors a duebill. Thereafter the notes in suit were executed to the payees and the duebills were taken up. The defendants vigorously complain because the plaintiff, as assignee of his clients, insisted upon and, in fact, induced Mr. Wilbur to execute the notes and take up the duebills. In this connection the defendants strenuously contend that, although the shows did not stop until March 17, 1923, the partnership was dissolved and no act of a partner could be performed as such by Mr. Wilbur on March 26, 1923, the date of the notes—nine days thereafter. From the record before us, it is clear that the partnership was formed as early as November, 1922. The defendants cite no part of the record showing a dissolu-

tion of the partnership prior to March 26, 1923, nor at any other time. The mere fact that the association ceased to produce entertainments on March 17, 1923, did not in itself show a dissolution on that date. The defendants further contend that as manager Mr. Wilbur did not have the power to execute the notes. The contention is entirely without merit. *Krasky v. Wollpert*, 134 Cal. 338, 341, 342, 66 P. 309; Civ. Code, § 2429.

The defendants contend that the relation existing among them was an agreement merely for financing. As stated above, such a contention is entirely without the issues in the case. Moreover it is in direct conflict with much of the evidence.

[4] The defendants assert that one of the notes was made payable to Ivy Mertons; that she was at all times mentioned in the pleadings the wife of Mr. Wilbur; that the note in her favor was community property; that the husband has the management of the community property; and that the assignment of the note to the plaintiff without the consent of the husband was invalid. There is no evidence that the assignment was without the husband's consent. Our statute authorizes a wife to sue alone on such a claim. Code Civ. Proc. § 370. No reason appears why her assignee may not sue thereon. Civ. Code § 954.

[5] Objection was made in the trial court, and is made at this time, that the notes were improperly received in evidence. The plaintiff was sworn as a witness and testified regarding his title to the notes. No evidence was introduced contradicting his testimony in that regard. Each note bore an indorsement in blank which purported to be the signature of the payee. The notes were produced out of the possession of the plaintiff. The trial court did not err in receiving them in evidence. *Edwards v. Wagner*, 121 Cal. 376, 53 P. 821; *Vance v. Gilbert*, 178 Cal. 574, 174 P. 42; *Bickerdike v. State*, 144 Cal. 698, 700, 701, 78 P. 277.

[6] In drawing his complaint, the plaintiff pleaded each note in *hæc verba*; as recited above, each note contained a clause that a reasonable attorney's fee might be allowed by the court in case suit was brought; in each count the plaintiff did not plead what was a reasonable attorney's fee, but in his prayer he did ask for "a reasonable attorney's fee to be allowed in the premises." In making its findings, the trial court, "as conclusions of law," found separately the amount of the principal, the amount of interest, "plus \$250 attorney's fee." The pleading was sufficient to admit the proof and the findings were sufficient to support the judgment. *Conner v. Dale*, 63 Cal. App. 338, 341, 342, 218 P. 462.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

84 Cal. App. 413

(258 P.)

**CITY OF LOS ANGELES v. LOS ANGELES
PACIFIC NAV. CO. et al. ★
(Civ. 4641.)**

District Court of Appeal, Second District, Division 1, California. July 12, 1927.

Hearing Denied by Supreme Court Sept. 8, 1927.

1. United States ⇄ 52½—Agreement between United States Shipping Board Emergency Fleet Corporation and shipping company for operation of ship held to create agency.

Agreement between United States Shipping Board Emergency Fleet Corporation and shipping company for operation of steel cargo vessel, wherein company agreed to perform customary duties of management and operation subject to corporation's orders and to deposit moneys collected as trust fund, *held* not demise but contract creating agency for performance of specific duties.

2. United States ⇄ 52½—Shipping company, operating under agency agreement with Emergency Fleet Corporation, held to act solely as agent of United States in employing captain.

Shipping company, operating under agency agreement with Emergency Fleet Corporation, *held* to act solely as agent of the United States, the owner of the ship, in employing captain, so that captain was not the company's employee.

3. Collision ⇄ 115—Shipping company, operating under agency agreement with Emergency Fleet Corporation, held not liable for reckless navigation by captain (Civ. Code, § 2351).

Shipping company, operating under agency agreement with Emergency Fleet Corporation, *held* not liable for damages resulting from collision caused by reckless navigation by the captain, a subagent of the United States, employed by the company on the government's behalf, since, under Civ. Code, § 2351, original agent is not responsible to third persons for act of subagent.

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Action to recover damages for injuries to property through negligence, brought by the City of Los Angeles against the Los Angeles Pacific Navigation Company and another. Judgment for plaintiff against the defendant named, and that defendant appeals. Reversed.

E. R. Young, of Los Angeles, for appellant.
Jess E. Stephens and Charles B. MacCoy, both of Los Angeles, for respondent.

CONREY, P. J. The findings of the court include the following facts: On the 15th day of April, 1920, the plaintiff was the owner of a motorboat named "Thais," which was moored at a wharf or dock known as the First street dock, in and upon the waters of Los Angeles harbor. On the morning of that day appellant was operating and had the exclusive control and management of the freight steamer West Hixton, which was then being oper-

ated, managed, and directed by appellant, and was under the command of Lewis C. Drewson, captain of said vessel. The West Hixton was proceeding under the direct command of Drewson down channel to said First street wharf or dock under and by virtue of orders so to do issued to Capt. Drewson by the port captain of appellant. Drewson was employed as captain of said vessel by appellant, and his salary as such captain was paid by appellant. But in its operation of the West Hixton, and in its employment of Drewson, appellant claims that it was acting only as agent of the owner, out of whose funds Drewson's wages were paid.

At the same time the motor ferry T. F. was owned and being operated by the defendant San Pedro Transportation Company in ferry service. Shortly before the collision hereinafter mentioned, the ferry T. F. started upon a trip across the harbor from the east side of the channel to the First street ferry slip on the west side of the channel. As the ferry T. F. proceeded down channel for the purpose of docking at the First street wharf, the West Hixton struck it, and then struck the north end of the First street wharf, thereby displacing certain large timbers of the wharf, some of which fell upon the motorboat Thais, then moored under said dock, and thereby caused the damage of which plaintiff complains. The West Hixton at the time of and just prior to the said collisions was navigated by said Capt. Drewson in a careless, reckless, and negligent manner, thereby causing said collisions. The court further found that there was no negligence in the management of the ferry T. F., and that the damage was caused solely by the negligence of appellant. Accordingly, judgment was rendered against the Los Angeles Pacific Navigation Company alone, and that defendant appeals from the judgment.

Appellant makes no attack upon the finding that the cause of collision and resulting damage was the negligent navigation of the West Hixton by Capt. Drewson. Appellant presents as the sole ground of appeal its contention that it was not liable for the negligent navigation of the West Hixton by Capt. Drewson. As stated by counsel for appellant, the question for consideration here narrows itself to a pure question of law, whether or not, under the undisputed evidence, Capt. Drewson, as a matter of law, was an employee of the Pacific Navigation Company, or whether he was, as a matter of law, a subagent or coagent of that company, both the company and Drewson being agents of the owner of the West Hixton, the United States of America. It is conceded that if the captain was a servant and employee of appellant, then appellant was liable for his negligent acts, and the judgment should be affirmed. On the other

hand, appellant claims that, if the captain was the servant and in the employ of the United States Shipping Board, then appellant was not liable for his acts, and the judgment should be reversed.

In support of said contention of appellant, three points are made: First, that defendant's relation to the West Hixton was fixed by contract between the defendant and the United States of America, owner of the ship, and that under that contract appellant was but an agent of the United States for the performance of specified duties, which did not include responsibility for the vessel's navigation. Second, that, in navigating the vessel, the master of the West Hixton was the agent and employee of its owner, the United States of America, and that, in relation to appellant, the master was but a co-agent of appellant. Third, that an agent is not liable to third parties for the negligent acts of his principal, nor for the negligent acts of subagents or coagents of the principal.

The contract under which the West Hixton was being operated is in a standard form, known as "Form MO3." In part, it reads as follows:

"Agency Agreement for Managing and Operating Steel Cargo Vessels.

"This contract, dated this 17th day of March, 1920, between the United States of America, owner of certain vessels, represented by the United States Shipping Board Emergency Fleet Corporation, hereinafter called the corporation, and Los Angeles Pacific Navigation Company, managing agent, hereinafter called the agent, witnesseth:

"1. The corporation appoints the agent as its agent for the management, operation, and conduct of the business of such vessels as it has assigned and may assign to the agent for such purposes.

"2. The agent agrees to act as such agent and to manage, operate, and conduct the business of such vessels as have been assigned or may be assigned for such purpose. While the agent is to be held responsible for the management of the vessels, he shall be subject to the orders of the corporation as to all matters affecting the use of the vessels when the corporation deems the exercise of such power to be in the public interest.

"3. The agent agrees to man, equip, victual, and supply the vessel, to provide and pay for all provisions, wages, fuel, fresh water, stevedoring, port charges, pilotage, agencies' commissions, consular charges, cabin, deck, engine room, and other stores, and all other costs and expenses incident to the management, operation, and conduct of the business of the vessel except as is otherwise provided herein. * * *

"5. The agent agrees to exercise reasonable care to avoid damage of every nature and to see that no damage to the vessel arises from loading improper cargo, from improper stowage, or from improper berthing of the vessel, and to see that all freight is prepaid, except when otherwise instructed by the corporation, or where the prevailing customs in the particular

trade as to prepayment of freight is to the contrary, in which case the utmost diligence on the part of the agent shall be exercised both as to the acceptance of the cargo and in the collection of the freight money; failing to exercise such diligence, the agent shall be liable therefor.

"6. The agent agrees to perform all the customary duties of a managing and operating owner of the vessels, and to perform, or cause to be performed, all the customary agency duties concerned with loading and discharging cargoes at all ports included in the vessel's itinerary and all things necessary for the protection and safeguarding of the interests of the corporation. * * *

"8. The agent, on behalf of the corporation, agrees to collect at the proper time all freights and other moneys arising out of the management, operation, and business of the vessel and to advance all disbursements for customary cargo, managing, and operating expenses, and for all other reasonable expenses properly to be paid by a vessel owner, and to do all things which the corporation is required in law and custom to do, either as owner of the vessels or as carrier of cargo."

The contract then provides for deposit in bank, by the agent, of all moneys collected on behalf of the corporation, as a trust fund, which moneys shall be the property of the corporation. The contract further provided that the agent "shall not mingle the same with moneys owned or held by the agent, but shall make from such fund all disbursements authorized to be paid by the agent for the account of the corporation and shall, at such times and in such form as may be directed by the corporation, render a full account of all moneys received. * * *" It was provided further that the agent "shall keep separate books of account in such manner and form as may be prescribed by, or approved by, the corporation, devoted exclusively to its agency business with the corporation." The agent was to be compensated by a fixed fee, plus a stated commission on all net profits. For the purpose of determining net revenue, certain rules were established, one of which was that "general average, collision, and other claims shall be charged to the vessel only to such extent as they are not completely covered and reimbursed by insurance."

[1] We are satisfied that under this contract appellant was merely an agent of the United States for the performance of specified duties. In *Mallory S. S. Co. v. Garfield*, 10 F.(2d) 664, in the Circuit Court of Appeals, Second Circuit, this same form of contract MO3 was fully considered, and the court said:

"The terms of this agreement establish an agency. It clearly appears that the relation existing between the Fleet Corporation and the Mallory Steamship Company was that of agency, with duties and authority fully expressed."

Accordingly the Mallory Steamship Company was held not liable for damages for de-

lay in transportation of merchandise delivered to it for such transportation. In that case a petition for certiorari was denied October 18, 1926, by the United States Supreme Court. It is true that the Circuit Court in its decision distinguished between the liability on contract and a liability arising out of tort. "If a duty rested upon the Mallory line in its character apart from its agency, and was one that the law imposed upon it, independent of its agency employment, then it might be liable for tort."

[2] So here, if appellant was itself guilty of negligence proximately causing the injury for which respondent seeks to recover damages in this action, the agency contract would not protect appellant against that liability. The further question, therefore, is, "Was the negligence of Capt. Drewson the negligence of appellant?" Appellant contends that the answer here depends upon the further question, "Was Drewson an employee of appellant?" We are of the opinion that, in employing Drewson, appellant was acting solely as agent of the owner of the ship, and that Drewson was the employee of the owner and not of the agent. Conceding that, as respondent contends, the employee was under the control and subject to the orders of appellant, yet that control was merely control by the principal through the agent. The negligence did not occur by reason of appellant's direction to Drewson to move the ship to a certain place. It was negligence by the captain, consisting of carelessness in his manner of operation of the ship while executing the order. Under these circumstances the negligence must be attributed, not to the agent who gave the order under which the ship was being moved, but to the owner whose employee was guilty of that negligence.

[3] If there had been a demise charter of the West Hixton to appellant, so that for the time being the ship was being operated by appellant as owner, appellant might well be held responsible for the captain's negligence. But the contract was not a demise charter. If it had been intended that appellant should run the ship as owner and not as agent, naturally the wages of the captain and other employees would have been made payable by appellant out of its own funds and not out of the funds belonging to the United States. Here, appellant was acting as an agent in providing the ship with officers and a crew. The contract throughout indicates that intention. "If, under the circumstances, it appears that the agent employed the subagent for his principal, and by his authority, expressed or implied, then the subagent is the agent of the principal; * * * and, if damage results from the conduct of such subagent, the agent is only responsible to his principal in case he has not exercised due care in the selection of the subagent. For

the torts of such subagent to third persons, the agent would not be liable merely by virtue of this relation, but the principal would be liable as for the torts of any agent." *Mechem on Agency* (2d Ed.) § 332. The Civil Code, § 2351, says:

"A subagent, lawfully appointed, represents the principal in like manner with the original agent; and the original agent is not responsible to third persons for the acts of the subagent."

Again:

"The rule is that an agent is not in general liable to third persons for the misfeasance or malfeasance of a subagent employed by him in the service of his principal, unless he is guilty of negligence in the employment of such subagent or improperly co-operates in the latter's acts or omissions." *Baisley v. Henry*, 55 Cal. App. 760, 763, 204 P. 399.

The judgment is reversed.

We concur: HOUSER, J.; YORK, J.

84 Cal. App. 438

FIRST NAT. BANK OF LA HABRA v.
CALDWELL et al.

SAME v. ANNECHINI et al.

(Civ. 5058.)

District Court of Appeal, Second District, Division 1, California. July 15, 1927.

1. Escrows ⇐8(2)—Reasonable time for examining title and issuing certificate and guaranty is for court or jury, under circumstances of particular case.

Question of reasonable length of time for examination of title and issuance of certificate and guaranty as bearing on right to rescind escrow instructions is for court or jury to decide on all circumstances of particular case in issue.

2. Escrows ⇐8(2)—Evidence held to support finding that vendors' delay in delivering certificate of title and guaranty was unreasonable.

Evidence held to support finding of trial court that from the 7th day of June to the 21st day of September was unreasonable length of time for vendors of percentage of interest in mineral rights in certain property to deliver certificate of title and guaranty in accordance with escrow instructions.

3. Appeal and error ⇐1010(1)—Judgment will not be disturbed, where finding appears supported by evidence.

Where evidence appears to support finding of trial court, judgment will not be disturbed on appeal.

4. Escrows ⇐8(2)—Purchasers of interest in mineral rights could rescind escrow instructions on vendor's failure to deliver certificate of title and guaranty for unreasonable time (Civ. Code, §§ 1492, 1657).

Purchasers of interest in mineral rights held entitled to rescind or cancel escrow instruc-

tions after delay from June 7th to September 21st in delivering certificate of title and guaranty, though there was no time limit placed in escrow instructions, trial court finding that reasonable time allowed in such case, under Civ. Code, § 1657, had elapsed and delay not being capable of exact and entire compensation, as required by section 1492.

5. Escrows ⚡8(2)—Purchasers of interest in mineral rights were not required before rescinding escrow instructions to offer to return deeds not coming into their possession (Civ. Code, § 1057).

Purchasers of interest in mineral rights were not required before rescinding escrow instructions to return deeds as prerequisite where deeds never came into their possession or under their control, since placing of deed in escrow did not make it an executed instrument, within Civ. Code, § 1057.

6. Escrows ⚡8(1)—Escrow holder is agent of purchaser as to deed deposited with him and of seller as to money paid him by grantee.

Where a deed is deposited in escrow by grantor to be delivered to grantee on payment to escrow holder of sum of money to be delivered by him to grantor on production of satisfactory certificate of title, escrow holder is as to such deed and money agent of both parties until such time as satisfactory certificate is produced.

7. Escrows ⚡9—Escrow agent did not become purchasers' agent as to deeds, where satisfactory certificate of title was not produced before rescinding escrow instructions.

Where satisfactory certificate of title was not produced before rescission of escrow instructions, escrow agent did not become purchasers' agent as to deeds, and purchasers were never entitled to possession, making it unnecessary that they offer to return deeds as prerequisite of rescission.

8. Appeal and error ⚡1058(2)—Error did not result from refusing expert testimony as to time for examination of title, where it was permitted on cross-examination.

Where, in action involving rescission of escrow instructions, objection was sustained to question asked secretary of title company as to his opinion on reasonableness of time taken by title company in issuing certificate, prejudicial error did not result where he was permitted, on cross-examination, to testify over objection as to ordinary time it would take to check title to real estate.

9. Evidence ⚡570—It is not mandatory that trial court accept expert's conclusion.

It is not mandatory that trial court accept conclusion of an expert, even though it is uncontradicted.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Separate suits by the First National Bank of La Habra against W. W. Caldwell, Elva May Beer, and Leslie P. Beer, wherein defendant Caldwell filed a cross-complaint against defendants Beer, and defendants Beer

filed a cross-complaint against defendant Caldwell, and by the First National Bank of La Habra against Joe Marcell Annechini, Elva May Beer, and Leslie P. Beer, wherein defendant Annechini filed a cross-complaint against defendants Beer, and defendants Beer filed a cross-complaint against defendant Annechini. Judgment for defendant Caldwell in the first action, and for defendant Annechini in the second action, and defendants Beer appeal. Affirmed.

Owens & Wingert, of Whittier, for appellants.

Howard S. Lewis and Clarence E. Fleming, both of Los Angeles, for respondents.

McLUCAS, Justice pro tem. Defendants and cross-complainants Elva May Beer and Leslie P. Beer appeal from judgments rendered in favor of defendants and cross-complainants Caldwell and Annechini, except from that part of said judgment discharging the First National Bank of La Habra from liability as escrow holder. By stipulation of the parties, the two cases were tried together, and by further stipulation the cases were consolidated on appeal.

On the 7th day of June, 1923, Elva May Beer and Leslie P. Beer deposited with the First National Bank of La Habra their deeds conveying to W. W. Caldwell and Joe Marcell Annechini each a 2 per cent. of the entire mineral rights in certain real property situated in Los Angeles county, Cal., which property the Beers had previously sold, retaining one-sixth of the oil rights. They deposited therewith their escrow instructions covering such deeds, agreeing to a delivery thereof to Caldwell and Annechini upon the payment of \$15,000 in cash. On the same day Caldwell and Annechini each deposited with the same bank the sum of \$1,000, each giving their written escrow instructions as follows:

"To the First National Bank of La Habra.

"I herewith hand you \$1,000, later I will deliver you \$8,000 additional, this money is for your use when you can deliver me a deed, executed by Elva May Beer and husband, conveying 2 per cent. of the oil rights of lots 87, 89, 91, 93, and 94, Dunn, Smith and Cornell's addition, in Los Angeles County, Cal. I have this day marked my initials in lead pencil on this deed to identify it. I am to be furnished a certificate of title to show that the grantors of within deed reserved one-sixth interest in the oil right of this property, and further that said interest has not been conveyed by them, nor incumbered in any way, and that they still hold this interest, excepting the 2 per cent. interest sold to myself, and 2 per cent. sold to Joe Marcell Annechini in this escrow.

"We are to be charged only with the expense of recording our deed, and the new ownership fee on this certificate of title. It is understood that certificate of title shall be guaranteed for at least \$4,500, a per cent. of the interest con-

veyed, and shall be extended to show the deed conveying 2 per cent. *growo* oil interest to us, on record.

"We agree to deposit the additional \$8,000 with you at such time as the title company reports the title to the above interest is as called for above, in the event that we fail to make this additional deposit, you are to deliver the within \$1,000 to Elva May Beer and her husband, as liquidated damages to them."

The bank thereupon ordered the certificate of title from the Los Angeles Title Insurance Company. On June 25th the title company gave the bank a preliminary report, and on July 9th, a further report as follows. This exhibit is on the letter head of the Los Angeles Title Insurance Company:

"Los Angeles, Cal., July 9, 1923, at 8 a. m. In reply refer to order 234360. (Pencil notation on said document, 'Recd July 13—23.')

"First National Bank, La Habra, California. —Gentlemen: We have made an examination of the title * * * and from such examination find that on January 28, 1922, Elva May Schandoney was vested with the fee title to said property, free from incumbrances.

"By a deed dated April 21, 1922, recorded April 26, 1922, in Book 937, page 353, of Official Records, Elva May Beer, who acquired this title as Elva May Schandoney, and Leslie P. Beer, her husband, executed a deed for said property to Albert L. Tilton, which deed contains the following:

"'Excepting therefrom one-sixth ($\frac{1}{6}$) of all the mineral rights which the above Elva May Beer is to retain and which if oil is found on any of the above lots or in any pool of lots which the above lots or parcels of land happen to be in, mineral rights in this deed means, oil, gas, or any hydrocarbon substance which may be found on any of the above-described property.'

"A further examination of the title to said property subsequent to January 28, 1922, shows that the said Elva May Beer has not conveyed, incumbered, or suffered any incumbrances of her interest in said property reserved by the above-mentioned deed.

"Awaiting your further instructions, we are.
* * *

This latter report was copied by the bank and sent to both Caldwell and Annechini with the following letter, on July 13th:

"In connection with the escrow wherein you are buying an oil interest from Mrs. Elva May Beer.

"We are herewith inclosing you a copy of the report as to the title of this property made by the California Title Insurance Company, of Los Angeles, dated July 9, received by us today.

"It is the writer's opinion that if we can obtain a formal certificate of this company to the facts as set out on this report, with an additional statement that, the rights described in the deed to you from Mrs. Beer had been conveyed to you, and that this deed was of record, it will comply with your instructions to us

"When you were here we prepared a copy of this Beer deed, but find you failed to take it with you, thinking possible you might wish to consult with your attorney before closing this am sending this copy.

"Mrs. Beer is anxious to get her money, and would appreciate it if you would make the additional deposit to complete purchase price at once, at which time we will attempt to complete matters with as little delay as it is possible."

Upon the 18th day of July Caldwell and Annechini deposited the further sum of \$8,000 each with the bank. On July 19th the bank transmitted to the title company a copy of the deeds which the Beers had placed in escrow, and ordered a certificate guaranteed in the amount of \$9,000 as to each deed, showing the 2 per cent. interest of oil rights described in each of said deeds vested in the grantee. On July 25th the title company acknowledged receipt of the foregoing, and stated:

"The only guaranty this company can issue is one that will show that Beer is the owner of the interest retained in the deed to Albert L. Tilton, dated April 21, 1922, and recorded April 26th, as follows:

"Excepting therefrom one-sixth of all the mineral rights which the above Elva May Beer is to retain and which if oil is found on any of the above lots or in any pool of lots which the above lots or parcels of land happen to be in, mineral rights in this deed means, oil, gas, or any hydrocarbon substances which may be found on any of the above-described property; and that such interest has not been conveyed or incumbered by the owner. If such a guaranty will be satisfactory, kindly advise, and we shall proceed."

The foregoing letter was shown to Caldwell and Annechini. It thus appears that the title company, on July 25th, refused to issue the guaranty as required by the escrow instructions, though willing to issue a certificate of title for the land and oil rights without the guaranty of \$4,500, a per cent. of the oil rights. Notwithstanding this refusal of the title company to issue a guaranty certificate, the bank, with the consent of all parties, continued its efforts to secure said certificate, and on several occasions reported to Caldwell and Annechini that the certificate would be issued within a few days. On September 14th Owens & Wingert, attorneys for appellants Beer, addressed a letter to Annechini in which appears the following:

"We understand that the first National Bank of La Habra will, if it has not already, receive a certificate of title covering this land and showing 16 $\frac{2}{3}$ per cent. of the production of this lease vested in Elva May Beer and Leslie P. Beer. The reservation of the land royalty contained in the deed from Elva May Beer and Leslie P. Beer to Albert L. Tilton is not stated clearly, and they have employed us to bring an action to reform the instrument so as to conform to the intent of the parties at the time. From the evidence which we have at hand, there is no doubt in our minds but that we can reform the instrument to definitely express the intent of the parties at the time of the transfer."

Finally, on September 21st, Caldwell and Annechini demanded the return of the money which had been deposited with the bank in escrow, under date of June 7th, on the grounds that a certificate of title had not been furnished within a reasonable time, and that the Beers were unable to furnish a certificate. The title company was immediately notified by the bank to discontinue work. Appellants demanded completion of the escrow and the payment of the money, and on October 11th the title company signified its willingness to issue the guaranty certificate. These suits were brought by the bank as escrow holder, offering to deposit the money in court so that the conflicting claims of the respective parties might be determined, and that the bank be discharged of liability. Defendants and appellants Beer filed their answer and cross-complaint demanding that Caldwell and Annechini be compelled to complete the escrow instructions and pay over the moneys to defendants and appellants Beer. Defendants and respondents Caldwell and Annechini filed their answer and cross-complaint, demanding judgment for the payment of the money deposited in escrow, and that defendants and cross-complainants Beer take nothing under their cross-complaint. At the trial the plaintiff bank was by order of court released from further liability as to the money, and the cases were tried upon the respective cross-actions.

[1-3] The principal question before the trial court was whether the vendees, Caldwell and Annechini, were entitled to rescind their escrow instructions and to have the purchase money returned to them by the escrow holder. This, in turn, depends upon whether the time elapsing between the 7th of June and the 21st of September is an unreasonable length of time for the examination of title and the issuance of the certificate and guaranty of title.

The question of what is a reasonable length of time is one for the court or jury to decide upon all the circumstances of the particular case in issue. It is primarily a question of fact for the trial court. *Hoppin v. Munsey*, 185 Cal. 678, 198 P. 398; *Adams & McKee Land Co. v. Dugan*, 68 Cal. App. 226, 228 P. 681. With respect to the work done by the title company, the principal difficulty seemed to be the question of the matter of policy whether or not the company would issue the guaranty of \$4,500, a per cent. of the interest conveyed, such form of guaranty not having been issued before by the title company. On July 25th the title company by letter signified their unwillingness to issue such form of guaranty. Appellants insist that all parties waived any right they may have had to rescind the agreement by proceeding with the escrow after receipt of the letter of July 25th from the title company, and that the Beers were then entitled to reasonable time to furnish the certificate to comply with the

escrow instructions. Conceding, without deciding, this point, it is to be remembered that reasonable time is to be determined under all the circumstances of the case. The title company was ready to issue a certificate on the 25th day of July, and, according to the testimony of the assistant secretary of the title company, in order to issue a guaranty it was further necessary to examine 421 instruments to learn whether or not the Beers had joined in a community lease, so as to determine whether the Beers had conveyed away their interest in the oil rights. Other witnesses testified that this work did not require a detailed examination of the various instruments, but merely required an examination of the names of the parties to those conveyances in order to determine whether the Beers had joined in executing them. But the evidence was in conflict as to the time required by a title company to issue a similar certificate and guaranty. A witness from the title company testified that anywhere from three weeks to four months would have been a reasonable time to issue a certificate, and that thirty days was the usual time. One witness testified that six months would be required; another, that thirty days would be sufficient, and in less time where a rush order is given in an oil deal. The witness from the title company testified that the additional search was completed about September 15th, and also testified that the company flatly refused to issue the guaranty up to the time it received notice about September 21st to discontinue the work, and would not have issued the guaranty at the time it received notice from the bank to proceed no further. After a careful review of all the evidence and circumstances in the case, we cannot say that there was no evidence to support the finding of the trial court that from the 7th day of June to the 21st day of September was an unreasonable length of time for the appellants to deliver a certificate of title and guaranty. It should further be understood that we are not deciding as a matter of law that three and one-half months is an unreasonable time for the delivery of a certificate and guaranty in all cases, but merely that, under all the facts and circumstances in this case, there was some evidence to support the finding of the trial court that such time was unreasonable. Where such evidence appears to support the finding, as we have frequently held, the judgment will not be disturbed on appeal.

[4-7] We see no force in appellants' argument that respondents had no right to rescind or cancel the escrow instructions. True, there was no time limit placed in the escrow instructions, and where no time is specified for the performance of an act required to be performed, a reasonable time is allowed. Civ. Code, § 1657. According to the finding of the trial court, such reasonable time had elapsed. Nor was the delay in performance capable of

exact and entire compensation, as required by the provisions of section 1492 of the Civil Code. Neither is there any evidence of an offer of such compensation, as required by said section. Respondents were under no obligations to offer to return the deeds as a prerequisite of rescission, since the deeds never came into their possession nor under their control. The placing of the deed in escrow did not make it an executed instrument. There had been no delivery to the purchasers and no transfer of title. Civ. Code, § 1057; *Craig v. White*, 187 Cal. 489, 497, 202 P. 648. At no time were respondents entitled to demand the deeds from the escrow agent until the conditions therein were performed; namely, the issuance of a certificate and guaranty. Whenever a deed is deposited in escrow by the grantor to be delivered to the grantee upon payment by him to the escrow holder of a sum of money, to be by the latter delivered to the grantor upon the production by the latter of a satisfactory certificate of title, the escrow holder is, as to the said deed and money, the agent of both parties until such time as the said satisfactory certificate is produced, and he thereupon becomes the agent of the purchaser as to such deed and of the seller as to such money. *Shreeves v. Pearson*, 194 Cal. 699, 707, 230 P. 448; *Hildebrand v. Beck*, 196 Cal. 141, 236 P. 301, 39 A. L. R. 1076. In the case at bar a satisfactory certificate of title necessarily included the guaranty. It was not produced before the rescission; hence the escrow agent never became the agent of respondents as to the deeds, and respondents were never entitled to their possession.

[8, 9] Appellants complain of error committed by the trial court in sustaining an objection to a question asked the assistant secretary of the title company as to whether, in his opinion, the time taken by the title company in issuing a certificate of title was a reasonable time. The objection was sustained on the ground that that was a matter for the court to decide. It has frequently been held that it is not error to admit such evidence for the reason that it is because a man's professional pursuit, his peculiar skill and knowledge in some department of science, not common to men in general, enable him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt. *Vallejo & Northern R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 571, 147 P. 238; *Sheehan v. Board of Police Commissioners*, 197 Cal. 70, 78, 239 P. 844. In admitting such testimony the court does not empower the expert witness to decide the facts, nor is the court or jury bound to accept his assertion. *Lemley v. Doak Gas Engine Co.*, 40 Cal. App. 146, 153, 180 P. 671. But we observe no prejudicial error in the court sustaining the objection in the case at bar for the reason that the wit-

ness was, on cross-examination, permitted to testify, over objection, that the ordinary time to check the title to a piece of real estate would be anywhere from three weeks to four months, and for the further reason that we have been cited to no case holding it is error to exclude such evidence. It is not mandatory that the trial court accept the conclusion of an expert, even though it is contradicted. *Layne & Bowler Corporation v. Grogan*, 56 Cal. App. 31, 204 P. 252; *Spencer v. Collins*, 156 Cal. 298, 104 P. 320, 20 Ann. Cas. 49. In many jurisdictions such testimony has often been excluded. *Estate of Iser*, 52 Cal. App. 405, 198 P. 1014.

The burden of proof was sustained by respondents in furnishing evidence sufficient to support the findings of the trial court.

There being no prejudicial error, the judgments are ordered affirmed.

We concur: HOUSER, J., Acting P. J.; YORK, J.

84 Cal. App. 554

UNITED STATES FIDELITY & GUARANTY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5731.)

District Court of Appeal, Second District, Division 1. California. July 25, 1927.

1. Master and servant ⇨417(7)—Award of Industrial Accident Commission on evidence is conclusive (Workmen's Compensation Act 1917, § 3, subd. 4, as amended by St. 1919, p. 911).

Appellate court cannot weigh the evidence, on application for certiorari to review an award of compensation, under Workmen's Compensation Act 1917 (St. 1917, p. 833), § 3, subd. 4, as amended by St. 1919, p. 911, by the Industrial Accident Commission.

2. Master and servant ⇨417(7)—Award supported by evidence that disability was caused wholly by accidental injury cannot be attacked because it was caused partly by pre-existing disease (Workmen's Compensation Act 1917, § 3, subd. 4, as amended by St. 1919, p. 911).

Where there was evidence that employee's disability was caused wholly by accidental injury, award of compensation for temporary total disability cannot be successfully attacked on ground that claimant was entitled to compensation for only such proportion of disability as was due to aggravation of pre-existing disease, under Workmen's Compensation Act 1917 (St. 1917, p. 833), § 3, subd. 4, as amended by St. 1919, p. 911.

Proceedings for compensation under the Workmen's Compensation Act by Charles M. Whyte, employee, opposed by the United States Fidelity & Guaranty Company, insurance carrier. To review an order of the Industrial Accident Commission awarding compensation, the insurance carrier applies for certiorari. Writ denied.

Edward C. Mills and Harold J. Hunter, both of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Commission.

CONREY, P. J. It is conceded that petitioner is under liability to pay compensation to respondent Whyte, at least as for disability caused in part by the accident of June 23, 1926. The award as made is for temporary total disability from that date to December 28, 1926, and thereafter until termination of disability or until further order of the commission.

Petitioner contends that claimant, at and after the time of the accident, was suffering from a pre-existing active disease, contributing to the disability, and therefore that the claimant is entitled to compensation for only such proportion of the disability as is due to the aggravation of the pre-existing disease. This contention rests upon subdivision 4 of section 3 of the Workmen's Compensation Act of 1917, as amended in the year 1919 (St. 1919, p. 911), which provides that, under the stated condition, "compensation shall be allowed only for such proportion of the disability due to the aggravation of such prior disease as may reasonably be attributed to the injury."

Respondent commission admits the fact of the pre-existent and continuing disease, concurrent with the injury resulting from the accident, and that the question of apportionment of compensation may arise upon a subsequent consideration of the case by the commission upon an application to secure a rating for permanent disability when the disability has become permanent. But the commission contends that the evidence is sufficient to sustain the finding of temporary total disability produced solely as a result of the accidental injury.

On June 23, 1926, the applicant, Whyte, while working as a painter, fell 12 feet to the ground, by reason of the breaking down of a scaffold on which he was standing. Prior to that time, notwithstanding his disease, he had suffered no disability in the performance of his work as a painter. The fall and injury were the immediate cause of his disability to work, which began at that time. There is evidence tending to prove that at some early date after June 23, 1926, the disease would have interfered with Whyte's ability to work. How soon that interference would have manifested itself if there had been no accident, is a fact not known. The arthritis and the "decompensating heart" were not caused by the accident, but they now coexist with the injuries resulting from the accident. Dr. Schott thinks that the accidental injury "probably lighted up" an old hypertrophic arthritis in the hips and in the lower back and lower dorsal spine. Dr. Chaf-

fin (July 24, 1926) thought that Whyte's present disability "is due to his hyper-thyroidism and heart condition and is not a result of the injury sustained June 23, 1926."

On the other hand, Dr. Baker (December 28, 1926), said:

"Where his pain is and what is preventing him from work is where he was injured, and the other (the heart condition) was nothing to do with that, other than it might shorten his general existence here on earth." * * * "To the best of your judgment, what part of the disability do you think is due to the injury, and what part due to the old conditions?" "I would say entirely to his accident."

[1, 2] It is not for this court to weigh the evidence. We have referred to only a part of the evidence. The evidence would have sustained a finding that the disability is in part caused by disease, and on that evidence an apportionment of the causes of disability might have been made. But there also is evidence tending to prove that the disability thus far has been caused wholly by the accidental injury. This being so, the award could not be successfully attacked, and it would be useless to grant a writ of review. We think that the argument of counsel for respondent, on the present status of the case, should be sustained.

The petition is denied.

I concur: YORK, J.

84 Cal. App. 493

WIDNEY v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.
(Civ. 5764.)

District Court of Appeal, Second District, Division 1, California. July 19, 1927.

Mandamus  **Mandamus will not lie to require court to allow jury trial which has been denied.**

Mandamus held not appropriate remedy to compel superior court to allow jury trial in case where right to trial by jury has been denied.

Application by A. B. Widney for mandamus, to be directed to the Superior Court of Los Angeles County, Arthur Keetch, Judge, to compel the allowance of a jury trial. Writ denied.

R. M. Widney, of Pacoima, and Frank L. Muhleman, of Los Angeles, for petitioner.

PER CURIAM. In substance, the petitioner herein prays for a writ of mandate to compel the superior court to allow a jury trial in a case wherein the right of trial by jury has been denied. On the stated facts set forth in the petition mandate is not the

appropriate remedy. *Donohue v. Superior Court*, 93 Cal. 252, 28 P. 1043.

Wherefore it is ordered by the court that the petition for writ of mandate be denied.

84 Cal. App. 665

GOLDBERG v. STANTON. (Civ. 4694.)

District Court of Appeal, Second District, Division 1, California. July 29, 1927.

1. Fixtures ⇨ 15 — Tenant's heavy refrigerator, attached only by quarter-round molding tacked to ceiling, held not "fixture" (Civ. Code, § 660).

Heavy refrigerator installed by tenant in storeroom for use in grocery business, not attached to building except by quarter-round molding tacked to ceiling and to refrigerator, held not a "fixture," within Civ. Code, § 660, defining a fixture.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fixture.]

2. Landlord and tenant ⇨ 161(1) — Tenant may remove from demised premises refrigerator not constituting fixture, but is answerable for injuries caused thereby (Civ. Code, § 1019).

A tenant may remove from demised premises refrigerator belonging to him and not constituting a fixture, notwithstanding Civ. Code, § 1019, authorizes removal by tenant only if removal can be without injury, but, if in so doing he injures the premises, he is answerable in damages to the landlord.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action for damages by Philip Goldberg against Daniel E. Stanton and Daniel E. Stanton, doing business under the fictitious firm name and style of the Bay Cities Mercantile Company. Judgment for plaintiff, and the defendant appeals. Findings and judgment modified, and judgment, as modified, affirmed.

Fredericks & Hanna, of Los Angeles, for appellant.

Bearman & Engelhardt and George Appell, all of Los Angeles, for respondent.

HOUSER, J. This is an appeal from a judgment in favor of plaintiff for damages alleged to have been caused to him by reason of the removal by defendant of a refrigerator from certain premises which defendant leased from plaintiff.

It appears that the building in which the refrigerator was installed had no studding in its construction, but that the walls thereof were built by placing wooden boards in an upright position and thereafter covering the cracks between such boards with battens. When the refrigerator was installed a section of the side wall of the building was removed

and the refrigerator was taken into the building through the opening thus made. There was no floor in the floor space of the building occupied by the refrigerator, so that the refrigerator rested directly on the floor joists. The refrigerator was taller than the height of the walls of the building, and it became necessary to remove a part of the roof of the building in order to install the refrigerator, after which that part of the roof which had been cut away was rebuilt so as to form a proper but detached covering for the refrigerator, as well as for the building in which the refrigerator was located. No part of the refrigerator was physically attached by nails, bolts, screws or otherwise, to any part of the building excepting that on each of the sides of the refrigerator, at a point where it passed through the ceiling of the building, a strip of quarter-round molding was tacked to the ceiling and to the refrigerator, "making a neat looking job inside of the building." It further appears that defendant was engaged in conducting a grocery business in the storeroom in which the refrigerator was placed, and that it was used by defendant in connection with the operation of his business as a grocer.

[1] The principal questions in the case are whether the refrigerator was a fixture, and whether the tenant had the right to remove the refrigerator. Section 660 of the Civil Code provides that:

"A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws."

In the case of *Marker v. Williams*, 39 Cal. App. 674, 179 P. 735, it was held (syllabus) that:

"Where refrigerating plant was installed in a hotel building, under a conditional sale contract, in such manner that none of the machinery, pipes, or boxes constituted any part of the support of the building or any of its walls, although the removal of the machinery, piping, and boxes would leave the brackets attached to the walls and would leave apertures in the walls in one or two places requiring the plastering thereof, the character of the machinery, the use for which it was intended in connection with the hotel, the manner in which it was installed, and the apparent intention of its annexation, filled all the requirements of sections 660 and 1013 of the Civil Code to constitute it a fixture as between a grantor and a grantee, relying in good faith on appearances, and without notice of anything to the contrary, yet it was not so incorporated in the building as to be an integral part thereof, and, being removable without serious injury to the real property, it might under section 1019 of the Civil Code, be detachable as a 'trade fixture.'"

In the instant case it is apparent that in no just sense could the flimsy attachment of the refrigerator to the ceiling of the storeroom by means of the quarter-round molding be considered as "permanent," within the meaning of the language contained in section 660 of the Civil Code. It occupied no different position in the storeroom than did possibly the counters, standing desks, or the showcases which, although resting on the floor, may have been lightly tacked thereto for the purpose of helping to better secure them in their respective locations. In other words, in the circumstances here present, the refrigerator might be regarded simply as a piece of heavy furniture, like a steel safe, or equipment of any sort, either necessary or useful in the conduct of the business in which the defendant was engaged. The mere fact that some light nails were used in attaching the quarter-round molding to the ceiling and to the refrigerator cannot be considered as sufficient to create a condition by which the bulky refrigerator was "permanently attached" to the realty.

[2] It is suggested that the provisions of section 1019 of the Civil Code would bar defendant from removal of the refrigerator from the leased premises. That section is as follows:

"A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises."

In other words, if the refrigerator had not been so affixed to the premises as to become an "integral part" thereof, it might have been legally removed, provided that in effecting such removal no injury was done to the premises.

From what heretofore has been stated herein, it has been attempted to show that in the opinion of this court the attachment of the refrigerator to the ceiling of the storeroom by means of the quarter-round molding did not have the effect of making the refrigerator an "integral part of the premises" nor any part thereof. Primarily, the refrigerator was defendant's property and he had a right to its possession. But in its removal from premises belonging to plaintiff, defendant was bound, at his peril, to do no injury to property belonging to plaintiff. The evidence shows that a portion of the roof and one wall of the building was torn out by defendant in effecting the removal of the refrigerator, and consequently that considerable "injury to the premises" was thus effected. It is therefore proper that defendant respond in damages. With reference thereto, the findings by the trial court are:

"That by reason of the removal of said roof and wall of said building, * * * plaintiff has been damaged in the sum of \$309.50. * * *"

The trial court included in its judgment damages in favor of plaintiff in the sum of \$500 as the value of the refrigerator which defendant removed from the premises. In view of the fact that defendant was the legal owner of the refrigerator, we think error was committed in allowing plaintiff damages for its value.

It is ordered that finding 2 and the findings concerning damages by reason of the removal of said refrigerator, in the loss to plaintiff of the value thereof, be modified in accordance with the views hereinabove stated, and that the judgment be and hereby is so modified that thereby plaintiff shall have and recover of and from defendant the sum of \$309.50, with costs; and that, as so modified, the judgment shall be and it is affirmed.

We concur: CONREY, P. J.; YORK, J.

84 Cal. App. 448

LOCKE v. DUCHESNAY et al. (Civ. 3013.)

District Court of Appeal, Third District, California. July 15, 1927.

1. Joint adventures ⇨1—Evidence held to show joint adventure by defendants, sued for value of work done in improving land.

In action against landowner, real estate agent, and latter's wife, to whom land was conveyed without cash consideration, for value of work done in plowing, grading, and leveling land, evidence held to show joint adventure by defendants in improvement thereof for sale.

2. Appeal and error ⇨1170(3)—Permitting amendment of complaint to charge one of several joint adventurers with liability as principal held not reversible error (Const. art. 6, § 4½).

Permitting amendment of complaint, in action for value of work done in plowing, grading, and leveling land, to charge one of three defendants, whom evidence showed were joint adventurers, with liability as principal, held not reversible error, as showing miscarriage of justice as to him within Const. art. 6, § 4½, though amendments were filed before court order permitting them; such defendant being individually liable in either case.

3. Joint adventures ⇨7—One liable as joint adventurer is individually liable.

One liable with others as joint adventurer in improving land for purpose of sale, for value of work done in plowing, grading, and leveling it, is individually liable.

4. Appeal and error ⇨994(3)—Credibility of testimony and effect of defendant's denials are for trial court.

Credibility of witnesses' testimony and effect to be given defendant's denials are purely for consideration of trial court.

5. Contracts $\S$ 324(1)—When contract is fully performed, except for payment of money by defendant, plaintiff may declare specially thereon, or generally in *indebitatus assumpsit*.

When contract has been fully performed, and nothing remains to be done under it but payment of money by defendant, plaintiff may declare specially on contract, or generally in *indebitatus assumpsit*.

6. Pleading $\S$ 237(6)—On variance between allegations in *indebitatus assumpsit* and proof of express contract, fully performed except for payment of money by defendant, pleading is amendable.

When contract has been fully performed, and nothing remains to be done thereunder but payment of money by defendant, there is no fatal variance between allegations in action of *indebitatus assumpsit* and proofs of express contract, and pleadings may be amended to conform to proofs.

7. Appeal and error $\S$ 1170(7)—Permitting plaintiff's witness to refresh memory from books, showing time afterward testified to by defendant from his own records, held not reversible error (Const. art. 6, $\S$ 4½).

Permitting plaintiff's witness, in action for value of work done, to refresh his memory from time-books in testifying to work performed, was without prejudice to defendant, and hence not reversible error, under Const. art. 6, $\S$ 4½, where defendant afterward testified without contradiction as to identical time from his own records.

8. Payment $\S$ 17—Judgment for plaintiff held excessive by amount realized by discounting defendants' note; transaction constituting payment of such amount.

Judgment for plaintiff, in action for value of labor performed, held excessive by amount realized by plaintiff by discounting note, executed by defendants to enable plaintiff to raise money due him by using defendants' credit; such transaction constituting payment of such sum, though note was still held by bank.

9. Assignments $\S$ 115—Assignee of account, after assignment of note for part of amount due, cannot recover amount of note.

One to whom account for work done was assigned, after assignor's assignment to bank of note for part of sum due, could not recover amount of such note from parties for whom work was done.

10. Appeal and error $\S$ 880(3)—Default against defendants not appealing cannot be considered on codefendant's appeal from judgment against him.

Whether default against defendants not appealing or complaining was erroneous cannot be considered on codefendant's appeal from subsequent judgment against him.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by N. H. Locke against A. E. J. Duchesnay and others. From a judgment

against defendant Silva, he appeals. Modified, and affirmed as modified.

Driver, Driver & Tade, Driver & Driver, and B. F. Driver, all of Sacramento, for appellant.

Parkinson & Parkinson, of Stockton, for respondent.

PLUMMER, J. Plaintiff had judgment in an action to recover for work and labor performed, etc., in plowing, grading, and leveling a certain tract of land situate in the county of San Joaquin, and the defendant Silva appeals.

The appellant assigns five specific errors, as reasons for reversal of the judgment herein, to wit: (1) Error of the trial court in allowing amendments to pleadings to conform to the proofs; (2) errors of the trial court in admitting evidence; (3) error in denying appellant's motion for a nonsuit; (4) that the findings of fact and conclusions of law are not supported by the evidence; (5) that the judgment of the court is not justified by the pleadings, by the findings of facts, or conclusions of law.

Before referring to the alleged errors of the court, reference may properly be had to section 4½ of article 6 of the Constitution, wherein it is provided that:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

By this section, unless the alleged errors of the court relating to the pleadings and the admission of evidence, or refusal to strike out evidence, have led to a miscarriage of justice, then, even though it be admitted that the points made by appellant are technically correct, a case has not been made out for the reversal of the judgment. It may be stated that a careful review of the evidence and a thorough reading of the amendments allowed to the pleadings by the court fail to reveal any grounds upon which we could predicate a conclusion that there has been a miscarriage of justice. We will first consider the alleged error of the court in permitting amendments to the pleadings to conform to the proof.

The original complaint setting forth the cause of action charged the defendants as co-partners, liable for the payment of certain work done and performed by one A. W. Curtis, in plowing, grading, subsoiling, and leveling on a certain 200-acre tract situate in San Joaquin county. The complaint charges the reasonable value of the work to be the sum of \$3,051; that the work was done during the

year 1923; that it was to be paid for as follows: \$1,000 on the 1st day of July, 1923, and the balance thereof on the 1st day of August, 1923; that there has been paid on account of the said work and labor performed the sum of \$1,557.42 and no more, leaving a balance thereon due and payable in the sum of \$1,493.58. The complaint then contains allegations showing assignment of said cause of action to the plaintiff herein. The second cause of action is set forth against the same defendants to recover the sum of \$346, the value of board, etc., furnished men and teams pursuant to an agreement with the said A. W. Curtis. This cause of action was likewise transferred to the plaintiff.

The defendants Duchesnays defaulted. At the conclusion of the trial the court awarded judgment in favor of the plaintiff as against the appellant Silva in the sum of \$1,559.58 and costs.

The specific amendment complained of by the appellant is designated in the transcript as the one setting forth a tenth and separate cause of action alleging the employment of the said A. W. Curtis to perform the labor, work, etc., herein referred to by the defendant Charles F. Silva. This count or cause of action was based upon the alleged reasonable value of the work. The court permitted this amendment to the pleadings to be made, but directed further that it also be amended, so as to set forth a cause of action upon an express contract for the payment of the sum of money herein referred to, for the work and labor to be performed, wherein it was alleged that the defendant promised to pay the said A. W. Curtis for plowing, grading, subsoiling, and work on said farm, as follows, to wit: \$2 per hour for each hour upon which each tractor should be operated by said Curtis in said work, and at the rate of \$9 per day for each day that each team should be employed by said Curtis upon said work; that pursuant to said agreement said A. W. Curtis operated tractors upon said premises for a total of 972 hours and operated teams on said premises for a total of 123 days, aggregating the total value of the work as agreed upon, in the sum of \$3,041, on which amount there had been paid the sum of \$1,557.42 and the further sum of \$270.

The court found, among other things, that the said Charles F. Silva and the defendants A. E. J. Duchesnay and Loulou Duchesnay were not copartners and were not engaged as joint adventurers, but did find that the defendant Charles F. Silva was engaged in the operation, development, and improvement of a certain tract of land near Dry creek, in the county of San Joaquin, and that he entered into an agreement with A. W. Curtis to perform work and labor thereon, consisting of plowing, grading, subsoiling, etc., and that the work was to be paid for as set forth in the amendment to the complaint.

[1] The transcript shows the following facts: That prior to any negotiations with the said A. W. Curtis by either A. E. J. Duchesnay or Charles F. Silva, the defendant Charles F. Silva was the owner of 200 acres of land situate near Dry creek, in the county of San Joaquin; that he was desirous of having his land improved; that on the 22d day of March, 1923, the said Silva and A. E. J. Duchesnay, as parties of the first part, entered into a contract with one John Strieff, as party of the second part, to improve said 200 acres by plowing, scraping, leveling, etc., said lands and premises to be paid for as follows: Tractor, including scraper and driver, \$2 per hour; four-horse team and driver, \$9 per day; two-horse team and driver, \$6.50 per day.

The record further shows that John Strieff "fell down" on his contract and did not attempt to perform the work therein covenanted by him to be done and performed upon the 200 acres of land belonging to the said Silva; that, at the beginning of the negotiations with the said Curtis for the performance by him of work upon the premises, a conversation was had between the said Curtis and the defendant A. E. J. Duchesnay, during which conversation the said Curtis showed the original of the contract that had been entered into between the said Strieff and the defendant Silva and A. E. J. Duchesnay for the plowing, scraping, and leveling work to be done upon the premises referred to. Thereafter the said Curtis and the said A. E. J. Duchesnay went to Sacramento and had a conversation with the defendant Silva. In this conversation the Strieff contract was referred to, and in this conversation and subsequent conversations the manner of financing the improvement about to be made was mentioned, in which conversation the defendant Silva stated that he would assist in the financing by securing money through mortgages on the premises. Before this had occurred, however, the following transaction had taken place: The defendant Charles F. Silva had executed a deed of conveyance purporting to transfer the 200 acres of land referred to to the defendant Loulou Duchesnay, the wife of the defendant A. E. J. Duchesnay, and while the lands were estimated by the said Silva, according to his own testimony, to be of the value of \$40,000, the said Loulou Duchesnay did not pay any sum of money to the said Silva for and on account of the conveyance to her. She did, however, execute in favor of the said Silva a mortgage in the sum of \$10,000, and assumed a further indebtedness of \$12,000, evidenced by a mortgage upon the lands and premises in favor of some bank in San Jose.

The testimony of Silva and Duchesnay, taken together, shows the following in relation to the property: First mortgage, \$12,000; lien of reclamation taxes, about \$9,000;

second mortgage, in favor of Silva, \$10,000; improvements to be placed on the premises, \$10,000; total value represented by mortgages and improvements, \$41,000; estimated selling price, \$60,000; Silva's share, \$10,000; by payment of his mortgage share of A. E. J. Duchesnay, \$9,000.

The testimony of A. E. J. Duchesnay shows that he was a real estate agent, endeavoring to sell the property. The testimony of Curtis is to the effect that the defendant Silva stated in some of the conversations had, when he and Silva and A. E. J. Duchesnay were having conversations relative to the work, that he, Silva, and Duchesnay were "together in the land." The testimony of Silva is further to the effect that, while the arrangement was made with the Strieff Bros., the contract entered into with John Strieff was actually signed after the ranch had been transferred by him to the defendant Loulou Duchesnay. The testimony of the defendant Silva is that he sold the ranch to Loulou Duchesnay, but the contract with Strieff relative to the improvement of land, the showing of the contract to Curtis after the Strieff Bros., to use the language of the witness, "fell down on the contract," and the willingness of Curtis to take up the work on the same terms, and the statement of Silva that he was willing to assist in financing the improvement, by borrowing the money, were all matters before the court, for the court to determine and decide whether there had been, in fact, any actual sale of the premises, or whether Silva was still an owner therein, and liable for the improvements made upon the premises, even though the defendant A. E. J. Duchesnay made the agreement, or the principal part of the agreement, with Curtis for the work, and looked after the execution thereof, and supervised it during the time the improvements were being carried forward. The fact that Loulou Duchesnay, not shown to have any financial resources whatever, was the nominal purchaser of a 200-acre ranch without paying a cent therefor, was another circumstance for the trial court to consider in ascertaining who was liable for the payment of the improvements made thereon.

[2, 3] We think the testimony in this case clearly shows a joint adventure. It would require many pages to set it all forth, but we have stated the substance of what it shows. There were many conversations relative to the raising of money, and just how the \$1,557.42 paid on account of the work was raised does not clearly appear from the transcript; but the inference is that it was raised by mortgages given to, or money borrowed from, a real estate firm in the city of Stockton. The court, however, found that there was no joint adventure, and permitted an amendment to the pleadings charging the defendant Silva liable as principal. Does this show a miscarriage of justice, so far as the defend-

ant Silva is concerned? We think not. What we have said shows that he was liable as a joint adventurer, which made him liable for the payment to A. W. Curtis of the value of the improvement, or of the amount agreed to be paid therefor, and, so long as he was liable in the capacity of a joint adventurer with the Duchesnays in the improvement of the land, for the purpose of sale, he suffered no imposition on the part of the court when he was charged in the complaint as an individual, for the simple reason that he was individually liable in either case. The court, apparently, viewed the testimony as showing more clearly that A. E. J. Duchesnay was simply acting as agent for the defendant Silva in making the improvement of the premises for the purpose of selling and that the transfer of the paper title from Silva to Loulou Duchesnay was simply in furtherance of the plan to improve and sell; Silva's possible profits being represented by the \$10,000 mortgage executed to him by the said Loulou Duchesnay, and the profits of the defendant A. E. J. Duchesnay whatever he would realize upon the sale of the premises, over and above the liens to which we have referred.

The amendments to the complaint to which we have referred were filed prior to the time of the order of the court permitting the same; but, as appears from what we have stated, it is evident that the appellant suffered no damage by reason thereof.

[4] The testimony of the appellant to the effect that he had no interest in the lands and premises being improved after making the transfer thereof to Loulou Duchesnay, the wife of the defendant A. E. J. Duchesnay, without any consideration being given or paid therefor, except as to the promises herein referred to, does not affect anything we have said in relation to the amendments to the pleadings, because the credibility of witnesses' testimony and the effect to be given to his denials are matters purely for the consideration of the trial court. From the findings of the trial court it is evident that the court rejected the appellant's testimony, and, if we accept the appellant's denials for their face value, a conflict of evidence only would be presented.

[5, 6] The appellant's objection as to the variance in the testimony is completely answered by the rule found in 5 Corpus Juris, pp. 1386 to 1388, and quoted with approval in Willett & Burr v. Alpert, 181 Cal. 652, at page 659, 185 P. 976, 979. The rule there set forth is in substance and effect that, when the contract has been fully performed, and nothing remains to be done under it but the payment of money by the defendant, the plaintiff may, at his election, declare specially upon the contract or generally indebitatus assumpsit. Under such circumstances there is no fatal variance between the allegations and

the proofs, and an amendment to conform the pleadings to the proofs is proper. Had the court concluded that the true relation of the parties was that of a joint adventure under the allegations of the complaint, judgment might have been awarded against the appellant. *Vail v. Fish Products Co.*, 243 P. 869, at page 875.

From what we have heretofore said, based upon what took place between Curtis, A. E. J. Duchesnay, and the appellant, Silva, it is evident that the appellant's motion for a nonsuit was properly denied.

[7] As to the objection that the court erred in the admission of testimony, our attention is called to the transcript, where the witness A. W. Curtis was permitted, in testifying to the work and labor performed, to refresh his recollection by examining certain time-books, wherein was kept an account of the time put in by the different workmen engaged in the improvements referred to; the objection to the testimony being based on the ground that the record was not all kept by the witnesses. We do not need to examine into the correctness of the objections, or determine whether it was or was not well based, from the simple fact that thereafter the defendant A. E. J. Duchesnay testified to the time based upon his own records, which was identical with the time-books used by the witness Curtis in refreshing his memory. No attempt whatever was made to question the accuracy of the time as kept by the defendant Duchesnay. This testimony stands absolutely uncontradicted. The ruling of the court, if admitted to be error, in allowing the witness Curtis to refresh his memory from the time-books or time-sheets, was without any prejudice or injury to the appellant, and brings the objection squarely within the provisions of section 4½ of article 6 of the Constitution.

Appellant's objection that there was no testimony showing the number of hours constituting a day's work is not borne out by the record. The transcript contains testimony to the effect that nine hours constituted a day's work.

[8] It is finally urged by the appellant that the amount of the judgment should be reduced in the sum of \$250 on account of a certain note executed by A. E. J. Duchesnay and the appellant, and delivered to A. W. Curtis, which enabled the said Curtis to raise the sum of \$250, by discounting the note, and that said sum constituted a partial payment for the work and labor performed. The uncontradicted testimony both of Curtis and of the defendant A. E. J. Duchesnay is to the effect that Curtis was in need of said sum of money and was pressing for the payment of the amount due him, and that in order to raise some money the appellant and the said defendant Duchesnay executed said note and delivered the same to the said Curtis, and thus enabled him to realize the said sum of

\$250. The testimony further shows that this note is still in the possession of the bank, to which it had been delivered, and is outstanding in the full sum of \$250 and the interest thereon. The testimony of Curtis is further to the effect that the payments set forth on account of the work and labor performed and the credits given in the complaint do not include the said sum of \$250, and while the testimony of Curtis is to the effect that the receipt of the note by him executed as herein stated, and the obtaining of the money therefor by discounting the same at a bank at Galt, was only to enable him to obtain that sum, on account of the work and labor performed by him, it is evident that the obtaining of money due him by means of the use of the credit of appellant and the defendant A. E. J. Duchesnay did amount to and constituted a payment of that sum of money, as the defendant A. E. J. Duchesnay testified:

"I told Silva that we had to get some money for Curtis. I told him that I had taken the matter up with Curtis, and he thought it would be best to finance through his bank at Galt for that note; that the note was given to Curtis, so he could discount it at the bank at Galt."

The witness further testified:

"Q. Was that note delivered to Mr. Curtis by you? A. Yes, sir.

"Q. Was that a payment on the contract for doing work on the ranch? A. Well, it was not a payment. It was more of some assistance in financing Mr. Curtis' work.

"Q. Your name is on that note; you have not been sued for it; your bank still holds it? A. Yes, sir.

"Q. Was not that a payment on this job? A. If it had been paid, yes, sir; but it has not been paid."

This testimony shows that Curtis had the benefit of the \$250; that it was a method of financing the work, so that Curtis could obtain that sum of money. The fact that the note is still held by the bank does not render it any less a payment of that sum of money to Curtis, because he obtained the benefit of that sum of money. The legal conclusion of the witness that it was not a payment, because the note was still held by the bank, and he and Silva were liable on it, does not affect the legal conclusion that should have been drawn from the transaction that Curtis had received the sum of \$250, and therefore the additional credit in that sum should be given on account of the contract. Otherwise, the judgment would be for \$250 more than Curtis was entitled to; the defendants still owing the note upon which Curtis had received such sum of money. In other words, Curtis is not entitled to collect \$250, by discounting the note given to him by the defendants, and then again collect another \$250 on the judgment, which takes no notice of this part of the method of financing the work. Whatever may be the final result in relation to said \$250

note, it does appear that in the present action, based upon the work and labor performed, Curtis has received the sum of \$250, for which credit has not been given in this action, and that the judgment against the appellant is greater than it should be in just that sum.

The note to which we have referred in the foregoing was dated May 23, 1923, payable on July 15th of that year for the sum of \$250, bearing interest at the rate of 7 per cent. per annum until paid, and signed by the defendants A. E. J. Duchesnay and Charles F. Silva, and thereafter delivered by the defendant Duchesnay to the said Curtis. In the offering of this note in evidence counsel for plaintiff made the following statement:

"We offer this note in evidence as showing payment on account, and that there was more than that amount due with these various small deductions taken out."

The latter portion of the sentence, of course, has no bearing upon the present subject under consideration. It does show, however, that the note was offered in evidence as showing part payment on the account for work and labor performed by Curtis, as alleged by him, upon the contract theretofore entered into between Curtis and the defendants A. E. J. Duchesnay and Charles F. Silva, for the performance of the work herein referred to.

[9] But whether the note was or was not executed and delivered as a part of the method of financing the work referred to in this action, and to enable Curtis to obtain \$250 by assigning the same to a bank at Galt, was such as to constitute payment on the account; by the assignment of the note to the bank by Curtis, that much of his claim against the defendants A. E. J. Duchesnay and Charles F. Silva was transferred to the bank. Thereafter his assignment to the plaintiff in this action transferred to the plaintiff only what remained of the account subject to transfer, after deducting the previous assignment, representing \$250 worth of the work performed by the said Curtis. In other words, the plaintiff in this action is entitled to recover under his assignment only that portion of the account subject to assignment by Curtis at the date of the assignment. At this date the account shown, by what we have hereinbefore stated, was less in the sum of \$250 than that allowed by the trial court.

[10] It is finally urged on the part of appellant that the default against the defendants A. E. J. Duchesnay and Loulou Duchesnay is erroneous. As the Duchesnays are not appellants and are making no complaint, this contention, if true, is not before us for consideration. The whole record in this case shows that the deflation in the selling price of real estate, which occurred during the time the appellant and the other defendants were en-

gaged in making the improvements on the lands and premises referred to, in order to put the same upon the market, caused the method of financing adopted by the parties to miscarry, and therefore led to this litigation.

It follows, from what has been said, that the judgment of the trial court should be, and the same is, modified by striking therefrom the sum of \$250, and, as so modified, the judgment will stand affirmed; the appellant is allowed his costs on appeal.

We concur: FINCH, P. J.; GLENN, Justice pro tem.

84 Cal. App. 652

PADDOCK v. FONNER. (Civ. 5799.)★

District Court of Appeal, First District, Division 2, California. July 28, 1927.

Hearing Denied by Supreme Court Sept. 26, 1927.

1. Gifts ⇐80—Gift day before death by one suffering from cancer would be presumed made "in contemplation of death," under statute (Civ. Code, § 1150).

Gift made day before death by one suffering from cancer, who had expressed opinion she was getting worse, would be presumed to have been made "in contemplation of death," under Civ. Code, § 1150, providing when a gift is presumed to be in view of death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contemplation of Death.]

2. Gifts ⇐66(2)—Delivery of passbook and order directing bank to pay money was sufficient "delivery" of funds to constitute gift causa mortis.

Delivery on day before deceased's death, to niece, of bank passbook and order directing bank to close account and pay money was a sufficient "delivery" of funds to constitute a gift causa mortis to the person named in the order, if other elements of valid gift were present.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Delivery—Delivery.]

3. Gifts ⇐82(1)—Evidence that donee received passbook and order directing bank to deliver funds to donee was sufficient to show acceptance of gift causa mortis.

Evidence that one named in deceased's order to bank directing delivery of funds to him received the passbook and order was sufficient proof of acceptance of funds as gift causa mortis.

4. Gifts ⇐76—Donee's offer to turn over to administratrix passbook for purpose of adjudication of dispute could not affect validity of gift causa mortis.

Offer by one to whom deceased had caused to be delivered during her lifetime a passbook and an order on a bank directing payment of money to him to turn passbook over to administratrix for the purpose of ad-

judication of dispute could not affect the validity of alleged gift causa mortis.

5. Gifts $\Rightarrow$ 82(2)—Evidence sustained trial court's finding that decedent authorized defendant to draw money in bank for use and benefit of decedent and that no gift was intended.

Evidence that decedent did not intend to make absolute gift of fund in bank to defendant, but that she merely made him her agent to draw money from bank to be used for her living expenses, held to authorize trial court's finding that decedent authorized defendant to draw such money for decedent's use and benefit and that no gift was intended.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action for money had and received by B. H. Paddock, as administrator of the estate of May Howe, deceased, substituted in the case for B. E. Paddock, against John F. Fonner. Judgment for plaintiff, and the defendant appeals. Affirmed.

Henry L. Corson, of San Francisco, for appellant.

J. W. Henderson, of San Francisco, for respondent.

NOURSE, J. Plaintiff, as administrator of the estate of May Howe, sued the defendant for money had and received. The complaint alleged that on June 21, 1923, May Howe was the owner of money on deposit in a savings account in the Anglo-California Trust Company, and of Liberty bonds held by the same bank, amounting in all to \$3,949.27; that on said day she authorized the said bank to pay the money to defendant for the use and benefit of May Howe; and that on June 22, 1923, defendant received said sum of money from said bank and has retained the same. The answer denied that May Howe authorized the defendant to withdraw the money from the bank for her use and benefit, and alleged that the defendant has claimed and still claims the money as his own. Trial was had before the court without a jury, and judgment went for the plaintiff for \$3,634.11, being the amount claimed, less the sum of \$315.16, which defendant had paid out to meet the funeral expenses of the deceased. From this judgment the defendant has appealed on a typewritten record.

The trial court found that:

"On the 21st day of June, 1923, at Los Altos, Santa Clara county, Cal., said May Howe, in writing, authorized and instructed the said trust company to sell the said Liberty bond and pay the proceeds thereof, together with the said account, to the defendant, John F. Fonner, for the use and benefit of the said May Howe, and deliver the said writing to Edith Bagot, a niece, who delivered it to the defendant on the 22d day of June, 1923; that thereafter and on the

22d day of June, 1923, the said May Howe died."

It was also found that the defendant received from the bank the money in suit and the proceeds of the Liberty bonds, all of which he converted to his own use, except the sum paid by him for the funeral expenses of the deceased. Through the pleading of the ownership of the fund the defendant raised the issue that it came into his possession as the result of a voluntary gift causa mortis. The whole case was tried upon the theory that this issue was properly pleaded, and, in fact, no other issue was heard by the trial court and this appeal is presented on that point alone. Both parties argue the weight of the evidence—the appellant insisting that he has proved every essential element of a gift causa mortis, while the respondent claims that the evidence shows that the attempted gift was incomplete. The evidence tending to prove the gift is found in the testimony of the appellant, of his brother, and of Mrs. Bagot, a witness who was distinctly hostile to the appellant.

The deceased was a widow who had been seriously ill for more than a year prior to her death, suffering from a cancer for which she had undergone an operation; the appellant had occupied a room at her house for more than ten years and the two were very friendly; for some years prior to her death the deceased had been estranged from other members of her family; this unfriendly feeling of the family included the appellant and was carried to the extent of their refusal to attend the funeral; about four weeks before she died the deceased went to Los Altos, where she occupied a house belonging to appellant's brother and where she was under the care of a niece, Mrs. Edith Bagot; about two weeks before she died, the deceased told the appellant that she was giving him the money and Liberty bond because of the many kindnesses he had shown her during her illness, and that she wanted him to pay the funeral expenses out of it and keep the balance; a short time thereafter she told him she would prepare an order on the bank authorizing him to draw the fund; and on the Sunday preceding her death she told the appellant's brother that she was giving the fund to appellant under these same conditions. On the evening preceding her death she dictated to Mrs. Bagot an order on the bank, reading as follows:

"Los Altos, Calif., June 21, 1923. Anglo-California Trust Co. Sirs: Inclosed please find pass books. I wish to close my account and if possible to sell my Liberty bond. Kindly pay the balance of my account to John F. Fonner. It is necessary to close the account at once as I am very ill and must have the money. Sincerely yours, Mrs. May Howe."

She then directed Mrs. Bagot to place this order with her passbook and to deliver them to appellant; this was done on the following day prior to the death of the decedent.

This written order was the basis of the finding of the trial court that the deceased authorized the bank in writing to pay over the money in the bank and the proceeds of the bond to the appellant for her own use.

The essentials of a valid gift causa mortis are outlined in 28 Corpus Juris, p. 687, as follows:

"To constitute a valid gift causa mortis, the gift must be made in view of the donor's impending death, the donor must die of the disorder or peril, and there must be a delivery of the thing given. In addition to this, there must be a donor competent to make the gift, an intent on his part to do so, and an acceptance by the donee."

[1-4] It is conceded by the parties that if any one of these essentials is absent the validity of the gift cannot be sustained. Respondent argues that the evidence fails to show that the gift was made in view of the donor's impending death; that there was a delivery of the subject of the gift, an intention to make a donation, or an acceptance by the donee. We are not able to follow respondent in his argument that the gift was not made in contemplation of impending death, in view of the presumption found in section 1150, Civil Code, and the evidence which disclosed that the decedent was suffering from an incurable malady, and that she had on a number of occasions expressed the view that she was continually getting worse. The evidence of delivery of the passbook and order to Mrs. Bagot as agent for the decedent was a sufficient delivery of the funds represented by the passbook, and would constitute a valid gift causa mortis if the other elements were present. *Snidow v. Brotherton*, 140 Va. 187, 124 S. El 182, 40 A. L. R. 1246, and 1255, note. The evidence of acceptance of the gift on the part of the appellant was sufficient for this purpose, as it shows that he received the passbook and order and thereby took into his possession the means of obtaining the funds on deposit in the bank. The fact that he at a later date offered to turn the book over to the administratrix of the estate for the purpose of adjudication of the dispute between the parties cannot affect the validity of the gift made

on June 22 so far as the element of his acceptance is concerned.

[5] However, the important element of intention to make the gift is the one in which appellant's proof has failed. It appears that on a number of occasions the decedent told the appellant that she was going to turn over the money and Liberty bond in the Fillmore Bank to him; that she wanted him to pay her funeral expenses out of this money, and "the rest I am giving to you." This is practically the same language that is used in *Knight v. Tripp*, 121 Cal. 674, 679, 54 P. 267, 269, where the Supreme Court held that the statement of the deceased, "I want to give it to you, or place all of it in your hands, and tell you those whom I want should have it," merely indicated a purpose or desire on the part of the decedent as to the disposition of the property and was not sufficient to disclose an intention to make a gift of it. It was said in *Hart v. Ketchum*, 121 Cal. 426, 428, 53 P. 931, 932:

"If the donee is merely empowered to draw the money, and is thereafter to dispose of it in accordance with instructions from the donor, he is only an agent of the donor and his agency terminates with the death of the donor."

Here the evidence is that when the decedent delivered to the appellant her passbook she gave him a written order upon the bank authorizing him to collect the money on deposit and the proceeds of her Liberty bonds, and that in this order she stated that "it is necessary to close the account at once because I am very ill and must have the money." It is a fair interpretation of this language that the decedent did not intend to make an absolute gift of the fund to the appellant, but that she merely made him her agent for the purpose of drawing the money out of the bank to be used for her living expenses. It was the function of the trial court in the first instance to interpret this writing for the purpose of determining the essential question as to whether the decedent intended to make a gift of the fund on deposit in the bank, and, the trial court having found that the decedent authorized the appellant to draw this money for the use and benefit of the decedent we cannot say that there is not evidence sufficient to support that finding.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

84 Cal. App. 479

HASSELL et al. v. DENNING et al.
(Civ. 5512.)District Court of Appeal, First District.
Division 1, California. July 19,
1927.**1. Landlord and tenant** ⇨164(1)—Absent fraud, concealment, or covenant in lease, landlord is not liable to tenant for injuries from defective condition or faulty construction of premises.

Under doctrine of caveat emptor, and in the absence of fraud, concealment, or covenant in lease, a landlord is not liable to a tenant for injuries due to the defective condition or faulty construction of demised premises, though different rule obtains where lessee's injuries are caused by defects in premises known to lessor and unknown to lessee, if lessor through fraud or concealment allows lessee to occupy premises in ignorance of such risk.

2. Landlord and tenant ⇨162—Landlord, reserving portion of premises for use in common by himself and tenants, or by different tenants, must use ordinary care to keep such portions in safe condition.

Where portion of demised premises is reserved by a landlord for use in common by himself and tenants, or by different tenants, a duty is imposed on him to use ordinary care to keep those particular portions of the premises in a safe condition.

3. Landlord and tenant ⇨169(11)—Whether landlord reserved portion of premises for common use with tenants is question of fact, affecting his liability for injuries.

As affects lessor's liability for injury from defective premises, it is question of fact whether he reserved the defective portion of the premises for common use of himself and tenants, or whether such portion of premises was under exclusive dominion of tenant.

4. Landlord and tenant ⇨164(1)—Landlord's liability for injury from defect in premises reserved for common use of tenants is not affected by number of tenants.

Landlord's liability for injuries from defective portion of premises reserved for common use of tenants is not affected by fact that at time accident occurred premises were temporarily occupied by one or two tenants rather than a larger number.

5. Landlord and tenant ⇨169(3)—Complaint in action against landlord for injuries to tenant's wife from fall from stairway held to state cause of action.

Complaint in action against landlord for injuries to tenant's wife, sustained when railing on landing of outside rear stairway collapsed, held sufficient to state cause of action, under rule making landlord liable for defect in portion of premises reserved for common use of tenants, or tenants and landlord.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Frank J. Hassell and another against Clarence E. Denning and another.

Judgment for defendants, and plaintiffs appeal. Reversed, with directions.

Chauncey Gardner and Edward C. Gilbert, both of Los Angeles, for appellants.

Frank C. Prescott, of Los Angeles, for respondents.

KNIGHT, J. The plaintiffs, Frank J. and Winifred Hassell, as husband and wife, brought this action to recover damages on account of personal injuries sustained by the latter in falling from a landing at the top of an outside stairway in the rear of a two-story dwelling; plaintiffs being at the time the occupants of a portion of said dwelling and alleging that said landing was used jointly by them and defendants. The immediate cause of the accident was the collapse of a wooden railing inclosing said landing; plaintiffs alleging that the same was faultily constructed, insecure, latently defective, and constituted a dangerous nuisance, and that its defective condition was at all times known to defendants, but unknown to plaintiffs. Separate demurrers, identical in form, to the second amended complaint, were sustained, with leave to amend; but plaintiffs declined to amend, and judgments of dismissal were thereupon entered, from which judgments these appeals have been taken.

The record does not disclose upon which of the numerous grounds set forth in the demurrers the same were sustained; but in defendants' brief, after quoting certain Code sections and excerpts from a number of decisions in this state under the heading "Responsibility of Landlord," it is stated:

"The complaint wholly fails to fix a liability under the above rules. No fraudulent concealment is alleged against the landlords. No reasons are shown why this is not an ordinary case of tenants charged with the duty of examining premises themselves trying to throw responsibility on the owners."

[1] With respect to these contentions, it may be conceded that under the doctrine of caveat emptor, and in the absence of fraud, concealment, or covenant in the lease, a landlord is not liable to a tenant for injuries due to the defective condition or faulty construction of the demised premises; but, as indicated, the rule just stated is not absolute, it being held that a lessor is liable for personal injuries to the lessee caused by defects in the premises, known to the lessor and unknown to the lessee, because arising from some cause not extraneous, if the lessor through fraud or concealment allows the lessee to occupy the premises in ignorance of such risks. *Daley v. Quick*, 99 Cal. 179, 33 P. 859; 15 Cal. Jur. 705. In other words, as stated in 2 Underhill on Landlord and Tenant, p. 788:

"As to all patent defects which may be discovered by an examination of the premises, the

rule of caveat emptor applies. The tenant will be charged with constructive notice or knowledge of patent defects which exist in that portion of the premises leased to and actually occupied or used by him. As to concealed defects attended with personal danger to the tenant, and which no examinations upon his part would reveal, the rule is otherwise. The landlord is bound to disclose concealed defects, if their existence is known to him at the date of the letting, provided they are such as the incoming tenant would not discover by a reasonable inspection in order that the latter may guard against them. Where a landlord knows the premises which he is about to let are defective, and in an unsafe and dangerous condition, and especially if such dangerous or defective place is not obvious, or is not discoverable by the tenant by the exercise of ordinary care, and the landlord does not inform the tenant of the defective or dangerous place, and injury is occasioned thereby to the tenant or a member of his family who is not aware of such defective or dangerous place while in the exercise of ordinary care, the landlord is liable in damages. If, therefore, the landlord shall remain silent when it is his duty to speak about the defective condition of the premises, or if he expressly or by implication misrepresents the actual condition of the premises, either as to patent or latent defects, he will be liable to the tenant for all the injuries which naturally result from his silence or misrepresentation."

[2-4] Another qualification of the doctrine of caveat emptor in its relation to demised premises is that, where a portion of the premises is reserved by the landlord for use in common by himself and tenants, or by different tenants, a duty is imposed upon him to use ordinary care to keep those particular portions of the premises in a safe condition; and if he is negligent in this regard, and a personal injury results to a tenant by reason thereof, he is liable therefor. 16 R. C. L. p. 1037; *Merchants Loan & T. Co. v. Boucher*, 115 Ill. App. 101; *Gausco v. Levy*, 89 Conn. 169, 93 A. 136; *Cook v. Simon*, 98 Conn. 98, 118 A. 634; *Hinthorn v. Benfer*, 90 Kan. 731, 136 P. 247, L. R. A. 1915B, 98; *Maionica v. Piscopo*, 217 Mass. 324, 104 N. E. 839. Under such circumstances, and in the absence of a covenant in the lease to the contrary, it becomes a question of fact, to be determined by the trial court or jury, whether the lessor reserved the defective portion of the premises for such common use, or whether the same were under the exclusive dominion of the tenant who is injured thereby (*Miller v. Geeser*, 193 Mo. App. 1, 180 S. W. 3; *Loucks v. Dolan*, 211 N. Y. 237, 105 N. E. 411); and this latter rule as to the landlord's liability is not affected by the fact that at the time the accident occurred the premises were temporarily occupied by only two tenants, or even by only one, rather than by a larger number (*Flanagan v. Welch*, 220 Mass. 186, 107 N. E. 979; *Dillehay v. Minor*, 188 Iowa, 37, 175 N. W. 838, 11 A. L. R. 106).

[5] The complaint under consideration contains the following allegations:

"That, in addition to the ordinary use of said stairway for the purpose of ingress and egress, the defendants, at the time of the letting of the premises to plaintiffs, had provided and maintained on the wooden railing on the top landing thereof, for the convenient use of the premises, a certain mechanical device, consisting of a wire rope running through pulleys, one pulley being securely fastened to the said wooden railing, and the other being attached to a stationary object in a horizontal direction at a distance of about 15 feet. The said mechanical device was provided by the defendants for the joint use of plaintiffs and defendants as aforesaid, and the same was intended by the defendants to be used as a clothesline, and plaintiffs and defendants so used the same; that the said device was operated by hand at the terminal which was fastened to the said wooden railing as aforesaid; * * * that on or about the 14th day of August, 1923, the plaintiff Winifred Hassell was standing on the top landing of said stairway, and while she was operating the said device, and while she was then and there attempting to use the same as a clothesline, which was the use for which the said clothesline and mechanical device were intended to be used by the defendants, she, the said Winifred Hassell, while then and there using the same as aforesaid, observed the said wooden railing and mechanical device, both of which appeared to her to be sound and secure, when suddenly and without warning, and through no fault or negligence on her part, the said wooden railing collapsed and gave way because of its faulty construction, insecurity, and latent defectiveness, of which she was not aware and of which she could not have been aware by the exercise of ordinary care and prudence, thereby causing the plaintiff Winifred Hassell to fall to the ground, a distance of about 15 feet, whereby she sustained serious injuries. * * *"

It is further alleged:

"That the said device and wooden railing, because of their respective faulty construction, insecurity, and latent defectiveness, constituted, and each was, a dangerous nuisance, at the time of the said letting and at all times thereafter, all of which was at all times known to the defendants, and each of them, but which was at all times unknown to the plaintiffs or either of them," and " * * * that the said fall and accident to the plaintiff Winifred Hassell as aforesaid was caused alone by the negligence and carelessness of the defendants and each of them, in that they failed: (a) To have the said wooden railing and mechanical device properly constructed and in a safe and sound condition for the purpose of their intended use at the time of the said letting and at all times thereafter; (b) to give the plaintiffs or either of them at the time of the letting or at any time thereafter or at all any notice of the dangerous and unsafe condition thereof."

We are of the opinion that the facts thus alleged, when read in connection with the others set forth in said complaint regarding plaintiffs' legal relationship to defendants as tenants, the nature and extent of the per-

sonal injuries suffered by Winifred Hassell as a result of the alleged negligence, and the elements and amounts of damage sustained by plaintiffs therefrom, are sufficient to constitute a cause of action under either of the two theories hereinabove mentioned; the element of concealment being sufficiently charged in those portions of said complaint alleging that the latent defect which caused the accident was "at the time of the said letting and at all times thereafter * * * known to the defendants and each of them, but which was at all times unknown to plaintiffs or either of them," and that defendants failed "to give plaintiffs, or either of them, at the time of the letting, or at any time, thereafter, or at all any notice of the dangerous and unsafe condition thereof."

The authorities cited and relied upon by defendants relate to causes of action entirely different from those upon which plaintiffs' complaint is grounded, and therefore they are not in point. They pertain either to dilapidations occurring to demised premises subsequent to the letting thereof, in which case the provisions of sections 1941 and 1942 of the Civil Code are controlling, or to patent defects, of which the tenant is bound to take notice under the doctrine of caveat emptor, or to latent defects, unknown to the landlord and which he would not have discovered by the exercise of ordinary care prior to the letting of the premises, under which circumstances he is not liable. The instant proceeding is on demurrer to the complaint, and therefore, until issues as to the elements mentioned are brought into the case by answer, none of them can be properly considered.

For the reasons stated, the judgments appealed from are reversed, with directions to the trial court to overrule the demurrers.

We concur: TYLER, P. J.; CASHIN, J.

84 Cal. App. 557

BECKLEY v. HARRIS. (Civ. 5204.)

District Court of Appeal, First District, Division 1, California. July 26, 1927.

1. New trial $\S$ 162(1)—Court may make conditional order, granting new trial, unless plaintiff remits portion of damages awarded.

Trial court has power to make conditional order granting new trial, unless plaintiff remits portion of damages awarded.

2. New trial $\S$ 76(1)—New trial should not be granted for excessive damages, unless indicative of passion or prejudice.

New trial should not be granted for excessive damages, unless so excessive as to indicate that verdict was given under influence of passion or prejudice.

3. Appeal and error $\S$ 979(5)—Order granting new trial for excessive damages will not be disturbed, unless discretion was clearly abused.

Court's order granting new trial for excessive damages will not be disturbed on appeal, unless it clearly appears that its discretion was abused.

4. Appeal and error $\S$ 854(6)—Order granting new trial, unless plaintiff remits portion of damages awarded, may be sustained on any ground assigned, where record does not disclose ground.

Where record does not disclose ground of conditional order, granting new trial unless plaintiff remits portion of damages awarded, it will not be assumed to have been made on ground that passion and prejudice influenced verdict, but may be sustained on any ground assigned.

5. New trial $\S$ 163(2)—Order granting new trial, unless plaintiff remits portion of damages, on all grounds stated in notice of intention, held to support conclusion that insufficiency of evidence was one ground (Code Civ. Proc. $\S$ 657).

Conditional order, granting new trial unless plaintiff remits portion of damages awarded, on all grounds set forth in notice of intention, one of which was insufficiency of evidence to justify verdict, substantially complied with requirements of Code Civ. Proc. $\S$ 657, and supported conclusion that latter was one ground on which granted, where precise ground did not appear.

6. New trial $\S$ 71—Court may grant new trial, if verdict is not supported by, or is contrary to, evidence, though evidence is conflicting.

Though motion for new trial on ground of insufficiency of evidence to justify verdict may properly be refused, if there is substantial conflict in evidence, trial court may grant motion, if satisfied that verdict is not supported by, or is contrary to, evidence, though evidence is conflicting.

7. Appeal and error $\S$ 979(2)—Order granting new trial for insufficiency of evidence is conclusive on appeal, absent abuse of discretion.

Trial court's order, granting new trial for insufficiency of evidence to justify verdict, is conclusive on appeal, in absence of abuse of discretion.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Nellie Peirce Beckley against Theodore Harris. Judgment for plaintiff. From an order granting a new trial, she appeals. Affirmed.

Griffith Jones and John J. Craig, both of Los Angeles, for appellant.

Jud R. Rush and Wm. B. Beirne, both of Los Angeles, for respondent.

CASHIN, J. An appeal from an order granting a new trial. An action for slander was brought by appellant, in which a jury re-

turned a verdict against respondent in the sum of \$2,000.

The latter moved for a new trial on several grounds, among which were that the evidence was insufficient to justify the verdict, that the damages awarded were excessive, and the verdict given under the influence of passion and prejudice. An order denying the motion was entered as follows:

"The motion for a new trial coming on for hearing, the court stated that if plaintiff will consent to reduce the verdict to \$500 as punitive damages and \$50 as compensatory damages, and plaintiff not consenting to that reduction of the verdict, whereupon it is ordered that motion for new trial be and is hereby granted upon all the grounds stated in the notice of intention to move for a new trial in the files and minutes of the court."

It appears to be conceded by counsel that none of the grounds for a new trial specified in the notice of intention, other than those mentioned above, was urged at the hearing, and it is contended by appellant that the evidence fully sustains the verdict, and that nothing appears from the record that supports the conclusion that the verdict was excessive, or given under the influence of passion or prejudice.

[1-3] That the court had the power to make a conditional order granting a new trial unless the plaintiff should remit a portion of the damages is well settled (*Domico v. Casasas*, 101 Cal. 411, 35 P. 1024; *Bentley v. Hurlburt*, 153 Cal. 796, 803, 96 P. 890), and while a new trial should not be granted for excessive damages, unless so excessive as to indicate that the verdict was given under the influence of passion or prejudice, its action thereon will not be disturbed on appeal, unless it clearly appears that its discretion was abused (*Sherwood v. Kyle*, 125 Cal. 652, 58 P. 270).

[4, 5] It is not, however, to be assumed that such order was made on the ground that passion and prejudice influenced the verdict; and where the record does not disclose the ground of the conditional order, it may be sustained on any ground assigned. *Swett v. Gray*, 141 Cal. 63, 74 P. 439. Here the precise ground on which the order was based does not appear, but, having been granted on all the grounds set forth in the notice of intention, one of which was the insufficiency of evidence to justify the verdict, the order substantially complied with the requirements of section 657 of the Code of Civil Procedure, and supports the conclusion that this was one of the grounds on which the motion was granted. *Marr v. Whistler*, 49 Cal. App. 364, 193 P. 600.

[6, 7] Although a motion for a new trial on this ground may properly be refused, if there is a substantial conflict in the evidence, the trial court is not bound by the rule as to conflicting evidence (*Pollitz v. Wickersham*, 150

Cal. 238, 88 P. 911), and it may grant the motion, if it is satisfied that the verdict is not supported by or contrary to the evidence, although the evidence is conflicting, and its order is conclusive on appeal, in the absence of an abuse of discretion (*Gordon v. Roberts*, 162 Cal. 506, 123 P. 288).

After a careful review of the evidence, we are unable to say that the trial court in granting the motion abused its discretion.

The order is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

84 Cal. App. 526

PEREIRA v. TOSCANO et al. (Civ. 3290.)

District Court of Appeal, Third District, California. July 22, 1927.

1. Infants ⇨58(2)—Proceeds of sales of calves, etc., held not chargeable to minor disaffirming contract to purchase dairy business and live stock, if reasonably used in paying business expenses.

Proceeds of sales of calves and hogs by minor contracting to purchase dairy business and live stock on monthly installments requiring over 10 years to complete payments held part of income of business, not chargeable to him on disaffirming contract, if reasonably used in paying expenses of business; such sales not constituting conversion, as parties did not contemplate holding and accumulation of live stock and increase thereof for 10 years.

2. Infants ⇨105—Vendor crediting minor, disaffirming contract to purchase live stock, with price of his pre-existent interest in cows purchased by his partner, could not complain of judgment requiring accounting for half of value of such cows.

Seller crediting buyer of half interest in dairy business, live stock, etc., with \$5,250, agreed to be paid buyer by his partner for former's interest in cows already owned by them, could not complain of judgment requiring accounting to buyer, after his disaffirmance of contract on ground of minority, for \$1,700, being half of value of such cows, less \$600 received from sale of part of live stock purchased, on theory that buyer transferred his interest in cows to seller, who then sold it to buyer's partner.

3. Infants ⇨58(1)—Minor's oral disaffirmance of contract held sufficient.

Minor's oral disaffirmance of contract to purchase dairy business, live stock, etc., held sufficient.

4. Infants ⇨58(1)—Minor's action for purchase money paid held sufficient notice of disaffirmance of contract.

Minor's commencement of action to recover amount paid on contract for purchase of dairy business, live stock, etc., constituted sufficient notice of disaffirmance thereof.

5. Infants $\hookrightarrow$ 58(2)—Evidence and answer, in minor's action for amount paid on disaffirmed contract, held to show futility of offer to restore property and consideration received.

In minor's action to recover amount paid on disaffirmed contract to purchase dairy business, live stock, etc., evidence and answer, denying that plaintiff gave, or had any right to return of, consideration, held to show that offer by plaintiff to restore property and consideration received would have been futile.

6. Tender $\hookrightarrow$ 16(2)—Generally, tender is waived or unnecessary, when reasonably certain that offer will be refused.

Generally, tender necessary to establish right against another party is waived or becomes unnecessary when it is reasonably certain that offer will be refused.

7. Infants $\hookrightarrow$ 73—Court has broad discretion to see that equity is done in minor's action for amount paid on disaffirmed contract.

In minor's action to recover amount paid on disaffirmed contract of purchase, trial court is vested with broad discretion to see that equity is done.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Francisco Pereira, a minor, by John Cunha, as guardian ad litem, against James V. Toscano, in which John Cunha was made cross-defendant. From a judgment for plaintiff and cross-defendant, defendant appeals. Affirmed.

Edward Bickmore and A. R. Schottky, both of Merced, and G. P. Ross, of Los Banos, for appellant.

Thomas F. Lopez, of Fresno, and Hugh K. Landram, of Merced, for respondent.

FINCH, P. J. The plaintiff, a minor, by his guardian ad litem, brought this action to recover the amount which he alleges he paid on a contract for the purchase from defendant of a dairy business, live stock, and other personal property, and which contract the plaintiff disaffirmed on the ground of his minority. The court found in effect that the plaintiff had so paid the sum of \$2,300, and that he had received from the sale of a part of the live stock the sum of \$600, leaving a balance in his favor of \$1,700. Judgment was entered accordingly and the defendant has appealed.

Appellant urges two grounds for reversal of the judgment:

"First, that the evidence does not support or sustain the finding that plaintiff paid defendant the sum of \$2,300 on account of the purchase price of said dairy. * * * Second, that the evidence does not sustain the finding that plaintiff disaffirmed said contract of purchase or offered to restore to the defendant the property and consideration received from defendant, and did further offer to pay defendant the equivalent of all property that plaintiff has received

from defendant and could not return to defendant."

There is a substantial conflict in the evidence in some respects, but it is amply sufficient to support the findings. The evidence is clearly sufficient to establish the following facts: At the times of the transactions referred to herein, the defendant was president of the First National Bank of Los Banos, and his son, J. L. Toscano, was cashier thereof. Prior to December 1, 1920, the owner of a two-thirds interest in the dairy business and property involved in this action was indebted to the bank in the sum of \$24,000, and J. L. Toscano took over the property and assumed such indebtedness. On December 1, 1920, he sold an undivided half of such dairy business and property to the plaintiff for the sum of \$20,000, of which sum the plaintiff paid in cash \$3,000. At the same time cross-defendant Cunha purchased the other half interest in the business and property. Prior to the time of such purchase the plaintiff and Cunha, as partners, owned 37 cows, for which they had paid \$4,400. Neither of them can read English. Without their knowledge, but apparently without any fraudulent intent, J. L. Toscano caused these 37 cows to be included in the contracts which he executed with plaintiff and Cunha, thus making them appear to be buying their own cows from him. In January, 1921, J. L. Toscano assigned his interest in such contracts and the property therein described to the defendant. In August, 1921, Cunha sold his undivided half of the business and property which he had purchased from J. L. Toscano to Antone Gonsalves. About the same time Cunha agreed to purchase the plaintiff's interest in the said 37 cows for \$5,250. It was agreed that Cunha would pay this sum to the defendant, and that the latter would give the plaintiff credit for that amount. For the purpose of carrying out this agreement, the parties executed three instruments. The defendant and Cunha entered into what purports to be a conditional sales contract, by the terms of which the former agreed to sell and the latter to buy the 37 cows for \$5,250, payment to be made in installments of \$75 a month. The defendant executed and delivered to the plaintiff a receipt reading as follows:

"Received from Francisco Pereira \$5,250 for account of dairy business. Balance due \$12,250."

Plaintiff's indebtedness under the old contract had increased to \$17,500 by the accumulation of interest, and the defendant and the plaintiff executed a new conditional sales contract, by the terms of which the former agreed to sell to the latter the property purchased by the plaintiff from J. L. Toscano. The consideration expressed in the new contract was \$12,250, being the amount due upon

the old contract, less the credit given on account of the agreed price of the 37 cows. Two or three months thereafter the plaintiff orally notified the defendant that he disaffirmed the contract and demanded the return of the consideration given therefor. The plaintiff testified:

"I told him to take the business back; that I was a minor and that I did not want the business; * * * that I did not have my age, * * * and if I was in arrears on the ranch to take it out of the * * * money that I had paid on the business. * * * Toscano said he did not owe me any money. * * * He said he would not take the business.

"Q. Did you ever have any further conversation with Toscano * * * about taking the business back? A. Yes; he went there once at the ranch. * * *

"Q. What conversation did you have with him on that occasion? A. I told him the same thing. * * *

"Q. And what did Toscano say? A. Well, what Toscano said, I don't remember; * * * I was sitting down on the Ford, and Toscano jumped on the machine, and he wanted to choke my neck.

"Q. Did he say he would take the business, or would not take the business back? A. He said he would take the business back and for me to go away; that I had nothing there. * * * He said he would not give me any money."

The defendant thereupon took back the business and property, but refused to return the consideration received by him from the plaintiff. Prior to the commencement of this action the defendant "branded the cattle with his brand."

[1] The court found that the plaintiff received no profits from the business and no money "except the sum of \$350 received by plaintiff from the sale of live stock" prior to the execution of the new contract and "the further sum of \$250 * * * from the sale of part of the personal property and its increase" after the execution of such contract. Appellant has not called attention to any evidence tending to show that the amounts so found by the court are incorrect. The plaintiff testified that he received some money from the dairy, "but it was to pay bills; * * * everything was to pay bills"; that there was no profit. It appears from testimony quoted by appellant that the property which the plaintiff sold consisted of calves and hogs. Such sales are ordinarily as much a part of the business in which plaintiff was engaged as the daily sales of milk and cream. Included in the property purchased by plaintiff from defendant were 90 cows, 20 heifers, and 50 hogs. Plaintiff agreed to pay for the property in monthly installments of \$100 each. At that rate it would have required more than 10 years to complete the payments. It would be absurd to say that the parties contemplated the holding and accumulation of the live stock and the increase thereof for a period of 10 years. The sale of calves arriv-

ing in the dairy herd and of hogs when ready for the market did not constitute a conversion thereof by the plaintiff, but the amount received therefor must be treated as a part of the income of the business, and if, as plaintiff testified, the money so received was reasonably used in paying the expenses of the business, the plaintiff should not have been charged therewith. *Le Baron v. Berryessa Cattle Co.*, (Cal. App.) 248 P. 779.

[2] The appellant has no cause to complain of the judgment against him for \$2,300, less the offset judgment in his favor for \$600. The trial court apparently treated the transactions of August, 1921, relative to the 37 cows, as a transfer of the plaintiff's interest therein to the defendant, and the sale thereof by defendant to Cunha. On this theory, the court required defendant to account, not for the amount which Cunha had agreed to pay him, the amount with which he had credited the plaintiff, but only one-half of the value of the 37 cows. At the time of the trial, which was about 18 months after the transactions in question, Cunha testified that he had regularly paid the defendant \$75 a month on the purchase price of the 37 cows. The judgment against the defendant is for the least possible amount consistent with any reasonable theory of the case, if the plaintiff is entitled to recover at all. By selling the 37 cows to Cunha, the defendant put it beyond his power to restore them to the plaintiff, and it would have been an idle act to have demanded the return thereof.

[3-7] It is clear that the plaintiff's oral disaffirmance of the contract was sufficient. *Spencer v. Collins*, 156 Cal. 298, 303, 104 P. 320, 20 Ann. Cas. 49. The commencement of this action constituted a sufficient notice of disaffirmance. *Abdullah v. Abdullah*, 50 Cal. App. 115, 119, 194 P. 511. The foregoing testimony shows that the defendant would have refused any offer of restoration which the plaintiff might have made. The answer denies that the plaintiff had any right to a return of the consideration given by him in the purchase of the property and denies that plaintiff gave any consideration therefor. Any offer of restoration by the plaintiff, therefore, would have been futile.

"It is a general rule that, where necessary to the establishment of any right against another party, tender is waived or becomes unnecessary when it is reasonably certain that the offer will be refused." 24 Cal. Jur. 514.

As applied to the disaffirmance of their contracts by minors it is said:

"In accordance with the general rule governing tenders a tender sometimes may be excused, as where it is known that it will be refused." 31 C. J. 1074.

In cases such as this "the trial court is vested with a broad discretion to see that equity is done." *Le Baron v. Berryessa Cattle Co.*, supra. No abuse of such discretion

appears in this case to the prejudice of defendant.

The judgment is affirmed.

We concur: PLUMMER, J.; GLENN, Justice pro tem.

84 Cal. App. 661

PEOPLE v. HEBERN. (Cr. 1355.)

District Court of Appeal, First District, Division 2, California. July 29, 1927.

1. Criminal law §1158(1)—Appellate court will not disturb order granting new trial after conviction, where there was evidence in conflict with that supporting verdict.

The appellate court will not disturb the action of the trial court in granting defendant a new trial after conviction for violation of the Corporate Securities Act (St. 1917, p. 673), even though the evidence appears sufficient to support the verdict, where there was evidence in conflict with that on which the verdict rested.

2. Criminal law §913(1)—Trial court may grant new trial after conviction, where it determines miscarriage of justice has resulted.

The trial court may grant defendant a new trial in a criminal case, when it determines that, notwithstanding the jury's verdict, miscarriage of justice has resulted under the evidence.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Ed. H. Hebern, charged as Ed. L. Hebern, was granted a new trial after conviction of violation of the Corporate Securities Act, and the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and Earl Warren, Dist. Atty., and R. H. Chamberlain, Deputy Dist. Atty., both of Oakland, for the People.

T. C. West, of San Francisco, for respondent.

NOURSE, J. Defendant was tried on an information charging a violation of the Corporate Securities Act (St. 1917, p. 673). The jury returned a verdict of conviction, but the trial judge granted defendant's motion for a new trial made upon all the statutory grounds. From this order the state has appealed upon a typewritten record.

The information charged that the defendant, as president of the Hebern Electric Code, Inc., authorized and assisted in the sale of

200 shares of second preferred stock of said corporation at a price of \$5 per share, which price was in excess of the price fixed by the terms of the permit of the commissioner of corporations authorizing the issue of said securities. Ample evidence was offered to prove all the essential facts alleged in the information, but this was controverted to some extent by testimony offered by the defendant, tending to show that the stock sold to the complaining witness was at the time owned by the defendant's brother-in-law, to whom it had previously been sold by the defendant at a price not disclosed. Because of this testimony the defendant insisted that no crime was committed, inasmuch as the Corporate Securities Act only covered the sale of stock to which the corporation had title. In rebuttal of this testimony the state attempted to trace the stock back to an original issue of treasury stock from the corporation to the defendant, which issue it claimed to be void, because the stock had not been paid for by the defendant.

[1] If the verdict had been allowed to stand, we would have been compelled to say that it was amply supported by the evidence, as all the testimony offered by the state tended to show a deliberate effort on the part of the defendant to proceed in violation of the terms of the Corporate Securities Act.

[2] However, discretion has been reposed in the trial judge to pass upon the evidence, notwithstanding the verdict of the jury, and the rule has become fixed that, when the trial judge, having reviewed the evidence, reaches the determination that a miscarriage of justice has resulted, it is his province to grant a new trial.

The function of an appellate court, on an appeal from an order granting a new trial in a criminal case, is stated in *People v. Brooks*, 90 Cal. 174, 27 P. 72, where the court said:

"And when one of the grounds upon which it [a new trial] is asked is that the verdict is contrary to the evidence given in the cause, the action of that court in granting the motion will not be reversed by this court, unless the record clearly shows that there was no evidence which conflicted with that upon which the verdict rested."

The order is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

84 Cal. App. 730

CONLIN v. TRAEGER, Sheriff. (Civ. 5498.)★

District Court of Appeal, First District, Division 1, California. Aug. 5, 1927.

Hearing Denied by Supreme Court Oct. 3, 1927.

1. Exemptions ~~§~~44—Physicians' automobiles are not exempt from execution or attachment; "other equipments" (Code Civ. Proc. § 690, subd. 6).

The phrase "or other equipments," as used in Code Civ. Proc. § 690, subd. 6, exempting from execution or attachment certain vehicles of conveyance used by physicians in their practice, does not exempt automobiles, as the rule of ejusdem generis applies.

2. Exemptions ~~§~~4—Exemption statute should not be extended judicially to confer privileges and benefits not intended (Code Civ. Proc. § 690, subd. 6).

While the court should construe liberally the statutory exemptions from execution and attachment provided by section 690, subd. 6, Code Civ. Proc., it should not indulge in such liberal construction as will confer privileges and benefits not intended by the Legislature.

Appeal from Superior Court, Los Angeles County; C. W. Guerin, Judge.

Action by B. M. Conlin against William I. Traeger, Sheriff of Los Angeles County. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

C. E. B. Conlin and E. R. Simon, both of Los Angeles, for appellant.

Edward T. Bishop, Co. Counsel, and Ernest Purdum, Deputy Co. Counsel, both of Los Angeles, for respondent.

CAMPBELL, Justice pro tem. This is an action brought by appellant, who is a physician practicing his profession at Long Beach, Cal., to recover damages against respondent, who, as sheriff, attached an automobile belonging to appellant. The only question presented is whether an automobile used by a physician in the legitimate practice of his profession is exempt from attachment or execution under section 690 of the Code of Civil Procedure.

It is alleged in the complaint that plaintiff is a physician, duly licensed to practice medicine and surgery in the state of California, and that on March 29, 1923, and prior thereto, he was actually engaged in the practice of his profession as such physician and surgeon in the city of Long Beach, Cal., and that on said date he was in the actual possession of and entitled to the immediate possession of a certain Reo roadster automobile, which was then the vehicle of and part of the equipment used by him in the legitimate practice of his profession as a physician and surgeon, and on said date the defendant, as sheriff of Los Angeles county, Cal., without plaintiff's consent, wrongfully, and without right and legal authority, seized said automobile and took pos-

session thereof under a writ of attachment, and ever since said date has continued to and does now retain possession of said automobile without right or legal authority; that at the time of the seizure said automobile was of the value of \$1,000, and that the value of the use of said automobile is \$10 per day, and that plaintiff has been damaged by the detention of said automobile in the sum of \$3,300; that demand was made for the return thereof and that defendant refused and still refuses to return the same to plaintiff. Defendant filed a general demurrer to the complaint, which was sustained by the court without leave to amend, and judgment was thereafter entered in favor of defendant, from which judgment plaintiff has appealed.

The portion of section 690 of the Code of Civil Procedure which is involved here reads:

"The following property is exempt from execution or attachment, except as herein otherwise specially provided: * * * (6) * * * One horse with vehicle and harness or other equipments, used by a physician, * * * in the legitimate practice of his profession or business."

The statute exempts one horse with vehicle and harness, or whatever other equipment is used with or on the horse, and does not mention automobiles. If we are to give the statute a "liberal and forward-looking interpretation," as contended for by appellant, and concede that the words "horse with vehicle and harness or other equipments" include any means of transportation, then such language not only includes automobiles, but also any other method of transportation used by a physician, no matter how different from those mentioned in the statute or how valuable. As the court said in *Estate of Brown*, 123 Cal. 399, 55 P. 1055, 69 Am. St. Rep. 74:

"Exemptions are the creatures of statutes and exceptions to the general rule. No property is exempt unless made so by express provision of law. No assumed legislative policy can justify the courts in adding to the statutory list of exemptions. Legislators are presumed to understand the force and effect of the language which is used and to have contemplated all circumstances which would make it desirable that other property not in the list of exemptions should be added thereto. The language used is entirely unambiguous. The legislative intent is clear, and is to no extent defeated by executing the law as it reads. Under such circumstances it is fruitless to talk of the literal meaning of the language, and of other meaning than the literal meaning. * * * And, besides, we do not expect to find in such a statute negative words, for nothing is exempt save what is expressly made so, and when a statute gives a list of exempt property it expressly provides that no other property is exempt. To construe an unambiguous statute is an attempt to defeat the expressed legislative will and not to ascertain it. * * * It is said that the statute is remedial and should be liberally construed to effect the purpose of the Legislature.

That is so; but that is not a liberal construction, which defeats the plainly expressed purpose of the Legislature."

[1] The words "or other equipments" do not enlarge the statute, so that it means something different from the articles named. These words are not separated from the words "horse with vehicle and harness." They clearly refer to other equipments which can be used with a horse. They are general words which follow a specific enumeration, and by the rule of ejusdem generis can mean, not equipments in general, but like articles to the vehicle and harness, such as saddles and saddlebags. Giving the language of the statute the broadest construction of which it is susceptible, we could only say that other equipments might be used with the horse in place of the vehicle and harness, but we cannot separate the equipments from the remainder of the sentence without doing violence to the English language, the rules of punctuation, the law of construction known as ejusdem generis, and the inherent probabilities of the legislative action.

The Legislature has not included automobiles in the statute, and for the court to do so would be judicial legislation. As is said in *Stanton v. French*, 91 Cal. 276, 27 P. 657, 25 Am. St. Rep. 174:

"In the list of property allowed peddlers by statute as exempt from execution, we find no article answering in name or use to a breadbox, and a *debtor's claims are limited by the words of the statute.*" Italics ours.

In *Crown Laundry, etc., Co. v. Cameron*, 39 Cal. App. 617, 179 P. 525, in which it was claimed that an automobile used in the business of collecting clothes and garments from patrons and returning them after they had been laundered was exempt from attachment, the court says:

"The sole question presented is as to whether the automobile was exempt from execution under the provisions of subdivision 6 of section 690 of the Code of Civil Procedure. In that subdivision it is provided that the following property shall be exempt from execution: 'Two horses, two oxen or two mules, and their harness, and one cart or wagon, one dray or truck, one coupe, one hack, or carriage, for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster or other laborer habitually earns his living; * * *'. Clearly it appears to us that a motor driven vehicle is not a cart, wagon, dray, truck, coupe, hack, or carriage, as those terms are used in the section. The section plainly says that such exempt vehicles are vehicles which may be drawn by 'one or two horses.' If the Legislature intended that a motor vehicle should be exempt from attachment, we think that it would have so declared in plain terms. For the courts to add to the statute any articles not enumerated would in effect be judicial legislation."

The same question was raised in *Re Wilder* (D. C.) 221 F. 476. There the bankrupt claim-

ed as exempt under section 690 of the Code of Civil Procedure a taxicab automobile. The court says:

"This taxicab does not fall within the literal terms of the section and while those provisions are to be construed liberally, yet the court is not warranted in creating by interpretation new exemptions. The Legislature of this state has been in session several times since taxicabs have been in very general use, and might well have included them in the exempt list. As the Legislature has not done so, I do not feel warranted in doing so by an interpretation of the language of the section which at the best would be a forced one."

[2] While the statute should be liberally construed, it has been held that construction should not be indulged in to the extent of conferring privileges and benefits by construction which were not intended to be conferred by the Legislature, or to the extent of doing violence to the terms of the statute. So, where a specified article of personal property is made exempt, the courts are not authorized to extend the exemption by construction to any other or different article. *Kennedy v. Hills* (C. C. A.) 233 F. 666. As the automobile is an invention which was not in use when the statute was passed, it, of course, was not mentioned therein, and was not within the intent of the Legislature; and as the Legislature has been in session many times since the automobile came into common use, and has not seen fit to include it in the statute as exempt from attachment or execution, when used by a physician in the practice of his profession, we must hold that it does not come within the provisions of the statute, and is therefore not exempt.

Appellant, in support of his contention, cites us to *Spangler v. Corless*, 61 Utah, 88, 211 P. 692, 28 A. L. R. 72; *Lames v. Armstrong*, 162 Iowa, 327, 144 N. W. 1, 49 L. R. A. (N. S.) 691, Ann. Cas. 1916B, 511; *Roberts v. Parker*, 117 Iowa, 389, 90 N. W. 744, 57 L. R. A. 764, 94 Am. St. Rep. 316; *Patten v. Sturgeon* (C. C. A.) 214 F. 65; *Webb v. Brandon*, 4 Heisk. (Tenn.) 285; and *Favers v. Glass*, 22 Ala. 621, 58 Am. Dec. 272. The Utah case is the only one among the cases cited which is in conflict with the conclusion reached here. We agree with the Utah court that "an automobile is as essential to a physician now as a horse and buggy were in the past," but we cannot avoid the conclusion that the duty of substituting the term "automobile" for "one horse with vehicle and harness" rests with the Legislature, and not with the court, and for the court under the guise of interpretation to make the change would be an usurpation of the power of the Legislature. In the Iowa cases, in which it was held that automobiles were exempt, it is sufficient to say that the statute there construed contained the general term "or other vehicle" which is quite different from the California law. In *Patten v. Sturgeon* the federal court, in con-

struing an Oklahoma statute, merely held that an automobile is a carriage within the meaning of the statute; while the Tennessee and Alabama cases hold that a wagon with four wheels was exempt under the terms of the statute exempting "one ox cart," although lexicographers ordinarily define a "cart" as a two-wheeled vehicle.

In our opinion, the ruling on the demurrer was correct, and the judgment entered proper. The judgment appealed from is therefore affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

ETIENNE v. KENDALL. (Civ. 5809.)★

District Court of Appeal, First District, Division 2, California. July 28, 1927.

Hearing Granted by Supreme Court Sept. 26, 1927.

1. Corporations ⇨121(5)—Evidence held to sustain findings that representations of seller of mining stock as to tonnage of mine and cost of extracting minerals were mere statements of opinion.

In action to rescind contract for purchase of shares of stock in mining corporation on ground that defendant falsely represented tonnage of ore in mine and cost of extracting minerals, evidence held to sustain findings that defendant's statements were opinions only and were treated as such by plaintiff.

2. Contracts ⇨94(1)—Truth of any one of material misrepresentations alleged in complaint for rescission will entitle aggrieved party to judgment.

If any one of material misrepresentations, upon which complaint for rescission of contract is based, is true and other elements entitling party to rescission are present, party aggrieved is entitled to judgment.

3. Appeal and error ⇨1170(3)—Admission in answer of some of misrepresentations alleged, by failure to deny misrepresentations separately in action for rescission, held not ground for reversal where plaintiff was not prejudiced (Const. art. 6, § 4½).

In action to rescind contract for purchase of mining stock on ground of misrepresentations, admission of some of misrepresentations by answer which failed to deny each representation separately held not ground for reversal of judgment for defendant, under Const. art. 6, § 4½, where defect in pleadings was not called to attention of trial court and where plaintiff received fair and impartial trial and was not prejudiced.

4. Appeal and error ⇨1170(3)—To avoid judgment for error in pleadings, appellant must show miscarriage of justice resulted (Const. art. 6, § 4½).

When attack upon judgment is based upon error in pleadings, burden is on appellant to demonstrate that error complained of has resulted in miscarriage of justice, under Const. art. 6, § 4½.

5. Appeal and error ⇨1170(3)—Court may not reverse judgment for defect in pleadings without considering entire case, including evidence (Const. art. 6, § 4½).

Under Const. art. 6, § 4½, providing no judgment shall be set aside for error as to any matter of pleading unless miscarriage of justice resulted, appellate court must examine entire case, including evidence, before reversing for defect in pleadings.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Victor Etienne, Jr., against Zed Kendall. Judgment for defendant, and plaintiff appeals. Affirmed.

J. P. O'Brien, of San Francisco, for appellant.

W. H. Metson and W. G. Deal, both of San Francisco, for respondent.

NOURSE, J. Plaintiff sued for the rescission of a contract for the purchase of shares of stock in a mining corporation, alleging fraudulent misrepresentations as an inducement to the execution of the contract. Judgment went for the defendant, and the plaintiff has appealed upon a bill of exceptions.

The complaint alleged that on November 21, 1921, the plaintiff and the defendant entered into a written agreement wherein the plaintiff agreed to purchase and the defendant agreed to sell 250,000 shares of the capital stock of the Consolidated Virginia Mining Company, a corporation, for the total purchase price of \$152,005; that upon the execution of the agreement the sum of \$20,822.25 was paid by the plaintiff to the defendant in cash, and at the same time plaintiff delivered to the defendant his promissory note for the balance, secured by the shares of stock covered by the purchase and also by other collateral; that for the purpose of inducing the plaintiff to enter into said agreement the defendant represented to him that the said corporation "contained known ores and minerals and ore bodies situate in the so-called 'Old Bonanza Stopes,' in said mine, and between the 1,500 and 1,600 foot levels, in said mine, amounting to 2,000,000 tons of ores and minerals, that were valued at from \$20 to \$25 per ton; that all of said ores, minerals, and ore bodies could be mined, extracted, and reduced at a cost of not exceeding \$3 per ton"; and that within a very short time thereafter the stock of said corporation would greatly increase in value and large dividends thereon would be paid; "that the representations so made, by the defendant, to the plaintiff, as aforesaid, were and are untrue, and were then known to the defendant to be false and untrue, and the said representations were fraudulently made, by the defendant, with the intent to mislead and deceive the plaintiff, and to induce him to

enter into the agreement, aforesaid;" that the plaintiff, believing and fully relying upon said representations, was induced to enter into said agreement because of them; that the plaintiff did not discover the falsity of said representations until about July 30, 1923, and that upon discovering the facts which entitled him to rescind said agreement he immediately gave notice of rescission thereof to the defendant; that the defendant for many years past has been a stock broker and engaged in the business of promoting, operating and dealing in mining properties, but that the plaintiff was practically unfamiliar with the business of mining or the manipulation of the stocks of mining corporations. The answer alleged that for some time prior to the execution of the agreement the plaintiff had become interested in the purchase of mining stocks of corporations operating in the vicinity of the Consolidated Virginia and had urged the defendant to sell to him some of the stock of the latter company believing that because of renewed activity of operations in that locality the stock of the Consolidated Virginia would enhance in value; that the plaintiff had been to Virginia City, Nev., where the properties of these corporations were located, and had familiarized himself with the Consolidated Virginia mine and with other properties in the immediate neighborhood; that the stock was sold to the plaintiff at the latter's solicitation and upon the basis of quotations then made on the San Francisco Stock Exchange. The answer further denied that the "defendant estimated or represented to the plaintiff the amount or value of said ores described in said complaint, or at all, or made any representations or inducements that led the plaintiff to purchase any of said stock, or at all." The answer further denied that the defendant "represented to the plaintiff that the old Bonanza stopes in said mine between the 1,500 and 1,600 foot levels contained ore amounting to 2,000,000 tons; that said ore was valued at \$20 to \$25 per ton; that said ore minerals and ore bodies could be mined and extracted at a cost of \$3 per ton; that dividends would be paid; or at all made any representations or extended any inducements to plaintiff of any nature relative to the purchase by the plaintiff of any stock in said company."

[1] On this appeal it is contended on behalf of appellant that the decision is not sustained by the evidence; that the decision is against law; that the decision does not sustain the judgment; and that the judgment is erroneous and against law. Although on the face of the briefs it appears that four separate points are raised in the attack upon the judgment, there is but one, as all four points advanced are really an attack upon the nature of the denials in the answer. In reference to the first three charges of fraudulent representations—the tonnage

in the Bonanza stopes, the value thereof, and the average cost of extracting and treating the ore therefrom—the trial court found that the respondent did inform the appellant that the old Bonanza stopes contained approximately 2,000,000 tons of ore of a value of \$20 to \$25 a ton, but that in this connection the appellant knew that the respondent had no information as to the amount of the tonnage or the value of the ore, but was merely giving an estimate or opinion based upon information given him by others, and that there was no evidence that the ore in said stopes did not amount to said quantity or that it was not of said value. The court expressly found that it was not true that there was not 2,000,000 tons of ore in said stopes of the value of \$20 to \$25 per ton. It was further found that the respondent told the appellant that with improved facilities for treating ore at the mine the ore taken from said stopes could be extracted and reduced at a cost of about \$3 per ton, and that under such circumstances large profits would result from the operation of said mine, and that the dividends to be paid upon said stock would greatly increase. In this connection, however, it was found that these statements were also opinions only, were understood as such by the appellant, and were not treated by him as representations of fact. These findings were amply supported by the evidence. The properties of the Consolidated Virginia had been operated for a period of about 50 years prior to the execution of the contract. The old Bonanza stopes were known to have contained much valuable ore, but because of a fire which occurred therein in the year 1878 they had been bulkheaded off and had not been mined. The opinion had been freely expressed by those familiar with the conditions of the mine that these stopes would run 2,000,000 or more tons of ore of a value of \$20 to \$25 a ton. The problem which confronted those interested in the operation of the mine was to extract this ore, and the appellant and others interested in the affairs of the company entered upon this project in anticipation of procuring this large body of ore. However, some time after the execution of the contract, when the stopes were opened for the purpose of extracting the ore, operations were stopped because of a recurring fire. There is really no conflict in the evidence which goes to support these findings of the trial court. In fact, the appellant frankly stated that he had no information as to the quantity of ore or its value or as to the cost of extracting and treating it if the proposed new mill and improved facilities were put in operation.

[2, 3] As we have said, the real ground advanced by the appellant on this appeal is that, because of the character of the denials in the answer, the falsity of representations charged in the complaint was admitted, that, therefore, the findings should have been in

accord with the admissions of the pleading rather than upon the evidence adduced at the trial, and, consequently, the decision is against law and does not sustain the judgment. The theory of the appellant is that as the complaint alleged misrepresentations in respect to the quantity and quality of the minerals contained in the old Bonanza stopes and the cost of mining and reducing said ores and alleged that each of said representations was false and known to be false by the defendant, while the answer denied these allegations in the language of the complaint and did not deny in the disjunctive that each alleged representation was false or that the respondent knew each to be false or that each of such representations was made with intent to mislead and deceive appellant, or that appellant acted or relied upon any one of said representations or was misled or deceived by any one of them, the answer must be treated as an admission of any one of the alleged false representations. From this it is argued, in accordance with the well-settled rule, that, if any one of the material representations upon which the complaint for rescission is based is true and the other elements entitling a party to a rescission are present, the party aggrieved is entitled to judgment. 2 Pomeroy's Equity Jurisprudence (2d Ed.) § 880.

If the appellant had moved for judgment upon the pleadings upon the ground of respondent's failure to specifically deny the allegations of the complaint noted, there would be some merit in his attack upon the answer. However, he was not content to do this, but proceeded to trial upon the theory that the issues were properly presented. This trial commenced on December 26, 1923, and after a number of witnesses were called, was continued to January 10, 1924, for further hearing. At this time other testimony was heard and another adjournment to January 24, 1924, was taken, at which time further testimony was taken all on the subject of the issues raised by the complaint, that is to say, the truth or falsity of the representations upon which the appellant relied and the truth or falsity of his allegations of lack of knowledge or means of knowledge of the conditions of the mine and the quantity and value of the ore bodies located

therein. Throughout the trial no objection was made to the admission of any of this evidence, and no suggestion was made until the opening brief was filed on this appeal that any of the facts alleged in the complaint were admitted by the answer.

[4, 5] The cause having been tried upon the theory that the issues were properly pleaded, we are now asked to reverse the judgment for the sole reason of an error in the answer which was not suggested to the trial court at any stage of the proceeding. Section 4½ of article 6 of the Constitution provides that:

"No judgment shall be set aside * * * for any error as to any matter of pleading, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Under the terms of this section when the attack upon the judgment is based upon an error in the pleadings, it is incumbent upon the appellant to demonstrate before the appellate court that the error complained of has resulted in a miscarriage of justice. But even in such a case the appellate court may not reverse the judgment except upon an examination of the entire cause, including the evidence. Where, therefore, upon an examination of the evidence, the appellate court is satisfied that the error complained of has not resulted in a miscarriage of justice, but that in fact it has not affected the substantial rights of the appellant in any particular, it would be a distinct violation of this section of the Constitution to reverse the judgment solely upon the ground of the error occurring in the pleadings. Our examination of the record here discloses that the appellant suffered no prejudice because of any defect in respondent's pleading, but that, to the contrary, the pleading was treated as having fully tendered the issues to be tried by the trial court, and that after a fair and impartial trial of those issues the trial court found against the appellant upon substantial evidence, which in all essential matters was uncontradicted.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

84 Cal. App. 499

LINDSEY et ux. v. WRIGHT et al.
(Civ. 5495.)

District Court of Appeal, First District, Division 1, California. July 20, 1927.

1. Continuance ⚡12—Illness of party or member of his family does not necessarily require granting motion for continuance.

Illness of a party or of a member of his family does not ipso facto require granting of motion for continuance, since except when otherwise expressly provided by statute the granting of a continuance is within the sound discretion of the trial court.

2. Appeal and error ⚡966(2)—Granting or refusal of continuance because of illness of member of party's family will not be disturbed, unless discretion is abused.

Trial court's action in granting or refusing continuance because of the illness of a member of a party's family will not be disturbed, unless there has been a plain abuse of discretion.

3. Continuance ⚡12—Refusal of continuance of foreclosure case on physician's certificate of illness of defendants' son held not abuse of discretion.

Trial court's refusal of continuance of trial for foreclosure of land contract on physician's certificate that the son of defendants was suffering from acute throat and tonsilar inflammation, which might be diphtheritic, held not abuse of discretion, where none of the parties were under quarantine, and their presence at home was not shown to be necessary.

4. Vendor and purchaser ⚡172—Land contract, provision making time essential, held to apply to interest payments on mortgage assumed by purchasers.

Provision of land contract making time essential held to apply to promise by purchasers to pay interest installment on prior mortgage lien which they assumed, quarterly as required by the mortgage, though contract provided that interest on deferred payments should be paid annually.

5. Vendor and purchaser ⚡78—Time is not of essence of land contract, unless intention clearly appears expressly or by implication.

Time is not of essence of a contract for the sale of real property, unless it clearly appears from terms of agreement, expressly or by implication, that the parties so intended.

6. Vendor and purchaser ⚡172—Intention that time is of essence of land contract may be inferred from necessity of prompt payments on prior lien to protect vendor, though forfeiture provisions must be strictly construed (Civ. Code, § 1442).

Intention that time is of the essence of a contract for the purchase of land as to quarterly payments of interest on a prior lien assumed by the purchasers may be inferred from the provisions of the contract and the necessity of prompt payment to protect the vendor, though, under Civ. Code, § 1442, a condition involving a forfeiture must be strictly construed.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action to foreclose the right of purchase under a contract for the sale of real estate by G. W. Lindsey and wife against A. M. Wright and wife. Judgment for plaintiffs, and the defendants appeal. Affirmed.

Earl L. Wisdom, of Los Angeles, and Dorsey Whitelaw, of El Centro, for appellants.

J. S. Larew, of El Centro, for respondents.

CASHIN, J. An appeal from a judgment foreclosing the right of appellants to purchase under a contract for the sale of real property.

The parties, on December 1, 1922, entered into a contract in writing by which respondents agreed to convey to appellants certain land in Imperial county; the consideration being the promise by the latter to pay therefor the sum of \$80,000.

The contract with respect to payment provided as follows:

"The parties of the second part, in consideration of the premises, agree to pay to the parties of the first part the sum of eighty thousand and 00/100 dollars in lawful money, together with interest on all deferred payments at seven per cent. per annum, payable annually. Payable as follows, to wit: Fourteen thousand (\$14,000.00) dollars, equity in Lemon Grove lemon orchard and nineteen thousand (\$19,000.00) dollars by the assumption of a certain mortgage for like amount, made by the first parties, with interest at seven per cent. per annum, payable quarterly, and forty-seven thousand (\$47,000.00) dollars payable on or before ten (10) years after date with interest at seven per cent. per annum, payable annually."

Time was made of the essence of the contract, and it was further provided that, in the event the vendees should fail to make the deferred payments, or any of them at the times and in the manner provided, the contract should become null and void, and the vendors released from any and all obligation to convey, it being further agreed that it would be impossible to fix and determine the actual damage which would arise in the event of a failure by the vendees to make the deferred payments, and that all moneys paid on the purchase price should be retained by the vendors as liquidated damages caused by the failure to comply with the terms of the contract.

It was also provided that the agreement with a deed to the property and a certificate of title should be placed in escrow with a bank at El Centro, Cal., to be delivered to the vendees upon receipt of full payment, but to be returned to the vendors, "in case of failure of said second parties to comply with any or all of the terms of said agreement promptly as therein specified," and, further, "that,

in case of the death, physical or mental disability of the second parties, the settlement of his or their equity shall be by arbitration."

The complaint alleged that by the terms of the mortgage assumed by appellants and of the note thereby secured it was provided that, in the event of any installment of interest thereon becoming delinquent, the whole of the principal sum should, at the option of the holder, become immediately due and payable; that the contract provided that appellants should assume and pay as a part of the purchase price the note with the interest according to its terms; that appellants had failed to pay a quarterly installment of the interest due thereon; and that respondents had elected to terminate the contract.

A general demurrer to the complaint was overruled, and appellants by their answer admitted the foregoing allegations of the complaint, but alleged, as a defense, and by their cross-complaint for a rescission of the contract and the recovery of the property conveyed to respondents, that the failure to perform was caused by the physical disability of appellant A. M. Wright, which disability continued to exist.

It was further alleged, in effect, that the only means by which appellants could meet the payments was from the income produced from the land, and that, due to the physical condition of appellant Wright, they were unable to remain thereon or to make the payments provided by the contract; that they had offered and were ready to surrender possession to respondents upon an equitable adjustment of their rights being made as provided by the contract.

The foregoing allegations were denied by respondents, who subsequently, by leave of the court, filed a supplemental complaint, alleging that, since the commencement of the action three additional installments of interest on the mortgage, together with the annual interest on the balance of the purchase price, had become due, all of which appellants had failed to pay.

On the day fixed for the trial appellants moved for a continuance on the ground of the illness of a member of their family, and in support of the motion filed a written certificate, which was as follows:

"La Mesa, Calif. 2/25/24.

"To Whom It May Concern:

"This is to certify that I have this day visited professionally Baron Wright, son of A. M. Wright of La Mesa, Calif.—and find said Baron Wright suffering from acute throat and tonsillar inflammation which may be diphtheritic. The earliest possible report from a throat swab will be Wednesday morning Feb. 27, 1924. Until a negative report shall be had it will be dangerous for the family of A. M. Wright to be at large.

L. W. Zochert, M. D."

The motion was denied, whereupon the trial proceeded in the absence of appellants, and,

findings of fact having been waived by their counsel, a judgment was entered for respondents.

A motion for a new trial was denied, and an appeal taken from the judgment.

[1, 2] Appellants contend that the denial of their motion for a continuance was an abuse of discretion, and that the original complaint failed to state facts sufficient to constitute a cause of action.

An application for a continuance is addressed to the sound discretion of the trial court, and while in a proper case a continuance should be granted because of the illness of a party (*Morehouse v. Morehouse*, 136 Cal. 332, 68 P. 976), or of a member of his family (*Langdon-Creasy Co. v. Rouse*, 139 Ky. 647, 72 S. W. 1113, Ann. Cas. 1912B, 292; *Skinner v. Bryce*, 75 N. C. 287; *In re Townsend*, 122 Iowa, 246, 97 N. W. 1108), this does not ipso facto require the granting of the motion, as it is for the trial court in all cases, except where otherwise expressly provided by statute, to determine whether or not the circumstances shown are such as to make it proper that a continuance be granted, and its conclusion thereon will not be disturbed, unless there has been a plain abuse of discretion. *Lynch v. Superior Court*, 150 Cal. 123, 88 P. 708.

[3] In the instant case the application was not supported by an affidavit showing that the testimony of appellants would be relevant or material to the issues, and, while it might be inferred from the pleadings that appellant A. M. Wright would have been a material witness, the materiality of the testimony of his wife does not appear. Moreover, the nature of the illness of their son was undetermined, and, although the certificate states that it might prove to be diphtheria, none of the parties was under quarantine, and the presence of either appellant at the home on the day of the trial was not shown to have been reasonably necessary.

[4] The mortgage provided for quarterly payments of interest, and it is contended by appellants that, in view of the provisions of the contract, that interest on all deferred payments should be paid annually, and that the failure to make the deferred payments or any of them should relieve respondents from further obligation thereunder, the clause making time essential should be held to refer only to such payments of interest as were to be made directly to respondents, and not to the promise to pay the interest on the sum secured by the mortgage.

[5] As provided by section 1442 of the Civil Code, a condition involving a forfeiture must be strictly construed against the party for whose benefit it is created, and it is the rule that time is not of the essence of a contract for the sale of real property, unless it clearly appears from the terms of the agreement that the parties so intended.

[6] Such intention, however, need not be expressly declared (*Martin v. Morgan*, 87 Cal. 203, 25 P. 350, 22 Am. St. Rep. 240; *Depavo v. Rizzo*, 27 Cal. App. 200, 149 P. 793), but may be inferred from the provisions of the contract (*Bennett v. Hyde*, 92 Cal. 131, 28 P. 104), or implied where the benefit to accrue from the consideration to be paid materially depends upon strict performance in point of time (*Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677), or the relations and situation of the parties render such performance necessary for the protection of the vendor (*Wachung Realty, etc., Co. v. Llewellyn Holding Co.*, 96 N. J. Eq. 498, 126 A. 326; *Garrett v. Cohen*, 63 Misc. Rep. 450, 117 N. Y. S. 129; *Ruckman v. King*, 19 N. J. Eq. 360).

It being a part of the consideration that appellants should meet the interest payments on the mortgage which, in the event of the default the mortgagee had the right to foreclose, and it also being necessary for the protection of the vendors that the promise be promptly performed, the reasonable construction of the provisions of the contract supports the conclusion that it was the intention of the parties that the clause making time essential should apply to this provision equally with that requiring the payment of interest on the final installment of the purchase price.

The further contention is made that the court erred in failing to determine the rights of appellants under the provision of the contract that the physical disability of either should excuse performance, but, as stated, the facts alleged as grounds for relief under this provision were denied, and no evidence in support of the allegations was adduced.

We are of the opinion that the complaint stated a cause of action, and that the denial of the motion for a continuance was not an abuse of discretion.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

84 Cal. App. 611

DAVIS v. PACIFIC STUDIOS CORPORATION. (Civ. 5480.)★

District Court of Appeal, First District, Division 1, California. July 27, 1927.

Hearing Denied by Supreme Court Sept. 22, 1927.

1. Corporations ⇨518(1)—Defendant corporation must allege and prove ultra vires defense.

Where a defendant corporation seeks to avoid its contract on the ground of ultra vires, the burden is upon it to allege and prove such defense.

2. Corporations ⇨374—Corporations have implied power to do everything necessary to exercise powers expressly conferred (Civ. Code, § 354).

Under Civ. Code, § 354, every corporation, in addition to powers expressly granted, has

the implied power to do all acts necessary to enable them to exercise the granted powers and accomplish the objects for which they were created.

3. Corporations ⇨487(1)—Ultra vires doctrine is not favored, and its application will be limited.

Where contracts of corporations are not *malum in se* or *malum prohibitum*, the doctrine of ultra vires is not favored, and should be limited in its scope and application.

4. Corporations ⇨388(2)—Where corporation received benefit of plaintiff's work, claim of ultra vires held inequitable.

Where corporation received the benefit of plaintiff's work, claim that the agreement to pay him for such work was ultra vires held inequitable.

5. Corporations ⇨580—Evidence held to sustain finding that new corporation was continuation of old, and hence its agreement to pay debt of old corporation was valid.

Evidence held to sustain finding that new corporation was formed to carry on business originally planned for old and was continuation of the old corporation, and hence its agreement to pay the debt of the old corporation incurred for services of plaintiff from which it had derived benefits was valid.

6. Appeal and error ⇨1011(1)—Trial court's findings on conflicting evidence will not be disturbed on appeal.

Where there is substantial evidence to sustain the finding of the trial court on conflicting evidence they will not be disturbed on appeal.

7. Corporations ⇨580—Evidence held to sustain findings that corporation ratified agreement to pay for services performed for another corporation of which it was continuation.

Evidence that corporation board of directors had or should have had knowledge of agreement made by its general manager and president to pay for services performed for a former corporation of which it was a continuation, and that no objection was made, held to sustain finding that the corporation ratified the agreement.

8. Corporations ⇨432(6)—Authority of corporation officer may be shown by proof of course of business and knowledge of board of directors.

The authority of a corporation officer to make an agreement may be shown by evidence that the officer does business for the corporation with the acquiescence of its directors and that the directors knew or might be presumed to know of the agreement which it is claimed the officer had authority to make.

9. Corporations ⇨397—Corporation is bound by acts and declarations of its officer within scope of the business intrusted to him.

Where certain business of a corporation is shown to be habitually done by one of its officers with the knowledge and acquiescence of the board of directors, the corporation is bound

by the acts and declarations of its officer within the scope of the business intrusted to him.

10. Corporations ⇨426(10)—Where agreement to pay for services was made by general manager and known to president and most of directors, corporation held estopped from claiming that directors did not ratify agreement.

Where agreement made by general manager to pay for services from which the corporation had received benefits was known to president and most of the directors, corporation held estopped from claiming that the acts of its directors did not constitute a ratification of the agreement.

11. Corporations ⇨513(4)—Estoppel of corporation from claiming that directors had not ratified an agreement to pay for services need not be pleaded.

Plaintiff claimed corporation was liable on agreement to pay for his services which he had made with the president and general manager. The corporation claimed its officers had no authority to make the agreement. Held that plaintiff might claim that the corporation was estopped from denying that its board of directors had ratified the agreement without pleading the estoppel.

12. Evidence ⇨357—Letters from defendant corporation's general manager to plaintiff and corporation president held admissible, though not under seal, to prove agreement to pay plaintiff.

Letter from defendant corporation's general manager to plaintiff and an order to the corporation president, both written on corporation's stationery, though not under seal, held admissible to prove agreement to pay plaintiff for services.

13. Corporations ⇨519(3)—Evidence held to sustain finding that plaintiff believed services were worth what he had demanded from corporation.

In action against corporation on agreement to pay for services performed by plaintiff, where plaintiff had demanded from the general manager payment in excess of that allowed in the agreement, evidence held to sustain finding that plaintiff believed his services were reasonably worth what he had demanded.

14. Corporations ⇨519(3)—Corporation's agreement to pay sum of money for services held sufficient to sustain finding that services were worth amount agreed.

Finding in action against corporation for services that plaintiff's services were reasonably worth \$5,000 held supported by defendant's own agreement to pay him such sum.

Appeal from Superior Court, City and County of San Francisco; George H. Cabanis, Judge.

Action by Harry F. Davis against the Pacific Studios Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Sidney Rhein, of San Francisco, and Kirkbride & Gordon, of San Mateo, for appellant.

Preston & Duncan, of San Francisco, George W. Murphy, of Santa Rosa, and Robert E. Hatch, of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from a judgment entered in favor of respondent and against appellant on account of a compromise agreement. The allegations of the complaint may be summarized as follows:

In May, 1920, A. W. Scott and Frank Burt were promoting the Golden Gate Cinema Studios Corporation and engaged plaintiff as fiscal agent for the sale of its stock, agreeing to pay him 12½ per cent. brokerage or commission "of the amount of all stock issued or subscribed for"; that plaintiff commenced preparations for the sale of the stock, etc., but that before the conditions of the corporation commissioner's permit had been complied with Scott and Burt "and said Golden Gate Cinema Studios Corporation decided to organize another corporation to take the place of said Golden Gate Cinema Studios Corporation," and organized Pacific Studios Corporation, defendant herein; that prior thereto the employment of plaintiff "ceased and was terminated by mutual consent of the parties, without prejudice, however, to the claim of plaintiff for commissions," etc.; that there had been obtained subscriptions for \$85,000 of the stock of Golden Gate Cinema Studios, a corporation; that plaintiff was therefore entitled to \$10,625 brokerage. Plaintiff then alleges that defendant was organized for the purpose of carrying on the business originally planned by Golden Gate Cinema Studios Corporation, "which business said Pacific Studios Corporation has taken over and is now conducting," and that this defendant "has also taken over and appropriated, without consideration, all of the assets of Golden Gate Cinema Studios Corporation of the value of more than \$10,000; that by reason thereof Golden Gate Cinema Studios Corporation is insolvent, etc.; that thereafter plaintiff performed certain services for Pacific Studios Corporation of the reasonable value of \$2,500; and that on November 12, 1920, defendant Pacific Studios Corporation agreed to pay plaintiff and plaintiff agreed to accept the sum of \$5,000 in full satisfaction of both said claims in installments, of which but \$1,000 has been paid, and plaintiff therefore prays judgment for the balance of \$4,000."

The answer admits the first contract (Golden Gate Cinema Studios Corporation with Davis), but denies, among other things, that Pacific Studios Corporation was organized to take the place of Golden Gate Cinema Studios Corporation, or to carry on its business, or that it took over any assets of Golden Gate Cinema Studios Corporation, denies that any valid subscriptions were obtained

by Golden Gate Cinema Studios Corporation, and denies that it agreed to pay plaintiff anything, admits that there was paid to plaintiff on November 12, 1920, the sum of \$500 and on February 7, 1921, the sum of \$500, but that each of them was made by said Scott and Burt without warrant or authority from this defendant.

Thereafter permission was obtained by plaintiff to file a "second amended and supplemental complaint," in the main similar to the former amended and supplemental complaint, but adding a final installment of \$500.

The court found in accordance with the allegations of the complaint and entered judgment for respondent in the sum of \$4,000. From this judgment appellant Pacific Studios Corporation has appealed.

Appellant urges: (a) That the Scott-Burt and Davis agreement was beyond the power of the corporation to make; (b) that it was made without sanction or ratification of the board of directors of the corporation; (c) that this defendant is in no sense a continuance of Golden Gate Cinema Studios Corporation, and that defendant received no property whatever from Golden Gate Cinema Studios Corporation; (d) that the court erred in admitting in evidence the Scott-Burt and Davis agreement, and the order on Scott; (e) that the evidence is insufficient to support certain of the findings.

[1, 2] Under the assignment of error that the agreement was beyond the power of the corporation to make, it is questionable whether the defense of ultra vires is properly before the court, as there is no allegation in defendant's answer of such defense. If the defendant seeks to avoid its contract upon the ground of ultra vires, the burden is upon it to allege and prove such defense. *Brown v. Board of Education*, 103 Cal. 534, 37 P. 503; *Morgan v. Board of Education*, 136 Cal. 247, 68 P. 703. But even if the defense of ultra vires were pleaded, there is no showing that the contract sued upon was beyond the power of the corporation. The articles of incorporation are not before the court, nor has appellant attempted to define its powers. Corporations, in the absence of express restrictions, have, in addition to the powers expressly granted them, the implied power to do all acts that may be necessary to enable them to exercise the powers expressly conferred upon them and accomplish the objects for which they were created. "Whatever transactions are fairly incidental or auxiliary to the main business of the corporation and necessary or expedient in the protection, care, and management of its property, may be undertaken by the corporation and be within the scope of its corporate powers." *Teele v. Rockport Granite Co.*, 224 Mass. 20, 112 N. E. 497. Every corporation has the power to enter into any obligations or contracts essential to the transaction of its ordinary affairs. Civ.

Code, § 354. "Whether a contract is 'essential' to the transaction of its ordinary affairs, or for the purposes of the corporation, is to be determined by the corporation, or those to whom the management of its affairs is intrusted. If it is within the apparent scope of its organization, the fact that the contract has been entered into by it, or by its representative, is a determination on the part of the corporation that it is essential, and the corporation will not be permitted thereafter to question its effect." *Bates v. Coronado Beach Co.*, 109 Cal. 160, 163, 41 P. 855, 856.

See, also, *Woods Lumber Co. v. Moore*, 183 Cal. 497, 501, 191 P. 905, 11 A. L. R. 549; *Dunne v. Ind. Order of Foresters*, 185 Cal. 211, 217, 196 P. 41, 18 A. L. R. 639.

[3, 4] The defense of ultra vires, urged by appellant, is no longer looked upon by the courts with favor, particularly when relied upon as a shield to escape liability. It is the policy of the law and the endeavor of the courts to hold corporations as well as natural persons to their contracts. Such defense introduced against a contract which has been executed in whole or in part by the corporation is looked upon with disfavor. As to contracts of corporations that are malum in se or malum prohibitum, they will not be enforced; but as to contracts not thus objectionable, justice and public policy require that the doctrine of ultra vires should be limited in its scope and application. *McQuaide v. Enterprise Brewing Co.*, 14 Cal. App. 315, 111 P. 927. Here there is nothing in the contract that is either malum in se or malum prohibitum; the corporation received the benefit of the work done by respondent and the consequences to him render inequitable a claim of ultra vires by appellant.

"Where, as was clearly the case here, an officer of a corporation is held out by such corporation to be possessed of power to perform all acts involved in its ordinary or usual business, the law will not permit third parties to suffer from such acts of such officer by the plea of the corporation that the ostensible authority of such officer was not in fact conferred upon him." *Stevens v. Selma Fruit Co.*, 18 Cal. App. 242, 250, 123 P. 212, 216.

And in *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 387, 89 P. 86, 91, the court says:

"The majority of the board having knowledge of the facts, it was not necessary, to conclude the company defendant in favor of plaintiff, that his employment should be ratified at a regular meeting of the board. It was sufficient that the majority of the board individually were advised of the terms of the employment of plaintiff by Mr. Doe, and took no measures to disaffirm as directors that employment."

And in *Irwin v. Colburn*, 56 Cal. App. 41, 204 P. 551, the court uses this language:

"It nowhere appears that such action by these officers was prohibited. Authority to bind the corporation may be proved by evidence that

such officers have been allowed to conduct its business and that third persons have acted upon the authority which the corporation has thus permitted them to assume."

Appellant urges that at best respondent's claim was against Scott, Burt, and the Golden Gate Cinema Studios Corporation; that while there are allegations in the complaint alleging that Pacific Studios Corporation absorbed the assets of the former corporation, the testimony fails to show that the first corporation ever possessed anything; therefore, that while Scott and Burt may have been willing to pin the Golden Gate Cinema Studios Corporation indebtedness on Pacific Studios Corporation, something more must be shown before the corporation itself can be held liable for an attempt to foist upon it a debt wholly unconnected with its affairs. The evidence, however, establishes the fact that the debt is not, as appellant contends, a debt wholly unconnected with its affairs. It is not a case of one corporation paying the debt of another. In the first place, some of the services for which judgment was rendered were performed for appellant itself. The court so found, and there is sufficient evidence to support such finding. Mr. Davis testified that the new corporation reaped the benefit of the work that had been done through his activities and efforts as well as that of others, including Mr. Gerson, Mr. Gallagher, Mr. Burt, and Mr. Scott; that at a meeting at the company's office in the Hewes building, the office of the old and new corporation, Mr. Burt, general manager, stated to him (Davis) that he was authorized to offer him \$5,000 in full settlement of all his claim for brokerage (\$10,625 due from the old company) and services rendered defendant corporation (\$2,500), totaling \$13,125; that the \$5,000 was to be in settlement of all respondent's rights under the contract and for additional services rendered for and in behalf of the new company; that Mr. Burt represented to him that he had been authorized to offer him \$5,000; no more; no less. Appellant then stated to Burt that inasmuch as his (Davis') claim was for a brokerage of 12½ per cent. on \$85,000 and in view of the services he had rendered the new corporation, he felt that he was entitled to founders' shares in the new corporation and to a larger cash sum than \$5,000; that Burt did not deny that he was entitled to founders' shares, but stated to him that on that matter he had no voice; that he (Davis) had numerous telephones, long distance and otherwise, from Mr. Scott and Mr. Burt, requested him to take up with Mr. Stephens of Stephens & Co. the carrying on of the financing, they urging him to recommend the project to Mr. Stephens as a good offering; that he recommended that they procure the services of John Jasper of Hollywood to build the studios; that that was subsequently done, and

that Mr. Jasper called upon him for inside information, and that he recommended him to Mr. Scott and Mr. Burt. That some service was performed for the new corporation was admitted in a letter of Mr. Burt, manager of the new corporation, written to respondent. The letter is dated November 12, 1920, and written on the letter head of appellant corporation and addressed to respondent, and is as follows:

"Confirming verbal conversation of even date regarding your claim against the Pacific Studios Corporation for services rendered, it is understood between us that these services will amount in the aggregate to \$5,000 and that you will accept as payment the sum of \$500 monthly until same is liquidated, it being understood, however, that if at any time the company desires to pay in excess of this sum it is at their option. I am inclosing herewith order for the first payment of \$500 and will see that similar order is delivered into your hands every 30 days from this date. Kindly acknowledge receipt of this letter and verification of its acceptance. Very truly yours, Pacific Studios Corporation, by Frank Burt, General Manager."

The letter of even date from Frank Burt to A. W. Scott, president of Pacific Studios Corporation, is as follows:

"Will you kindly pay to Mr. Harry F. Davis on presentation of this order the sum of \$500 in keeping with agreement entered into with Mr. Davis of even date? Very truly yours, Pacific Studios Corporation, by Frank Burt, General Manager."

[5] Furthermore, this is not a case of one corporation paying the debt of another. The evidence amply sustains the finding of the court that the appellant, Pacific Studios Corporation, was formed for the purpose and with the intent to carry on the business originally planned and intended to be carried on by the Golden Gate Cinema Studios Corporation and was in fact a continuation of the old corporation.

Mr. Davis, who was himself a subscriber to the first corporation, testified that the new company was formed to take over the assets of the old company, that it took over all the assets of the old company, took over the same option for a site at San Mateo, and the indorsements and subscriptions that were on hand, and the contracts with production companies for making pictures, occupied the same offices in San Francisco, and that its officers and directors were substantially identical with the old company. The Golden Gate Cinema Studios Corporation had planned to build at San Mateo on the same site. The directors of the new corporation are, with one exception, the same as the old corporation. They have the same president and the same general manager. They had been proceeding under a wrong plan, and it needed revamping. They needed more capital to carry out the undertaking as it was then being planned. This testimony is corroborated

by the testimony of Mr. Scott, which shows that the new corporation took a lease on the San Mateo site upon which he had previously taken an option for the earlier company, and which same site so leased was referred to in the prospectus of the Golden Gate Cinema Studios Corporation and the permit granted to it by the corporation commissioner and, in the later prospectus, of the Pacific Studios Corporation. It also shows that the indorsement of the Golden Gate Cinema Studios Corporation, made and ratified by the board of supervisors of San Francisco, was appropriated and used by Pacific Studios Corporation for the purposes of promotion, and that they likewise took advantage of the indorsement of the committee appointed by the mayor of San Francisco, which appeared as an "advisory board" on the prospectus of the Golden Gate Cinema Studios Corporation and the indorsement of the Civic League. Furthermore, in a letter written by Mr. Scott, president of the new company, to Mr. Merk, editor of "The Advance," for publicity purposes, August 12, 1920, only a few days after the incorporation of the new company. Mr. Scott wrote:

"I know you will be interested to learn that our plans for the building of a motion picture studio enterprise in your city are rapidly approaching consummation. As you know we started out some months ago with a plan contemplating the investment of some \$300,000 for this project. Discussion of the plan in San Francisco and consultation with experts in this line with financial interests brought us to the conviction that the situation justifies the building of the enterprise on a more comprehensive scale and the investment of a considerably greater sum of money, and we have arranged our plans to that end and changed the name of the company to the Pacific Studios Corporation, and our ultimate investment in your community will probably approximate \$1,000,000. * * * Several contracts have already been arranged which assures us of the success of the enterprise."

Mr. Gallagher, who was a director in both corporations, considered the new corporation liable to him for his own claim for moneys advanced to the old corporation and that the new corporation is the result of the work they did with reference to the old corporation.

Mr. Gerson, who claimed to be the originator of the idea of the studios and who performed services in the formation of the first corporation and was one of its directors, claimed founders' shares in the new corporation for the work done for the old corporation. Mr. Kirkbride, who assisted in securing the San Mateo and Burlingame subscriptions, testified that about two-thirds of the persons who pledged subscriptions to the first corporation subscribed to the second.

[6] Continuance of the old corporation in the new is also evidenced by a stipulation

showing the personnel of the new corporation to be substantially identical with that of the old. It is also evidenced by the fact that the new corporation assumed and paid obligations of the old corporation, to wit: The printing bill, a claim for publicity work by Mr. Crowley, Mr. Scott's account for advancements made to the old corporation, and that founders' shares were given to Gerson, Gallagher and Scott for services rendered to the old corporation. To be sure, some of the witnesses for appellant deny the identity of the new corporation with the old, but such testimony only creates a conflict of evidence, and there being substantial evidence in the record to sustain the findings of the trial court, under the well-established rule they will not be disturbed on appeal.

[7] The evidence also sustains the conclusion that the contract was sanctioned and ratified by Pacific Studios Corporation. Mr. Burt, who wrote the letter of November 12, 1920, was the general manager of appellant corporation, held out as such to the public by the corporation through its circulars and prospectus. The corporation had an executive committee with extensive powers appointed pursuant to its by-laws, which committee at the time respondent's claim was adjusted consisted of Mr. Burt, Mr. Scott, Mr. Gallois and Mr. Pearson, and both Mr. Scott and Mr. Burt obviously authorized and approved the settlement with Mr. Davis, and there is no direct evidence that Mr. Gallois and Mr. Pearson disapproved it. In addition, Mr. Bell, a director and attorney for the corporation, approved the settlement. He stated to Mr. Lum, representing respondent, that he would recommend to appellant a settlement of \$5,000 net cash. Mr. Stephens knew of respondent's claim and that negotiations for settlement were going on and offered to take up with Mr. Scott the matter of settlement. He advised respondent to accept \$5,000 on the partial payment plan and himself approved it. Mr. Caswell, treasurer of the corporation, signed the checks by which two \$500 payments on the contract were made by the corporation. Also, Mr. Burt testified that Mr. Caswell, Mr. Bell and Mr. Scott were in favor of the settlement. Mr. Gallagher, also a director of the new corporation, favored the settlement and also testified that "there was a continuous discussion of the Davis claim running through the boards of the old and the new corporation," showing knowledge of the corporation. Mr. Burt in a letter of October 1, 1920, to Mr. Davis stated that the settlement of this claim was placed in the hands of Mr. Bell "by instruction of the board of directors." Mr. Davis testified that he had conversations with all the different members of the board, including Mr. Burt, Mr. Scott, Mr. Stephens, Mr. DeCamp, Mr. Gallagher and others before November 12th, the date of the accord. Mr. Burt testified:

"Q. Did you tell Mr. Stephens that you had settled this claim with Mr. Davis after you had written this letter of November 12th? A. I presume I told the board about my action, for I regularly made a written report of my activities."

"Q. Do you know whether you reported that to the board? A. I said I presumed I reported it."

There is no evidence that the directors ever repudiated the agreement until the answer was filed in this action.

[8] Existence of authority may be shown by proof, of course of business, the knowledge of the board of directors of the corporation, and by presumptions of such knowledge. *Mahoney Min. Co. v. Anglo-Cal. Bank*, 104 U. S. 192, 26 L. Ed. 707. Authority of the corporation may be shown by evidence that the person does business for the corporation and on its behalf as agent with the knowledge and acquiescence of its directors or by their direction.

[9] The corporation in such case is bound by his acts and declarations within the scope of the business intrusted to him. It is not the law that the authority of the agent or officer to act for a corporation can be proven only by the minutes of its board of directors or by a contract in writing. *Venice v. Short Line Beach Land Co.*, 180 Cal. 447, 453, 181 P. 658; *Aigeltinger v. Burke*, 176 Cal. 621, 169 P. 373; *Sessions v. Pacific Imp. Co.*, 57 Cal. App. 25, 206 P. 653; *Betts v. So. Cal., etc., Exch.*, 144 Cal. 402, 77 P. 993; *Irwin v. Colburn*, 56 Cal. App. 41, 204 P. 551; *Raftis v. McCloud River Lumber Co.*, 35 Cal. App. 397, 400, 170 P. 176.

[10, 11] But even if the acts of the directors do not constitute a ratification of the contract, they are estopped from so claiming, and such estoppel need not, as claimed by appellant, be pleaded. In *Blood v. La Serena L. & W. Co.*, 113 Cal. 221, 41 P. 1017, 45 P. 252, the court held that an estoppel in pais may be shown without pleading it by way of equitable rebuttal to defendant's proof of want of authority to execute a note and mortgage sued upon after plaintiff had established a prima facie case, and that it is only when a plaintiff must rely on an estoppel in pais in order to maintain his action against defendant that it must be pleaded.

Eells v. Gray Bros., etc., Co., 13 Cal. App. 33, 108 P. 735, holds that if a corporation clothes its officer or agent with apparent authority to act for it in a particular matter, it will be estopped to deny such authority as against persons dealing with such officer or agent in good faith and in ignorance of any limitations on his authority. See, also, *Fowler Gas Co. v. First Nat. Bank*, 180 Cal. 471, 181 P. 663; *Union Oil Co. v. Purissima Oil Co.*, 181 Cal. 479, 482, 185 P. 381; *Doerr v. Fandango, etc., Co.*, 31 Cal. App. 318, 160 P. 406.

Cal.Rep. 258-260 P.—13

"It is a general rule that notice to an officer or agent of a corporation is notice to the corporation if in matters in which such agent or officer would have authority to act for the corporation or whose duty it would be to communicate it to the board of directors or to an officer who had some power or authority in the matter. Such agents or officers are conspicuously the president of the corporation, the general manager, if it have one, the secretary and a bank cashier." *Clarke, California Corporations*, § 586.

"But if full knowledge was necessary, it must be presumed that the corporation had full notice of all the facts which were known to the president. The president of a corporation is a proper person to whom notice, which is to affect a corporation, is to be given. The corporation has no eyes, ears or understanding save through its agents. The president is considered the head of the corporation, and it is his duty to report to the trustees information affecting the interests of the corporation. And the presumption is that he does so. Usually this is a conclusive presumption." *Thompson on Corporations*, § 5228.

This rule is cited with approval in *Balfour v. Fresno Canal, etc., Co.*, 123 Cal. 397, 55 P. 1062; *Fresno St. Ry. Co. v. Southern Pacific Co.*, 135 Cal. 202, 67 P. 773; *Montecito Valley, etc., Co. v. Santa Barbara*, 144 Cal. 597, 77 P. 1113; *Lowe v. Yolo County, etc., Water Co.*, 157 Cal. 513, 108 P. 297; *Goodwin v. Central Broadway Bldg. Co.*, 21 Cal. App. 376, 131 P. 896; *Jan Wai v. Smith-Riddell Co.*, 55 Cal. App. 63, 202 P. 952.

Appellant cites *Guernsey v. Johnson Organ & Piano Co.*, 29 Cal. App. 699, but that case is not analogous. There the only evidence that the defendant corporation assumed the indebtedness of the Harris company was a letter written by the secretary, who stated that it was written as a means devised by himself to assist the Harris Company. There was no evidence that the defendant corporation received any benefit nor, as the court says, "is it shown by a scintilla of evidence that [the secretary] had any ostensible authority to act in the matter. * * * The cause of action was based solely upon the letter without any other showing whatsoever."

Nor is *Bonner Oil Co. v. Pennsylvania Oil Co.*, 150 Cal. 658, 89 P. 613, cited by appellant, in point. There the secretary of the corporation who signed the composition did so without the knowledge or consent of the other corporation officers, and there was no consideration moving to the corporation for the signature to the compensation. In *Fontana v. Pac. Can Co.*, 129 Cal. 51, 61 P. 580, quoted by appellant, certain elements were lacking, and their absence was held fatal in that case, but these very elements are present in the instant case. There was no evidence that either the president or secretary who signed the contract had any powers from which it might be inferred that they or either of them could make such a contract.

There was no claim or evidence of subsequent ratification and "no evidence that the directors ever knew of the contract, much less authorized it by their conduct or acts."

International Magazine Co. v. National Radio Co., 67 Cal. App. 498, 227 P. 918, cited by appellant, is also distinguishable from this case. There the contract in question was signed by the president alone, though it appeared that the corporation had a general manager at the time. Also there was no evidence that the directors had knowledge of the action of the president, and there was no evidence of his ostensible authority or that the plaintiff had relied upon such authority. The court recognized and asserted the rule that the authority of the president to contract "may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract or accept the benefits of it, and thereby be bound."

Pacific Bank v. Stone, 121 Cal. 206, 53 P. 634, and *Hoffman v. Gottstein Inv. Co.*, 101 Wash. 428, 172 P. 573, are likewise distinguishable from the instant case. Here appellant had knowledge of the agreement with respondent and received the benefits. The negotiations were known to the president and the general manager, the agreement itself was known to most of the directors and the records of the corporation showed two payments made to respondent on account thereof.

From what has been said it follows that there is no merit in appellant's assignments "that the Scott-Burt and Davis agreement was beyond the power of the corporation to make, that it was made without sanction or ratification of the corporation, that this defendant is in no sense a continuance of Golden Gate Studios, and that defendant received no property whatever from Golden Gate Studios."

[12] As to the assignment "that the court erred in admitting in evidence the Scott-Burt and Davis agreement and the order on Scott," for the reason, as urged by appellant, that such evidence is incompetent, immaterial, and irrelevant and not binding on the corporation because not authorized and because it bears no seal, it is sufficient to say that it is not a deed as was the case in *Barney v. Pforr*, 117 Cal. 59, 48 P. 987, cited by appellant, and the only effect of the seal attached thereto would be to constitute prima facie evidence of its execution by the corporation in the absence of affirmative proof of authority. See

Leitch v. Marx, 21 Cal. App. 212, 131 P. 328. The letters were both written on the stationery of the corporation and signed by the general manager, and, while not conclusive evidence of the accord, they were obviously admissible as elements of the transaction between the parties. They were no less competent than the oral communications between respondent and the officers of the corporation to which the witnesses freely testified.

[13, 14] As to the assignment "that the evidence is insufficient to support certain of the findings," there is likewise no merit. The findings which it is claimed are unsupported are finding 6, that defendant has taken over and appropriated without consideration the assets of the Golden Gate Studios and that such assets are worth \$10,000; finding 7, that plaintiff believed there was due him \$10,625, and that he performed certain services for defendant and plaintiff believed the reasonable value of such services to be \$2,500; finding 10, that the reasonable value of the service rendered by plaintiff to both corporations is \$5,000; finding 9, to the effect that defendant duly and regularly agreed to pay plaintiff \$5,000; findings 12 and 13, relating to the agreement to pay plaintiff \$5,000, and finding 14, finding many of the denials in the answer untrue. As to finding 7, the evidence shows that defendant assumed and agreed to pay the claim of plaintiff; therefore it is not important what was the value of the assets of the former corporation; however, there is evidence of such assets and their value, which, if necessary, is sufficient to sustain the finding. As to finding 7 the court was justified in finding from the demands made by plaintiff upon Mr. Burt, the general manager, for such amounts that plaintiff believed that his services were reasonably worth what he demanded. Finding 10, that plaintiff's services were reasonably worth \$5,000, finds sufficient support in defendant's own agreement to pay him such sum therefor, even if there were no evidence of their value in the record. As to findings 11, 12, and 13, relative to the agreement of defendant to pay plaintiff \$5,000, such findings are supported, as is shown by the evidence herein set out, and there is likewise no error in finding 14, wherein the denials of defendant are found to be untrue.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

84 Cal. App. 382

PEOPLE v. GODDARD. (Cr. 1407.)

District Court of Appeal, First District, Division 2, California. July 8, 1927.

1. Criminal law ⚡274—Refusing permission to change plea of guilty was not error, because counsel had advised defendant to plead guilty if he desired probation.

It was not error to refuse defendant, charged with bigamy, permission to change his plea of guilty, on the ground that his counsel had advised him that it would be better to enter a plea of guilty, if he desired to obtain probation.

2. Courts ⚡95(2)—In construing Constitution or statutes of another state, its highest court should be followed.

In determining construction or effect of the Constitution or statutes of another state, the court should follow the decisions of the court of last resort of that state, even though they would be inclined to place a different construction on a similar provision in their own Constitution or statutes.

3. Criminal law ⚡320—California court may assume that Oregon law respecting application of statute regulating marriage after divorce is same as California law, in absence of contrary holding by Oregon's highest court.

California court may assume that law of Oregon respecting the application of its statute declaring party to divorce incapable of marriage to a third party until the expiration of six months after the divorce decree should be entered is the same as the law of California on the subject, in absence of contrary holding by Oregon court of last resort.

4. Bigamy ⚡1—As regards bigamy, marriage in California within six months after divorce in Oregon was valid, though contrary to Oregon statutes.

As regards offense of bigamy, one who secured divorce in Oregon, whose statutes declared party to divorce incapable of marrying third party for six months after date of the decree of divorce, may contract a valid marriage to a third party in California before the expiration of the six months, since Oregon statute has no extraterritorial effect.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Pruette Kearns Goddard was convicted of bigamy, and he appeals. Affirmed.

Soren X. Christensen and J. C. Wood, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., Emery F. Mitchell, Deputy Atty. Gen., and Earle Warren, Dist. Atty., and Leonard J. Meltzer, Deputy Dist. Atty., both of Oakland, for the People.

STURTEVANT, J. On the 10th day of December, 1926, the district attorney of Alameda county filed an information against the defendant, charging him with the crime of big-

amy. On December 14 the defendant entered a plea of not guilty. By consent the cause was set for trial on January 10, 1927. On that date the trial was continued until a subsequent date. However, on January 12, 1927, by consent, the last-named order was set aside and the trial was taken up immediately by consent. Acting upon the request of the defendant, he was allowed to withdraw his plea of not guilty and to enter a plea of guilty. At the request of the defendant the cause was ordered referred to the probation officer, and the further proceedings were continued until January 25, 1927. From time to time the hearing was further continued. On March 19, 1927, the hearing was again taken up, and at that time the defendant asked permission to withdraw his plea of guilty and to enter a plea of not guilty. Argument was had, and the further proceedings were continued until March 22, 1927. On that date the trial court denied the defendant's motion to change his plea, and also denied him probation, and thereupon the court proceeded to sentence the defendant. Immediately thereafter counsel for the defendant made a motion that the sentence and judgment be set aside, and renewed his motion that the defendant be permitted to withdraw his plea of guilty and to enter a plea of not guilty. In support of his motion the defendant offered in evidence an affidavit theretofore made by him, and at the same time he took the stand and was examined and cross-examined.

From the evidence introduced it transpired that the alleged offense of the defendant rested on the fact that he married Audrey Ethel Hargraft at Oakland, Cal., on the 3d day of August, 1926. Prior to that date he married Marjorie K. Roys at Sacramento, Cal., who was still living, and that marriage had never been dissolved or annulled. It also appeared that Marjorie K. Roys had formerly married Reuben F. Roys, and that they had been divorced by a decree of the circuit court of the state of Oregon in and for the county of Multnomah on the 28th day of August, 1923. It was not contended in the trial court, and it is not contended in this court, that Mrs. Roys and the defendant left Oregon and went to Sacramento to be married, and did so for the purpose of evading the laws of the state of Oregon. The trial court denied the motion to set aside the sentence and judgment, and from the judgment entered against the defendant he has appealed.

Both in the trial court and in this court the defendant contended (1) that he had been induced to enter a plea of guilty because he would surely secure probation; and (2) under the laws of Oregon Marjorie K. Roys was not legally divorced before she married the defendant, was not entitled to contract marriage, and that the intermarriage of the defendant and Marjorie K. Roys was void.

[1] An examination of the record discloses that the defendant did not contend that the trial court or any officer thereof stated or intimated to the defendant that he would surely secure probation if he would enter the plea of guilty. It does appear that the defendant's counsel advised the defendant that, if he desired to obtain probation, it would be better to enter the plea of guilty. Such facts were not sufficient to sustain the claim that the trial court erred in refusing the defendant permission to change his plea. *People v. Manriquez*, 188 Cal. 602, 605, 206 P. 63, 20 A. L. R. 1441.

The second point made by the appellant involves no question of fact, but solely a question of law as to whether Marjorie K. Roys was, under the laws of Oregon, at liberty to contract a valid marriage at Sacramento, Cal., on November 30, 1923. In open court counsel for both parties stipulated that the laws of Oregon on the subject were embodied in the statutes and decisions from which we have quoted, or which we have cited below. The original statutory provision will be found in 1 Hill's Annotated Laws, § 503. Later that statute was amended to read as follows:

"A decree declaring a marriage void or dissolved at the suit or claim of either party shall have the effect to terminate such marriage as to both parties, except that neither party shall be capable of contracting marriage with a third person, and if he or she does so contract, shall be liable therefor as if said decree had not been given, until the suit has been heard and determined on appeal; but in no case until the expiration of six months from the date of said decree."

In the case of *Twigger v. Twigger*, 110 Or. 520, 223 P. 934, the Supreme Court of Oregon reviewed its statutes and decisions, and then, at page 936 (110 Or. 527) it said:

"* * * This court has decided that, where parties resident of this state, one or both of whom have been divorced by our courts within six months, go into the state of Washington, are there married, and return to this state to reside, the marriage is void. This results from a construction of the divorce statutes as they then stood; that is to say, the legislation in its then condition assumed to invalidate for all purposes in this state a marriage contracted in a sister state under the circumstances mentioned. None of those decisions, however, go so far as to say that the marriage would be otherwise than valid for all purposes in Washington."

[2] "Where a question as to the construction or effect of the Constitution of statutes of a state arises in the courts of another state, or of the United States, such courts should follow the decisions of the court of last resort of the state whose constitutional or statutory provisions are involved, even though they would be inclined to place a different, or even an opposite, construction upon a similar provision if it appears in the Con-

stitution or statutes of their own state." 15 C. J. 927, § 316.

In *McGrew v. Mutual Life Ins. Co.*, 132 Cal. 85, 64 P. 103, 84 Am. St. Rep. 20, a question arose regarding the laws of Hawaii on the subject of divorce. The respondent made certain contentions as to what should be the holding on that subject. Mr. Justice McFarland, speaking for the court, on page 89 (64 P. 104), stated as follows:

"* * * But, admitting these legal propositions to be correct, the courts of Hawaii have held otherwise, and their construction of the statutes of their own country cannot be here assailed. *McGrew v. McGrew*, 9 Hawaii, 475. Full effect must therefore be given to the judgment in the divorce suit."

[3] These authorities lead us to the conclusion that the highest court of Oregon has decided that that court has never held that the Oregon laws of divorce have any extraterritorial application to marriage contracted in some other state. We are entitled, therefore, to assume that the law of Oregon is the same as the law of the state of California.

[4] However, the law of the state of California on the subject has been very clearly defined. In the case entitled *Estate of Wood*, 137 Cal. 129, 69 P. 900, the validity of the marriage of Abbie Rose Wood and Joseph M. Wood at Reno, Nevada, on January 1, 1898, was involved. At the time of the marriage Wood was a single man, but Mrs. Wood had been divorced by decree rendered August 19, 1897. At that time section 61 of the Civil Code provided:

"A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless: 1. The former marriage has been annulled or dissolved; provided, that in case it be dissolved, the decree of divorce must have been rendered and made at least one year prior to such subsequent marriage."

The court made an exhaustive examination of the decisions, and on page 135 (69 P. 902) Mr. Justice Garoutte, speaking for the court, quoted and followed *State v. Shattack*, 69 Vt. 403, 38 A. 81, 40 L. R. A. 428, 60 Am. St. Rep. 936, as follows:

"The language of our statute is general, and it is a fundamental rule that no statute, whether relating to marriage or otherwise, if in the ordinary general form of words, will be given effect outside of the state or country enacting it. * * * Hence, if a statute, silent as to marriages abroad, as ours is, prohibits classes of persons from marrying generally, or from intermarrying, or declares void all marriages not celebrated according to prescribed forms, it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state. Those marriages are to be judged of by the courts of such state, just as though the statute did not exist."

We think that the rule just quoted is clearly applicable to the facts of this case and determines the question as against the appellant. Under these circumstances the trial court committed no error in denying defendant permission to withdraw his plea of guilty and to enter a plea of not guilty.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

**WEST GLENDALE METHODIST EPISCOPAL CHURCH v. McCLELLAN
et al. (Civ. 5327.)★**

District Court of Appeal, Second District, Division 2, California. July 16, 1927.

Hearing Granted by Supreme Court Sept. 12, 1927.

1. Taxation ⇨251—Allegation in mandamus to compel cancellation of assessment on church property held insufficient as allegation that board of supervisors had acted on petition to cancel (Pol. Code, § 3804a).

In mandamus to compel board of supervisors to cancel assessment on property used for religious purposes, allegation that board of supervisors had refused to direct auditor to cancel and latter had refused to cancel assessment and tax based on failure of plaintiff to make statutory affidavit held not an allegation that board of supervisors had conducted a hearing on petition to cancel assessment or passed on questions of fact involved, as required by Pol. Code, § 3804a.

2. Taxation ⇨251—Court could not act in mandamus to compel cancellation of assessment on church property until board of supervisors acted on petition to cancel (Pol. Code, §§ 3804a, 3611).

Courts were without jurisdiction to act in mandamus proceeding to compel board of supervisors to cancel assessment on property used for religious purposes, where petitioner had not made return as required by Pol. Code, § 3611, and property had been assessed, until board of supervisors had acted on petition to cancel tax under section 3804a and upon finding facts in petitioner's favor had refused to cancel tax.

3. Taxation ⇨497—Jurisdiction of board of supervisors to cancel tax erroneously assessed is quasi judicial as regards right to mandamus (Pol. Code, § 3804a).

Jurisdiction of board of supervisors, acting on petition to cancel tax erroneously assessed as provided in Pol. Code, § 3804a, is quasi judicial, as regards right to mandamus to compel such action.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Mandamus action by the West Glendale Methodist Episcopal Church against R. F. McClellan and others, as members of the Board of Supervisors of and the County of Los Angeles, H. A. Payne, Auditor, and an-

other, to compel cancellation of assessment on property used for religious purposes. From a judgment of dismissal following sustaining of demurrer, plaintiff appeals. Affirmed.

George H. Moore, of Los Angeles, for appellant.

Edward T. Bishop, Co. Counsel, and J. A. Tucker, Deputy Co. Counsel, both of Los Angeles, for respondents.

MURPHY, Justice pro tem. This is an appeal from a judgment of dismissal following an adverse ruling of the superior court on demurrer without leave to further plead. The plaintiff, a nonprofit religious corporation, was assessed during the year 1923 for its church property, consisting of a lot of land and the church buildings erected thereon. This proceeding is in mandamus, and is brought to compel the defendants, the board of supervisors of Los Angeles county and the county auditor, to proceed under section 3804a of the Political Code to cancel the assessment on said building and lot, with a further prayer that the tax collector be restrained from certifying said tax as delinquent and selling the property according to law.

Section 1½, art. 13 of the Constitution of the state of California, under which the personal property is exempt from taxation, reads as follows:

"All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship shall be free from taxation; provided, that no building so used which may be rented for religious purposes and rent received by the owner therefor, shall be exempt from taxation."

This amendment was read into the Constitution in 1900 and in 1903 the Legislature, as an emergency measure, added section 3611 to the Political Code, which, after quoting the constitutional provision above set out, provides that:

"Any person claiming property to be exempt from taxation under this section shall make a return thereof to the assessor annually, the same as property is listed for taxation, and shall accompany the same by an affidavit showing that the building is used solely and exclusively for religious worship, and that the described portion of the real property claimed as exempt is required for the convenient use and occupation of such building, and that the same is not rented for religious purposes and rent received by the owner therefor."

The property having been assessed for the year 1923, this action is prosecuted under section 3804a of the Political Code, which provides that when property exempt from taxation has been erroneously assessed,

"* * * the board of supervisors may, upon satisfactory proof thereof, with the written consent of the district attorney, and by an order entered upon its minutes, direct the auditor to cancel such assessment." Application was regularly made to the board of supervisors, with the written consent of the district attorney, to cancel this assessment. This the board refused to do. The complaint, in apt language, brings the property owned by the plaintiff clearly within the provisions of the constitutional exemption, but does not allege that the plaintiff has complied with the requirement of section 3611, supra, of the Political Code. The trial court held that the failure of plaintiff to file with the assessor the report and affidavit required by that section was fatal to his cause of action. The correctness of that ruling is the sole matter to be determined in this appeal. Appellant in his closing brief, in vigorous and somewhat intemperate language, characterizes this proceeding as follows:

"I covet a consideration according to 'ideas in their just relation.' Sophistry, detraction, consideratum, and even systematization, when employed to defeat or suspend, or curtail the operation of a clear, unambiguous, mandatory, and prohibitory provision of the Constitution, is nothing less than destructive and damnable."

Nothing in the act or in the practical operation thereof justifies these denunciatory expletives. The act was passed two years after the constitutional exemption became operative. It was passed as an emergency measure, and it may be fairly inferred that its enactment came in response to difficulties and complications encountered by administrative officers in performing their duties. This regulatory statute does not, on its face or its practical application, impair or destroy the right guaranteed by the Constitution. (If such were its effect it would undoubtedly be ineffective and void.) What it does do is to require the exemptioner to identify its property, or so much of its property as it claims to be covered by the beneficial purposes of the law. The failure of a property owner to comply with the requirements of section 3611 does not abrogate the right of exemption. It simply postpones its right of enjoyment until such time as it shall arouse itself from a state of moribidity and disclose to the proper officers the nature and character of its property. The nature, character, and use to which property is subjected is not evident from its outward appearances. In determining this matter, we should bear in mind that the right of exemption from taxation is purely statutory, and the statute must be strictly construed against the taxpayer. 2 Cooley on Taxation, p. 1404; Vesty on Taxation, p. 108; and Estate of Brown, 123 Cal. 399, 55 P. 1055, 69 Am. St. Rep. 74, wherein the Supreme Court says:

"Exemptions are the creatures of statutes and exceptions to the general rule. No property is exempt unless made so by express provision of law. No assumed legislative policy can justify the courts in adding to the statutory list of exemptions. Legislators are presumed to understand the force and effect of the language which is used, and to have contemplated all circumstances which would make it desirable that other property not in the lists of exemptions should be added thereto."

Neither should we lose sight of the fact that all presumptions and intendments are in favor of the constitutionality of the statutes. This is clearly expressed in 5 Cal. Jur. 628, wherein it is said:

"The undisputed general rule is that all presumptions and intendments are in favor of the constitutionality of statutes; that all doubts are to be resolved in favor of and not against the validity of a statute; that before an act of a co-ordinate branch of the government can be declared invalid by the judiciary for the reason that it is in conflict with the Constitution, such conflict must be clear, positive, abrupt and unquestionable; and that in case of fair, reasonable doubt of its constitutionality, the statute should be upheld, and the doubt be resolved in favor of the expressed wishes of the people as given in the statute."

The constitutional provision does not exempt all church property or all used church property. The kind of church property exempted is specifically limited and circumscribed. In order to entitle it to the privilege of exemption it must measure up to these requirements. Section 1 $\frac{1}{4}$, art. 13 of the Constitution, provides that: (1) It must be used; (2) it must be used for religious worship; (3) it must be used for no other purposes; (4) the real property exempted must be required for the convenient use and occupation of the buildings occupied; and (5) that the property used is not rented property. These are questions of fact that must be determined in some reasonable and practicable way to effectuate the purposes of the above-quoted section of the Constitution. It was to meet this condition that the Legislature enacted section 3611 of the Political Code. Under such and similar conditions it has been repeatedly held that such regulatory measures are not only proper but necessary to facilitate and effectuate, without confusion, the purpose of the people expressed in the Constitution. In Washburn College v. Commissioners of Shawnee County, 8 Kan. 344, the Supreme Court of that state, speaking through Mr. Justice Brewer, said:

"To bring this property within the terms of the section quoted it must be 'used exclusively for literary and educational purposes.' This involves three things, first, that the property is used; second, that it is used for educational purposes; and third, that it is used for no other purpose. * * * If the framers of the Constitution had intended to exempt all property belonging to literary and charitable institutions

from taxation, the language employed would have been very different. They would have used the simple ordinary language for expressing such intention. The fact that they ignored 'ownership,' and made 'use,' the test of exemption, shows clearly that they recognized the essential distinction between the two, and established the latter rather than the former as the basis of exemption."

In the case of *Capen v. Foster*, 12 Pick. (Mass.) 485, 23 Am. Dec. 632, where the question of the reasonableness of regulatory provisions and the election laws were under consideration, Chief Justice Shaw said:

"The right of any individual person, claiming the privilege of voting, may involve an inquiry into the fact of citizenship, sex, age, domicile within the commonwealth, domicile within the town or district, the payment of taxes, exemption by law from the payment of taxes, and the fact of his being a pauper or under guardianship, or otherwise. All these are questions of fact, open to proof of various kinds. * * * If then the Constitution has made no provision, in regard to the time, place and manner, in which such examination shall be had, and yet such an examination is necessarily incident to the actual enjoyment and exercise of the right of voting, it constitutes one of those subjects, respecting the mode of exercising the right, in relation to which it is competent for the Legislature to make suitable and reasonable regulations, not calculated to defeat or impair the right of voting, but rather to facilitate and secure the exercise of that right."

This case concludes with the statement that it was competent for the Legislature to enact the regulatory measures, which, not being repugnant to the Constitution, are valid and binding laws, to which both voters and presiding officers at election are authorized and bound to conform. Our own Supreme and appellate courts have repeatedly upheld such regulatory legislation. *Bergevin v. Curtz*, 127 Cal. 86, 59 P. 312; *Minges v. Board of Trustees*, 27 Cal. App. 15, 148 P. 816; and *Chester v. Hall*, 55 Cal. App. 611, 204 P. 237. In each of these cases it is held that the Legislature may enact regulatory measures to facilitate the operation of constitutional enactments and place safeguards around their exercise so long as the right itself is not curtailed. This power is expressly given in section 13, art. 13, of the Constitution, wherein it is said: "The Legislature shall pass all laws necessary to carry out the provisions of this article." Section 8 of article 13 of the Constitution provides:

"The Legislature shall by law require each taxpayer in this state to make and deliver to the county assessor, annually, a statement, under oath, setting forth specifically all the real and personal property owned by such taxpayer, or in his possession, or under his control, at twelve o'clock meridian on the first Monday of March."

It will thus be observed that the primary duty and obligation is upon the taxpayer to make return to the county assessor and to list all the real and personal property owned by him whether exempt or not exempt, and under section 3611 of the Political Code the further requirement is put upon him by the Legislature to declare such of his property as he claims to be exempt under the laws of this state. The question involved in this litigation has been determined adversely to appellant's contention by the Supreme Court of this state in the case of *Great Western Power Co. v. City of Oakland*, 189 Cal. 649, 209 P. 553, wherein it is substantially said: The provision of section 10 of the act of the Legislature (Stats. 1911, p. 530) adopted to carry into effect the provisions of section 14 of article 13 of the Constitution separating state and local taxation, that when the assessor of any county finds in the report of operative property in his county made to the state by a public service corporation, any property which he regards as nonoperative property, he shall within thirty days thereafter notify the state board of equalization of his claim, and that such board shall investigate and determine the proper classification of such property, is mandatory, and the failure to file such notice is jurisdictional in so far as the right to thereafter claim that such property is nonoperative property or to assess the same locally as such is concerned. It would seem to be a logical conclusion that if the Legislature may require a public utility to file with the local assessor a copy of the return made to the state board of equalization before the utility is entitled to its exemption from local taxation, surely, the Legislature may require a church claiming such exemption to perform the acts entitling it to be placed within the exemption. Section 3611 of the Political Code places no greater burden upon the taxpayer than does section 3665 of the Political Code. The *Great Western Power Company Case* is a tax case, and the principle involved may not in our opinion be distinguished from that in the case at bar.

In response to the appellant's contention that section 3611 does not impose any conditions to the enjoyment of the constitutional exemption and basing its claim on the fact that the section does not in terms declare what shall be the effect of the failure to comply with its requirements the trial court said:

"This construction of the section amounts to a nullification of its provisions and reduces it to the level of good advice offered by the Legislature which the persons affected by it are at liberty to accept or not if they see fit * * * the section declares in unequivocal language that any person claiming property to be exempt from taxation * * * shall make a return."

This is mandatory language, and its proper effect is that any one who does not make a return removes himself from the class of

those claiming exemption, or, in other words, waives the exemption.

The judgment is affirmed.

CRAIG, Acting P. J. I concur.

[1-3] I agree with the conclusion reached in the foregoing opinion, but for reasons other than those therein stated. The Political Code, § 3804a, provides that:

"When property that is exempt from taxation has been erroneously assessed, * * * the board of supervisors may, upon satisfactory proof thereof, with the written consent of the district attorney, and by an order entered upon its minutes, direct the auditor to cancel such assessment. * * *"

It is obvious that this provision contemplates a hearing of some character by the board of supervisors, in order that they may pass upon the questions of fact involved. The petition is somewhat uncertain in its allegations in paragraph 7, having to do with the presentation of a petition to the board of supervisors for cancellation of the tax. However, construing the pleading most strongly against the pleader, no allegation appears therein that the board of supervisors have conducted any such hearing or passed upon the questions of fact involved. The allegation that "at all times since said board of supervisors has refused to direct the auditor to cancel, said auditor has refused to cancel said assessment and tax, and have based their refusal solely upon the ground that plaintiff failed to make an affidavit [as authorized by Political Code, § 3611] between the first Monday in March and the first Monday in July, 1923," does not constitute an allegation such as is required. From this statement it seems that the board of supervisors has refused to consider the petition that the tax be canceled, or to determine the truth of the essential allegations contained in it to the effect that the property in question belonging to petitioner is used solely and exclusively for religious worship, is required for the convenient use and occupation of any building located upon the premises, and that the same is not rented for religious purposes and the rent received by the owner. In order to entitle the property of the church to be exempt from taxation these facts must be found to exist. In addition to the provision for tax

exemption contained in section 3611 of the Political Code, and the requirement contained in the same section for the filing of an affidavit by the owner of property used for religious worship, the Legislature has seen fit to place in the hands of the board of supervisors authority to direct the cancellation of the tax erroneously assessed, as stated in the above quotation from section 3804a of the Political Code. This remedy provided by the Legislature has apparently not been resorted to by the petitioner. True, it has asked the board of supervisors, and the district attorney as well, to cancel the tax. The latter has no authority under the provisions of section 3611 to do more than consent to the petition being presented to the board of supervisors, but if that board has failed to conduct a hearing to determine the truth of the allegations contained in the petition presented to it by the petitioner herein the immediate remedy of the latter is to seek to require by writ of mandate the performance of that duty on the part of the board. Until this step shall have been taken the courts are without jurisdiction to act. The jurisdiction of the board of supervisors in this behalf is clearly quasi judicial. If it should determine the issues of fact presented by the petition alleged to have been filed with it adversely to the petitioner, that determination, if supported by substantial evidence, would be final. If the findings should be in favor of the petitioner, but such board should still refuse to cancel the tax because of a failure to file the affidavit contemplated by section 3611 of the Political Code, then, and not until then, should a proceeding such as that before us be instituted.

Petitioner makes no point of the fact that the demurrer was sustained without leave to amend, and the matter was apparently heard and passed upon by the trial court upon the theory that the petitioner had stated its full case in the petition, otherwise the question might arise as to its rights to further amend.

THOMPSON, J. I concur.

I am impressed with the fact that the petitioner should have sought to compel the board of supervisors to hear and determine its petition, and that for us to pass upon any other question would be obiter. For that reason I concur in the foregoing concurring opinion.

84 Cal. App. 567

WILSON et al. v. MATTEI. (Civ. 5832.)

District Court of Appeal, First District, Division 2, California. July 26, 1927.

1. Evidence ⇨265(3)—Silence and subsequent statement of defendant's attorney held to warrant finding that validity of certain items of labor and material furnished by plaintiff was conceded.

In action for labor and material furnished, silence of defendant's attorney, when plaintiff's attorney stated that defendant admitted certain items, and his subsequent statement that two items were admitted, when plaintiff's attorney asked witness whether one of them was admitted, *held* to warrant finding that validity of such items was conceded by defendant.

2. Stipulations ⇨14(4)—Findings of fact admitted by stipulation are unnecessary.

When an issue is admitted by stipulation, findings as to such fact are unnecessary.

3. Work and labor ⇨30(4)—Finding, in action for labor and materials furnished, that certain pipes were to be installed by plaintiff at his cost, held not inadvertent.

Where paramount issue, at trial of action for labor and materials furnished, was whether plaintiff or defendant was required to bear cost of installing safety valve and vent pipes, and evidence as to former was conflicting, finding that they were to be installed by plaintiff at his own cost *held* not inadvertent, but finding intended.

4. Stipulations ⇨18(6)—Finding conflicting with stipulation should be disregarded.

Finding in conflict with admissions, stipulated at trial, should be disregarded, as not within issues.

5. Appeal and error ⇨932(1)—Appellate court must assume that court, definitely specifying items allowed, intended to disallow omitted items.

Where court definitely specified each item and amount allowed, in action for labor and materials furnished, it must be assumed on appeal that omission to allow other items indicates court's intent to disallow them.

6. Appeal and error ⇨1033(7)—Defendant, appealing from judgment for plaintiffs, cannot complain of omission to allow certain items for which plaintiff claimed credit.

Defendant, appealing from judgment for plaintiffs in action for labor and materials furnished, cannot complain of court's omission to allow certain items for which plaintiffs claimed credit; such failure being favorable to defendant.

7. Appeal and error ⇨1071(1)—Inaccurate conclusion or erroneous computation of aggregate amount of judgment, satisfactorily appearing from findings, is not reversible error.

Mere inaccurate conclusion and erroneous computation of aggregate amount of judgment, which satisfactorily appears from face of findings, is not reversible error, and should be reconciled, giving way to true sum, secured by

correct computation of value of items specifically enumerated in findings.

8. Trial ⇨404(4)—Specific findings, inconsistent with general findings, control.

Specific findings control in case of inconsistency with general findings.

9. Trial ⇨404(1)—Findings should be liberally construed to support judgment, and reconciled, if reasonably possible.

Findings should be liberally construed in support of judgment, and reconciled, if reasonably possible.

10. Appeal and error ⇨1071(1)—Judgment will not be reversed for conflict in findings, unless clear and irreconcilable.

Judgment will not be reversed because of conflicting findings, unless conflict is clear and irreconcilable.

11. Appeal and error ⇨1071(6)—Failure to find that damages resulted to defendant's property from fire held not reversible error, in absence of evidence of amount of his pecuniary loss.

Failure to find, in action for labor and materials furnished, that any damages resulted to defendant's property from fire, which court found injured and destroyed work and materials of plaintiff, *held* not ground for reversal of judgment for plaintiff, in absence of evidence of amount of pecuniary loss sustained by defendant.

12. Work and labor ⇨9—Contractor, completing work, accepted by owner, could sue for value of materials and labor, instead of suing on contract.

Where contracts were completed and accepted by owner, and nothing remained except payment of money, contractor was authorized to sue on common counts for value of materials furnished and labor performed, instead of suing on contract.

13. Work and labor ⇨27(4)—Contract was competent evidence in action for value of materials furnished and labor performed thereunder.

In action on common counts for value of materials furnished and labor performed under contract, contract was competent evidence as admission of standard of value or proof of any other fact necessary to recovery.

14. Work and labor ⇨23—One, sued for value of labor and materials, waived defense by not pleading noncompliance with contract provision for arbitration.

By failing to plead plaintiff's noncompliance with provision of contract for submission to arbitration of value of extra materials furnished, defendant waived such defense to action for value of labor and materials furnished.

15. Work and labor ⇨23—Failure to plead contract provisions for authorization of extra work by architect, and settlement of controversies by him and engineer, was waiver of such defenses to action for value of labor and materials furnished.

Defendant's failure to plead, as bar to action for value of labor and materials furnished.

provision of contract that all extra work be first authorized by architect, and clause authorizing engineer and architect to settle all controversies over meaning of plans and specifications, was waiver of such defenses.

16. Pleading ⚡106(1)—**Defense based on plaintiff's incapacity to sue is plea in abatement.**

A defense based on plaintiff's incapacity to sue is regarded as a plea in abatement.

17. Parties ⚡76(3)—**Plaintiff's incapacity to sue, not apparent on face of complaint, is deemed waived, unless raised by answer.**

Where plaintiff's incapacity to sue does not appear on face of complaint, it must be raised by answer, or is deemed waived.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Albert J. Wilson and another, co-partners doing business under the firm name and style of the William F. Wilson Company, against A. Mattel. Judgment for plaintiffs, and defendant appeals. Modified, and affirmed, as modified.

Lewis H. Smith and Claude L. Rowe, both of Fresno, for appellant.

Gallaher, Simpson & Hays, of Fresno, for respondents.

THOMPSON, Presiding Justice pro tem. This is an appeal from a judgment against the defendant A. Mattel for the sum of \$3,026.66 for labor and materials furnished. The complaint was drawn in three counts. The first cause of action was based upon an alleged open book account; the other two causes were stated upon the common counts for the reasonable value of materials furnished and labor performed incident to certain contracts, which were not set up in the pleadings.

The appellant seeks a reversal (1) because the contracts required all extra work to be previously authorized in writing by the architect; (2) the contracts provided that all disputes concerning extra work must be submitted to arbitration as a condition precedent; (3) that the contracts authorized the architect and the engineer to settle all disputes regarding the meaning of the plans and specifications; (4) that the findings are uncertain and contradictory; and (5) that the court failed to find no material issues.

Plaintiff's assignor entered into two separate contracts with the defendant A. Mattel, one for the construction of a building on defendant's lots in the city of Fresno, and the other for the installing of a heating plant in that same building. Some time after the completion of the contracts and acceptance of the work by the defendant, the plaintiff brought this action, not upon the contracts, but for the reasonable value of materials furnished and labor performed, without enumer-

ating specific items. Without demurring, the defendant answered to the merits of the cause categorically denying his liability, but affirmatively alleging the payment of \$912.91 to plaintiff on account, and claimed credit for the payment of two additional items amounting to the sum of \$129.86. He also set up by way of counterclaim damages in the sum of \$271.84 incurred as the result of a fire, which occurred from the alleged negligence of plaintiff in the course of the construction of the building. The contracts incident to which said extra materials and labor were supplied by plaintiff were set up in neither the complaint nor the answer. The cause was tried upon its merits. The contracts were received in evidence. The testimony was conflicting, but there was substantial evidence to the effect that plaintiff furnished the items of extra materials and labor not included within the contracts, and of the reasonable value thereof. There was no substantial evidence of the existence of a book account. At the trial plaintiff offered proof concerning 18 separate items, aggregating the sum, of \$4,158.49, a list of which items plaintiff's attorney read to the court as follows:

1. Installing extension loops.....	\$ 347 00
2. Work and material, fire loss.....	78 21
3. Changing radiator, first floor.....	365 00
4. Extending chilled water pipe.....	492 00
5. Balance due on original contract.....	153 36
6. Making steam changes.....	306 15
7. Changing pipes	49 12
8. Changing gas meter.....	102 98
9. Changing pipes	32 20
10. Changing sprinkler main	39 94
11. Safety valve and pipe.....	1,815 70
12. Steel plate under meter.....	4 50
13. Running water to turbine.....	54 28
14. Running water to turbine.....	24 92
15. Changing radiator, sixth floor.....	170 11
16. Changing radiator, sixth floor.....	25 34
17. Turnbuckle hanger	255 30
18. Vent pipe from blow-off tank.....	342 38

Total \$4,158 49

[1] After reading this list, plaintiff's attorney, Mr. Gallaher, said:

"Of these items the defendant admits the following: 3, 4, 5, 15 and 17."

This statement was not contradicted by defendant's attorney. His silence, together with the subsequent colloquy between counsel on this subject, impels the court to conclude that defendant assented to this statement, and warrants a finding that the validity of these five items was conceded by defendant. Subsequently, in the examination of a witness on the subject of these items, Mr. Gallaher said: "17 was admitted?" To which Mr. Smith, defendant's attorney, replied: "Yes; and 18." From the record, it must therefore be assumed that defendant stipulated to the validity of these 6 items.

It was also conceded that defendant paid plaintiff on account of these items the sum of \$912.91. Defendant also claimed credit for

the balance of said stipulated items in damages alleged to have been sustained on account of the fire, and for the payment of two additional bills in behalf of plaintiff. The trial court found that the contracts had been fully performed, and that "it is true that * * * the defendant did become indebted to the plaintiff in the sum of \$4,069.43 upon an account for labor and materials furnished to the defendant * * * by the plaintiff; * * *" that the defendant had paid plaintiff, and was entitled to credit on that account, for the sum of \$912.91, together with two additional items amounting to \$129.86, making a total credit due defendant of the sum of \$1,042.77.

The court then specifically found that the plaintiff did supply materials and furnish labor at the special instance and request of defendant, of the reasonable value specifically enumerated, and that "all of said charges and items herein specified * * * were extra, and not included within the work specified in said contract. * * *" The items so allowed plaintiff in the findings were:

Changes in first floor radiators.....	\$ 365 00
Extending water pipes.....	492 00
Changes in sixth floor radiators.....	170 11
Installing turnbuckle hangers.....	255 30
Replacing gas meters.....	102 98
Installing expansion loops in main pipes....	347 00
Changing steam pipe apparatus.....	306 15
Changing pipe at ceiling.....	32 20
Placing steel plate under meter.....	4 50
Installing water pipes for turbine.....	79 20
Changing radiators	25 34

Total items specifically allowed plaintiff	\$2,179 78
Additional stipulated item No. 5.....	153 36
Additional stipulated item No. 18.....	342 38

Total credit to which plaintiff is entitled	\$2,675 52
Less total credit allowed defendant.....	1,042 77

Net balance to which plaintiff is entitled \$1,632 75

[2] The court failed to adopt a specific finding with reference to the foregoing item No. 5 for \$153.36. But, when an issue is admitted by stipulation, findings as to such fact become unnecessary. *Alderson v. Cutting*, 163 Cal. 503, 126 P. 157, Ann. Cas. 1914A, 1; *Fernandez v. Watt*, 26 Cal. App. 86, 146 P. 47. In the last case cited the court said:

"It needs no citation of authority to support the proposition that findings upon admitted facts are not required, and that a judgment will not be disturbed because of a real or apparent conflict in such findings."

[3] With respect to items numbered 11 and 18, the first being the sum of \$1,315.70 for "safety valve pipes," and the latter for the sum of \$342.38, being for "vent pipes from blow-off tank," the court found:

"That said safety valve escape pipe and said vent pipe from the blow-off tank were to be installed under said contract *by the plaintiff* at his own cost and expense."

It is contended by respondent that the court inadvertently found that these two items

"were to be installed * * * *by the plaintiff* at his own cost," whereas it intended to find that they were to be installed by the defendant at his own cost. This contention is strongly supported by the provisions of the contract which was received in evidence. But the paramount issue at the trial was the question as to whether plaintiff or defendant was required to bear the cost of installing these items. There is a conflict of evidence with respect to the first item for \$1,315.70, which was not stipulated to. Under this state of the record, it cannot be said on appeal, that the term "plaintiff" was inadvertently used, instead of that of defendant. This court must hold that the trial court intended to find just as it did find that this item "was to be installed *by the plaintiff* at his own cost."

[4] But with respect to the last item No. 18, for the sum of \$342.38, the finding is flatly in conflict with the admission stipulated to at the trial. So far as that particular item is concerned, the finding should therefore be disregarded, and the stipulation should control. By the stipulation that item No. 18 was taken out of the issues of the trial; no finding on that subject was necessary, and the erroneous finding should therefore be disregarded. This will have the effect of crediting this item to plaintiff as a stipulated fact.

"A court in its findings should not deviate from the facts * * * which are contained in a stipulation of the parties made in the course of a trial as a substitute for evidence. Findings contrary to such admissions are outside the issues." 24 Cal. Jur. 982, § 211; *Carpentier v. Small*, 35 Cal. 346; *Henning v. Wuest*, 48 Cal. App. 147, 191 P. 713. Where the court finds adversely to stipulated, or admitted, facts, such findings should be disregarded. *Welch v. Alcott*, 185 Cal. 731, 754, 198 P. 626.

[5, 6] There was no specific finding with respect to other items for which plaintiff claimed credit, aggregating the sum of \$242.42. Since the court definitely specified each separate item allowed, together with the respective amounts, it must be assumed that the omission to allow certain items indicates that the court intended to disallow them. Since this failure to allow these additional items is favorable to the defendant, he may not complain of this omission.

It therefore appears from the findings, by mere mathematical calculation, that the total reasonable value of materials and labor supplied by the plaintiff, and either found by the court or stipulated to, amounts to the sum of \$2,675.52, instead of the sum of \$4,069.43, inaccurately stated by the court as the total sum, and that after deducting the sum of \$1,042.77, found to be a valid credit to which defendant is entitled, there remains due to the plaintiff the net sum of \$1,632.75. This solution appears from a construction of the findings upon their face.

[7, 8] A mere inaccurate conclusion or erroneous computation of figures as to the aggregate amount of a judgment, which satisfactorily appears from the face of the findings, is not reversible error, and should be reconciled, giving way to the true sum secured by a correct computation of the value of the items specifically enumerated in the findings. "Where the court, in addition to general findings, makes specific findings, * * * the latter control in the case of inconsistency." 24 Cal. Jur. 974, § 206.

[9, 10] Findings should be liberally construed in support of a judgment, and should be reconciled, if reasonably possible, and, unless a conflict is clear and irreconcilable, a judgment will not be reversed. *Ames v. City of San Diego*, 101 Cal. 390, 35 P. 1005; *Price v. Occidental Life Ins. Co.*, 169 Cal. 800, 147 P. 1175; *Goodwin v. Snyder*, 70 Cal. App. 98, 232 P. 763; *Breyfogle v. Tighe*, 58 Cal. App. 301, 208 P. 1008.

[11] The appellant urges the necessity of a reversal for failure of the court to find upon his claim for damages in the sum of \$271.84 on account of the fire alleged to have occurred through the negligence of plaintiff. It appears that the court did find "that a fire * * * injured and destroyed work and materials of the plaintiff of the value of \$78.21, * * * which were replaced by plaintiff * * * at a cost of \$78.21," but failed to find that any damages resulted to defendant's property. This failure, however, is not reversible error, since, while there is ample evidence to indicate that damages did result to defendant's property from a fire which occurred through the fault of plaintiff, yet our attention has been called to no evidence, and we are unable to find any in the record indicating the amount of pecuniary loss, if any, which was sustained by defendant thereby.

[12, 13] The contracts having been completed and accepted by the owner, and nothing remaining except the payment of the money, the contractor was authorized to maintain his action based upon the doctrine of the common counts for the value of the materials furnished and labor performed, instead of suing upon the contract. *Castagnino v. Balletta*, 82 Cal. 250, 258, 23 P. 127; *Blodgett Co. v. Bebe Co.*, 190 Cal. 665, 214 P. 38, 26 A. L. R. 1070. Under such a form of pleading, the contract was competent evidence on the trial "as an admission of the standard of value, or as proof of any other fact necessary to the recovery." *Reynolds v. Jourdan*, 6 Cal. 108; *Castagnino v. Balletta*, supra.

[14] The defendant contends that plaintiff is barred from recovery in this action because he failed to comply with the provisions of the contract which required him as a condition precedent to submit the dispute to arbitration. The contract provided:

"Should any dispute arise respecting the value of extra work, or works omitted, the same shall

be valued by two men—one selected by the owner, and the other by the contractor, and, in case they cannot agree, these two shall have power to name an umpire whose decision if agreed to by one of the two shall be final."

The general rule with respect to arbitration is announced in 5 C. J. 42, as follows:

"An agreement to submit to arbitration, not consummated by an award, is no bar to a suit at law or in equity concerning the subject-matter submitted."

But, as an exception to the foregoing general rule, that same authority at page 43, § 69, declares that:

"Where a contract contains a stipulation, not that all questions arising thereunder * * * shall be submitted to arbitration, but that the decision of arbitrators on a certain question or questions, such as the quantity, quality, or price of materials or workmanship, the value of work, the amount of loss or damage, or the like, shall be a condition precedent to the right of action on the contract itself, no fixed sum being stated in the contract, such stipulation will be enforced. * * *"

In support of this claim that the plaintiff is barred from maintaining this action, the defendant relies upon the case of *Davisson v. East Whittier Land, etc., Co.*, 153 Cal. 81, 96 P. 88, where the court held that noncompliance with an agreement to arbitrate, which agreement was couched in substantially the same language as the one in the instant case, was a complete bar to recovery for the value of extra work performed. But in that case the defendant set up the arbitration clause of the contract in an amended answer, as a special plea in abatement. In the instant case the contract was mentioned in neither the complaint nor the answer. By his failure to plead plaintiff's noncompliance with the provision of a contract agreeing to submit to arbitration the value of extra materials furnished, the defendant waived that defense. *Chamberlain v. Hibbard*, 26 Or. 428, 38 P. 437; *Borg v. Utah Const. Co.*, 117 Or. 22, 242 P. 600; 2 *Bancroft's Code Pl.* 1268, § 869.

[15] Likewise the failure of the defendant to plead as a bar to this action the provision of the contract requiring all extra work to be first authorized by the architect, as well as the clause authorizing the engineer and architect to settle all controversy over the meaning of the plans and specifications, was a waiver of the defenses.

[16, 17] A defense based on the incapacity of a plaintiff to sue is regarded as a plea in abatement. 1 Cal. Jur. 32, § 18. Where the incapacity to sue does not appear on the face of the complaint, it must be raised by answer or it is deemed to have been waived. *Reed & Co. v. Marshall*, 12 Cal. App. 697, 703, 108 P. 719; *Bernheim Distilling Co. v. Elmore*, 12 Cal. App. 85, 106 P. 720; *California Sav. & L. Soc. v. Harris*, 111 Cal. 133, 42 P. 525; 21

Cal. Jur. 139. *Chamberlain v. Hibbard*, supra, was an action to foreclose a mechanic's lien. The defendant sought to defeat the action for failure on the part of the plaintiff to submit the dispute to arbitration pursuant to the terms of their contract. Similar to the situation in the instant case, the defendant, in that case failed to set up the arbitration clause of the contract as a plea in abatement. The court said:

"The plaintiff did not set out a copy of said contract in his complaint, but brought his suit for the reasonable value of the extra work; and hence his complaint states a cause of suit. * * * The defendant set out a copy of said contract in his answer, but he did not plead its provisions to settle by arbitration any dispute arising thereunder in abatement of the suit. The defendant's right to have the alterations valued by arbitrators was one which he could waive, and by pleading to the merits he waived the matter in abatement."

We are therefore of the opinion that the findings are not in irreconcilable conflict, that they support a judgment for plaintiff for the sum of \$1,632.75, that the findings are sufficiently supported by the evidence, and that defendant waived his defense of lack of authorization for the extras, as well as the requirement to arbitrate, by his failure to plead those provisions of the contract.

For the foregoing reasons, the judgment is modified to conform to the findings, and the trial court is directed to enter judgment against the defendant for the sum of \$1,632.75, and, as so modified, the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

84 Cal. App. 663

PEOPLE v. McKIM. (Cr. 1360.)

District Court of Appeal, First District, Division 2, California. July 29, 1927.

Indictment and information  154—Objection that information charging contributing to minor's delinquency is not specific held waived unless made under statute (Juvenile Court Act, § 21, and § 1, subds. 1-13; Pen. Code, §§ 950-952, and § 1004, subd. 2).

Objection that information, charging in the language of the Juvenile Court Act (Deering's Gen. Laws 1923, Act 3966), § 21, that defendant caused or tended to cause minor to become a person within section 1, subds. 1-13, does not conform to Pen. Code, §§ 950-952, in that it fails to specify the particular element of delinquency, must be taken under section 1004, subd. 2, or will on appeal be deemed to have been waived.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Alfred McKim (true name Albert McKim) was convicted of contributing to the delinquency of a minor child, and he appeals. Affirmed.

Myron Harris and L. A. Sullivan, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was tried before a jury upon an information charging him with contributing to the delinquency of a minor child. From the judgment following the verdict of conviction and from the order denying his motion for a new trial, he has appealed upon a typewritten record.

The information charged in the language of section 21 of the Juvenile Court Act that the defendant sold a quantity of intoxicating liquor to a minor of the age of 16 years, and that he thereby caused and tended to cause the said minor to come within the provisions of subdivisions 1 to 13, inclusive, of section 1 of the Juvenile Court Act, and thereby caused said minor to become a person coming within the provisions of the same subdivisions of section 1 of that act. The evidence disclosed that on the day named in the information the defendant, who was conducting a barber shop in the city of Oakland, sold a quantity of whisky to the boy named in the information, who was at the time of the age of 16 years; that this minor, in company with a boy friend, drank the liquor purchased from the defendant and became so intoxicated that he was unable to return to his home, but was taken into custody by the police officers after having slept the greater part of the night in a vacant lot. The testimony also showed that the minor had purchased intoxicating liquor from the defendant on several other occasions prior to the date charged in the information.

On this appeal the defendant has for the first time raised the question that the information failed to state a public offense. The point is that because the information charged a violation of section 21 of the Juvenile Court Act (Deering's General Laws of 1923, Act 3966) in the terms of that section and did not specify the particular element of delinquency covered by subdivisions 1 to 13 of section 1 of that act, it failed to state a public offense. The theory of the appellant is that the information is deficient because it did not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code. The complete and effective answer is that the information stated the acts alleged to have been done by the defendant and which, under the statute, constitute the offense charged, and that any objection going to the failure of the information to specify the particulars in which the acts charged con-

tributed to the delinquency of the minor was an objection which should have been taken by special demurrer to the information, under section 1004, subd. 2, of the Penal Code. Where a party accused fails to demur upon any of the grounds mentioned in section 1004, the objection is to be deemed waived and cannot be presented for the first time on appeal. *People v. Welton*, 190 Cal. 236, 240, 211 P. 802.

Judgment and order affirmed.

I concur: STURTEVANT, J.

Presiding Justice Joseph S. KOFORD, being disqualified, does not participate herein.

84 Cal. App. 689

FITZGERALD v. GLOBE INDEMNITY CO. OF NEW YORK. (Civ. 3278.)★

District Court of Appeal, Third District, California. Aug. 2, 1927.

Hearing Denied by Supreme Court Sept. 29, 1927.

1. Insurance ⚡524—That professional man makes contracts, keeps bank account, and pays taxes does not conclusively show transaction of business duties preventing recovery under health policy for total disability.

Mere fact that professional man may make contracts in relation to his property, keep bank account and pay taxes, insurance, and other debts, does not conclusively show that he is engaged in business outside his profession, preventing recovery under policy of accident and health insurance permitting compensation for total disability only if insured is unable to transact all business duties.

2. Insurance ⚡524—Transaction of business duties does not prevent recovery for total disability under health policy; the test being not what insured did, but what with prudence and care he was reasonably able to do.

Transaction by insured of business duties does not prevent recovery for total disability under policy of accident and health insurance allowing compensation for total disability only in case of inability to transact all business duties, where insured is in fact not reasonably able to transact such business in exercise of common care and prudence; acts themselves being merely evidence of ability and not conclusive.

3. Appeal and error ⚡1011(1)—Findings based on substantially conflicting testimony are conclusive.

Findings of trial court, based on substantially conflicting testimony, are conclusive on appeal.

4. Insurance ⚡524—Total disability under health policy providing also for partial disability does not require absolute helplessness, but merely inability to perform substantial business duties in customary way.

Provisions of health policies for indemnity in event insured is totally disabled do not re-

quire that insured be rendered helpless, but require merely such disability as renders him unable to perform substantial and material acts of his business or occupation in usual and customary way, though policies also provide for partial disability.

5. Insurance ⚡524—Insured's performance and physical ability to perform business duties is not conclusive evidence that disability is not total, if reasonable prudence require that he desist.

Fact that insured may do some work or transact some business duties during time for which he claims indemnity for total disability under health policy, even if he may be physically able to do so, is not conclusive evidence that his disability is not total, if reasonable care and prudence require that he desist.

6. Insurance ⚡665(4)—Evidence held to support finding of total inability of insured to transact business either as physician or walnut grower.

In action by physician, who was also engaged in business of walnut cultivator and grower, to recover indemnity payments for total disability under policy of health insurance, evidence held to sustain findings of trial court that plaintiff, afflicted with Bright's disease, was totally and continuously unable to transact business duties of either occupation at time indemnity was claimed.

7. Appeal and error ⚡1071(5)—Finding that insured was not engaged in growing walnuts prior to issuance of health insurance held immaterial in action for total disability.

In action by person engaged as physician and walnut grower for compensation for total disability under health policy, finding that insured was not engaged in business of growing walnuts for sale prior to time of issuance of policy held immaterial.

8. Appeal and error ⚡1056(1)—Excluding evidence as to how often insured visited ranches held not prejudicial in action for total disability under health policy.

In action to recover compensation for total disability under health policy, by insured engaged as physician and walnut grower, sustaining objection to questions asked on cross-examination as to how many times insured went to his ranches and whether he talked with men in charge held not prejudicial.

9. Appeal and error ⚡1056(1)—Excluding testimony as to whether physician suing for total disability under health policy still received checks from former partner held not prejudicial.

In action by physician to recover compensation for total disability under health policy, overruling objection to question asked plaintiff as to whether he still received checks from former partner on dissolution of partnership held not prejudicial.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by William Wesley Fitzgerald against the Globe Indemnity Company of

New York. Judgment for plaintiff, and defendant appeals. Affirmed.

Hartley F. Peart, of San Francisco, and George F. McNoble, of Stockton (Charles V. Barfield, of San Francisco, of counsel), for appellant.

Levinisky & Jones, of Stockton, for respondent.

FINCH, P. J. This is an action on an accident and health insurance policy issued by the defendant to the plaintiff October 11, 1916. Plaintiff was given judgment for the amount of unpaid indemnity at the weekly rate specified in the policy for total disability caused by disease. The defendant has appealed from the judgment on the judgment roll and a bill of exceptions.

The complaint is in the usual form. It alleges that plaintiff has been totally and continuously unable to transact any business duties since the 9th day of February, 1918, the disability being caused by chronic nephritis, or Bright's disease; that the defendant has paid the indemnity provided to be paid by the policy for total disability up to January 19, 1922, but has refused to pay any indemnity thereafter. A copy of the policy is attached to and made a part of the complaint. It provides for payment of indemnity for total disability caused by disease at the rate of \$50 a week, for a period not to exceed 52 weeks, "if such disease causes the insured to be totally and continuously unable to transact all duties pertaining to his occupation"; for intermediate disability at \$25 a week if "unable to transact a major portion of all the duties pertaining to his occupation"; and for partial disability at \$12.50 a week if "unable to transact a material portion of any or all duties pertaining to his occupation." There is indorsed upon the policy an "amendment rider," which contains the following:

"In consideration of ten dollars additional premium, the undermentioned policy is hereby amended as follows: * * * If such disease causes the insured to be totally and continuously unable to transact all business duties, the company will pay for the entire period thereof, indemnity at the rate per week specified * * * for total disability."

Plaintiff's occupation is stated in the schedule of warranties as follows:

"My occupation and business duties, fully described, are as follows: Physician and surgeon, general practice, which I agree shall be classed as No. 1."

The policy contains a number of provisions, among which is the following:

"If any such injury is sustained by the insured while engaged in an occupation classed as more hazardous than that stated herein, recreation or ordinary duties about the residence excepted, liability hereunder shall be limited to such sum as the premium paid would have purchased for the increased hazard ac-

cording to the company's table of rates or classification of risks last filed as above provided."

The issues presented on this appeal are clearly stated in appellant's opening brief as follows:

"It is alleged in the answer that respondent was engaged in a dual occupation at the time of the execution of the policy, to wit, his profession of physician and surgeon, and that of a walnut cultivator and grower, and that he has continued in such dual occupation ever since. * * * So far as actual occupations are concerned the policy is ambulatory and in fact contemplates changes therein by reason of the provisions limiting the company's liability in case the insured became engaged and was injured in any occupation more hazardous than that stated in the application. * * * But irrespective of the ambulatory provisions of the policy, the amendment rider eliminates the restriction upon business duties as pertaining to the occupation stated, and expressly prescribed 'all business duties.' There can be no doubt that maintaining walnut orchards and the sale of the produce therefrom is a business and would constitute an additional occupation of the insured."

The court found that subsequent to the 10th day of October, 1916, and up to the 9th day of February, 1918, "plaintiff was engaged in the business of growing and cultivating walnuts for sale in the market." At the oral argument counsel for appellant said:

"The company requested the doctor to submit himself to an examination of a board of physicians composed of Dr. Catton of San Francisco, Dr. Reid of San Francisco, Dr. Eugene Kilgore, Dr. Addis and Dr. Bine. Three of these doctors, as the record shows, Dr. Kilgore, Dr. Catton and Dr. Reid, found, and two so testified, that in their opinion, at least in 1922 when they made this examination, Dr. Fitzgerald was able to transact a portion of his duties as physician and surgeon and practice, as they described it, where free from the heavy strain of operative cases, and free from the infection of the hit and miss run of patients. * * * The two other doctors felt it would be dangerous to engage in any practice. His partner, Dr. Dozier, Dr. Craviotto and Dr. Williamson all felt it was not proper for him to engage in any form of practice. Our position is that, there being a conflict in the record on the testimony of these physicians, we will not present * * * any argument upon that point at all. * * * But that has no relation to the demonstrated ability to perform these other duties."

Appellant's argument is based upon the proposition, asserted in the briefs and at the oral argument, that the plaintiff was not "totally and continuously unable to transact all business duties" pertaining to his farming operations. But the evidence upon this question, also, is conflicting.

At the commencement of his illness the plaintiff was of the age of about 50 years. He had an established and lucrative practice

as a physician and surgeon, about five times as much as the indemnity specified in the policy for total disability. He owned two farms, on each of which there were suitable farm buildings. One of these farms contained 100 acres and the other 60 acres. He had planted both farms to walnuts, which were coming into bearing in commercial quantities about the time the policy was issued. Both farms were operated by men employed by the plaintiff and under his general supervision. He had become an expert in the care and cultivation of walnuts. In the early part of 1918 the plaintiff, acting upon the advice of his physicians, entirely abandoned his practice of medicine and surgery. He testified, and the court found, that at the same time he gave up the management and supervision of his walnut groves and farming operations.

Plaintiff's illness commenced with an attack of influenza in November, 1917. This was followed by an acute nephritis, or Bright's disease, which later developed into chronic nephritis. Plaintiff testified:

That he placed a man in "absolute and full charge" of his walnut groves and farming operations in 1918; that he "had a definite understanding" with this man that "he was to take complete charge and I was not to have any responsibility whatever; that I would give him a monthly allowance; * * * and that he would render me a statement at the end of the month, * * * but I didn't want to be bothered about any details. * * * After the commencement of 1919 * * * I left the management of the walnut groves * * * to their entire management. * * * At times I was sick abed. There would be times that I didn't get out of bed. There would be other times that there would be days and weeks that I would not get out of the house scarcely. There would be other times that I would be feeling pretty fair for three or four weeks. * * * I am emotional. I can't control myself, and I have been that way all through my sickness. Little things worry me. Representatives of this company would come to me and try to explain why they didn't pay me. These visits upset me. I would spend six nights afterwards in sleepless nights. * * * After such occurrences I would be prostrated a week and probably confined to the bed or to the couch for several days. * * * I am not doing any business in relation to my walnut groves or any other business since I have been ill; the only business I have done is to notify my manager with the definite instructions that I was to have no responsibility or no cares about it. * * * Up to the time I rented the ranches I got a monthly statement from my man in charge as to their expenses and the like in connection with their operation. I found that annoyed me when they would bring their monthly statement in until I rented the Lodi place with an option of selling at a great sacrifice to relieve me even of the annoyance of having the manager come in with the monthly statement, and also sold half interest in the Cherokee Lane place with a written agreement that the man was to care for the place for a number of years. * * * Generally when

these statements were in * * * as a rule I would be ill for three or four days. * * * For that reason I rented or sold the place. * * * I found that it was impossible for me to care for my health and have a monthly statement rendered to me. * * * Sometimes when I went to the place after I became ill I would see my manager there. * * * I generally asked them how things were going. I might ask them if it looked like it was going to be a good crop; * * * but I gave them no orders."

Plaintiff's wife testified that he "has performed or done no * * * business of any kind, character, or description since January 1922"; that since that time "he spent most of the time on his couch or bed. * * * After January, 1922, we went for short rides in the country sometimes. We went to both of the ranches. One ranch is 5 miles out, * * * and the other is 12 miles. * * * Sometimes Dr. Fitzgerald got out of the machine at the ranches and sometimes he sat in the machine. When he got out of the machine he walked around a little bit, I should judge a half a block. He never walked further than a half a block as I recall. * * * When I went with him he drove the car."

Dr. Addis, professor of medicine at Stanford University, who since 1911 has been "mainly engaged in the investigation of Bright's disease," and who, at the request of the defendant, examined the plaintiff in October, 1922, testified:

"Dr. Fitzgerald was suffering from * * * chronic Bright's disease. * * * It is progressive. * * * A relief from mental and physical strain * * * is very important. * * * Dr. Fitzgerald was capable of taking a short walk, * * * of reading light literature, of going to a theater; but much more than that I thought he should not do. * * * I should consider the engaging in any business definitely bad for him. * * * I should be obliged to suppose that even under the best conditions Dr. Fitzgerald will gradually grow worse. * * * He had the mental attitude of strain and a hyperexcitability. * * * I thought any occupation which was not of a more or less automatic nature, and any occupation which would involve any cerebration on his part, would be prejudicial to him at that time. * * * I would not regard work which requires small mental effort for Dr. Fitzgerald as detrimental if it were not accompanied, as it usually is, of course, by responsibilities."

Dr. Dozier, plaintiff's former partner and his attending physician during the entire period of his illness, testified that the plaintiff "would not have lived a period of two years had he attempted to practice medicine and surgery," and that, at no time during his illness has his condition been such as to warrant him in taking "active charge or supervision even of a walnut grove or any other sort of farm." Dr. Williamson testified that the plaintiff is not in condition to take the "responsibility of supervising or managing a

ranch." Dr. Hill, clinical professor of medicine at Stanford University, and who examined the plaintiff in February, 1918, and at subsequent times, testified:

"My examination extended over * * * three or four days. * * * Subsequently * * * I examined Dr. Fitzgerald many times, several times at least. * * * The last of these examinations * * * was on April 24, 1923. * * * The disease had progressed from December, 1919. * * * He then maintained a systolic pressure of 158, a diastolic of 105, and there was a trace of albumen, of many glandular casts, and a few hyaline casts. On April 24, 1923, * * * he had a systolic blood pressure of 185 and diastolic blood pressure of 120. He had a heavy cloud of albumen, many large glandular casts and a few hyaline casts. This shows a definite progression from December, 1919, to April, 1923. * * * Physical exertion and nerve strain are most important to be avoided. * * * The condition is not such that he would not be physically able to carry them (professional duties) out. * * * It would have a marked tendency to increase the trouble which he had. * * * Increasing the trouble necessarily would have an effect of shortening his life. * * * I advised him the first time I saw him in February, 1918, to give up his work entirely, not to engage in any sort of work. * * * His condition at no time between 1918 and 1923 has improved to such an extent that my opinion in that regard has been altered. * * * He said he had a walnut ranch, as I remember, and he said he wanted to take care of this walnut ranch, and I said he couldn't do it."

[1-4] The plaintiff frequently drove his automobile on short trips and a few times on longer ones. He drove it down town nearly every day and made purchases of household supplies. He executed the contracts referred to in his testimony quoted herein and a few other contracts. For a time he received and examined monthly reports of the farming expenses. He maintained deposits in two banks and drew checks thereon from time to time. He paid taxes, insurance, and interest on money which he had borrowed. He performed other similar acts. Appellant contends that these acts constituted the transaction of "business duties" within the meaning of that term as used in the policy of insurance. While those acts are business transactions, they do not constitute engaging in business in the sense in which that term is ordinarily used. The mere fact that a professional man may make contracts in relation to his property, keep a bank account and pay his taxes, insurance and other debts does not necessarily show that he is engaging in a business outside his profession. The doctor, the lawyer, the teacher, the preacher, and the priest do all these things without causing any one to think that their occupations are dual. But to concede that the plaintiff's acts amounted to the transaction of business duties within the meaning of the policy would not require a reversal of the judgment. The ultimate

fact to be determined is not what the plaintiff actually did in the way of business duties, but what, in the exercise of common care and prudence, he was reasonably able to do. Proof of what he did is merely evidence tending to show his ability to do, just as the opinion of the physicians who testified are evidence tending to show that his disability was or was not total. This expert opinion evidence alone, in view of the nature of the plaintiff's affliction, is sufficient to create a substantial conflict, and the finding of the trial court thereon is conclusive. "The weight of authority supports the view that provisions in accident policies for indemnity in the event the insured is totally or wholly disabled do not require that the accident shall render the insured absolutely helpless, but such provisions are construed as meaning such a disability as renders him unable to perform the substantial and material acts of his business or occupation in the usual and customary way." 41 A. L. R. 1376; 37 A. L. R. 151; 24 A. L. R. 203; L. R. A. 1917B, 108; 23 L. R. A. (N. S.) 352; 38 L. R. A. 529; Joyce on Insurance, § 3031; May on Insurance (4th Ed.) § 522; Bacon on Life and Accident Insurance (4th Ed.) § 541. An examination of the cases cited herein shows that the same rule applies in cases of disability caused by disease. Appellant concedes "that perhaps the weight of outside authority is that in the ordinary case where provision is made for total disability alone, the courts will give practical construction to the language employed in order to make the policy operative and to prevent a forfeiture," but that the same rule does not apply where the policy provides for "various degrees of disability." No logical reason appears, however, why the same rule should not be applied where the policy provides for both total and partial disability in order to make the total disability clause "operative and to prevent a forfeiture" of the indemnity provided by that clause. In either case a literal interpretation of the total disability clause would defeat the very purpose of insurance against total disability, because it rarely happens that an insured is so completely disabled that he can transact no business duty whatever. The rule quoted has been applied in many cases where the policy in suit provided for both total and partial disability. United States Casualty Co. v. Perryman, 203 Ala. 212, 82 So. 462; Fidelity & Casualty Co. v. Logan, 191 Ky. 92, 229 S. W. 104; Bachman v. Travelers' Ins. Co., 78 N. H. 100, 97 A. 223; Fidelity & Casualty Co. v. Joiner (Tex. Civ. App.) 178 S. W. 806; Hefner v. Fidelity & Casualty Co. (Tex. Civ. App.) 160 S. W. 330; Commonwealth Bonding & Casualty Ins. Co. v. Bryant (Tex. Civ. App.) 185 S. W. 979; North American Accident Ins. Co. v. Miller (Tex. Civ. App.) 193 S. W. 750; Clarke v. Travelers' Ins. Co., 94 Vt. 383, 111 A. 449; Jacobs v. Loyal Protective Ins. Co., 97 Vt. 516, 124 A. 848.

[5] In most of the other cases cited herein it does not appear whether or not the policies therein considered provided for both total and partial disability. The fact that the insured may do some work or transact some business duties during the time for which he claims indemnity for total disability or even the fact that he may be physically able to do so is not conclusive evidence that his disability is not total, if reasonable care and prudence require that he desist. *United States Casualty Co. v. Perryman*, supra; *Great Eastern Casualty Co. v. Robins*, 111 Ark. 607, 164 S. W. 750; *American Liability Co. v. Bowman*, 65 Ind. App. 109, 114 N. E. 992; *Fidelity & Casualty Co. v. Logan*, supra; *Starling v. Supreme Council Royal Templars of Temperance*, 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709; *Lobdill v. Laboring Men's Mutual Aid Ass'n*, 69 Minn. 14, 71 N. E. 696, 38 L. R. A. 537, 65 Am. St. Rep. 542; *Rathbun v. Globe Indemnity Co.*, 107 Neb. 18, 184 N. W. 903, 24 A. L. R. 191; *Bachman v. Travelers' Ins. Co.*, supra; *Continental Casualty Co. v. Wynne*, 36 Okl. 325, 129 P. 16; *Brown v. Missouri State Life Ins. Co.*, 136 S. C. 90, 134 S. E. 224; *Hefner v. Fidelity & Casualty Co.*, supra; *Fidelity & Casualty Co. v. Joiner*, supra; *Commonwealth Bonding & Casualty Ins. Co. v. Bryant*, supra; *North American Accident Ins. Co. v. Miller*, supra; *Metropolitan Casualty Ins. Co. v. Edwards* (Tex. Civ. App.) 210 S. W. 856; *Clarke v. Travelers' Ins. Co.*, supra; *Jacobs v. Loyal Protective Ins. Co.*, supra; *Starnes v. United States (D. C.)* 13 F. (2d) 212; *Metropolitan Life Ins. Co. v. Bovello*, 56 App. D. C. 275, 12 F. (2d) 810.

[6] Both the evidence and the law support the conclusion of the trial court that the plaintiff was totally and continuously unable to transact the business duties of either occupation in which he was engaged at the commencement of his illness. His physicians advised him to desist therefrom, and they testified at the trial that he was totally and continuously unable to transact his business duties without increasing bodily waste and hastening the progress of the disease which caused the disability. It cannot be said as a matter of law that the occasional transactions in which he engaged constituted the performance of "the substantial and material acts of his business or occupation in the usual and customary way" or conclusive proof that, in the exercise of reasonable care and prudence he was able to transact such business duties.

[7] The court found that "prior to, and on said 10th day of October, 1916, said plaintiff was not engaged in the business of growing or cultivating walnuts for sale in the market." Appellant contends that this finding is not supported by the evidence. The finding is not material to any issue in the case. The court found that the plaintiff was engaged in such business prior to and at the commencement of his illness and, on the defendant's theory of the case, proof that he was there-

after able to transact the business duties pertaining to that business would have been a complete defense. The answer does not allege that the plaintiff misrepresented his occupation in his application for insurance and counsel for defendant stated at the trial that it did "not claim any fraud on the part of the doctor."

[8] On cross-examination of plaintiff's wife by counsel for defendant, she was asked the following questions:

"On an average how many times would you and the Doctor go out to the ranches a week after January, 1919, that is after this year was past? Would the Doctor on the occasions when he began to go back to the ranch with you after this year following his illness talk with the men in charge of these ranches?"

Counsel for the plaintiff objected "upon the ground that it is not within the scope of the direct examination; we have not gone into the period between 1918 and January, 1922." The court sustained the objection. As a basis for such cross-examination, appellant makes two quotations from the direct examination of the witness as follows:

"To my knowledge after February, 1918, the Doctor never engaged or did anything in the practice of his profession of medicine. People called him in a professional way after 1918. I generally received the phone call or messages. I did not let them talk with him or see him. I told them he was ill. The Doctor spent his time lying down, at home. I was with him all of the time.

"Q. And when he spent the time at home what did he do, did he read? A. Yes, sir." "As far as I can observe there has been changes in Dr. Fitzgerald's mental condition since February, 1918. He is nervous and irritable. He was not nervous or irritable before February, 1918."

Counsel for defendant did not direct the attention of the trial court to the testimony to which it is now contended the cross-examination related. While it may be said that the questions were within the range of liberal cross-examination, it does not appear that the defendant was substantially prejudiced by the ruling. Defendant was permitted to examine the plaintiff as a witness in relation to all his activities during the entire period of his illness. As stated, what plaintiff actually did during that period was important only as tending to show what he was capable of doing. His physical condition, the progress and effect of his disease, and the activities in which he was capable of engaging with prudence, all called for the testimony and opinions of medical experts who had examined him. Against such testimony and opinions it is not probable that the trial court would have acted upon its own conclusions based upon what the plaintiff actually did. In view of the foregoing considerations, it cannot be held that the ruling "complained of has resulted in a miscarriage of justice."

The court sustained objections to a series of questions asked the plaintiff regarding the development of his walnut groves, the income therefrom, his work in connection therewith, and his lectures on walnut growing and marketing, all relating to times prior to the issuance of the policy of insurance. While evidence of the character indicated by the questions would have tended to show that plaintiff's farming operations constituted a business, any error in the ruling was harmless, because the court found that the plaintiff was engaged in such business prior to and at the commencement of his illness and, as stated, it is immaterial whether he was engaged in such business prior to the issuance of the policy.

[9] The court sustained objections to the other questions by which the plaintiff was asked what he received from his former partner, Dr. Dozier, on the dissolution of the partnership, when he received the last check in that connection, whether he was still receiving checks from Dr. Dozier, and whether he deposited the checks so received in a bank. Answers to such questions might have had some slight tendency to show business capacity, but the matter is not of sufficient importance to require a reversal of the judgment.

While the weight of the evidence is for the determination of the trial court, an examination of the whole record strongly leads to the conclusion that the judgment is just.

The judgment is affirmed.

We concur: PLUMMER, J.; GLENN, Justice pro tem.

84 Cal. App. 685

PEOPLE v. REED. (Cr. 1403.)

District Court of Appeal, First District, Division 2, California. Aug. 2, 1927.

1. Criminal law ⚡409—Evidence of defendant's admissions relative to uttering fictitious check held admissible under proof that name of purported maker did not appear in records of drawee bank or in city directory (Pen. Code, § 476).

In prosecution for passing fictitious check under Pen. Code, § 476, testimony that name signed to check as maker was not disclosed by records of drawee bank or by city directory held sufficient proof of corpus delicti to render admissible defendant's admissions as to drawing of check which he passed by indorsement.

2. Forgery ⚡44(2)—Showing to common certainty that no person existed in vicinity under name of purported drawer held sufficient to prove fictitious character of check uttered (Pen. Code, § 476).

In prosecution for passing fictitious check under Pen. Code, § 476, state was not required to prove that no person in the world existed under name signed to check as drawer, but was only required to show to common certainty that

there was no such person in existence in vicinity of counties connected with particular acts charged.

3. Witnesses ⚡319—Defendant in criminal prosecution may be impeached on cross-examination (Code Civ. Proc. § 2051).

Under Code Civ. Proc. § 2051, defendant in criminal prosecution, like any other witness, is open to impeachment on cross-examination.

4. Witnesses ⚡337(6)—Where witness accused of crime testified in his own behalf, cross-examination as to previous convictions for felony held proper (Pen. Code, § 476; Code Civ. Proc. § 2051).

In prosecution under Pen. Code, § 476, for passing fictitious check, in which defendant testified in his own behalf, cross-examination of defendant as to whether he had been convicted of felony in another state, and of previous violation of section 476, held proper, under Code Civ. Proc. § 2051.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

J. F. Reed was convicted of violating Pen. Code, § 476, relating to the uttering of fictitious instruments, and he appeals. Affirmed.

Harold Jacoby and E. G. Palmer, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. Defendant was tried and convicted upon an information charging the violation of section 476, Penal Code. From the judgment following the verdict, and from the order denying his motion for a new trial, he has appealed upon a typewritten record.

The information charged that on the 8th day of September, 1925, in the county of Alameda, the defendant passed a certain fictitious check purporting to be for the payment of money of one E. H. Gould, and drawn upon the Farmers' & Mechanics' Bank of Sacramento. The check was dated as if made at Sacramento on September 8, 1925, and was made payable to the defendant. It purported to bear the signature of E. H. Gould, who the prosecution claimed to be a fictitious person. On September 8th the defendant indorsed the check on the back as the payee thereof, and delivered it to one Hatherill, who was at the time operating an automobile service station in the county of Alameda, and who at the time deducted from the amount of the check the charge for gas and oil which he served to the defendant, and then delivered to the defendant the balance called for by the check. Upon his arrest the defendant admitted that he had drawn the check; that he recognized Hatherill as the man he had seen at the service station; that he did not know any one by the name of E. H. Gould; that he had procured a number of blank checks of the Farmers' & Mechanics' Bank of Sacramento

while he was passing through Sacramento some time prior to the making of the check; and that he had made and passed other checks of the same character on that bank. When asked whether he had passed the check in evidence on Hatherill on that day, he replied that he had been drinking about that time and that he had passed that check and several others.

[1] On this appeal the appellant insists that the corpus delicti was not established, because it was not shown that there was no such corporation, copartnership, or individual as E. H. Gould in existence at the time the appellant passed the check. The state called as a witness a teller of the Farmers' & Mechanics' Bank of Sacramento, who testified that he had examined the records of the bank, and ascertained that they disclosed no account in the name of E. H. Gould, and that he had also examined the city directory of the city of Sacramento for the year 1925, and ascertained that it did not contain the name of E. H. Gould. An inspector of police in the city of Oakland testified that he had made a similar examination of the directory of the city of Oakland, and found that it did not contain the name of E. H. Gould. This prima facie showing having been made, the statements of the appellant made to the police officer at the time of his arrest became admissible and completed the proof that the name of E. H. Gould was fictitious. The question was fully considered by this court in *People v. Carmona*, 251 P. 315, where testimony of similar character was held to be sufficient.

[2] The appellant argues that the trial court erred in instructing the jury that the state was not required to prove beyond a reasonable doubt that there was no such person in the world as E. H. Gould, but that it was only necessary to show to a common certainty that there was no such person in existence in the vicinity of the county of Sacra-

mento and the county of Alameda connected with the particular acts charged in the information. This instruction was a correct statement of the law as pointed out in *People v. Gordon*, 13 Cal. App. 678, 685, 110 P. 469.

[3, 4] The appellant criticizes the action of the trial court in permitting the district attorney to ask the appellant upon cross-examination if he had ever been convicted of a felony, and particularly whether he had been convicted of a felony in the state of Washington, and whether he had been convicted of a violation of section 476, Penal Code, in the year 1923. The appellant had taken the stand as a witness in his own behalf, and on direct examination had testified simply that he did not remember having called at the gas station on September 8th because he was drinking about that time. This seems to have been the entire defense appellant sought to urge before the jury—that because of his excessive drinking he was unable to remember whether he had been at the gas station or whether he had passed the check in evidence. The purpose of this line of testimony was to show a want of intent on the part of the accused to pass the check. Like any other witness, he was open to impeachment on cross-examination. Section 2051, Code Civ. Proc.; *People v. Muchupoff* (Cal. App.) 249 P. 240. The cross-examination of the appellant by the district attorney was entirely within the proper bounds.

In this same connection the appellant now argues that the district attorney committed prejudicial error in asking the questions about prior convictions, but, as we have seen, the questions were proper in the cross-examination of the witness, and hence no error arose.

Judgment and order affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

3. **Fraudulent conveyances** ⚡58—Conveyances to debtor's wife may be fraudulent, though he kept some property.

That husband kept certain of his property in his own name would not necessarily prevent conveyances to his wife of realty, paid for from his funds, from being fraudulent as to his creditor.

4. **Fraudulent conveyances** ⚡169—Guilty knowledge of debtor's wife, paying nothing, need not be proved to show fraud in conveyances to her.

Guilty knowledge of wife, admittedly giving no consideration for transfers of realty to her, need not be proved to show that transaction was fraudulent as to husband's creditor.

5. **Fraudulent conveyances** ⚡57(5)—Conveyances to debtor's wife of realty, paid for by husband without other property, are fraudulent as matter of law, irrespective of grantor's intent (Civ. Code, § 3442).

Under Civ. Code, § 3442, conveyances to debtor's wife of property paid for by husband, who had no other property, are fraudulent as matter of law, irrespective of grantor's intent.

6. **Fraudulent conveyances** ⚡269(1)—Spouse's testimony as to husband's gifts of purchase money to wife held admissible on issue, tendered by answer setting up agreement relinquishing community interests to her, in action to set aside conveyances to her as fraudulent.

In action to set aside conveyances of realty to wife as defrauding husband's judgment creditor, wife's testimony as to getting purchase money from her husband and how long she had it, and husband's testimony as to his gifts of money to wife, held admissible on issue tendered by them in answer setting up written agreement, relinquishing all his community interests to her.

7. **Witnesses** ⚡219(2)—Spouse's recording, pleading, and putting in evidence agreement relinquishing husband's community interests in property conveyed to wife waived immunity from inquiry as to her receipt of purchase money from him.

Husband and wife filing for record, pleading in defense to action to set aside conveyances of realty to wife as defrauding husband's judgment creditor, and introducing in evidence written agreement relinquishing his community interest in property to wife, put bona fides thereof in issue, and thereby waived immunity from inquiry as to source of purchase money on ground that neither could testify against other without latter's consent.

8. **Witnesses** ⚡188(2)—Spouse's testimony as to wife's receipt of purchase money from husband held not inadmissible as privileged in action to set aside conveyances to her as fraudulent.

Wife's testimony that she got money from her husband to pay for property conveyed to her, and his testimony as to his gifts of money to her, held not inadmissible, as concerning privileged communications between them, in action to set aside conveyances as defrauding husband's judgment creditor.

201 Cal. 689

TOBIAS v. ADAMS et ux. (L. A. 9868.)

Supreme Court of California. July 29, 1927.

1. **Appeal and error** ⚡1011(1)—Debtor's statement that entire estate was not put in others' names to defraud creditor would not create bona fide conflict in testimony.

Mere ipse dixit of one keeping his bank account in another's name admittedly to prevent his creditor from reaching it by legal process, and then putting his entire estate in his wife's name, or depositing it in his secretary's name, knowing of judgments against him, that it was not done to defraud judgment creditor, would not create bona fide conflict in testimony, rendering finding for him conclusive on appeal.

2. **Appeal and error** ⚡1011(1)—To conflict, evidence must present reasonable ground for difference of opinion.

While finding on substantially conflicting evidence will not be disturbed on appeal, evidence, to raise conflict, must be such as to present fair and reasonable ground for difference of opinion.

9. **Fraudulent conveyances** ⚡288—Evidence of husband's insolvency three months after agreement relinquishing community interests held admissible, in action to set aside conveyances to wife as fraudulent.

In action to set aside conveyances of realty to wife as defrauding husband's judgment creditor, testimony as to husband's insolvency at time of trial, about three months after date of written agreement relinquishing all his community interest in property to wife, held admissible preliminary to establishing his insolvency on date of agreement, which was not remote.

10. **Fraudulent conveyances** ⚡57(5)—Insolvent husband's relinquishment of community interests to wife is fraudulent as matter of law (Civ. Code, § 3442).

Under Civ. Code, § 3442, written agreement, relinquishing insolvent husband's community interests in property to his wife, is fraudulent as matter of law.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Frank I. Tobias, as special administrator of the estate of William E. Tobias, deceased, against Francis D. Adams and wife. Judgment for defendants, and plaintiff appeals. On motion to dismiss appeal. Motion denied.

Wellborn, Wellborn & Wellborn and Stephen Monteleone, all of Los Angeles, for appellant.

Francis D. Adams and Earl Curtis Peck, both of Los Angeles, for respondents.

PRESTON, J. Some preliminary considerations must be met before we consider the merits of this appeal. The action is by plaintiff and appellant as special administrator of the estate of William E. Tobias, deceased, against Francis D. Adams and Gertrude B. Adams, as husband and wife, defendants and respondents, to set aside certain conveyances of real property made by said husband to his wife, and to have certain property standing in the name of the wife declared the property of the husband on the ground that it was taken and held by the wife as a voluntary transaction at the instance of the husband in order to hinder, delay, and defraud plaintiff's intestate as the judgment creditor of said husband. The husband is an attorney at law, and appeared herein as one of his own attorneys as well as one of the attorneys for his wife.

Appellant has three judgments, all bearing date prior to March 4, 1924, against said husband, on an indebtedness which arose in October, 1923, aggregating some \$7,000. He has caused several executions to issue upon said judgments, and the same have been delivered to the sheriff of the county for levy upon the property of said defendant Francis D.

Adams, attorney at law, with a return in each case nulla bona.

It seems, however, that in December, 1925, and during the early months of the year 1926, the husband had a stroke of good fortune. He got together as an attorney's fee some seventy odd thousand dollars, one-half of which belonged to him, and was received by him in liquid assets. The receipt of so large a sum had such an unusual effect upon him that he says he was restless under the weight of it, and could not sleep until the securities by which it was evidenced were deposited with the Bank of America at Los Angeles for safe-keeping; it apparently never occurring to him that he might lessen his responsibility and increase his nightly repose by paying the representative of his deceased judgment creditor the claims in suit, the justice of which he has never at any time heretofore or now disputed.

In due time, however, to wit, on January 5, 1926, Nicholas William Brick and Helen Brick, his wife, deeded to defendant Gertrude B. Adams a valuable piece of real property, for which the sum of \$25,000 was paid as follows: \$17,000 in cash, and the remainder by the assumption of an existing mortgage upon said property in amount of \$8,000. This transfer is directly involved in this action; plaintiff claiming the property is community property of defendants, and, indeed, it is admitted that the cash payment was advanced through defendant husband from said above-mentioned attorney's fee. It is also admitted that a portion of the remainder of said fee was used in paying creditors of said husband other than plaintiff, and the large surplus remaining was safely placed in the name of the law secretary or stenographer of said husband according to a custom which sprang up suddenly at the time plaintiff began in the years 1923 and 1924 to sue out attachments and levy upon his bank account. It is even said that, during the existence of plaintiff's claims, some \$27,000 appeared at one time in the name of said secretary. But said husband claims at this time that it was not put in her name for the purpose of hindering, delaying, or defrauding creditors, but because it was more convenient to have it in that form.

In this connection it is pertinent to quote some of said defendant husband's testimony, where, after stating that no real property had stood in his name since the year 1923, he said:

"Q. Since that time you have had no property in your name? A. I have had no real property in my name. Q. Do you keep your bank account in your name? A. I have kept a bank account in my name up until some time when you began to attach it every day; then I took it out of my name. Q. When was the last time you had a bank account in your name? A. The last time you attached it. Q. How long ago was

that? A. Oh, I think that was some time in '23 or '4; I am not sure which. Q. In whose name did you carry your bank account at the present time? A. I carry my bank account in the name of Edna Smith, my secretary. Q. And all of the fees and money you collect, you deposit in the name of your secretary? A. Well, not all of them; practically all of them; yes, sir."

It should be stated also that said defendant testified that from his law practice in the year 1925 he had an income of \$56,243.66; also, from the same source for the first six months of 1926, he had an income of \$15,000, but the sheriff, after searching with great diligence, was unable to find a penny to satisfy these several and alias executions. It should also be noted that defendant Gertrude B. Adams had standing in her name several other very valuable pieces of real property acquired by her from her husband after the indebtedness to plaintiff was incurred. It is also true that the family have two automobiles, which were acquired also by said husband but which are now claimed as the separate property of the wife, although the husband says he may, and still does, use them as and when he pleases.

Finally, on September 17, 1926, only a few weeks prior to the trial of this action, said defendants entered into a written agreement, whereby said husband relinquished to his wife all the community interests in the above-mentioned and three other pieces of real property of the community; also all the household furniture and furnishings of their dwelling and the two above-mentioned automobiles. What the defendant husband received in return for his concession of his rights in property worth, he says, more than \$100,000, does not appear, except that it was agreed that property, if any, acquired thereafter should be his own, even though it stood in the name of his said wife, and to her he accorded a corresponding right. It will be noted that this written agreement between husband and wife was made an exhibit to the joint answer of defendants; was filed for record in the office of the county recorder; and was by defendants introduced and received in evidence on the trial of this cause.

The defendants had findings and judgment in their favor in the court below. The case is before us now after passing over the road of trial and appellate procedure with unusual celerity. Refusing to check its speed to a final determination, we are considering it out of order and at the expense of other causes, although it is but fair to state that respondents are "riding to a fall." The case was at issue on December 8, 1926; was tried on December 20, 1926; and judgment for defendants ordered the same day. Notice of appeal was filed in due course, and at the May calendar in Los Angeles a motion to dismiss the appeal and for affirmance of the judgment was made and denied. At the July calendar

in San Francisco respondents noticed a motion styled a motion to dismiss appeal and for affirmance of the judgment on the ground that a casual inspection of the record would disclose that said appeal was frivolous and not taken in good faith.

We were not impressed with this showing until respondent Francis D. Adams, attorney at law as aforesaid, appeared in his own behalf and in behalf of his said wife, and represented that the respondents were losing thousands of dollars by this litigation; that appellant had filed a *lis pendens* against "our property," and was harassing and annoying them; that this was one of several suits brought by the same plaintiff; and that, after filing them, plaintiff would make no effort to bring them to trial; that the conduct of plaintiff's attorney in the premises was an "outrage," and said defendant intended to take the matter up with the bar association. Yielding to the *prima facie* force of these statements, we agreed to entertain the motion in accord with the doctrine announced in *Hibernia Sav. & Loan Soc. v. Doran*, 161 Cal. 118, 120, 118 P. 526, where it was said:

"It is a rule of convenience for the expedition of the business of this court that it will not ordinarily entertain a motion to dismiss involving an examination of the record in advance of the hearing upon the merits. But where, as in this case, a mere inspection of the record discloses that no relief can be given to the appellant this court will consider the question, to save unnecessary delay and expense to litigants."

Although this motion is styled a motion to dismiss appeal and affirm judgment, it is tantamount to a motion to advance the cause on the calendar and hear it on its merits with the record in such condition as it is then found to be. In *Randall v. Duff*, 105 Cal. 271, 272, 273, 38 P. 739, speaking of a motion similar to the one before us, the court said:

"This is in substance only a motion to advance the cause for hearing prior to being reached in its order upon the calendar; and it can be readily seen that, if such procedure is permitted, the number of respondents who will urge an early hearing of their causes on account of the lack of merit in the appeal will be increased to such a degree as to practically dispense with the regular calendars of causes."

In *Chino Land, etc., Co. v. Hamaker*, 171 Cal. 689, 690, 154 P. 850, it is said:

"This motion is made long before the appeals are reached in regular order for hearing in this court, the real purpose of the motion being, of course, to advance the hearing of the appeals in this court, over many other appeals preceding them on our calendar, when there is in fact no good reason for such advancement. It is apparent that this is not a proper case for such action as is desired. Mere consideration of the motion necessarily involves a full examination of the record and briefs of counsel as to the merits of the appeal, precisely the same examination we would be compelled to make upon

the hearing of the appeals on their merits when the cases are regularly reached for hearing."

See, also, 2 Cal. Juris, § 436, p. 749; *Id.* § 577, p. 979.

Being thus required to examine the record we have done so, although we have not had cited to us by either side a single authority on the questions involved.

[1] Appellant urges as his sole ground on the merits that the evidence shows, without substantial or any conflict, that the transaction in suit, and particularly the deed of January 5, 1926, from Brick and wife to respondent Gertrude B. Adams, and the written agreement of September 17, 1926, were purely voluntary as to her, without consideration moving from her, and with the intent of said defendant Francis D. Adams to hinder, delay, and defraud plaintiff as judgment creditor.

[2] We are much inclined to agree with appellant. For, if a man keeps his bank account in the name of another admittedly to prevent his creditor from reaching it by legal process, and then takes his entire estate, and either puts it in his wife's name, or deposits it in the name of his secretary, knowing that the judgments are in existence, his mere ipse dixit that it is not to defraud his creditor would hardly create a bona fide conflict in the testimony. "While a finding will not be disturbed on appeal if there is a substantial conflict in the evidence from which it springs, 'the evidence, in order to raise a conflict, must be such as to present a fair and reasonable ground for a difference of opinion' (*Field v. Shorb*, 99 Cal. 661, 34 P. 504; *Felsenthal v. Warring*, 40 Cal. App. 119, 180 P. 67)." *White v. Greenwood*, 52 Cal. App. 737, 742, 199 P. 1095, 1098.

[3] Even if said defendant had kept certain of his property in his own name, it would not necessarily have prevented the transaction in question from being fraudulent. *Benson v. Harriman*, 55 Cal. App. 483, 204 P. 255; *First National Bank v. Maxwell*, 123 Cal. 360, 55 P. 980, 69 Am. St. Rep. 64.

[4] Neither is it necessary to prove guilty knowledge in the wife, inasmuch as admittedly she gave no consideration for the transfers, which were purely attempted gifts to her. *Chalmers v. Sheehy*, 132 Cal. 459, 64 P. 709, 84 Am. St. Rep. 62; *Judson v. Lyford*, 84 Cal. 505, 24 P. 286; *Knox v. Blanckenburg*, 28 Cal. App. 298, 152 P. 59.

[5] Defendant Francis D. Adams took the stand and was careful not to state that he had any property on September 17, 1926, other than that relinquished to his wife by said written agreement. If this be true, then as a matter of law the conveyances, if they be deemed to have occurred on that date, were fraudulent. Sec. 3442, Civ. Code. The intent of the grantor in such case is immaterial. *Atkinson v. Western, etc., Syndicate*, 170 Cal. 506, 150 P. 360. If a transaction of this kind were upheld by the courts, then

fraud uncurbed and brazen would stalk over all the land. We need not, however, pass definitely upon this question, for the motion must be denied because of failure of the court below to allow and consider material evidence in the case. This action by the court may be illustrated by setting out proceedings upon two occasions during the trial.

[6] The defendant Gertrude B. Adams was called as a witness by plaintiff under section 2055 of the Code of Civil Procedure and testified in part:

"Q. By Mr. Monteleone: When did you acquire that property, Mrs. Adams? A. Last December. Q. How much did you pay for the property? A. Well, do you mean how much it is worth, how much is the value? Q. No, how much did you actually pay for that property? A. \$17,000. Q. Is there any mortgage against the property at the present time? A. Yes. Q. Was there a mortgage against the property at the time you acquired it? A. Yes. Q. How much of a mortgage? A. \$7,000. Q. You paid \$17,000 cash? A. Yes. Q. Now, where did you get the money to buy that property? Mr. Peck: Just a minute, if your honor please. Object to that on the ground it is a privileged communication. If she got it from her husband, it is certainly a communication between husband and wife, about which I believe she cannot testify. The Court: Well, I cannot assume that she is going to testify that she got it from her husband. She may have got it from the estate of some relative. You may answer. A. I got it from my husband. Mr. Peck: Now, we move to strike out the answer, if the court please, as a privileged communication. The Court: The answer will be stricken out as a privileged communication, a transaction between husband and wife under the section. Q. By Mr. Monteleone: How long did you have the \$17,000 to apply on that property before you purchased the same? Mr. Peck: We object to that as immaterial, if your honor please. The Court: What is the materiality of that? Mr. Monteleone: I intend to show, if the court please, that the money was acquired by this witness a short time before the property was acquired. The Court: Oh, I don't think that is material whether she had it one minute before it was acquired or not; I don't think the length of time she had it is material. Sustained. Q. By Mr. Monteleone: Did you acquire the \$17,000 from inheritance? A. No. Mr. Adams: Object to that; already asked and answered. The Court: Overruled. Mr. Adams: No, that was stricken out. Pardon me. Withdraw the objection. Q. By Mr. Monteleone: What was your answer? A. No. Q. Did you acquire it from any of your relatives? A. Yes. Q. Did you acquire it from any of your relatives outside of your husband? A. No. Mr. Peck: Now, if your honor please, we move that the last two questions and answers be stricken out on the ground it is clearly a privileged communication. The Court: Yes, the answers will be stricken out. That is an adroit, but indirect way of adducing testimony from this witness of the fact that the transaction was between herself and her husband. I suppose you can get at that by elimination as well as any other way, but I think the purpose of the law is to keep such transactions out altogether on the ground that transactions between

husband and wife are privileged and are not admissible under the section, that is, where the act is between husband and wife, so the motion to strike out will be granted."

The defendant Francis D. Adams was later called as a witness by plaintiff under said section 2055 of the Code of Civil Procedure, and testified in part:

"Q. Do you operate any automobiles? A. I do. Q. How many? A. Two. Q. In whose names do the automobiles stand? A. Gertrude B. Adams. Q. Do you know where Gertrude B. Adams got the money to buy the automobiles? A. I do. Q. Where, from whom? A. Why, she got it from me; that is, indirectly. One of them she got from me some time, I don't know, five years ago, and that car was eventually traded for a Cleveland car which she now has, and she purchased herself a Paige car, which she now has. Q. You are operating the two cars? A. I operate either one of them when I please. Q. And you furnished the money to buy both of the cars? A. In the first instance, yes. Q. Do you know anything about this property designated as lot 17 in tract 6388? A. I do. Q. Do you know when that property was acquired? A. I do. Q. When? A. That property was acquired on or about the 17th of December. That is, the transaction was arranged about the 17th of December and continued thru until sometime in January or February of 1926. Q. Do you know how much was paid for that property? A. \$17,000 cash and an \$8,000 mortgage assumed. Q. Do you know where the \$17,000 came from? A. I do. Q. To pay for that property? A. I do. Q. From whom? A. Me. On or about— Q. Do you know anything about the property— A. I want to explain that answer, tho. The Court: You may do so. A. On or about the 17th day of December I borrowed \$5,000 from the Bank of America, and I gave Mrs. Adams a present then, it being just before Christmas, of \$1,000 of that \$5,000 which I had borrowed. A few days later I received a fee of some \$35,000 or \$38,000, which was paid to me in gold bonds, payable to bearer, and I gave Mrs. Adams, of that \$35,000 then received, \$16,000, and a further sum of \$4,000 which I gave her in cash as a Christmas present. I had then left—together with my other moneys, I had then left in my possession and in the bank and under my control and in my name approximately \$25,000 to \$30,000. Q. By Mr. Monteleone: When did you give the \$16,000 to your wife? A. I gave the \$16,000 to Mrs. Adams between the 20th, or about the 20th, 22d, it might be, I forget just the day, of December, and the first of February of 1926. That is, the 22d of December, 1925, to the first of February, 1926. The first \$1,000 as I stated, I gave to her from a loan made to me by the Bank of America, of which I gave her \$1,000 on the 17th of December, and then I gave her an additional \$7,000 a few days later, and then I gave her \$9,000 a few days later, and then I gave her \$3,000 or \$4,000 in cash a few days—along in there; I don't know just how I gave her that last \$4,000. Q. How was the first money evidenced that you gave to her? Was that given by check or otherwise? A. I gave that to her— Mr. Peck: Now, wait a minute. I think, if your honor please, this comes clearly within the privileged communi-

cations, and I move that the answer be stricken out—all that testimony as to what he gave her and what he did about it. The Court: The motion will be granted. It calls absolutely for transactions with Mrs. Adams. Mr. Monteleone: May it please the court, the witness had volunteered the statement himself. The Court: He has not had his wife's consent yet to testify against her, and the section reads, as I remember, that neither party can testify against the other without the other's consent, and she has not consented, so the motion will be granted. All that testimony as to the gifts of money, transfers of money from Mr. to Mrs. Adams, will be stricken out. He cannot volunteer that testimony without his wife's consent."

[7] It is manifest that the testimony here excluded was pertinent to the issue tendered by the defendants in their answer setting up said written agreement of September 17, 1926, which was Exhibit A thereto. Every question and answer related specifically to such matter covered by said agreement. It must be held that defendants as husband and wife, by filing for record a written agreement between themselves, and by pleading it in defense to plaintiff's action, and by introducing it in evidence, put the bona fides of such paper in issue, and thereby waived expressly any privilege thrown around them by the law. It would be monstrous if husband and wife might between themselves conspire to defraud the creditors of the one or the other, and to conceal their act produce a written instrument which is immune from all inquiries, and which must be accepted by the defrauded party as final. The freedom of contract between husband and wife and the power to transmute community property into separate property or vice versa by agreement between themselves renders it imperative that, when such an agreement is relied upon by their joint answer, thereby the whole subject-matter of said agreement is open to inquiry which may include communications from one to the other. This we understand upon examination of the transcript to be the effect of the holding in *Johnston v. St. Sure*, 50 Cal. App. 735, 195 P. 947, rehearing denied by this court.

[8] There as here a defendant husband alleged that the property in question was the separate property of his wife. Nothing, therefore, that she could say when under examination as a witness could in any wise affect or injure her husband, if the allegations of their joint answer were true. Moreover, the witness refused to answer questions practically the same as those stricken out in the case before us. The court held that the witness should answer the questions, and that by the allegations of the answer husband and wife had waived all privilege in connection with the said transaction. Besides, the communications stricken out in this case were not such communications as are privileged anyway. *Poulson v. Stanley*, 122 Cal. 655, 658, 55 P. 605, 68 Am. St. Rep. 73; *Savings*

Union Bank, etc., Co. v. Crowley, 176 Cal. 543, 547, 169 P. 67.

[9, 10] The court also was in error in excluding the answer to the question as to whether the defendant Francis D. Adams was then insolvent. This was December 20, 1926. The contract between husband and wife was dated September 17, 1926, a date only about three months prior thereto. If he was insolvent on September 17, 1926, the transaction was a fraud as a matter of law. Sec. 3442 of the Civil Code; Atkinson v. Western, etc., Syndicate, supra. Plaintiff should have been allowed to start with said defendant's condition on the trial, and, if insolvent then, to trace it back at least to September 17th, which was not a remote date.

This record presents a clear case of an attorney at law evading his just obligations by trying to take advantage of his knowledge of the infirmities of the law, and then trying to have this court peremptorily sustain him in his conduct. The lawyer, above all others, should redeem his personal obligations, if for no other reason than to prevent reflection upon the profession.

The appeal, instead of being frivolous and taken in bad faith, appears on the contrary to have been taken in good faith, and to be meritorious.

Motion denied.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.

We concur in the order denying the motion: WASTE, C. J.; SEAWELL, JJ.

201 Cal. 668

NAIL et al. v. JACKS.

McELROY v. SAME.

(Sac. 3858.)

Supreme Court of California. July 26, 1927.

1. Waters and water courses $\S$ 213—Fact that first diversion of water was for private purpose is not inconsistent with subsequent dedication to public.

The fact that the first diversion of water was for a private purpose is not inconsistent with a theory of a subsequent dedication to a public use.

2. Waters and water courses $\S$ 247(1)—Defendant's evidence held insufficient to meet plaintiffs' claim that defendant and predecessors had dedicated water of creek to public use.

In action to determine water rights, where plaintiffs claimed that defendant and his predecessors had dedicated water of a creek to public use by selling it to landowners for many years for irrigation purposes, defendant's evidence held insufficient to meet the claim or to substantiate his claim that the water was dis-

tributed to other landowners only after his own requirements were satisfied.

In Bank.

Appeals from Superior Court, Plumas County; J. O. Moncur, Judge.

Actions by James E. Nail and another and by Phillip McElroy against A. R. Jacks. Judgments for defendant, and plaintiffs appeal. Reversed.

L. H. Hughes, of Quincy, for appellants.
H. B. Wolfe, of Quincy, for respondent.

WASTE, C. J. Separate actions were brought by the plaintiffs against the defendant for judgments fixing and determining their rights in the use of certain water, restricting and enjoining defendant from interfering with such use, and for actual and exemplary damages for defendant's failure to furnish plaintiffs water for irrigation purposes during the season of 1924. The plaintiffs alleged that for more than 40 years the premises described in their respective complaints had been supplied with water for irrigation from Meadow Valley creek appropriated, diverted, and distributed by defendant and his predecessors, under a dedication to a public use. The defendant in his answers admitted that for many years the lands of plaintiffs have been irrigated with the waters from the creek, furnished by defendant and his predecessors for an agreed compensation, but alleged that any such distribution was at all times surplus water available only after the requirements of the defendant were supplied. He denied dedication of the water to a public use, or that he had refused to furnish plaintiffs with water during 1924, alleging a shortage of water during that year, by reason of which there was not a sufficient supply with which to meet his own demands and supply the requirements of plaintiffs.

Judgments were rendered in favor of the defendant and against plaintiffs for costs. Plaintiffs have appealed, the two appeals being consolidated pursuant to stipulation. The transcript was filed in this court October 9, 1925, and the appellants' brief on November 27 of the same year. The time within which respondent might file his brief expired on December 26, 1925. Nothing further appearing of record, the cause (with others) was placed on a special calendar, and the respondent ordered to show cause why the judgments therein should not be reversed or some other appropriate order be made. Counsel appearing as of record for the respective parties were duly notified by the clerk of this action of the court, but when the case was called no appearance was made on either side and the same was ordered submitted.

The trial court found that the appropri-

tion and use of the water in Meadow Valley creek by defendant and his predecessors was for a private purpose, to wit, for furnishing power for the operation of a sawmill and for mining purposes, and not for the purpose of sale and distribution, and that, upon cessation of the operation of such sawmill and mining operations, the water was used by the predecessors of the defendant for irrigation purposes and the surplus thereof sold by defendant and his predecessors to adjoining landowners, among whom were plaintiffs and their predecessors, but that neither the defendant nor his predecessors dedicated the waters of the creek to a public use. It further found, however, that the lands in Meadow Valley are agricultural in character and in order to produce crops irrigation is necessary, and that for a period of 40 years before the commencement of the action, defendant and his predecessors had appropriated the waters of the creek and diverted the same by means of a ditch through the lands of the plaintiffs and through lands adjoining the same, and that during that time the plaintiffs and their predecessors have been supplied with water for irrigation purposes from Meadow Valley creek as appropriated, diverted, owned, and used by defendant and his predecessors, for an agreed compensation, renewed from year to year, at a rate agreed upon by the parties.

The contention of the appellants is that the trial court assumed an erroneous view of the evidence tending to establish the dedication of the water in Meadow Valley creek to public use, and that the testimony bearing upon the issue of dedication of the water in the creek to a public use is without conflict. From our examination of the record we are of the view that the contention of the appellants is correct. The record is silent as to any positive or competent evidence showing when and how, or by whom, or for what purpose the ditch was constructed and the waters first diverted. The record does show, however, that as far back as 1871 the waters were being used for power, mining, and irrigation purposes, the ditch having been constructed and used prior to that time. For many years prior to the closing down of a sawmill operated on the ditch the water was generally used for the irrigation of farm lands in Meadow Valley, for which use a rental was regularly paid. Defendant himself testified that since his earliest recollection the water had "been confined to irrigation by the bulk of the Meadow Valley people." From the testimony of the defendant it also appears that as the ranchers in Meadow Valley increased their clearings they were required to pay him an increased rate

for water. The evidence introduced on behalf of the plaintiffs is indubitably to the effect that since 1871, if not before, there was on the part of the owners of the ditch a "holding out" to sell water to any applicant within the area adjacent to the system and within the limits of the supply, and that the defendant and his predecessors have actually sold water to the landowners who applied for the same.

[1] The fact, assuming it to be a fact, that the first diversion of the water was for a private purpose is not inconsistent with the theory of a subsequent dedication to a public use. *Traber v. Railroad Comm.*, 183 Cal. 304, 312, 191 P. 366.

[2] There is nothing in the record to substantiate the claim of the defendant that he distributed water to the other landowners in Meadow Valley only from a surplus after his own requirements were satisfied. The history of the distribution and use of water in the valley does not support such a contention. During the dry season of 1924 there was not sufficient water flowing in the ditch to fully supply the demands of all the users, and a controversy arose between these plaintiffs and defendant over the amount of water the plaintiffs might use. The defendant endeavored to arrange for an equitable division of the water among the landowners supplied from the ditch. He offered to supply plaintiffs, whom he accused of wasting the water, with water to the extent of the whole supply which was available, and in proportion to the needs of himself and others to whom he had contracted to sell water. Being unable to arrive at a satisfactory understanding with the plaintiffs, the defendant shut off their supply and returned to them the amount of the annual rental theretofore paid by them.

The real controversy between the parties seems to be over the amount of damages alleged to have been suffered by the plaintiffs by reason of the shutting off of the water. Much of the evidence, in fact, practically all of the testimony in behalf of the defense, is addressed to soil, water, and crop conditions in Meadow Valley during the season of 1924, and is responsive only to the issue of damages and to the question whether or not the plaintiffs were entitled to any preference over the other consumers in a time of water shortage. It does not meet the claim of the appellants that the water diverted from Meadow Valley creek by defendant and his predecessors has been and is dedicated to a public use.

The judgments are reversed.

We concur: PRESTON, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

201 Cal. 750

(258 P.)

PORTER v. MILLER et al. (L. A. 9332.)

Supreme Court of California. Aug. 11, 1927.

1. Appeal and error ⇨1011(1)—Judgment cannot be reversed because evidence is conflicting where supported by any substantial evidence.

Where judgment is supported by any substantial evidence it cannot be supported because the evidence is conflicting.

2. Appeal and error ⇨1011(2)—That appellant's testimony included documentary evidence held not to prevent application of rule that trial court's judgment on conflicting evidence will not be disturbed.

That appellant produced some documentary evidence held not to prevent the application of the rule that where there is some substantial evidence supporting a judgment, it will not be reversed merely because the evidence is conflicting.

3. Appeal and error ⇨1070(1), 1071(4)—Trivial errors in verdict or finding which are not prejudicial will not justify reversal.

Errors and irregularities in a verdict or findings which are trivial and without prejudice will not justify a reversal.

In Bank.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Charles L. Porter against Charles R. Miller and wife and another. Judgment for defendants, and plaintiff appeals. Affirmed.

R. M. Wiley, Hewitt, Ford & Crump, Hewitt, Ford, McCormick & Crump, and Charles L. Porter, all of Los Angeles, for appellant.

Haas & Dunnigan and H. E. Forster, all of Los Angeles, for respondents.

PRESTON, J. Plaintiff seeks by this action to rescind an agreement made by him with defendants for the purchase and sale of an apartment house located in Los Angeles, Cal., the amended complaint alleging that he was induced to enter into said contract by false and untrue representations about material matters made to him both by defendants and their agents, Kells & Grant, the real estate firm through whom the deal was consummated, said alleged material misrepresentations mainly relating to the income, gross and net, derived from said apartment house, the number of vacancies therein during 1924, the year preceding the purchase, and failure to accord plaintiff an opportunity to inspect the books of said apartment house as to income and expenditures prior to consummation of the transaction.

The trial court found in substance that the books and records of said apartment house, particularly the monthly record sheets and expense sheets for the year 1924, were volun-

tarily exhibited to plaintiff in the presence of C. L. Edwards, a representative of Kells & Grant, and that plaintiff did, on that occasion and on a number of occasions thereafter prior to consummation of the deal, inspect same and make such memoranda therefrom as he desired; that there were only the usual vacancies in said apartment house during the year 1924, such vacancies not exceeding 12.75 per cent. of the entire available time; that plaintiff in entering into said contract did not rely upon representations alleged to have been made by defendants and their agents that the annual gross rentals received from said property were \$26,000, or any other representations relative to income therefrom, but that prior to consummating the transaction on a number of occasions while the matter was in escrow, plaintiff had access to and saw certain documents showing the gross income from said premises for 1924 to be \$25,377.52, which documents upon careful rechecking showed gross receipts for the year to be \$25,716.55, and the gross income from rentals to be \$21,847.70; that the representations made by defendants were not untrue and were not made with the intent to induce plaintiff to enter into said contract, escrow, or transaction. The court accordingly gave judgment for defendants, from which plaintiff has prosecuted this appeal.

[1] Conceding the correctness of the principle that: "A judgment cannot be reversed because the evidence is conflicting. On the contrary, the rule is established by a host of decisions that an appellate court will not disturb a verdict of a jury or findings of a court when there is a substantial conflict of evidence on material points and when there is some evidence to support the verdict or findings" (2 Cal. Jur. § 543, p. 921)—appellant nevertheless asserts that this rule has no application in this case, as the evidence here is without real conflict in that all testimony for defendants may be paraphrased into the four short words, "He saw the books," whereas appellant's testimony is supported by documentary evidence, such as the following proviso, which was written in the printed form of contract executed February 7, 1925: "This contract is subject to verification of rentals and expenses as furnished purchaser, all books and records of owner to be open for inspection for that purpose"—said proviso tending to prove that plaintiff had not seen any books or records prior to that date; likewise telegram of March 10, 1925, from appellant to defendants' agents, requesting that verified statement of annual rents be filed with escrow and demanding revision of contract if less than \$26,000 annually; otherwise rescission and return of deposit. Appellant also calls attention to apparent variances in affidavits made by defendant Charles R. Miller relative to income upon filing his license tax and income tax returns.

[2] It is true that the conflict in the evidence must be real and substantial upon material points, but such true conflict is clearly shown here. There is abundant evidence to support the findings and judgment. The showing made by appellant is directly contradicted by the testimony, not only of defendants, but of members of the real estate firm, and particularly C. L. Edwards. The existence of documentary evidence does not prevent application of the rule above set forth. As said in 2 Cal. Jur. §§ 547, 548, pp. 931, 932:

"It has been contended that the rule of 'conflict' does not apply where the evidence is documentary, and that in such case the appellate court should weigh and measure it by the same standard that the trial court is required to apply. But in view of the fact that one of the reasons for the rule is the essential distinction between the trial and appellate courts as to their functions to decide questions of fact, such a contention is untenable, and it has been so held."

Criticizing at length the memorandum opinion of the trial court, appellant attacks the finding to the effect that his purported offer to restore fell short of the requirements of our Code with respect to rescission. Under the circumstances such finding can in no way prejudice or injure the rights of appellant, and it becomes unnecessary for us to pass upon its merits. The sole ground of rescission urged is fraud. We have hereinabove upheld the finding that appellant was not defrauded. Hence on this appeal it is immaterial whether or not the alleged offer to restore was made in proper form or due time, or whether or not a certain letter dated April 28th from appellant to defendants constituted sufficient notice of rescission. Lacking convincing proof of misrepresentation and fraud, the attempted rescission must in any event fall.

[3] Appellant also attacks finding III, relative to scope of authority of Kells & Grant and their employees as agents of defendants; finding V, which apparently contains an erroneous statement that plaintiff called to look at said apartment house in response to advertisement of February 1, 1925, whereas plaintiff first looked at said apartment house during the Christmas holidays of 1924; finding IX, with reference to purported offer of restoration; and other findings in general as being without support in the record. The matters urged here are so trivial that but a brief reference to them will suffice. We perceive no error in any finding which has resulted in a miscarriage of justice or which has prejudiced or injured the rights of appellant. As a whole the findings are consistent and amply supported by the evidence. "Errors and irregularities in a verdict or findings which are without prejudice will not justify reversal. * * * But if a judgment is amply supported by findings which are unob-

jectionable, findings on other issues become immaterial, and it is not ground for reversal that such other findings are unsupported by evidence or are uncertain or otherwise defective." 2 Cal. Jur. § 612, pp. 1028, 1029.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.; LANGDON, J.

201 Cal. 701

WILSON et ux. v. CROWN TRANSFER & STORAGE CO. (L. A. 8427.)

Supreme Court of California. July 30, 1927.

1. Warehousemen ⇨34(7)—Verdict against warehouseman of goods destroyed by fire held supported by evidence (Warehouse Receipts Act, § 8).

Burden being on defendant, in action for conversion of goods destroyed by fire while stored in its warehouse, to prove its freedom from negligence as to cause of fire, under Warehouse Receipts Act, § 8 (St. 1909, p. 438), verdict for plaintiffs on conflicting evidence amounted to implied finding that such burden was not maintained and was supported by evidence.

2. Warehousemen ⇨34(5)—Instruction that warehouseman must prove freedom from negligence and lawful excuse for not returning goods not destroyed by fire held proper (Warehouse Receipts Act, § 8).

In action for conversion of goods stored in defendant's warehouse, court properly instructed plaintiff that, if plaintiffs established demand for goods, offer to pay any amounts due defendant, and latter's refusal to redeliver them, burden was on defendant to prove its defense that part of goods was destroyed by fire, without fault or negligence on its part, and to establish lawful excuse for failure to return goods not so destroyed, in view of Warehouse Receipts Act, § 8 (St. 1909, p. 438).

3. Appeal and error ⇨1066—Instruction to view with distrust weaker evidence than was available is not prejudicial, in absence of evidence to which applicable (Code Civ. Proc. § 2061).

Giving of instruction, embodying provisions of Code Civ. Proc. § 2061, that evidence offered should be viewed with distrust, when stronger and more satisfactory evidence is within power of party offering it, is not prejudicial error, when there is nothing in evidence to which rule could apply.

4. Warehousemen ⇨34(10)—Evidence held to justify instructions that warehouseman's mingling of depositors' goods, if proximately contributing to fire, was negligence (Warehouse Receipts Act, § 22).

In action against warehouseman for conversion, evidence that defendant's officers told plaintiff that tin box, containing partly burned matches and wrapping paper, had been taken from room in which plaintiff's goods were stored, and intimated that its contents were cause

of fire which destroyed goods, *held* to justify instructions reflecting provisions of Warehouse Receipts Act, § 22 (St. 1909, p. 441), that warehouseman must keep depositors' goods separate and that mingling of plaintiff's goods, if proximately contributing to fire, was negligence as matter of law.

5. Warehousemen ⇨34(10) Instruction that warehouseman, refusing to inform depositor of circumstances, is presumed to have willfully permitted loss of goods, held warranted (Civ. Code, § 1838).

In action for conversion of goods stored in defendant's warehouse, evidence that defendant's vice president, actively connected with affairs of warehouse, informed plaintiff's agent, on written demand for goods shortly after fire, that there was no use demanding them because they had burned up, *held* to justify instruction, based on Civ. Code, § 1838, that warehouseman refusing to inform depositor of circumstances under which loss or injury to goods occurred, so far as known to him, is presumed to have willfully, or by gross negligence, permitted loss or injury to occur.

6. Warehousemen ⇨34(10)—Instructions held properly modified and refused as eliminating question of warehouseman's negligence causing fire destroying goods.

In action for conversion of goods stored in defendant's warehouse, defendant's instruction as to circumstances under which it would be guilty of negligence *held* properly modified, so as to instruct jury that defendant would be guilty of conversion if goods were destroyed by fire, unless shown that fire was not result of defendant's negligence, and instruction that question of negligence was immaterial in determining whether there was conversion properly refused, as entirely eliminating question of negligence as necessary element of defense.

7. Warehousemen ⇨34(10)—Instructions that depositors are presumed to know contents of warehouse receipt and limited to recovery of amount stated therein held properly refused.

Where warehouseman, sued for conversion of goods stored, was fully advised by plaintiffs as to true value thereof, but made no demand for or suggestion of excess storage charge during 18 months, court properly refused instructions that plaintiffs were conclusively presumed to know contents of warehouse receipt, delivered to them two weeks before destruction of goods by fire, and could not recover more than amount to which defendant's liability was limited therein.

In Bank.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by C. Lewis Wilson and wife against the Crown Transfer & Storage Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Ticknor, Carter & Webster, of Pasadena, for appellant.

Culver & Nourse, of Los Angeles, amici curiæ.

Goudge, Robinson & Hughes, of Los Angeles, for respondents.

CURTIS, J. Action in conversion brought by plaintiffs as the owners of certain household goods against the defendant for damages upon its failure to return said goods to plaintiffs after the latter had stored them with defendant in its warehouse. The plaintiffs, on July 9, 1920, delivered said goods to the defendant for the purpose of having the same stored and kept by defendant in its said warehouse. On July 11, 1922, plaintiffs demanded of defendant a return of said goods, but defendant failed and refused to return the same, except a trunk containing certain clothing and wearing apparel in a greatly damaged condition. The complaint contained three causes of action. The first was for the conversion of the goods, which defendant failed to return, valued at \$8,500; the second cause of action was for damages to the trunk and contents which were returned, the damage being alleged to be \$450; and the third cause of action was based upon the contract for the storage of said goods. At the trial the court directed plaintiffs to elect whether they would stand on the first or third cause of action, and plaintiffs elected to stand upon the first cause of action. Their election, therefore, eliminated the third cause of action, and we will have no further occasion to refer to it. The defendant justified its refusal to return said goods upon the ground that a fire occurred in its warehouse on the 9th day of February, 1922, and destroyed the greater portion of said goods, without any fault or negligence on the part of defendant. The cause was tried by a jury, which returned a verdict in plaintiffs' favor in the sum of \$3,500, and judgment upon said verdict was entered accordingly. From this verdict the defendant has appealed.

[1] The grounds upon which appellant has based its claim for a reversal of said judgment are the insufficiency of the evidence to support the verdict and errors of law committed by the court in giving certain instructions and in refusing to give certain proposed instructions of the appellant. We will consider these grounds in the order and manner in which the appellant has presented them in its brief. The court instructed the jury that the burden was upon appellant to prove that the goods were destroyed without fault or negligence on its part. In this connection appellant states in its brief:

"In considering whether or not the evidence is sufficient to justify the verdict, the effect of this instruction is very important. We are convinced that under the authorities this instruction was erroneous, and for convenience and because of its being so closely related to the question whether or not the verdict is supported by the evidence, we will consider the two questions together."

[2] We understand appellant's position to be that if this instruction was erroneous, and consequently the burden of proving negligence as to the cause of the fire was upon the respondents, then the evidence fails to maintain this burden and the verdict in respondents' favor finds no support in the evidence. We do not understand appellant to concede the converse of this proposition to be true, that is, if the burden is upon appellant to show it was free from negligence as to the cause of the fire, then the verdict is supported by the evidence. As we view the case, however, we think this latter proposition is substantially correct. If the burden was upon the appellant to prove that it was free from negligence, then it must be held that the verdict of the jury in respondents' favor amounted to an implied finding that this burden had not been, in the opinion of the jury, overcome by appellant's evidence. This would be so without doubt if there was any conflict in the evidence, and we do not think that it can be held that such conflict does not exist. The importance of this instruction, therefore, becomes important. This instruction reads as follows:

"Plaintiffs' first cause of action is based upon an alleged conversion by defendant of the goods stored by them, that is, by the plaintiffs, with the exception of the contents of the trunk returned to plaintiffs, which unreturned goods plaintiffs allege were of the value of \$8,500. In this form of action, proof of a demand by plaintiffs upon the defendant for the stored goods and of an offer by them to pay any prices due the defendant, and of a refusal by the defendant to redeliver the goods, is sufficient prima facie to sustain plaintiffs' action. If you believe from the preponderance of the evidence that the plaintiffs did establish such demand, offer and refusal, then you are instructed that the burden of proof devolved upon the defendant to prove its defense that part of plaintiffs' goods were destroyed by fire without fault or negligence on the part of defendant; also to establish a lawful excuse for its failure to return the goods which were not destroyed by fire."

This instruction is supplemented by a further instruction (No. 9) in part as follows:

"In this case the burden is upon the defendant to establish by a preponderance of the evidence in its affirmative defense that certain of plaintiffs' goods were destroyed by fire without negligence on its part. Unless the defendant has established by such preponderance its defense that certain goods were destroyed by fire and that such destruction was due to no negligence on its part, your verdict in so far as said goods is concerned should be for the plaintiffs."

The force of these instructions was further accentuated by other instructions given by the court, but all of such instructions related to the same subject—that is, the burden of proving that the fire was caused by the negligence of the appellant—and they will therefore be

considered together as one instruction. Section 8 of the Warehouse Receipts Act (Stats. 1909, p. 437) is as follows:

"A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with—

"(a) An offer to satisfy the warehouseman's lien.

"(b) An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt, and

"(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman.

"In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal."

It is conceded that this section of the statute applies to the present action and that respondents complied with all its requirements at the time of their demand upon appellant for the return of said goods. Appellant, however, contends that when it had shown that the goods stored with it were destroyed by fire, that it had established a prima facie defense, and that the burden then shifts to respondents to show that the fire was due to appellant's negligence. We think this question has been settled by the decisions of this court as well as those of other jurisdictions, so that there can be no doubt as to what is now the law upon this subject. In the cases of *Wilson v. California C. R. R. Co.*, 94 Cal. 166, 29 P. 861, 17 L. R. A. 685, and *Dieterle v. Bekin*, 143 Cal. 683, 77 P. 664, the precise question was before this court and decided adversely to appellant's contention. In the case of *Dieterle v. Bekin*, supra, this court said:

"The case of *Wilson v. Southern Pacific R. R. Co.*, 62 Cal. 164, is cited by respondent to the point that the burden of proof was on the plaintiff here to show that the loss was attributable to defendant's negligence. We have no quarrel with the decision of that case as applied to the facts involved therein, but the facts as well as the issues were different from the facts and issues here. There the plaintiff assumed the burden of showing the negligence of defendant in his complaint, and the question of whether defendant was negligent at all seems to have been in grave doubt. Here the defendant has assumed the burden of showing that the loss was not the result of his negligence in his answer, and that he did not use due care in storing the property we have already seen. As giving further scope to this distinction, see the comment on that case by this court in the case of *Wilson v. California, etc., R. R. Co.*, 94 Cal. 172 [29 P. 861, 17 L. R. A. 685]."

There appears to be a marked line of distinction made by the decisions between two

classes of cases wherein this question has arisen. Where the plaintiff alleges that the goods stored were lost by fire due to negligence of the defendant, then the burden of proving these allegations is upon the plaintiff, but when the plaintiff's pleadings contain no such allegation, but the defendant, seeking to justify its refusal to return the goods, sets up their destruction by fire and alleges that the fire was not due to its fault or negligence, then the burden is upon the defendant to prove the allegations of its affirmative defense and show that it was free from negligence as to the cause of the fire. In addition to the two cases just referred to, the following cases lay down the same rule: *Metropolitan Electric Service Co. v. Walker*, 102 Okl. 102, 226 P. 1042; *Caldwell v. Skinner*, 100 Kan. 567, 164 P. 1166; and *Rudy v. Quincy Market, etc., Co.*, 249 Mass. 492, 144 N. E. 286. The two last-mentioned cases were decided under so-called uniform warehouse receipt acts similar in all essential respects to that in force in our own state. In the case from the Supreme Court of Massachusetts, the court held under a section of the act corresponding to section 8 of the act of our state that while the rule was different under the common law, it had been changed by the Uniform Warehouse Receipts Act of that state (G. L. c. 105, § 15). In that action the trial court instructed the jury that the burden was upon the plaintiff to show that the defendant was guilty of negligence. In reversing the case the court held that the instruction was in accordance with the rule of the common law, but the Warehouse Receipts Act had changed the rule and that "the design of the act was to remove the confusion or uncertainty arising from conflict of statutes or decisions among the several states and to make plain and general the controlling rules of law. * * * It would be difficult to give a reasonable construction to the statute without attributing to it the force of placing the burden of proof for failure to deliver on the warehouseman."

The appellant relies upon the cases of *Wilson v. Southern Pacific R. R. Co.*, supra; *Runkle v. Southern Pacific Milling Co.*, 184 Cal. 714, 195 P. 398, 16 A. L. R. 275; and *Atwood v. Southern California Ice Co.*, 63 Cal. App. 343, 218 P. 283. The case of *Wilson v. Southern Pacific R. R. Co.*, supra, was considered and discussed in the case of *Dieterle v. Bekin*, supra. Whatever was said in the *Runkle* and *Atwood* Cases upon this subject was not necessary to the decision of any question in either of those cases. They were both against warehouse companies, and in each case the judgment in favor of plaintiff was affirmed on appeal. We are satisfied that the great weight of authority in this and other states sustains the instruction given by the court. It follows, therefore, that it was not error for the court to so instruct the jury

and also that the evidence is sufficient to support the verdict.

[3] The next instruction to which appellant objects embodied the provisions of section 2061, Code of Civil Procedure, to the effect "that if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust." There appears to be no evidence in the record justifying the giving of this instruction. However, it has been held that the giving of it was not prejudicial error when there was nothing in the evidence to which the rule could apply. *Brown v. Sharp-Hauser Contracting Co.*, 159 Cal. 89, 112 P. 874; *Lawyer v. Los Angeles Pacific Co.*, 23 Cal. App. 543, 138 P. 920.

[4] The court gave two instructions reflecting the provisions of section 22 of the Warehouse Receipts Act to the effect that a warehouseman must keep the goods of a depositor separate from those of other depositors, and that if the jury should find that appellant failed in this respect as to respondents' goods, but mingled them with goods of other depositors and that this mingling of the goods proximately contributed to the fire, causing the loss of said goods, this was negligence as a matter of law on the part of appellant in the operation of said warehouse. Appellant insists that the record is absolutely destitute of any evidence as to the mingling of any of respondents' goods with those of other depositors with the possible exception of that referring to a tin box containing some partially burnt matches and a quantity of wrapping paper which was slightly charred around the edges. There was evidence that a box and contents answering the above description not belonging to the respondents was on one occasion when the respondent, Mrs. C. L. Wilson, visited the warehouse after the fire, sitting out near the entrance to the room in which respondents' goods were stored; that two officers of the appellant who were with said respondent on said occasion told her that this box had been taken out of the room in which respondents' goods were stored and at least intimated to her that its contents had been the cause of the fire which destroyed respondents' goods. Appellant claims that it was shown that neither of these officers had any actual knowledge as to where the box and its contents came from and that whatever conclusions they may have entertained upon the subject were founded merely upon hearsay. Admitting this claim of the appellant as to the source of knowledge of its two officers, yet in view of the evidence in the record as to their statement regarding this box and its contents and its probable connection with the origin of the fire, we are not prepared to say that there was absolutely no evidence in the record which would justify the giving of these instructions.

[5] Practically the same situation is shown as to the giving of instruction No. 16 to the effect that if the jury found that the warehouseman refused to inform the depositor of the circumstances under which the loss or injury to the goods occurred, so far as he had information concerning them, or willfully misrepresents the circumstances to the depositor, then the warehouseman was presumed to have willfully or by gross negligence permitted the loss or injury to occur. This instruction is based upon section 1838, Civil Code. It appears from the evidence while most of the goods of respondents deposited with appellant were destroyed by fire, yet, in addition to the trunk and its contents already referred to, there was another trunk and two boxes containing goods belonging to the respondents which were not destroyed, but were either lost or stolen immediately after the fire. Respondents' agent, a Mr. Walker Brown, called upon appellant and made a written demand for the goods shortly after the fire, and was informed by one of appellant's officers, its vice president, that "there was no use demanding the goods; they had been burned up." If this officer knew that a part of respondents' goods had been either lost or stolen, and from his active connection with the affairs of the warehouse it is only reasonable to presume that he had such knowledge, and failed to so inform respondents' agent of that fact, then in the language of said section of the Civil Code, it might be fairly said that he "refuses to inform the depositor of the circumstances under which the loss or injury occurred." This evidence, while very slight, would in our opinion afford some justification for the giving of the last-mentioned instruction, and with it in the record we are unable to say that the court in the giving of such instruction committed any prejudicial error.

[6] Instruction No. 14 as given by the court in its original form had been prepared by appellant. This instruction informed the jury as to the measure of damages to be applied by them in returning their verdict in the event they should find for the respondents. It then proceeded to inform the jury under what circumstances the appellant would be guilty of negligence. The court, however, before giving it in its final form, modified it by inserting therein in one place the words, "without negligence on its part," and in another the words, "or otherwise injured without the negligence of the defendant." In its modified form the court in effect instructed the jury that the appellant would be guilty of conversion of respondents' goods if the same were destroyed by fire without it was also shown that the fire was not the result of appellant's negligence. The court refused to give another instruction proposed by appellant telling the jury that in determining whether there was a conversion of said goods

by appellant the question of negligence was immaterial and should be disregarded. The action of the court in modifying the first of these instructions and refusing the second was not error. In this case, as we have already seen, as to the goods lost by fire the appellant sought to justify its refusal to deliver said goods upon respondents' demand by showing that said goods were destroyed by fire, but as we have further seen proof of loss by fire is not a good defense to respondents' demand unless appellant further showed that the fire was not the result of negligence on appellant's part. In case of the injury to portions of said goods by fire the rule is the same.

These two instructions as prepared by appellant, the first by its silence and the second by its expressed direction, eliminated the question of appellant's negligence entirely as one of the necessary elements of appellant's defense. They were, therefore, not correct statements of the law governing appellant's defense, and the action of the court in modifying the one and in refusing the other was proper and legal.

[7] Two other instructions prepared by appellant were refused by the court. These two instructions also dwelt with the same subject, and the objections to them will therefore be considered together. These instructions are:

"You are instructed that the plaintiffs are conclusively presumed to know the contents of the warehouse receipt issued by the defendant, from the time that such warehouse receipt was delivered to the plaintiffs."

"You are instructed that, inasmuch as the warehouse receipt issued by the defendant for the goods in question contained a provision to the effect that the responsibility of the defendant for the contents of any piece or package is limited to the sum of \$25, unless the value thereof is made known at the time of storing and receipted for in the schedule and an additional charge made for the higher valuation, the plaintiffs cannot in any event recover more than the sum of \$25 for the contents of any piece or package of goods stored with the defendant, unless you further find by a preponderance of the evidence that the value of the contents of any such piece or package was made known to the defendant either at the time of the storing thereof, or within a reasonable time after the plaintiffs or either of them were informed of such provision, and was receipted for in the schedule and an additional charge for the higher valuation."

Within a short time after the deposit of said goods in defendant's warehouse they were attached by a creditor of respondents. The appellant thereupon issued its receipt for said goods to the sheriff who levied said attachment and did not deliver any receipt therefor to respondents or either of them at the time the goods were stored. The attachment was not discharged until about January 26, 1922, two weeks prior to the fire. At that time the

respondents paid all back storage against said goods, and the sheriff indorsed said receipt to respondents and it was delivered to the respondent Mrs. C. L. Wilson. The receipt contained the following stipulation:

"The responsibility of the above company for the condition of any piece or package is limited to the sum of \$25, unless the value thereof is made known at the time of storing, and receipted therefor in the schedule; and an additional charge made for the higher valuation."

The receipt itself is not before us; neither is there any facsimile thereof in the record, although a copy of the receipt is contained in the reporter's transcript. Respondents' counsel in their brief state that:

"The warehouse receipt had printed on it, at the top of the page, certain matter in very small type (which, by the way, fills two pages of the reporter's transcript). A part of this matter is a clause purporting to limit the defendant and appellant's liability to \$25 for each package delivered."

This statement is not controverted by appellant, so we may assume that it is true. Respondent Mrs. C. L. Wilson, who appears to be the only respondent who ever saw this receipt, stated that she had never read it after its delivery to her. She further testified that prior to the storage of said goods and shortly thereafter she had conversations with Mr. Aldridge, one of the officers of the warehouse company, in which conversations she asked him if he wished an itemized list of the goods and Mr. Aldridge replied that it was not necessary; whereupon Mrs. Wilson asked that he give them his personal attention as she had her silverware in the dresser drawers and valuables in the trunks and that she had between \$6,000 and \$7,000 worth of goods and her husband had other "architectural things." She further testified that in the month of January, 1922, and before the fire, she again called upon Mr. Aldridge and stated that she would like to get a loan upon the goods and that they were worth \$5,000 or \$6,000. There is no evidence, that any of the officers of the appellant corporation ever suggested to respondents at the time the goods were stored or ever (except through said receipt, which was not given to respondents until the goods had been in storage over 18 months) notified respondents or either of them that its liability for the loss of said goods was limited to \$25 for the contents of any piece or package unless the value thereof was made known at the time of the storage and receipted for in the schedule. It is the contention of appellant, however, that, having received said receipt at the time they did, about two weeks before the fire, respondents were conclusively presumed to have read the same, and that they are, therefore, conclusively bound by its terms and provisions. The principal authority relied upon by ap-

pellant in support of this claim is the case of *Taussig v. Bode & Haslett*, 134 Cal. 260, 66 P. 259, 54 L. R. A. 774, 86 Am. St. 250, where the court referred to the notice contained in a warehouse receipt as follows:

"We think it clear that the notice is a part of the contract. It was printed plainly on the face of the receipt. The whole paper is extremely brief. It was the duty of respondents to take note of its contents, if they had the opportunity, and their opportunity was ample. The presumption, therefore, is, that they did read it. Against this presumption there is no evidence, and none, we think, would have been admissible to show that the respondents had failed to do what their duty required them to do."

A facsimile of that receipt used by the warehouse owner in that case is set forth on page 265 of the opinion (66 P. 260). There is no question but that the notice limiting the liability of the warehouse owner, as the court said, "was printed plainly on the face of the receipt." The court could well have held in that case that it was conclusively presumed that the respondents read the notice and were bound thereby. In the present action a very different state of facts is presented. The appellant was notified of the true value of the goods at the time they were left for storage and at least on one occasion thereafter. No demand was ever made by appellant for any increased rate of storage. No receipt was given to the respondents until about 18 months after the goods were actually stored with appellant. The notice in said receipt where appellant sought to limit its liability was in small type and was merely a part of a large amount of printed matter of the same character appearing on the receipt. Was it error with all those facts before it for the trial court to refuse to instruct the jury that respondents were conclusively presumed to know the contents of the warehouse receipt and that respondents' right to recover for the loss of their goods was conclusively controlled by its provisions? As we have before said, neither the original receipt nor a facsimile thereof is before us. In this respect we have not an equal opportunity with the trial court to pass upon the sufficiency of the notice therein. Evidently the character of this notice had a material bearing upon the trial court in determining whether the respondents were conclusively presumed to know its contents. Then there is evidence to the effect that respondents declared the true value of their goods and offered appellant an itemized list thereof at the time they were delivered to the warehouse and were informed by appellant that such a list was not necessary. It is true respondents did not at that time formally offer to comply with the notice in the receipt limiting appellant's liability for the reason, apparently, that appellant had never brought this notice either directly or indirectly to their attention at the time of the

storage of the goods, and did not even indirectly do so until 18 months after it accepted the goods. It was, of course, not appellant's fault that the goods were attached and the receipt given to the sheriff, who held them under attachment, but this did not relieve appellant of the duty, if it desired to limit its liability for the loss of the goods, of bringing home to the respondents notice that the goods were accepted and held under such limited liability. The receipt was delivered to the respondents two weeks before the goods were destroyed by fire in the warehouse. There is no evidence that either of the respondents read the finely printed matter thereon containing the limited liability clause. The respondent Mrs. E. L. Wilson, who apparently had charge of the matter for both respondents, testified that she did not read it. Respondents had already informed appellant of the true value of the goods; the goods had been in storage with appellant 18 months; no demand or suggestion had been made to respondents for an excess storage charge on account of such valuation. The right of warehouse owners to limit their liability by such a notice is given in order that they may protect themselves from unreasonable and excessive demands for loss of goods without any previous knowledge of their real value. No such reason for applying this rule applies in the present action. The appellant was fully advised by respondents as to the true value of their goods. Appellant was, therefore, in a position to protect itself by giving the respondents' property the care and supervision its rather large value required, and to make a charge therefor based upon such valuation. Under all the facts and circumstances as shown by the evidence in this case, we cannot say that the court committed any error in refusing to give either of the last two mentioned instructions.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

201 Cal. 602

KRUGER v. CALIFORNIA HIGHWAY INDEMNITY EXCHANGE. (S. F. 11518.)★

Supreme Court of California. July 27, 1927.

Rehearing Denied Aug. 25, 1927.

I. Pleading — 121(2)—Defendant's denial that execution issued on certain judgment may be disregarded, where issuance was of record.

In action on policy of automobile indemnity insurance to recover from insurer amount of judgment obtained against insured, defendant's denial, for want of information or belief, that any execution had been issued on such judgment

may be disregarded, where issuing of execution and return thereof was matter of record.

2. Insurance — 616½—Insurer under automobile indemnity policy, guaranteeing payment of judgment against insured, held bound by judgment obtained without its knowledge, in absence of fraud.

In action on policy of automobile indemnity insurance to recover from insurer amount of judgment against insured obtained without insurer's knowledge, defendant, in absence of claim of fraud or collusion, is bound by such judgment, where policy guaranteed payment of judgment against insured.

3. Insurance — 616½—Insurer in automobile indemnity policy must pay judgment against insured, notwithstanding latter's failure to comply with policy by forwarding papers served.

In action under policy of automobile indemnity insurance by one who had obtained judgment against insured, failure of insured to comply with policy by forwarding to insurer papers served on him cannot affect insurer's liability to plaintiff to pay judgment, which liability was expressly and unconditionally assumed by terms of policy.

4. Municipal corporations — 121—Attack on constitutionality of ordinance requiring indemnity insurance on busses held no defense to enforcement of insurer's liability under policy conforming to ordinance.

In action on policy of automobile indemnity insurance covering jitney bus, as required by city ordinance, attack on constitutionality of such ordinance presents no legal defense to enforcement of liability under policy which was voluntarily assumed.

5. Municipal corporations — 703(1)—Municipality can prescribe nature of security to be given by those operating vehicles for hire on streets.

Municipality has the right within reasonable limits to prescribe the nature of the securities to be given by those operating vehicles for hire on its public streets.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Marie Kruger against the California Highway Indemnity Exchange. Judgment for plaintiff, and defendant appeals. Affirmed.

Barry J. Colding and Theodore Hale, both of San Francisco, and B. P. Gibbs, of Los Angeles, for appellant.

E. J. Tremont and J. Clark Benson, both of San Francisco, for respondent.

CURTIS, J. Action brought to recover upon a policy of insurance. The policy was issued by the appellant, the California Highway Indemnity Exchange, as insurer, to one John E. Delaney, the insured, referred to therein as the "subscriber." It appears from the com-

plaint that by an ordinance of the city and county of San Francisco, known as the "jitney bus ordinance," it was provided that it should be unlawful for any person to drive a "jitney bus" in said municipality without first procuring from the board of police commissioners a permit to operate the same, and, as a prerequisite to obtaining such permit, it was necessary for the applicant therefor to file a bond or policy of insurance with said board, insuring the owner of said "jitney bus" against any loss by reason of damage that might result to any person from the operation of said automobile, said policy to be limited to \$5,000 as damages for injury or death of one person injured or killed, "and said policy shall guarantee payment of any final judgment rendered against the said owner or lessee of said jitney bus (within the above-mentioned limits), irrespective of the financial responsibility or any act or omission of said jitney bus owner or lessee"; that in pursuance of said ordinance, and for the purpose of obtaining from said police board a permit to operate a "jitney bus" in said city and county, said John E. Delaney procured the said policy of insurance from appellant and filed the same with the said board of police commissioners; that thereafter, while said policy of insurance was in full force and effect, said Delaney negligently drove said automobile against said plaintiff, the respondent herein, causing injuries to her person; that thereafter said plaintiff brought suit against Delaney to recover damages for the injuries sustained and in said action recovered judgment against said Delaney in the sum of \$7,750, together with interest and \$15 costs; that execution was issued on said judgment and returned unsatisfied, and that nothing has been paid thereon, and the same is in full force and effect and wholly unsatisfied; that demand has been made upon defendant to pay said judgment, and defendant has refused to pay the same. The prayer of the complaint is for judgment against defendant in the sum of \$5,015. A copy of said policy of insurance was annexed to the complaint and by proper reference made a part thereof. It purports upon its face to be issued in compliance with the provisions of said "jitney bus" ordinance. The provisions of the policy inserted therein for the purpose of having the same comply with said ordinance are in part as follows:

"It is hereby understood and agreed that, in the event a final judgment covering any loss or claim under this policy is rendered against the subscriber, the exchange guarantees the payment of said judgment direct to the plaintiff securing such judgment irrespective of any financial responsibility on the part of the subscriber: Provided that any action by the said plaintiff to recover under this clause is commenced within 12 months next after such final judgment shall have been rendered, or where such limitation of time is prohibited by the laws of the state where-

in this policy is issued, then and in that event no suit or action shall be sustainable unless commenced within the shortest limitation permitted under the laws of such state. The exchange does not prejudice by this condition any defense against such loss or claim that it may be entitled to make under this policy in so far as it relates to any action brought against the exchange by the subscriber. In all other respects the terms, limits, and conditions of this policy remain unchanged."

[1] The answer of the defendant denied that Delaney negligently or otherwise, or at all, drove his automobile against plaintiff as a result of which plaintiff sustained any injury. It also denied, for want of information or belief, that any execution had been issued on said judgment; but, as the issuing of an execution and return thereof was a matter of record, this denial may be disregarded. As a second and separate defense to said action said defendant set forth in its answer that it did not know of the existence of the action of Marie Kruger against John E. Delaney, being the action in which said judgment was rendered, until more than six months after the rendition thereof, when demand was made upon it for the payment of the sum of \$5,015 with interest thereon from July 27, 1923, the date of said judgment. It was further set forth by defendant in its second defense that the policy of insurance issued to Delaney provided that, if suit were brought against Delaney to enforce any claim for damages on account of any accident covered by said policy, Delaney would immediately forward to the office of defendant "every summons, notice, or other process" served upon him, and the defendant would defend such suit in the name and on behalf of Delaney or settle the same.

An inspection of the copy of the policy annexed to the complaint discloses that such a provision was contained in and was made a part of said policy. The defendant further set forth in said second defense that Delaney failed to comply with this provision of the policy, and furthermore, that neither Delaney nor the plaintiff herein nor any one notified the defendant or any of its officers or representatives of the institution or pendency of said action or of the default of defendant. It is then set forth that Delaney had a good and sufficient defense to plaintiff's cause of action in that he did not negligently drive said auto bus, as alleged in said complaint, against plaintiff, but that the injuries sustained by the plaintiff, if any were sustained, were proximately caused by the negligence of said plaintiff; that plaintiff refrained for more than six months after the rendition of said judgment from notifying the defendant, appellant herein, of the rendition of the same; that immediately on learning of the rendition of said judgment appellant applied, under section 473 of the Code of Civil Procedure, to have the default of Delaney for fail-

ure to answer said complaint set aside; that said motion was denied for the reason that it was not made within the period of six months after the rendition of said judgment, and that plaintiff well knew prior to the time she filed her said action against Delaney that the appellant herein was the legal representative of Delaney, and notwithstanding said knowledge she refrained from notifying defendant of the pendency of her action against Delaney for more than six months after the rendition of said judgment.

The answer also contained a third defense, in which, by proper reference thereto, it made the allegations of the second defense a part of the third defense, and further alleged that "it had a complete and meritorious defense against the said John E. Delaney, * * * for any loss that he may have sustained under said policy, by reason of his failure to notify this defendant of the pendency of said action No. 136106" (the action in which said judgment was rendered). It was then alleged:

"That in so far as said 'jitney ordinance' requires payment direct to the plaintiff procuring a final judgment against the subscriber (Delaney), irrespective of any financial responsibility on the part of the subscriber, or any act or omission on his part, said 'jitney ordinance' is unconstitutional and in violation of article 14 (section 1) of the Amendments to the Constitution of the United States, and section 13 of article 1 of the Constitution of the state of California, in that said ordinance attempts to take property without due process of law and denies to this defendant the equal protection of the laws."

Upon the filing of said answer the plaintiff filed a general and special demurrer thereto, and a motion to strike out certain parts of the second and third defense and a motion for judgment upon the pleadings. The general demurrer went to the answer as a whole. The special demurrer was directed to the second and third defense only and set forth a number of particulars in which it was claimed that each of said defenses was ambiguous, uncertain and unintelligible. These matters all came on for hearing before the court at the same time, and, as recited in the judgment, "having been duly argued and submitted by counsel for said parties, and this court having fully considered all of said matters," judgment was ordered for plaintiff as prayed for in her complaint. From this judgment the defendant has appealed.

[2] We will first consider the motion for judgment on the pleadings. If the action of the court in granting this motion is sustained, then whatever rulings it may have made regarding the demurrers and the motion to strike out portions of the answer are of no consequence. We will consider the combined defenses made by appellant in the first and second defenses of its answer. As we view this defense, it appears to us that the sole

question presented thereby is whether the judgment procured by respondent herein in the action of *Kruger v. Delaney* is conclusive upon appellant in the present action, or has appellant, under all the facts and circumstances shown by the pleadings, the right to again litigate the question as to the negligence of Delaney and whether such negligence was the proximate cause of respondent's injuries. Respondent claims that, under the provisions of the policy quoted above, appellant guaranteed the payment to her of any judgment which she might secure against Delaney. Respondent relies in support of this contention upon the following language of the policy contained in the above quotation therefrom:

"It is understood and agreed that in the event a final judgment covering any loss or claim under this policy is rendered against the subscriber (Delaney), the exchange (appellant) guarantees the payment of said judgment direct to the plaintiff securing such judgment, irrespective of any financial responsibility on the part of the subscriber."

It would be difficult to frame language more simple or direct than this language. It can have but one meaning, and that is that appellant guaranteed the payment to the party securing the same of any judgment rendered against Delaney and covering any loss or claim under said policy. The undertaking is to pay the judgment to the party injured and not the damages sustained nor the loss incurred as a result of the injury. It is true plaintiff could have joined appellant as a defendant with Delaney in her action against the latter (*Milliron v. Dittman*, 180 Cal. 443, 181 P. 779), but independent of the policy she had a right of action against Delaney alone for any injury she may have sustained by the latter's negligence, and under the terms of the policy the appellant guaranteed the payment of any judgment she might so secure against Delaney.

Appellant's liability was to pay the judgment, and in a contract of that character the promisor is bound by the judgment whether he have notice of the action or not, even though he is not a party thereto. "The general rule appears to be that judgments are conclusive and binding on parties and their privies, but as to all others they are neither *prima facie* nor conclusively binding, for the reason that it would be unjust to bind a person by any proceeding in which he had no opportunity to make a defense, of offering evidence, of cross-examining witnesses, or of appealing if he were dissatisfied with the judgment. Indemnity contracts against loss or liability are sometimes said to constitute an exception to this rule, while again it is said that they do not in fact constitute an exception at all, but are based upon a fair and reasonable interpretation of the contract. It seems to be generally con-

ceded, however, that wherever a surety has contracted with reference to one of the parties in some suit or proceeding in the courts, he is concluded by the judgment. * * * Furthermore, if a surety has undertaken to perform a judgment, or to pay any balance which shall be found to be due by the principal to the obligee, he is bound by the judgment rendered. In all such cases the judgment is binding upon the surety unless he can show that it was obtained by fraud or collusion." 13 Cal. Jur. pp. 996, 997; *Easton v. Boston Investment Co.*, 51 Cal. App. 246, 251, 196 P. 796; *Irwin v. Backus*, 25 Cal. 214; *Pico v. Webster*, 14 Cal. 203, 205. In the last of these cases it is said:

"There can be no doubt, that where a surety undertakes for the principal, that the principal shall do a specific act, to be ascertained in a given way, as that he will pay a judgment, that the judgment is conclusive against the surety; for the obligation is express that the principal will do this thing, and the judgment is conclusive of the fact and extent of the obligation. As the surety in such cases stipulates without regard to notice to him of the proceedings to obtain the judgment, his liability is, of course, independent of any such fact."

In 14 Ruling Case Law, p. 63, the rule is stated as follows:

"It should also be noted that if a person enters into a contract of indemnity whereby he expressly agrees to become responsible for the result of a litigation, or if, by operation of law, such a responsibility is cast upon him without any agreement, he will, in the absence of fraud or collusion, be conclusively bound by the judgment rendered, whether he had notice of the action in which it was entered or not."

A clear and comprehensive statement of the rule is to be found in the case of *Conner v. Reeves*, 103 N. Y. 530, 9 N. E. 440, where the court said:

"The covenantor in an action on a covenant of general indemnity against judgments, is concluded by the judgment recovered against the covenantee, from questioning the existence or extent of the covenantee's liability in the action in which it was rendered. The recovery of a judgment is the event against which he covenanted, and it would contravene the manifest intention and purpose of the indemnity, to make the right of the covenantee to maintain an action on the covenant, to depend upon the result of the retrial of an issue which as against the covenantee had been conclusively determined in the former action, 'always, however, saving the right, as the law must in every case where the suit is between third persons, to contest the proceeding on the ground of fraudulent collusion, for the purpose of charging the surety.'"

We also find in the case of *Pioneer Sav. & Loan Co. v. Bartsch*, 51 Minn. 474, 53 N. W. 764, 38 Am. St. Rep. 511, a case cited by appellant, the same principle stated, as follows:

"Hence, if a surety stipulates for any particular method by which the liability of his

principal or of himself shall be fixed, he is bound by it. If he has undertaken, either expressly or by implication from the position which he has assumed with reference to pending litigation, to be responsible for the result of a suit between others, to which he is not a party, and to which he has not been made privy by notice and an opportunity to defend, then, in the absence of fraud and collusion, the judgment against the principal alone would be conclusive evidence against him of every fact which it was necessary to find to recover such a judgment. This would be because he had so contracted."

We find nothing in any of the authorities cited by appellant which in any way conflicts with the rule enunciated above and we must therefore conclude that as appellant makes no claim that the judgment rendered in respondent's favor against Delaney was procured by either fraud or collusion it is binding and conclusive upon appellant, notwithstanding it was not a party to said action and had no notice of the pendency thereof until after the rendition of said judgment. It is liable for the payment of said judgment by reason of its expressed undertaking guaranteeing the payment of the same.

[3] Appellant seeks to avoid the force of the foregoing rule by a reference to the terms of the policy wherein it is provided that the insured or subscriber (Delaney) agreed to immediately forward to appellant every summons, notice or other process as soon as the same were served upon him and that Delaney failed to perform this provision of the policy. This failure on the part of Delaney to forward to appellant the papers served upon him would undoubtedly be a good defense to an action brought upon the judgment by Delaney against appellant, but it is without effect in the present action brought by respondent. Appellant's undertaking to pay the judgment to plaintiff is absolute and is not conditioned upon Delaney's agreement to forward to appellant said papers or any papers which may be served upon him. The latter's failure to perform his part of the agreement cannot in any way affect appellant's liability to third persons expressly and unconditionally assumed by the terms of the policy. In our opinion, therefore, the allegations of the first and second defense of appellant's answer were insufficient to constitute any defense to the cause of action set forth in the complaint herein.

[4] The third defense of the answer, as we have already seen, seeks to raise the constitutionality of the so-called "jitney bus ordinance" of the city and county of San Francisco. In the case of *In re Cardinal*, 170 Cal. 519, 524, 150 P. 348, 350 (L. R. A.) 1915F, 850) the validity of this ordinance was sustained by this court, and at that time the court said:

"We see no reason to doubt the power of the state, or any county or municipality, in the ex-

ercise of its police power or regulation, to require security in the shape of a bond or insurance policy from its licensees in all cases where the giving of such security may fairly be held to be a reasonable requirement for the protection of the public."

The particular objection which appellant now makes to such ordinance was not directly involved nor considered by the court in the case of *In re Cardinal*, supra. Appellant's claim that under its right to contract, as protected by constitutional enactments, it had the right to enter into a contract to indemnify licensees under said ordinance against loss through accident or otherwise in the operation of their "jitney busses" and to provide in such contracts that it shall have notice and an opportunity to defend as a condition precedent to its liability, and that if the ordinance deprives it of this right, it is unconstitutional in that respect.

Appellant's argument, we think, is predicated upon a false premise. Its right to enter into contracts given under the state and national constitutions does not extend to every kind and character of contract. It would have no right to contract to operate a railroad or conduct a banking business, as it is prohibited by statute from entering into such contracts. Even an individual whose right to enter into a contract is protected by the Constitution, at least to the same extent as that of appellant, cannot become a party to every kind and character of contracts. In fact, an individual is prohibited by this identical ordinance of the city and county of San Francisco from entering into a contract as a surety on a bond required thereunder and this provision of the ordinance has been sustained by this court. "It is suggested that the requirement that the bond be given by a responsible surety company or association authorized to do business under the laws of the state of California, to the exclusion of personal sureties, renders the provision invalid. We know of no constitutional right that one has to give any particular kind of security. A legislative body having the right to require the giving of security necessarily has the right to prescribe the kind that shall be given, with the limitation always, of course, that its provisions in this regard shall not be unreasonable. * * *"
In re Cardinal, supra, p. 126 (150 P. 351). If, then, individuals can be excluded from entering into contracts of surety by the terms of said ordinance and by such exclusion there is no invasion of their constitutional rights to enter into contracts, it can hardly be successfully contended that the appellant, a

creature of the law, has any constitutional right to enter into the contracts of indemnity, provided for by the ordinance, without limitation or restriction.

[5] The municipality undoubtedly has the right within reasonable limits to prescribe the nature of the security to be given by those operating vehicles for hire upon its public streets. There is nothing unreasonable in the provisions of the ordinance requiring the operator of such a vehicle to protect the public by the bond or policy of insurance required therein and in the manner as required. There was nothing obligatory upon the appellant requiring it to issue such a policy as it did. The policy was issued freely and voluntarily and without coercion on the part of any one. It can with perfect safety be assumed that appellant was familiar with the terms of said ordinance and expressly contracted in reference thereto and agreed to be bound by those provisions of the policy inserted therein in compliance with the requirements of the ordinance. It is not unreasonable to assume that the premium charged upon such a policy was fixed in reference to the extent of the liability incurred by appellant in issuing the same. To now hold that the ordinance is void and appellant released from its obligations under the policy of insurance would be to grant it immunity from its voluntary contracts entered into for an adequate and valuable consideration under the guise of protecting its constitutional rights. As already seen, the ordinance in no way invaded appellant's constitutional rights. On the other hand, the liability which respondent now seeks to enforce against appellant is one it voluntarily assumed. The allegations of appellant's third defense presents no legal defense to the enforcement of said liability.

From the foregoing it is apparent that the answer of appellant failed to state facts sufficient to constitute a defense to said action. The judgment upon the pleadings, therefore, must be sustained. As already stated, it will not be necessary for us to consider the action of the trial court, either upon the demurrers or upon the motion to strike out portions of the answer, for whatever action the court may have taken in these matters could not affect the validity of the order granting the motion for judgment upon the pleadings nor the judgment rendered thereon. The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.; SHENK, J.

201 Cal. 618

PEOPLE v. MAHONEY. (Cr. 3027.)★

Supreme Court of California. July 22, 1927.

Rehearing Denied Aug. 18, 1927.

1. Criminal law §363—Declarations to be admissible as *res gestæ* must have been uttered contemporaneously with act and explain or qualify it so as to be connected with it so that declaration and act form single transaction.

Declarations, in order to be admissible as part of *res gestæ*, must have been uttered contemporaneously with, and grow out of, act on which they have bearing so as to be spontaneous and not narrative, must qualify, illustrate, explain or unfold its character or significance so as to be connected with it in such manner that declaration and act form single and indivisible transaction.

2. Criminal law §368(1)—Evidence regarding injuries and cries of others in collapse of grandstand when deceased was killed held improperly admitted as *res gestæ*.

In prosecution for manslaughter, evidence of injuries, and of cries, shrieks, and groans of others immediately after collapse of grandstand in which deceased was killed, held improperly admitted as part of *res gestæ*.

3. Criminal law §655(1)—Trial judge's conduct in espousing cause of prosecution in manslaughter prosecution held improper.

In manslaughter prosecution, trial judge's conduct in espousing cause of prosecution by commenting on evidence, and making disparaging remarks to defendant's counsel and witnesses, held improper.

4. Criminal law §633(1)—Every defendant in criminal case is entitled to fair trial on facts.

Every defendant in criminal case is entitled to fair trial on facts, and not trial on temper or whimsies of judge who sits in case.

5. Criminal law §1186(4)—Where trial court by conduct discredits cause of defense, new trial is necessary, though record may show defendant guilty of a crime (Const. art. 6, § 4½).

Where trial court persists in making discourteous and disparaging remarks to defendant's counsel and witnesses, and utters frequent comment, from which jury may plainly perceive that judge does not believe testimony of witnesses, and in other ways discredits cause of defense, it has transcended so far beyond pale of judicial fairness as to render new trial necessary, though record may show defendant guilty of a crime, notwithstanding Const. art. 6, § 4½.

Seawell and Curtis, JJ., dissenting in part.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Paul F. Mahoney was convicted of manslaughter, and he appeals. Reversed, and new trial ordered.

Le Compté Davis and William B. Beirne, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

PER CURIAM. The appellant, a contractor, and C. B. Bucknall, deputy building inspector of the city of Pasadena, were charged by indictment with manslaughter. The jurors were unable to agree upon a verdict respecting the charges against Bucknall, but returned a verdict of guilty against the appellant. He appeals from the judgment pronounced upon the verdict and from an order denying his motion for a new trial. The charge against the defendant Bucknall was dismissed by the court upon motion of the district attorney.

It has become the custom on New Year's day of each year to hold a festival of flowers in the city of Pasadena, known as the Tournament of Roses. It is viewed by thousands, many of whom pay for seats from which to watch the parade. In December, 1925, the appellant secured from the building department of the city of Pasadena permits to erect four grandstands for the accommodation of these spectators. All of them were constructed along similar lines. The one erected at Colorado and Madison avenues collapsed. Many people were injured; some were killed, including one Mrs. Bessie Borich, for whose death the jury held the appellant responsible. The prosecution of the appellant was had under section 192 of the Penal Code, defining the crime of manslaughter, and upon the theory that in the erection and construction of the stands the appellant did not exercise due caution and circumspection. We deem it unnecessary to review the nearly 2,000 pages of testimony taken in the court below. It suffices to say that there is evidence from which the jury might well conclude that the grandstand which collapsed was so negligently constructed as to be unable to carry the tremendous load placed upon it.

In support of his appeal, which is presented by counsel who did not participate in the trial of the case in the court below, the appellant relies upon alleged error in the introduction of certain testimony offered by the prosecution, and misconduct of the trial judge during the trial. As to both of these matters we adopt the opinion of the District Court of Appeal of the Second District, Division 2, as the opinion of this court, to wit:

[1, 2] "The appellant first complains of the admission in evidence, over defendant's objection, of testimony showing injuries to persons other than the deceased, Mrs. Borich, and of the cries, shrieks, and groans of the people in the stand immediately after its collapse. This testimony was admitted by the trial court on the theory that it constituted a part of the *res gestæ*. The offense charged is what has generally been known as 'involuntary manslaughter—

ter' or a case—'where death results unintentionally, so far as defendant is concerned, from an unlawful act on his part, not amounting to felony, or from a lawful act negligently performed.' 1 Whart. Crim. Law (8th Ed.) § 305. The principal questions in determining the guilt or innocence of the defendant were, first: Was the stand negligently constructed or was it constructed unlawfully or in violation of the ordinance? Second: Did death result from the unlawful or negligent act? It is important to have these main questions, which may be denominated the main transaction, in mind in determining whether the testimony admitted was part of the *res gestæ* because we find that declarations which would otherwise be hearsay, or evidence of another offense which would not otherwise be admissible under any other exception, would be competent, if constituting a part of the *res gestæ*. In order, however, that they may come within the rule, it is necessary that they possess the following characteristics: 'First, they must have been uttered contemporaneously with and grow out of the act upon which they have a bearing so as to be spontaneous and not narrative; second, they must qualify, illustrate, explain, or unfold its character or significance, so as, third, to be connected with it in such a manner that the declaration and the act form a single and indivisible transaction.' Underhill's Crim. Evidence (2d Ed.) § 93. It will be observed, therefore, that the acts and declarations admissible as a part of the *res gestæ* depend largely upon the character of the crime, or, as said by the same author, section 95: 'The main question is: Are they relevant to, and do they explain and illustrate the facts of the transaction in issue? In other words, can we learn from them something of the motives or intention present in a relevant act.' Tested by these questions, it is apparent that injuries or the extent of injuries suffered by other parties who were present in the grandstand could throw no light either upon the character of the construction, or upon the question as to whether faulty construction was responsible for the death of Mrs. Borich. If the stand were negligently or unlawfully constructed, the defendant would have been guilty of the offense charged if such construction resulted in her death, regardless of injuries to other persons and regardless of their spontaneous utterances of pain. Undoubtedly, such testimony would have great effect upon the sentiments and would tend to arouse the indignation of the jury. We conclude therefore, that the testimony admitted was not to be considered a part of the *res gestæ*, and it was error to admit it as such.

"The remaining two points urged by appellant as reasons for the reversal of the judgment may properly be considered under one head. They consist of twenty-three utterances by the trial judge and numerous instances where he took to himself the task of examining witnesses, which, appellant says, conveyed to the mind of the jury the impression that the judge was convinced of the guilt of the defendant and that his sympathy was wholly with the prosecution. No assignments of error were made at the time of the occurrences by defendant's counsel, and no opportunity given to the court to right the wrong done, if such it was. We are not unmindful of the rule which requires some effort to be made in the trial court

to prevent and to correct such errors when they occur. But there may be instances, and this is one of them, where such effort would be entirely fruitless; no retraction sufficient to undo the harm; and the effort made might result in further error. Further, it is evident from the attitude of the trial judge, as shown by the record, that any assignment of misconduct would have been disregarded. Counsel for the appellant, by making an assignment, would have brought upon himself further attack. *People v. McDonald*, 167 Cal. 545, 140 P. 256; *People v. Derwae*, 155 Cal. 593, 102 P. 266; *People v. Frank*, 71 Cal. App. 575, 236 P. 189. It would extend this opinion beyond any reasonable bounds to treat each assignment separately, many of which, while perhaps not strictly in keeping with judicial language and discretion, were not of that irremediable nature except when considered as a part of the whole, and therefore we shall consider only a few instances. D. Z. Gardner, a member of the bar, was permitted to testify on behalf of defendant as an expert on construction. During the examination of Mr. Gardner the following occurred: 'A. By the Court: Let's put it this way, Mr. Gardner: From your experience as a builder and contractor of about eight years, obtained thirty-four years ago, would you say that the stand in question was constructed in a safe and workmanlike manner? A. Absolutely so. Q. What happened to it, do you know? A. I know it fell down. But— Q. That is all. You have answered the question. A. Yes. I don't think it is hardly fair when the question has been— Q. Now, you are not here to say whether a question that is asked is fair or not, and— A. I understand, Your Honor. Q. * * * The fact that you are an attorney of the court and an officer of the court makes it all the more wrong for you to attempt to make such a statement as that, and, if it occurs again I shall hold it a contempt of court, just as I would do with anybody else who is insulting or doesn't show the proper respect for the court. Now, you are here as a witness to answer questions. A. I understand. I want— Q. Never mind what you want. You are here to answer questions, and when you have answered the questions close your face after you have answered the question, and don't let me hear any more remarks of that kind. If you do, you will be up here in a structure that will bear a whole lot more weight than any grandstand is intended to bear.' Shortly after this occurrence and immediately preceding an afternoon recess of the court, the following statement was made by the trial judge: 'Well, I guess we had better take the afternoon recess, ladies and gentlemen; we don't want to tire our noted expert out.' After Mr. Gardner was permitted to testify as an expert, his testimony should have gone to the jury unimpaired by the comment of the court thereon. Realizing the eagerness with which juries grasp the suggestions of the trial judge, we can appreciate the fact that no weight would be attributed by them to his testimony after the remarks just quoted. On more than one occasion the trial judge asked the witness, in referring to the grandstand, 'What happened to it?' as though the fact that it had fallen satisfied his mind that it had fallen by reason of negligent construction, eliminating the possibility of a latent defect, which due care and circumspection may

not always guard against. And to further accentuate his belief, when questioning one witness regarding the three stands which did not fall, asked the following question: 'You think the mercy of Providence might have had something to do with it?' Under our present system, judges are not permitted to comment upon the evidence or its effect. They cannot be too careful or cautious lest they by word, look, or inflection of the voice bring to bear upon the jury an influence not compatible with an unbiased verdict of the jury. *People v. Williams*, 17 Cal. 142; *People v. Matthai*, 135 Cal. 442, 67 P. 694 and *People v. Frank*, supra. In addition to the foregoing misconduct of the trial judge, we deem it proper to instance the following: The counsel for one of the defendants had objected to a question. The witness on the stand had commenced an answer, when counsel for the other defendant interposed an objection also. The record then proceeds: 'The Court: The witness had not finished her answer, so I could not very well rule on the objection, not knowing what the witness' answer is going to be until she finished. And I will instruct counsel not to interrupt the witness again when she is making an answer. Make your objection when the witness finishes the answer or move to strike it out when she has finished, but don't interrupt the witness. Show the witness the common courtesy of allowing her to finish her answer. Mr. —: Well, but, Your Honor— The Court: Now, that is all I want to hear from you. I expect a witness in my court to be treated with ordinary gentlemanly courtesy, and it is going to be done. Mr. —: I will be very glad to do that, Your Honor, of course. The Court: Very well; see that you do.' Upon a similar occasion, when another witness was on the stand, the judge said to defense counsel: 'The witness had not finished his answer. He will be allowed to finish his answer, and if there are any more interruptions some one is going to suffer for it.' The record also shows the following, the questioner being the counsel for one of the defendants: 'Q. * * * Mr. Kelly, as chief of police in Pasadena, are you an insurer against crime? The Court: Oh, you don't need to answer that question, Captain. That is too utterly silly to require an answer. Q. * * * As head of the department? The Court: Now, that question * * * you know is not a proper question. I am willing to allow a lot for ignorance, but some questions pass the bounds, and that is one of them.' The same witness was examined by the counsel of defendant Bucknall as to the latter's reputation. The record shows: 'Q. He is a man who bears a good reputation in Pasadena? A. Excellent. * * * Q. For his truthfulness? A. Yes, sir. Q. Honesty? A. Yes, sir. Q. Integrity? A. Yes, sir. Q. By the Court: And chastity? A. Yes, sir. The Court: We might as well get them all in.' While the same witness was on the stand, the prosecution inquired whether the lumber formerly in the wrecked stand had been changed in its condition after removal from the place where it fell. Upon objection being made by both counsel to certain questions, the judge said to one of them: 'You don't want the officer to testify he slept on it, do you?' During the direct examination of a witness for the prosecution, one of defense counsel started to say something. Then: 'The Court: Wait just a

minute. I think Mr. — is laboring with an objection.' A little later the same situation presented itself, when this occurred: 'The Court: Just a moment. Mr. — is a little bit slow in getting started, so we will have to give him a little chance to make his objection. Go ahead, Mr. —, I can always tell from the motions you are making there is an objection about to come forth. Mr. —: Yes, Your Honor. The Court: Now you have passed through the preliminary pain, give birth to it.' On another occasion the judge said of one of the counsel for the defense: 'The Court: Well, Mr. — has made that objection so many times that I think he ought to have it sustained at least once. * * * I don't want him to be utterly without hope of having that objection sustained some time during the trial.' One of defense counsel objected to the introduction in evidence of certain photographs. After a colloquy over the question whether it was necessary to call as a witness the photographer who took them, the following occurred: 'The Court: Well, it seems to me it is an idiotic objection, to be frank about it. All right, bring the photographer here, since they seem to want to make you a little more trouble. Do you want them to bring the camera here? Mr. —: No. The Court: You want him to bring the same shoes he had on when he took the picture? How about the gum he was chewing? Do you want him to pick that up again? Just about as sensible. I haven't much patience with an objection which is made just for the purpose of making objection, when there doesn't seem to be a scintilla of sense in making them. A proper objection I have absolute respect for, of course. If a witness testifies a picture absolutely delineates that which he is testifying to, that certainly ought to be sufficient without insisting that the man who did the actual act of pressing the bulb be brought in to testify he pressed the bulb to the camera to take the picture.' While a witness for the defense was being cross-examined by the district attorney this took place: 'Q. * * * Are you a carpenter or a laborer? A. Why, I am a carpenter. Q. By the Court: Belong to the carpenter's union? A. No, sir. Q. (By a deputy district attorney.) Well, I thought you said in answer to his question that you had been working either as a laborer or carpenter, or was I mistaken? The Court: You are not one of those scabs, then, some of the witnesses have referred to as connected with this work? A. Carpenter. I used to work at labor sometimes when I was a boy.' The owner of the property upon which the collapsed stand was constructed was a witness for the prosecution. After he testified to the consideration paid him for the use of the property and had said that he was on the stand at the time of the collapse: 'Q. By the Court: You had two broken legs of your own in addition to that, didn't you? A. I had two broken legs. Q. That was a premium outside of the other consideration you got? One of the counsel for the defense objected at one point: 'These questions are leading. The Court: Oh, I don't care if they are. That is an awful trivial objection, unless the question puts the answer directly in the mouth of the witness, but when you are questioning a man who is qualified as an expert I don't see any necessity of

consuming about five times the time that is necessary by beating around the bush. You might as well go right at the point and ask about the fact we are interested in."

[3, 4] "We have presented sufficient to show a state of affairs which trial judges should not permit, and which may be pointed to as an example of what they should not do in the trial of lawsuits. If they will lend themselves to such methods, if they will so intemperately espouse the cause of the prosecution in criminal cases, no man charged with a penal offense is safe, whether he be guilty or innocent. Every defendant under such a charge is entitled to a fair trial on the facts, and not a trial on the temper or whimsies of the judge who sits in his case. Whatever the degree of guilt of appellant here, those who know the circumstances surrounding his conviction are likely to feel that the verdict resulted from the conduct of the judge and not from the evidence."

[5] The prosecution attempts to justify the remarks of the trial court upon the ground that, because there was sufficient evidence of the negligent and faulty construction of the grandstand to support the finding of the guilt of the defendant, they were "harmless," made in a "facetious light," and that the court was "indulging in a bit of humor." It also invokes the curative provisions of section 4½ of article 6 of the Constitution. Such an attitude on the part of a trial court as that here disclosed cannot be passed over so lightly. Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. For this reason, and too strong emphasis cannot be laid on the admonition, a judge should be careful not to throw the weight of his judicial position into a case, either for or against a defendant. It is unnecessary to cite the cases bearing on this subject. It is a fundamental principle underlying our jurisprudence. When, as in this case, the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses, and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense, it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary. Neither can a plea for the application of the section of the Constitution save this situation. The fact that a record shows a defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice. In this case the defendant did not have the fair trial guaranteed to him by law and the Constitution.

The judgment of conviction is reversed, and a new trial ordered.

SEAWELL, J. I concur in the judgment of reversal, but I do not concur in that portion of the opinion which holds that it was error (presumably prejudicial error) to admit in

evidence the exclamations, declarations, and conditions which accompanied and immediately followed the collapsing of the grandstand, the faulty construction of which, it is claimed by the prosecution, amounted to criminal negligence on the part of the defendant. It has always been my understanding of the criminal law that those things that happen at the time of the commission of an act denounced as criminal, or that accompany it or immediately follow it, and which are the natural and immediate result of the act criminally set in motion, are admissible in evidence. If this is not the law, then we have almost innumerable decisions in our reports that are misstatements of the real meaning of *res gestæ*. A homicide is committed, and the person who receives the mortal wound immediately thereafter, in the presence of a score of people who witnessed the infliction of the wound, exclaims, in accusatory words, "You are a murderer." Can it be doubted that such an exclamation, although accusatory, is admissible? Had the exclamation been one of pain would it be any less admissible as a part of the *res gestæ*? The defendant was charged with the negligent construction of a grandstand that was to sustain the aggregate weight of thousands of persons, and the fact that a thousand persons were injured by the collapse of the grandstand and the things that immediately ensued were inseparably connected with the negligent act that caused the grandstand to collapse. That question is the crux of the crime charged.

If a person was to fire a rifle at an animal in the park, and with one shot kill or wound unto death three or more persons, could it be said that, in a trial charging the slayer with manslaughter of one of the victims of his criminal negligence, the admission of the exclamations of the others uttered immediately after being struck by the one bullet was error? Such is not my understanding of the rule. I have no doubt that, in a case involving the collapsing of a grandstand, a bridge, or other structure, or in case of a railway collision, in which many persons are injured, that the situation as it existed at the time of, and immediately following, and which is but the natural result of the negligent act constituting the crime, is admissible. The bloody clothes of a decedent, even in cases where they seem not to be illustrative of an act which is not already shown by other evidence, are quite universally received in evidence. I am not persuaded that a jury would be inflamed beyond the power of self-control by a description of the things that occurred upon the falling of a grandstand crowded with people to the degree that it would inflict upon its builder immedicable wrong. Neither am I able to convince myself that any body of reasonable men would under such circumstances substitute effect for cause. It is scarcely conceivable that the human imagination would not instantly from a recitation of

the physical facts supply the things that must inevitably follow. In fact, the result would be but a deduction which the average mind of men would make. I am satisfied that the condition as it existed immediately upon the collapsing of the grandstand is inseparably connected with the charge sought to be established. Surely a jury ought not to permit the horror of a situation alone to supply substantial evidence, and I do not believe that the evidence sought to be excluded had such an effect. Nevertheless it is a part of the case.

I concur: CURTIS, J.

34 Cal. App. 516

SAN JOSE HOSPITAL v. ETHERTON et al.
(Civ. 5485.)

District Court of Appeal, First District Division 1, California. July 21, 1927.

1. Venue ⇨41—That venue was properly laid as against nonresident codefendant did not deprive defendant of right to have venue changed.

That venue was properly laid as against nonresident, codefendant in transitory action, did not deprive defendant of right to have case tried in county in which he resided at commencement of action.

2. Venue ⇨69—Unless answer has been filed, counter motion to refuse venue change on ground convenience of witnesses will be promoted will not lie (Code Civ. Proc. § 397, subd. 3).

Unless answer has been filed at time demand is made for change of venue, counter motion to retain cause on ground that convenience of witnesses will be promoted by refusing change will not lie, under Code Civ. Proc. § 397, subd. 3.

3. Venue ⇨69—Where issues were not settled, and plaintiff's affidavit supporting counter motion failed to state names of witnesses, motion for change should not have been denied for convenience of witnesses (Code Civ. Proc. § 397, subd. 3).

Where nonresident codefendant had filed answer, but defendant had filed demurrer with demand for change of venue and plaintiff's affidavit in support of counter motion to refuse change for convenience of witnesses, as provided by Code Civ. Proc. § 397, subd. 3, did not state names of witnesses or matters to which they were expected to testify and issues in case remained to be settled, motion for change of venue should have been granted.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by the San Jose Hospital against E. E. Etherton, doing business as the E. E. Etherton Company, and another. From an

order denying the motion for a change of venue, defendant named appeals. Reversed.

Chalmer Munday, of San Francisco, and Fry & Jenkins, of San Jose, for appellant.

Samuel G. Tompkins, of San Jose, for respondent.

CASHIN, J. An appeal from an order denying a motion for a change of venue.

An action was brought by San Jose Hospital, a corporation, against defendant E. E. Etherton, a resident of Los Angeles county, to recover damages, for the failure of the latter to complete the construction of a building in accordance with a contract between the above parties and against defendant Hart-Wood Lumber Company, a foreign corporation, as surety on the bond executed by both defendants to indemnify plaintiff against loss in the event of a failure by Etherton to perform the contract mentioned.

An answer was filed by defendant corporation, and thereafter Etherton served and filed a demurrer to the complaint with a demand and notice of motion for a change of venue to Los Angeles county, the motion being supported by an affidavit of merits.

The motion was denied, and Etherton appeals from the order.

The allegation as to the residence of Etherton was not denied by respondent, but its counter affidavit filed in opposition to the motion alleged that the answer of defendant corporation raised several issues of fact requiring the testimony of at least 15 witnesses at the trial of the action, all of whom resided in Santa Clara county.

The names of these witnesses were not stated, nor did the affidavit show what testimony was expected from them.

[1] The defendant corporation being a nonresident, as against it the venue was properly laid, and the trial of the action might have been had in Santa Clara county (Thomas v. Placerville Mining Co., 65 Cal. 600, 4 P. 641; Rains v. Diamond Match Co., 171 Cal. 326, 153 P. 239; Ryan v. Inyo, etc., M. & P. Co., 41 Cal. App. 770, 183 P. 250), but the action being transitory, this did not deprive appellant of the right to have the case tried in the county in which he resided at the commencement of the action (Banta v. Wink, 119 Cal. 78, 51 P. 17; Pittman v. Carstenbrook, 11 Cal. App. 224, 104 P. 699).

[2] A motion for a change of venue on the ground that the action was not brought in the proper county may be opposed by showing that the convenience of witnesses will be promoted by refusing the change (section 397, subd. 3, Code Civ. Proc.), but the rule is well settled that, unless the answer has been filed at the time the demand is made, a counter motion to retain the cause on the latter ground will not lie (McSherry v. Pennsylvania, etc., Mining Co., 97 Cal. 637, 32 P. 711; Pascoe v. Baker, 158 Cal. 232, 110 P. 815; Sheffield v.

Pickwick Stages, 191 Cal. 9, 214 P. 852), and it has been held that the affidavit supporting the counter motion should contain the names of the witnesses, together with the testimony expected from each, that the court may from the issues judge of the materiality of their testimony (Loehr v. Latham, 15 Cal. 418; Cook v. Pendergast, 61 Cal. 72-80; Grant v. Bannister, 145 Cal. 219-222, 78 P. 653; Ennis-Brown Co. v. Long, 7 Cal. App. 313, 94 P. 250).

[3] The right to a change of the place of trial on the grounds stated in appellant's motion was clear, and while a counter motion to retain the cause for the convenience of witnesses is addressed to the discretion of the trial court, and its action thereon will not be disturbed on appeal in the absence of an abuse of discretion, here the affidavit filed in support of the counter motion failed to state the names of the witnesses or the matters to which they were expected to testify, and it appears that the issues in the case remained to be settled.

In view of the state of the pleadings and the insufficiency of the affidavit within the rules stated in the above cases, the materiality of the testimony of the witnesses could not be determined, and appellant's motion should have been granted.

The order is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

84 Cal. App. 701

HAMMOND LUMBER CO. v. GORDON et al.
(Civ. 5044.)

District Court of Appeal, Second District, Division 2, California. Aug. 3, 1927.

1. Fixtures ⇨7—Finding that balconies nailed and bolted to building were, in absence of express contract, fixtures, held proper in mechanic's lien foreclosure suit (Civ. Code, § 660).

In absence of express contract, finding of trial court that balconies, pillars of which were fastened to walls of building with bolts and nailed to floor, were fixtures, held proper in action to foreclose mechanic's lien, under Civ. Code, § 660, defining fixture as thing permanently attached to buildings by means of cement, plaster, nails, bolts, or screws.

2. Mechanics' liens ⇨30—One furnishing lessee materials for balconies nailed and bolted to building, without actual or constructive knowledge of contract that balconies were removable, held entitled to foreclosure of mechanic's lien as against owner failing to give notice of nonresponsibility (Civ. Code, § 660; Code Civ. Proc. § 1192).

Person furnishing materials to lessee used in construction of balconies, which were bolted and nailed to building with owner's knowledge,

held entitled to foreclosure of mechanic's lien on property, under Civ. Code, § 660, where stipulation in contract between owner and lessee that balconies were to be removable was unknown to materialman and contract was not filed, and where owner failed to give notice of nonresponsibility under Code of Civ. Proc. § 1192.

3. Mechanics' liens ⇨26—Materialman cannot be deprived of lien by concealed purpose of persons interested in constructing improvement (Civ. Code, § 660).

One furnishing material for addition to building which would ordinarily become part of realty under Civ. Code, § 660, cannot be deprived of statutory and constitutional right to lien by concealed purpose held by persons responsible for construction.

4. Fixtures ⇨4—Character of property claimed to be attached to realty, where rights of third party are involved, depends on apparent intent.

Though intent of parties is controlling criterion in ascertaining whether property is permanently attached to land as between immediate parties to transaction, where rights of persons unconnected with transaction and without actual or constructive knowledge of intent of parties are concerned, question must be determined from apparent intent reasonably appearing to such third person.

5. Fixtures ⇨35(5)—Finding that balconies were bolted and nailed to building held sufficient as finding of their attachment to realty (Civ. Code, § 660).

In action to foreclose mechanic's lien for materials furnished in constructing balconies on building, finding that balconies were attached by means of bolts and nails held sufficient as finding that balconies were permanently attached and became part of realty under Civ. Code, § 660, where court found as conclusion of law that balconies were improvements as contemplated by law determining materialmen's liens.

6. Appeal and error ⇨1071(2, 6)—Judgment will not be reversed for error resting solely in statement of conclusions of law, or for absence of finding not affecting judgment.

Judgment will not be reversed for error in statement of conclusions if findings and judgment are sound, or for absence of finding which if made would have sustained judgment.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by the Hammond Lumber Company against J. Gordon, Edward Faust Squadrilli, and the Security Trust & Savings Bank, as executor of the estate of Gertrude E. Haws, deceased. Judgment for plaintiff, and defendant last named appeals. Affirmed.

Lucien Gray, of Los Angeles, for appellant.
R. L. Horton, of Los Angeles, for respondent.

CRAIG, J. This is an appeal by the executor of Gertrude E. Haws from a judg-

ment in an action to foreclose a mechanic's lien. Mrs. Haweis was the owner of certain real property in Los Angeles county, Cal.; she leased the second floor of the building thereon for a five-year period beginning May 1, 1922, to defendant Squadrilli; after making the lease Squadrilli made a written contract with the defendant Gordon for the construction of balconies in the room leased. The contract provided that the balconies were to be so constructed as to be removable at any time. The plaintiff furnished certain materials to Gordon, which were used in the construction of the balconies. Defendant Haweis had no part in ordering the materials from the plaintiff, but had knowledge that the balconies were being built.

The court found, among other things, that the plaintiff at the time it furnished the materials did not know of the lease between Mrs. Haweis and Squadrilli, nor of the written contract between her and Gordon, and that the materials were furnished without actual knowledge as to who was the owner of the premises. Neither the lease nor the contract was placed on record.

Another finding states in detail the manner in which the balconies were constructed and attached to the building. It is found that certain heavy pillars of the balconies were fastened to the walls with 9-inch bolts, and were nailed to the floor; that 20 of these posts each had one 9-inch bolt screwed into the wall of the building; nails used to fasten the posts to the floor were 8 and 10 penny nails; also the stringers for the stairways were fastened to the wall by 5 and 6 No. 16 screws, one-quarter inch thick by 3 inches long, and the stairways were then nailed to the stringers with spikes; the balconies were each 7 to 8 feet wide, 7 feet high, and 75 feet long.

The answer of the defendant Haweis, among other allegations, contains the statement that:

"Any and all and every of the materials furnished to said Gordon by plaintiff were for the construction of said removable balconies as aforesaid, and not at the instance or request or by authority or on behalf of the defendant, and not for the construction of any alteration or addition or improvement or repair to said building or said premises of the defendant or any part thereof."

[1, 2] The question involved is whether the land of the defendant Haweis is subject to a mechanic's lien for the materials so furnished and used in the balconies. We are clear that this must be answered in the affirmative. Section 660 of the Civil Code defines a fixture as follows:

"A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent,

as by means of cement, plaster, nails, bolts, or screws."

It cannot be doubted that in the absence of an express contract to the contrary the balconies in question were so attached to the defendant's building as to make them fixtures, or at least to require that this court sustain a decision of the trial court to that effect. It is true that the contract between Squadrilli and Gordon stipulated that the balconies were to be removable, and it appears as a matter of fact that they were removed from the building. However, since the plaintiff had neither actual nor constructive notice of the existence of this contract, it cannot be in any way affected thereby. Aside from consideration of the contract, the owner has no defense to the plaintiff's lien, since she failed to give the notice of nonresponsibility permitted by section 1192 of the Code of Civil Procedure as a means by which an owner may protect himself against such a liability. *Leoni v. Quinn*, 189 Cal. 622, 209 P. 551; *Pacific Sash & Door Co. v. Bumiller*, 162 Cal. 664, 124 P. 230, 41 L. R. A. (N. S.) 296.

Appellant argues upon the theory that since it was not intended by the parties to the contract for the building of the balconies that they should be a part of the building to which they were attached, but should be removable by Squadrilli, therefore these balconies never became alterations, additions, or improvements, and so cannot afford a right to a lien for those furnishing materials for their construction. In connection with this contention some authorities are cited, none of which are in point in the instant case. In none of them was a secret contract unknown to the materialman the basis for holding that the article built was not a fixture. In none of them was the structure in question at any time actually a part of the building to which they were claimed to be affixed.

[3, 4] In the case at bar the balconies when completed and when nailed and bolted to the building were a part of that building. As the structure then stood they were an addition to it and an improvement upon the premises. One about to furnish material for this work, acquainting himself with the plans to be used, would have known that when constructed this would be the result. Such a person cannot be deprived of his statutory and constitutional right to a lien by the concealed purpose held by those responsible for the construction. Of course it is true, as said in *Gosliner v. Briones*, 187 Cal. 557, 204 P. 19, that generally the intent of the parties is a controlling criterion in ascertaining whether property is permanently attached to the land or retains its identity as personalty. This applies between the immediate parties to a transaction, such as mortgagor and mortgagee, vendor, and ven-

dee, etc., and their successors in interest. But where, as here, the rights of a person unconnected with that transaction are concerned, and who is without actual or constructive notice concerning the intent of the parties responsible for annexing the personality to the realty, the question is not so much the intent of such parties as the apparent intent as it would reasonably appear to such third person.

[5, 6] Complaint is made that the findings are defective. It is claimed that there is no finding as to whether or not the balconies were permanently attached to the building or were fixtures as defined by section 660 of the Civil Code. The findings contained one, No. 11, above mentioned, detailing the construction of the balconies and the exact manner in which they were attached to the building. The court found as a conclusion of law that "said balconies were alterations, additions, or improvements to said building as contemplated by the law determining materialmen's liens as a conclusion of law from the foregoing facts." We think this was sufficient. Finding 11 is more than a mere recital of the evidence. The manner in which the balconies were attached to the building is there established as a fact for the purposes of the decision to be by means of bolts and nails, etc. Such a means of annexation is declared by section 660 of the Civil Code to constitute a permanent attachment, which conclusion is a matter of law, and might have been stated unqualifiedly in the conclusions of law. However, it is well settled that a judgment will not be reversed for error in the statement of the conclusions of law if the findings and judgment are sound, nor, for that matter because of the absence of a finding where, as here, if such a finding had been made it would have sustained the judgment.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

84 Cal. App. 605

MILLER v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO. (Civ. 5856.)★

District Court of Appeal, First District, Division 1, California. July 27, 1927.

Rehearing Denied Aug. 26, 1927. Hearing Denied by Supreme Court Sept. 22, 1927.

1. Executors and administrators ⇨171—Language of ambiguous assignment should be interpreted most strongly against party who caused uncertainty to exist.

Where assignment by its terms purported to transfer individual interests of Mary Miller and her daughter in cause of action, only ground for inference that more was intended being fact that beneath Mary Miller's signature appeared

words, "Administratrix of Estate of William Miller," language of assignment held required to be interpreted most strongly against assignee, who prepared instrument and thus caused uncertainty to exist.

2. Executors and administrators ⇨171—Assignment imputed intention to transfer only individual interests of administratrix and daughter, and finding that sale from estate was intended held unsupported (Code Civ. Proc. § 1526).

Assignment purporting to transfer individual interests of assignor and her daughter in cause of action, though signed by assignor as administratrix and no notice of sale being given as required by Code Civ. Proc. § 1526, held not to impute intention to transfer more than the individual interests of assignor and her daughter, and not to support trial court's implied finding that sale from the estate was intended so that court was without jurisdiction to confirm.

3. Certiorari ⇨64(2)—In certiorari proceeding, jurisdiction of court to make order of confirmation of sale regular on its face could be inquired into.

In certiorari proceeding, appellate court could review record of court below and also evidence to determine jurisdiction of court to make order of confirmation of sale by deceased's estate regular on its face.

4. Executors and administrators ⇨367—Validity of proceedings for sale of property of decedent depends upon substantial compliance with law.

Since proceedings for sale of property of estate of a decedent are statutory, their validity depends upon substantial compliance with law.

5. Executors and administrators ⇨375—Alleged sale of property of estate of decedent which is void cannot be confirmed.

An alleged sale of property of estate of a decedent which is shown to be void cannot be confirmed; there being no subject-matter upon which an order of confirmation can act.

6. Executors and administrators ⇨375, 386—Where alleged sale of property of decedent is but transfer of individual interest of representative in property of estate, court cannot confirm, and transfer does not divest rights of other heirs.

Where alleged sale of property of estate of a decedent is in effect but transfer of individual interest of representative in property of estate, court has no power to confirm, and transfer cannot operate to divest rights of other heirs.

Application by Mary F. Miller for certiorari to review an order of the Superior Court in and for the City and County of San Francisco, Thomas F. Graham, Judge, confirming sale of property of a decedent's estate. Order annulled.

Keyes & Erskine, of San Francisco, for petitioner.

Daniel O'Connell, of San Francisco, in proper.

CASHIN, J. A proceeding to review an order of confirmation made by the superior court in and for the city and county of San Francisco, in the matter of the estate of William Miller, deceased.

The deceased in his lifetime, pursuant to an agreement with Herman Murphy and others, paid the taxes, amounting to \$996.37, which were a lien on certain real property in Alameda county. The title to the property was in litigation between the parties, and it was agreed that in the event of a judgment adverse to Miller's claim the amount should be repaid to him with interest and be secured by a lien on the land. The litigation having resulted in favor of Murphy and his codefendants, an action to foreclose the lien was commenced by Miller and was pending at the time of his death. Mary Miller, his wife, was subsequently appointed as administratrix of his estate, and the action was continued in her name.

After two trials of the action, the judgment first entered having been reversed, a judgment was entered on March 28, 1924, in favor of the estate for \$1,370.21. The latter judgment was affirmed on appeal and was collected by the administratrix on November 3, 1926, the total amount received being the sum of \$1,733.90.

A petition for a confirmation of sale was filed in the estate proceeding on October 27, 1926, this being followed on December 6, 1926, by a report of sale, both of which were signed and the latter verified by Daniel O'Connell.

It was alleged that petitioner loaned to the deceased in his lifetime the sum of \$500 for the purpose of enabling the latter to make the payment under the contract with Murphy, that this sum had not been repaid, and that petitioner in addition paid the costs and rendered services as an attorney in the litigation leading to the recovery of the judgment by the administratrix, for which he had not been reimbursed or compensated; that after the reversal of the judgment first entered therein the administratrix refused to proceed further in the action, whereupon at his request an assignment of the cause of action was executed to petitioner by the administratrix and her daughter, Anna M. O'Connell.

It was further alleged that the consideration for its execution was the services rendered, the disbursements made by petitioner, and his agreement to save the estate and Mrs. Miller harmless from loss, expense, or liability in the prosecution of the action, and, further, that there was no other property of the estate with which to pay the expenses of maintaining the action or the expenses of administration; that the assignment was for the best interests of the estate, and the consideration therefor fair and reasonable, the petition concluding with a prayer that the transaction be confirmed as a sale from the estate to petitioner.

The petition contained no allegation of a

compliance with the provisions of section 1526 of the Code of Civil Procedure, and it is admitted that no notice of sale was given.

Objections were filed by the administratrix, and after a hearing a decree of confirmation was entered, which required the administratrix to pay the proceeds of the judgment to O'Connell.

A motion to vacate the decree made by Mary F. Miller, who is the petitioner here and an heir of the deceased, was denied.

It is contended in the present proceeding that the finding that a sale was made by the estate is unsupported; and, it being admitted that no notice of sale was given, and no return having been made by the administratrix, the court in making its decree acted without and in excess of its jurisdiction.

The return to the writ shows all the proceedings had, including the evidence adduced before respondent court, and it appears that the assignment referred to in the petition for confirmation and upon which the petitioner therein relied in support of the allegation that a sale from the estate had been made was in words and figures as follows:

"In the Superior Court of the State of California, in and for the County of Alameda.

"William Miller and Mary Miller, as Administratrix, v. Herman Murphy et al.

"No. 54744—Dept. 3.

"Assignment.

"I hereby assign and transfer to Daniel O'Connell all my right, title, and interest in and to the subject-matter of the above-entitled action and the cause of action sued thereon. Mary Miller, Administratrix of the Estate of the said William Miller, Anna M. O'Connell. June 15, 1923. Witness: Florence Miller."

The assignment by its terms purports to transfer the individual interests of Mary Miller and her daughter in the cause of action, the only ground for the inference that more was intended being the fact that beneath the signature of the former appears the words "Administratrix of the Estate of the said William Miller."

[1, 2] It is undisputed that Mrs. Miller was unable to read, and that her ability to write was limited to her signature, and it is admitted that the instrument was prepared by O'Connell. Under such circumstances the language of the instrument should be interpreted most strongly against the party who caused the uncertainty to exist. *Payne v. Neuval*, 155 Cal. 46, 99 P. 476; *Lassing v. James*, 107 Cal. 348, 355, 40 P. 534.

It is admitted that the instrument was executed at the request of the assignee, and, according to the testimony of Mrs. Miller, its execution was induced by the following statement made by him: " * * * He told me I ought to sign it or we won't get our money, * * * some taxes money. * * * "

It is alleged in the report of sale that the claim against Murphy constituted the whole

of the estate, and, so far as appears, such was the fact.

At the time the assignment was made O'Connell, who was the attorney for the estate, claimed an interest in the cause of action, which in amount exceeded that of the estate, and as shown by the records of the superior court of Alameda county the costs paid by him previous to the assignment amounted to \$18.75. In view of his claim, he was equally chargeable with the expense of conducting the litigation and the conclusion that it was the intention that he should acquire the whole estate in consideration of the above expenditure and the services previously rendered, the total value of which was much less than the value of the estate, would be unreasonable. Nor is such intention rendered probable by his promise to save the estate harmless in the further conduct of the litigation which, according to his contention, was to be conducted solely for his benefit.

From the foregoing and the fact that no notice of sale was given, we are satisfied that it cannot reasonably be inferred that it was the intention to transfer more than the individual interests of the administratrix and her daughter, that the portion of the assignment last quoted was merely descriptive of one of the assignors, and that the implied finding that a sale from the estate was intended was unsupported.

[3] An order of confirmation regular on its face cannot be collaterally attacked, but certiorari, in so far as the determination of the jurisdictional facts in concerned, is not a collateral but a direct attack; and while not a writ of error, it is nevertheless a means by which the power of the court in the premises can be inquired into, and for this purpose the review extends not only to the record of the court below, but to the evidence, when necessary to determine the existence of the jurisdictional facts. *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 P. 35; *Schwarz v. Superior Court*, 111 Cal. 106, 43 P. 580.

[4, 5] Proceedings for the sale of property of the estate of a decedent being statutory (*Estate of O'Sullivan*, 84 Cal. 444, 24 P. 281), their validity depends upon a substantial compliance with the law (*Hellman v. Merz*, 112 Cal. 661, 44 P. 1079), and an alleged sale which is shown to be void cannot be confirmed (*Schlicker v. Hemenway*, 110 Cal. 579, 42 P. 1063, 52 Am. St. Rep. 116); there being no subject-matter upon which an order of confirmation can act (*Townsend v. Tallant*, 33 Cal. 45, 91 Am. Dec. 617).

[6] It is equally essential to the validity of the order that a sale from the estate be shown, and where the sale alleged is in effect but a transfer of the individual interest of the representative in the property of the estate, the court for the reasons stated in *Townsend v. Tallant*, supra, is without power to confirm, and the transfer cannot operate

to divest the rights of other heirs. *Morrisson v. Bowman*, 29 Cal. 337; *King v. Harford*, 48 Cal. App. 405, 191 P. 993.

It is our conclusion that no sale by the estate was had, and that respondent court was without jurisdiction to confirm; and it will therefore be unnecessary to consider the further questions raised by petitioner.

The order is annulled.

We concur: TYLER, P. J.; KNIGHT, J.

84 Cal. App. 599

MORRIS v. MORRIS et al. (Civ. 5513.)★

District Court of Appeal, First District, Division 1, California. July 27, 1927.

Hearing Denied by Supreme Court Sept. 22, 1927.

1. Negligence ⇨134(1)—Passenger suing automobile driver for injury must show by preponderance of evidence that negligence caused damage.

In passenger's action against driver to recover for personal injury sustained in automobile accident, plaintiff was under duty to show by preponderance of evidence that damage was caused by defendant's neglect.

2. Appeal and error ⇨1064(1)—Instruction denying jury right to draw inferences from evidence of cause of accident inconsistent with defendant's reasonable and unimpeached testimony, which jury must accept, held prejudicial error.

In action for injuries arising from automobile accident, instruction that jury could not draw any inferences from evidence as to cause of accident inconsistent with explanation offered by defendant which was reasonable, and not impeached or contradicted, and that they were bound to accept such testimony whether they believed it or not, was prejudicial error.

3. Negligence ⇨121(3)—Doctrine of *res ipsa loquitur* held applicable, in action for injuries to passenger in automobile colliding with pole at intersection.

In action for injuries sustained by plaintiff riding in automobile driven by defendant which collided with electric light pole in attempting turn at intersection, doctrine of *res ipsa loquitur* was applicable.

4. Negligence ⇨121(2)—Inference of negligence from doctrine of *res ipsa loquitur* cannot be disregarded by jury without evidence overcoming *prima facie* case.

Inference of negligence arising from circumstances bringing case within doctrine of *res ipsa loquitur*, though not changing burden of proof, which remains on plaintiff, cannot be disregarded by jury, in absence of evidence sufficient to meet *prima facie* case made out.

5. Trial ⇨140(2)—Weight and value of defendant's testimony, though for most part uncontradicted, is for jury (Code Civ. Proc. § 2061).

Under Code Civ. Proc. § 2061, weight and value of defendant's testimony is for jury, though it was for most part uncontradicted.

6. Trial ⚡139(1)—Whether evidence is sufficient to establish case for plaintiff is for jury (Code Civ. Proc. § 2061).

Under Code Civ. Proc. § 2061, whether evidence as whole was sufficient to establish case for plaintiff is for jury.

7. Evidence ⚡598(1)—Jury need not decide in conformity with evidence of any number of witnesses not producing conviction against less number or against presumption or other evidence (Code Civ. Proc. §§ 1847, 2061).

Under Code Civ. Proc. §§ 1847, 2061, jury is not bound to decide in conformity with declaration of any number of witnesses which does not produce conviction against less number or against presumption or other evidence satisfying their minds, though witness is presumed to speak truth, and uncontradicted testimony cannot generally be disregarded.

8. Negligence ⚡136(7)—Question whether testimony overcame inference of automobile driver's negligence as to passenger was for jury.

In passenger's suit for injuries sustained in automobile accident, question whether uncontradicted testimony of witness was sufficient to overcome inference of negligence arising from nature of accident was for jury.

9. Trial ⚡194(16)—Instruction precluding jury from considering whether inference of negligence would not be equally reasonable with explanation by defendant held not justified.

That explanation given by defendant for automobile accident might appear to jury to be reasonable would not justify instruction precluding jury from considering whether inference of negligence drawn from all circumstances shown by evidence would not be equally reasonable and of so finding.

10. Negligence ⚡134(4)—Inference of negligence of driver of automobile injuring passenger held warranted.

In action to recover for injuries sustained when automobile in which plaintiff was riding collided with post at intersection, inference that driver was negligent, and that injury was proximately caused thereby, would have been fairly supported.

Appeal from Superior Court, Los Angeles County; Paul Burks, Judge.

Action by Ida B. Morris against Hattie M. Morris and husband. Judgment for defendants, and plaintiff appeals. Reversed.

R. C. Gortner, of Los Angeles, for appellant.

David R. Faries and John R. Berryman, Jr., both of Los Angeles, for respondents.

CASHIN, J. The plaintiff was injured while riding in an automobile operated by defendant Hattie M. Morris, and Robinson A. Morris, who was the husband of the latter, was joined as a defendant in the action.

The complaint contained general allegations

of negligence in the operation of the automobile with averments as to the character of the injuries suffered and the damage sustained; these allegations, with the exception of the fact that plaintiff was injured, being denied by the answer.

The action was tried by a jury, which returned a verdict for defendants, and from the judgment entered therein the plaintiff appealed. It is urged as grounds for reversal that certain of the instructions to the jury were prejudicially erroneous.

The plaintiff and Hattie M. Morris, who will hereinafter be referred to as the defendant, were, so far as appears, the only persons who witnessed the accident. The plaintiff was riding in the rear seat of the automobile, which was being driven in a westerly direction on San Marino street in the city of Los Angeles. It was the intention of the parties to turn at the intersection of San Marino street with western avenue, and proceed south along the avenue. The plaintiff, who was unable to explain the cause of the accident, testified that, when the automobile entered the intersection, its course was directly toward an electric light pole which was situated between the curb and the sidewalk at the southwest corner of the intersection; that, when the driver attempted to turn to the south, the speed of the car suddenly increased, and a collision with the pole occurred, causing the damage alleged. She further testified that, as the automobile approached the intersection, she looked to the south along the avenue, and saw no automobiles approaching from that direction.

It was testified by the defendant that the automobile entered the intersection at a speed of approximately 10 miles per hour; that three other automobiles were then approaching from the south, the nearest being distant about 65 feet; that, fearing a collision with the latter, she became excited, pressed her foot upon the accelerator, and that, as the result of the increase in speed, she was unable, after passing the center of the intersection, to turn the automobile sufficiently to the left to avoid striking the pole mentioned.

Contributory negligence on the part of the plaintiff was not pleaded by the defendants, and it was stipulated as to the extent of plaintiff's injuries, and also that the width of Western avenue between the curbs was 56 feet, and of San Marino street 40 feet.

The first instruction of which appellant complains was as follows:

"If you find that the accident in this case is as consistent with the neglect of the duty on the part of the plaintiff, Ida B. Morris, as it is with the neglect of the duty on the part of the defendant, then the plaintiff cannot recover in this action in damages, and your verdict must be for the defendant."

[1] It was incumbent upon the plaintiff to show by a preponderance of evidence that the damage alleged was caused by the neglect of the defendant, and, as held in the following cases, the instruction was properly given. *Sheldon v. James*, 175 Cal. 474, 480, 166 P. 8, 2 A. L. R. 1493; *Straten v. Spencer*, 52 Cal. App. 98, 110, 197 P. 540.

[2] The jury was further instructed as follows:

"Any presumption which the law may raise or permit you to draw from the grave character of the accident as indicating that the same was caused by negligence, or not caused by negligence of the operator of the automobile, is overcome by direct and competent evidence as to how or why the accident actually did happen, if such evidence is or stands uncontradicted. In other words, in the absence of any explanation as to how the accident happened, the law permits you to draw reasonable, but not imaginary, inferences in respect to the happening of such accident and the probable cause thereof; but, when competent witnesses have testified to the manner of the happening of the accident and to the cause thereof, then, if such testimony be reasonable, and not in any manner contradicted or impeached, you are not entitled to draw any inferences or to assume any of such facts respecting said accident or causes of the happening thereof, inconsistent with or contradictory to such testimony. In other words, you must accept as true the testimony of any witness who is competent to testify, provided such testimony is reasonable and not contradicted or impeached by any other evidence, and even though, in your own minds, you cannot believe such testimony to be true."

[3] The circumstances of the injury were such as to justify the application of the *res ipsa loquitur* doctrine (*Bauhofer v. Crawford*, 16 Cal. App. 676, 117 P. 931; *Mansfield v. Pickwick Stages*, 68 Cal. App. 507, 229 P. 890; *Leitert v. Pickwick Stages*, 68 Cal. App. 504, 229 P. 889); and it is apparent from the complaint and the testimony of the plaintiff that she relied thereon.

[4] While negligence on the part of a defendant is not to be presumed from the mere happening of an accident, and the inference of negligence arising from the circumstances which bring the case within the doctrine does not change the burden of proof which remains upon the plaintiff (*O'Connor v. Mennie*, 169 Cal. 217, 146 P. 674), this inference, in the absence of evidence sufficient to meet the *prima facie* case thus made, could not be disregarded by the jury. *Bush v. Barnett*, 96 Cal. 202, 31 P. 2; *Housel v. Pacific Electric Ry. Co.*, 167 Cal. 245, 139 P. 73, 51 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 665.

[5, 6] In the present case the defendant testified as to the cause of the accident, and, although her testimony, with the exception of the statement that other cars were ap-

proaching close to the intersection, was uncontradicted, it was for the jury to determine the weight and value of her testimony (Code Civ. Proc. § 2061), and whether the evidence as a whole was sufficient to establish the case for the plaintiff. By the latter instruction the jury was told in effect that they were not at liberty to draw from the circumstances shown by the evidence as a whole any inference as to the cause of the accident inconsistent with, or contrary to, the explanation offered by the defendant, provided her testimony was reasonable, and not impeached or contradicted, and, further, that they were bound to accept such testimony whether they believed it or not.

[7, 8] Although a witness is presumed to speak the truth (Code Civ. Proc. § 1847), and it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, nevertheless the jury is not bound to decide in conformity with the declaration of any number of witnesses which do not produce conviction in their minds against a less number or against a presumption or other evidence satisfying their minds. Code Civ. Proc. § 2061. Moreover, as held in *Lauder v. Currier*, 3 Cal. App. 28, 84 P. 217, the question whether the uncontradicted testimony of a witness was sufficient to overcome the inference of negligence arising from the nature of the accident was one for their determination.

[9] That the explanation given by the defendant might appear to the jury to be reasonable would not justify an instruction which precluded them from considering whether an inference of negligence drawn from all the circumstances shown by the evidence would not be equally or more reasonable and of so finding, if such was their conclusion.

[10] Notwithstanding her explanation, the circumstances tended to show that the driver was inattentive in the operation of the car and to the conditions at the intersection, and the inference that she was negligent in this respect, and that the injury was proximately caused thereby, would have been fairly supported.

We find no instruction in the record which can reasonably be said to have removed the misleading effect of the instruction in question, and, after an examination of the entire record, including the evidence, we are of the opinion that this instruction was prejudicially erroneous, and that as a reasonable probability the result was a miscarriage of justice.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

84 Cal. App. 550

KISTNER v. POMEROY et al. (Civ. 5499.)

District Court of Appeal, First District, Division 1, California. July 25, 1927.

1. Schools and school districts ⇨85—Statute held not to require approval of school building plans by county superintendent before paying architect for preparing them (Pol. Code, § 1543, subd. 12, § 1608, subd. 4).

Pol. Code, § 1543, subd. 12, does not require that school building plans, contracted for by school board, as impliedly authorized by section 1608, subd. 4, be approved by county superintendent, before payment of architect for preparing them, but merely requires such approval before final adoption of plans by board.

2. Schools and school districts ⇨85—Approval of school building plans by county superintendent need not be made condition precedent to payment of architect for preparing them.

In absence of express statutory provision, law does not require that approval of plans for construction of school buildings by county superintendent of schools be made condition precedent to payment for architect's services in preparing them, and such clause is not essential to validity of contract therefor.

3. Pleading ⇨214(1)—Averments of complaint must be taken as true on demurrer.

The averments of the complaint must be taken as true on demurrer thereto.

4. Schools and school districts ⇨86(2)—On school board's repudiation of contract for preparation of building plans, architect could sue immediately for damages, even if approval by county superintendent was condition precedent to payment (Pol. Code, § 1543, subd. 12; Civ. Code, § 3532).

On school board's repudiation of contract with architect for preparation of school building plans, when they were ready for submission to county superintendent for approval under Pol. Code, § 1543, subd. 12, architect was not required to proceed further in performance of contract, in view of Civ. Code, § 3532, but could treat it as terminated, and sue immediately for damages, even if such approval of plans was condition precedent to payment for services in preparing them.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Theodore C. Kistner against L. F. Pomeroy and others, as trustees of Anaheim School District. From a judgment of dismissal, plaintiff appeals. Reversed, with directions.

H. J. Bischoff, of San Diego, for appellant. Alex P. Nelson, former Dist. Atty., C. N. Mozley, D. G. Wettlin, Kenneth H. Burns, former Deputy Dist. Attys., and Z. B. West, Jr., Dist. Atty., all of Santa Ana, for respondents.

KNIGHT, J. Plaintiff, a licensed architect, brought this action to recover damages for

an alleged breach of contract of employment. A general demurrer to the second amended complaint was sustained with leave to amend, but, plaintiff having declined to amend, judgment of dismissal was entered, from which judgment plaintiff appealed.

The essential averments of the complaint are: That on April 15, 1919, defendants, constituting the board of trustees of Anaheim school district in Orange county, entered into an agreement with plaintiff whereby the latter was employed "as architect for said school district in the construction of two new school buildings," at an agreed compensation of 6 per cent. of the cost of the construction of said buildings, the estimated cost of which was \$100,000; "that, pursuant to said contract of employment, said plaintiff entered upon the performance of his duties as architect, and prepared preliminary drawings for both of said school buildings, consisting of floor plans and elevations; that said plaintiff conferred with said members of said board of trustees from time to time regarding said plans and the buildings to be constructed; that, after said preliminary drawings for said buildings were completed, said plaintiff proceeded with the preparations of final drawings, consisting of floor plans and elevations and details of the school building to be constructed on the site known as Central school site; that the plans for said building provided for ten classrooms, kindergarten and teachers' room, and principal's office; that said plaintiff continued in the performance of his duties as architect until the 15th of August, 1919, and expended large sums of money in the preparation of said plans; that said plans had been practically completed and were ready for submission for approval by the county superintendent of schools of said Orange county; that on said August 15, 1919, plaintiff received notice from said board of trustees that he had been discharged as architect." The prayer of the complaint was that plaintiff be given judgment in the sum of \$4,000.

[1] Section 1543 of the Political Code provides that "it is the duty of the superintendent of schools of each county: * * * Twelfth—Except in incorporated cities having boards of education, to pass upon and approve or reject all plans for school houses. To enable him to do so, all boards of trustees, before adopting any plans for school buildings, must submit the same to the county superintendent [of schools] for his approval"; and, in view of said provision, defendants contend "that, before plaintiff can recover in this action, he must prove that his plans for the school buildings in question had been submitted to the county superintendent of schools of Orange county, in which county the school district involved herein is located

and that the said county superintendent of schools has approved the same. And further that, if such facts are indispensable evidence before recovery can be had, it would follow that the complaint should allege that plaintiff's plans had been submitted to, and approved by, the said county superintendent of schools before any liability would attach to the board of trustees of said school district. The said amended complaint contains no such allegation, and therefore does not state a cause of action against said board of trustees."

We are of the opinion that the provision of the Political Code hereinabove quoted, and upon which defendants rely to sustain their position, does not have the effect of limiting the power of school boards to contract for the preparation of plans for the construction of school buildings, but that the limitation mentioned therein affects only, as its terms clearly imply, the right of said boards to finally adopt plans without the approval of the same by the county superintendent. Subdivision 4 of section 1608 of the Political Code expressly confers upon said boards the power "to build school houses"; and in defining the authority which they may exercise under said section it has been held that the power "to erect school houses implies as a necessary incident to that power the right to procure plans and specifications." *Harris v. Cooley*, 171 Cal. 144, 152 P. 300; *Miller v. Boyle*, 43 Cal. App. 39, 184 P. 421. That being so, the right to procure plans must necessarily include the right to incur a legal obligation to pay for the service of preparing the same in order that they may be submitted for approval to the county superintendent of schools, as provided in said section 1543. If, on the other hand, defendants' construction of said subdivision 12 of section 1543 be adopted, and it be held that the authority to pay for such services is dependent upon the subsequent approval of the plans by the county school superintendent, then said subdivision 4 of section 1608 conferring power upon school trustees to build school buildings would become practically inoperative, because in many cases, under those conditions, boards of trustees would be unable to procure the plans to submit for approval to the county school superintendent.

[2] We therefore conclude that, in the absence of express statutory provision to that effect, the law does not require that the approval of plans for the construction of school buildings be made a condition precedent to the payment for the services of preparing the same, and consequently a clause to that effect was not essential to the validity of the contract under consideration.

[3,4] Even though under any possible construction it could be held that the approval of such plans by the school superintendent

did constitute a condition precedent to the payment for the services of preparing the same, the averments of the complaint in the present case, which on demurrer must be taken as true, are to the effect that defendants breach the contract of employment just at the time the plans were ready to be submitted to the school superintendent for approval. Therefore, upon such breach, plaintiff was not required to proceed further in the performance of the contract, but was entitled to treat the same as at an end, and to sue immediately for such damages as may have resulted from such breach. 6 Cal Jur. 464, 465. "The law neither does nor requires idle acts" (6 Civ. Code, § 3532), and manifestly it would have been idle for plaintiff to have submitted the plans to the school superintendent for approval after defendants had terminated his contract of employment. In other words, if, as defendants claim, the obtaining of the school superintendent's approval was a condition precedent to the payment of plaintiff's demand, the point that plaintiff failed to perform such condition is not available to defendants in this proceeding on demurrer, because it is averred in the complaint that the alleged repudiation of the contract by defendants prevented such performance. *Antonelle v. Kennedy & Shaw Lumber Co.*, 140 Cal. 309, 73 P. 966.

No other points being made as to the power of said board to enter into the contract of employment in question or against the sufficiency of the complaint, the judgment appealed from is reversed, with directions to overrule the demurrer.

We concur: TYLER, P. J.; CASHIN, J.

84 Cal. App. 657

PAYNE v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5863.)★

District Court of Appeal, First District, Division 1, California. July 29, 1927.

Rehearing Denied Aug. 26, 1927. Hearing Denied by Supreme Court Sept. 26, 1927.

1. Master and servant ☞417(7)—Industrial Accident Commission's award on evidence is conclusive.

Appellate court, in reviewing awards of Industrial Accident Commission, is not acting as court of appeal, and is without power to determine weight to be given evidence, or which of two opposing inferences should be drawn therefrom.

2. Master and servant ☞417(7)—Findings of Industrial Accident Commission award on reasonably sufficient evidence must be affirmed.

It is not necessary that findings of Industrial Accident Commission shall accord with preponderance of evidence, and unless it can be said that there was no evidence reasonably suf-

ficient to support findings, award must be affirmed.

3. Master and servant ☞375(1)—Voluntary acts incidental to regular duties, if beneficial to employer and not personal to employee, are within "scope of employment."

Although injury suffered by employee while voluntarily doing something entirely outside of his employment, even though of benefit to employer, is not an injury in course of employment, acts incidental to his regular duties, if of benefit to employer and not personal to employee are within "scope of his employment."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Scope of Employment.]

4. Master and servant ☞375(1)—Injury to barber shop porter assisting employer, without express request, to remove linoleum from floor, held compensable (Workmen's Compensation, Insurance and Safety Act 1917, § 8[b]).

Evidence held sufficient to support findings that injury to porter in barber shop, whose duty was to sweep shop and on Sundays to clean mirrors and other articles in addition, sustained while assisting employer who did not expressly request him to assist in removing linoleum from floor on Sunday, occurred in course and arose out of employment under Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831), § 8(b).

Proceeding under the Workmen's Compensation Act by J. A. McCullough, claimant, for injuries, opposed by Robert Payne, employer. The Industrial Accident Commission awarded compensation for the injuries, and the employer brings certiorari. Award affirmed.

A. P. Hayne and Nutter, Hancock & Ruth-erford, all of Stockton, for petitioner.

G. C. Faulkner and Gordon S. Keith, both of San Francisco, for respondents.

CASHIN, J. A proceeding in certiorari to review an award made by the Industrial Accident Commission to respondent J. A. McCullough.

The petitioner was the proprietor of a barber shop in the city of Stockton, and respondent, McCullough, at the time of the injury for which he sought compensation, was conducting a bootblack stand on the premises occupied by petitioner. Respondent paid no rental for the privilege of conducting the stand, but in lieu thereof rendered services to petitioner as a porter in the latter's shop. It appears from the testimony that it was respondent's duty to sweep the shop in the morning and evening, and on Sundays in addition to the sweeping to clean the mirrors and other articles therein. Respondent on Sunday, June 13, 1926, while engaged in removing certain linoleum from the floor of the shop, received an injury which resulted in a partial loss of his sight.

The commission found that respondent was

in the employ of petitioner, that the injury occurred in the course and arose out of the employment, and awarded compensation. Petitioner contends that the evidence does not support the findings and that consequently the action of the commission was without and in excess of its jurisdiction.

The testimony shows that on the morning of the accident both petitioner and respondent were present at the shop and that the latter was told by petitioner that it was his intention to remove the linoleum. During the temporary absence of petitioner the work was commenced by respondent and was conducted by both when petitioner returned, the injury occurring during the absence of the latter. Respondent testified that he was not expressly requested to do or to assist in the doing of the work, and that the service was rendered as an accommodation to petitioner.

[1, 2] The court, in reviewing awards of the commission, is not acting as a court of appeal (*Southern Pacific Co. v. Industrial Acc. Comm.*, 177 Cal. 378, 170 P. 822), and is without power to determine the weight to be given the evidence (*Dearborn v. Industrial Acc. Comm.*, 187 Cal. 591-594, 203 P. 112), or which of two opposing inferences should be drawn therefrom (*Western Pacific R. R. Co. v. Industrial Acc. Comm.*, 193 Cal. 413, 224 P. 754). Moreover, it is not necessary that the findings in its judgment shall accord with the preponderance of the evidence (*San Francisco v. Industrial Acc. Comm.*, 183 Cal. 273-282, 191 P. 26), and unless it can be said that there was no evidence reasonably sufficient to support the findings, the award must be affirmed (*Engels Copper, etc., Co. v. Industrial Accident Commission*, 183 Cal. 714, 192 P. 845, 11 A. L. R. 785).

As provided by section 8 (b) of the Workmen's Compensation, Insurance and Safety Act of 1917 (Stats. 1917, p. 831):

"Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this act."

[3] While an injury suffered by an employee while voluntarily doing something entirely outside of his employment, even though of benefit to the employer is not an injury in the course of the employment (*Engels Copper, etc., Co. v. Industrial Acc. Comm.*, supra), acts incidental to his regular duties, if of benefit to the employer and not personal to the employee, are within the scope of his employment (*Myers v. Industrial Acc. Comm.*, 191 Cal. 673, 218 P. 11); and, as held by the Commission in *Crawford v. Jones Investment Co.*, 4 Cal. I. A. C. 180, even though an employee is acting at his own suggestion, the duty may be in the course of his employment where it is connected therewith and is performed with the knowledge and acquiescence of his employer.

[4] In the present case the testimony sufficiently shows that the service was incidental to the regular duties of the employee, also of benefit to the employer, and as in the case of *Martin v. Guiberson*, 9 Cal. I. A. C. 82, wherein a writ of review was denied by our Supreme Court, a request that the service be performed might reasonably be implied from the conduct of the employer. This evidence was sufficient to support the findings, and the award is therefore affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

84 Cal. App. 678

MOOR et al. v. VAWTER. (Civ. 5062.)

District Court of Appeal, Second District, Division 1, California. Aug. 1, 1927.

1. Wills ⚡427—Decree fixing rights of beneficiaries under trust, though inconsistent with will, supersedes will and binds beneficiaries.

Rights of beneficiaries under trust created by will are conclusively governed by terms of decree with reference to terms of trust, even though decree is incorrect from standpoint of following terms of will, as decree supersedes and prevails under will's provisions.

2. Wills ⚡427—Provision of will relative to distribution of trust estate in event of death of beneficiaries could be disregarded in action to terminate trust where provision was omitted from decree.

In action by beneficiaries to terminate trust created by will, provision in will for distribution of beneficiaries' share to issue in case of death could be disregarded, where decree which superseded will omitted such provision.

3. Trusts ⚡61(1)—Adult beneficiaries, on death of testator's widow, given life interest in trust estate, held entitled to have accumulation of income distributed (Civ. Code, §§ 723, 724, 733).

In action by adult beneficiaries to terminate trust created by will for 10-year period, after death of testator's widow given life interest therein, beneficiaries held entitled to have accumulation of trust estate distributed to them before expiration of ten-year period under Civ. Code §§ 723, 724, 733.

4. Trusts ⚡61(1)—Court has power to terminate trust, where interests have vested and beneficiaries desire its termination.

Court has power to decree termination of trust, where all its objects and purposes have been accomplished, where interests under it have vested, and where all parties beneficially interested desire its termination.

5. Trusts ⚡61(1)—Competent adult beneficiaries on death of testator's widow given life interest in trust estate held entitled to termination of trust before expiration of term where only duty of trustee was to pay beneficiaries specified monthly income.

Adult beneficiaries of trust, who were competent and not spendthrifts, on death of testator's widow given life interest therein, held

entitled to have trust terminated before expiration of ten-year period created by will, where only duty of trustee was to pay beneficiaries stated monthly sums until expiration of such period.

6. Trusts ⚡61(1)—Court may not, in exercise of discretion, arbitrarily deny termination of trust.

Discretion vested in trial court to terminate trust will not justify arbitrary action on its part denying relief to which beneficiaries ordinarily would be entitled.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Orlando M. Moor and others against Jesse P. Vawter, trustee of the estate of Orlando Moor, deceased. Judgment for defendant, and plaintiffs appeal. Reversed.

Denis Evarts Bowman, of Los Angeles, for appellants.

Warren L. Williams and Seymour S. Silvertown, both of Los Angeles, for respondent.

HOUSER, J. The facts appear to be that by the terms of a will the testator left all his property in trust to defendant herein as trustee for the benefit of the widow of the testator during her natural life, and at her decease (provided that she should live ten years after the decease of the testator), to be distributed equally among the three sons of the testator. Furthermore, if the widow were to die at any time before such ten-year period expired, each of the sons was to be paid \$10 per month from the date of the death of the widow until the expiration of the said period of ten years. The will further provided that:

"If either of my sons, before such division, have died, leaving lawful issue, such issue to receive the parent's share; but if there be no issue, then such share to become a part of the balance of the estate and divided among the survivors in the manner before directed."

In the proceedings on the probate of the will, a decree was rendered by the court distributing the property of the testator "according to law and the provisions of the said will," excepting that the provision therein and hereinbefore set forth was omitted from such decree.

Before the expiration of the ten-year period following the decease of the testator, the widow died, and thereafter the sons brought this action against the trustee for the purpose of terminating the trust. On the hearing of the action it was stipulated that the plaintiffs were the only children and heirs at law of the testator and his widow; that each of them was competent, not a spendthrift, nor under any disability regarding the continuation of the trust; that each of them was able to care for his own prop-

erty; and that they joined in the request that the trust be terminated and the estate of the testator be distributed to them. It also appeared that the difference between the income derived from the trust estate and the expenses of distribution thereof amounted to approximately the sum of \$340 per year, which sum was invested and reinvested by the trustee and thus permitted to accumulate to the betterment of the trust estate.

The appeal herein is from a judgment rendered in the action in favor of the trustee, in effect denying any relief to the plaintiffs.

[1] Generally speaking, as established by many authorities, the decree of the court with reference to the terms of the trust, and not the will, is the measure of the rights of the beneficiaries. Even though incorrect, from the standpoint of following the terms of the will, nevertheless, in the absence of reversal on appeal, the decree is conclusive as to the rights of the interested parties. *Miller v. Pitman*, 180 Cal. 540, 544, 182 P. 50; 12 Cal. Jur. 206; *McKenzie v. Budd*, 125 Cal. 600, 602, 58 P. 199; *Luscomb v. Fintzelberg*, 162 Cal. 433, 438, 123 P. 247; *Goad v. Montgomery*, 119 Cal. 552, 557, 51 P. 681, 63 Am. St. Rep. 145; *Matter of Trust of Trescony*, 119 Cal. 568, 570, 51 P. 951; *Toland v. Earl*, 129 Cal. 148, 152, 61 P. 914, 79 Am. St. Rep. 100; *Estate of Learned*, 156 Cal. 309, 104 P. 315; *Drexler v. Washington Development Co.*, 172 Cal. 758, 760, 159 P. 166; *Estate of Scrimger*, 188 Cal. 158, 164, 206 P. 65.

[2] As hereinbefore noted, by the terms of the decree the trust estate was distributed "according to law and the provisions of the said will, as follows. * * *" While from such reference alone ordinarily it might be argued that the intention was to include within the decree all "the provisions of the said will," nevertheless the point appears to have been settled by judicial authority to the contrary. In the case of *Keating v. Smith*, 154 Cal. 186, 97 P. 300, the language of the decree was identical with that here under consideration, in that it provided for the disposition of the estate "according to law and the provisions of said will," notwithstanding which, it was held that the terms of the decree superseded those of the will and prevailed over any provision in the will which was inconsistent with the decree. In the case of *Wills v. Wills*, 166 Cal. 529, 137 P. 249, it is held in effect that the decree is conclusive in itself, excepting where by apt language the will is incorporated into the decree. It therefore may be assumed that, so far as may concern the provision of the will relating to the disposition of the trust in the event of the death of either of the sons of the testator prior to the expiration of the ten-year period following the death of the testator, in the face of the fact that such provision is omitted from the de-

creed—the legal effect is as though no such provision had ever existed.

[3] Considering the position of the trustee with reference to the accumulation of income of a trust, it will be noted that by the provision of section 724 of the Civil Code, such an accumulation is valid as affecting trust estates for the benefit of minors only; and, so far as the facts pertaining to this action are concerned, the effect of section 723 of the Civil Code is to declare void the accumulation of the income of the trust estate here under consideration. By section 733 of the Civil Code it is provided that:

"When in consequence of a valid limitation of a future interest, there is a suspension of the power of alienation or of the ownership during the continuation of which the income is undisposed of, and no valid direction for its accumulation is given, such income belongs to the persons presumptively entitled to the next eventual interest."

In addition to the statutory provisions to which reference has been had, it is held in *Estate of Yates*, 170 Cal. 254, 149 P. 555, that while the direction in a trust for the accumulation of income beyond the age of minority of the beneficiary under the trust is unquestionably void, the trust itself may be valid, with the result that upon reaching majority the beneficiary may be entitled to receive the entire net income derived from the trust.

The case entitled *Estate of Whitney*, 176 Cal. 12, 167 P. 399, among other things, involved a question similar to that now being here considered, and it was there held that a direction in a will which provided for the accumulation of income from the estate during the lives of three adult children of the testator was void. An identical conclusion was reached by the court in *Estate of Duffill*, 180 Cal. 748, 183 P. 337.

With such an array of authority it must be concluded that with reference solely to the question of the accumulation of income from the trust property herein, the plaintiffs were entitled to have such accumulation distributed to them.

Considering the facts and the law as indicated by the authorities hereinbefore cited, it follows that the trust stands as though originally it had been intended that, after the expiration of ten years, the trust estate should be distributed to the beneficiaries therein named—the plaintiffs in this action—and the question then arises regarding the right of the plaintiffs to have the trust terminated before the expiration of such ten-year period.

In the case of *Huber v. Donoghue*, 49 N. J. Eq. 125, 23 A. 495, the testator left a will which in its provisions closely resembled those herein, in that in the cited case, after providing for the sale of certain property, the will provided:

"At the expiration of ten years from my death, I direct my said executors to sell at public sale all the residue of my real estate to the highest bidder." * * * "I do direct that my said executors shall, out of the proceeds of the sales above mentioned, and the rents, issues and profits of such properties and investments shall be applied, so far as necessary, to the maintenance of my wife and unmarried children during the period of ten years next succeeding my death; and at the expiration of said ten years (after the sale last above mentioned) all the moneys or investments then remaining in the hands of my said executors shall be divided equally, share and share alike, between my wife and my children, who survive me."

It was held that the estate vested immediately in the widow and the children of the testator, and, being sui generis, they might successfully ask the aid of the court to declare the trust terminated. The court said, in part:

"With the aid of the court, can an absolute title be transferred prior to the expiration of 10 years? First, is the interest given to the parties who ask for the sale a vested interest? In other words, do their rights include the entire estate, subject only to the power given to the executors to sell? If there were any doubts whatever upon this point prior to the determination of the court of errors and appeals in the case of *Post v. Herbert*, 27 N. J. Eq. 541, all such doubts were then removed in favor of the vesting of the absolute fee. In this case, as in that, the estate was given to the trustees for the period of 10 years, not only for the benefit of the widow, but for the children also during that period. The vesting, therefore, waits upon no contingency. If the interest be a present, vested interest, which by the direction of the will is to be enjoyed in possession at and after the expiration of 10 years, can the children who will then be entitled to such possession, with the consent of the widow, enjoy such possession now, or, what is equivalent thereto, effectuate a sale and pass a valid title? This would seem to follow both from reason and the law, notwithstanding the express devise of the lands to the executors, with power to sell the same after the expiration of 10 years, and then to divide the proceeds. This rule rests upon the fact that in every such case the executors in reality are only clothed with a power of sale, and that the title is vested in them for no other purpose than that of conveying it. Consequently the executors have no interest."

The case of *Hill v. Hill*, 90 Neb. 43, 132 N. W. 738, 38 L. R. A. (N. S.) 198, is also in point, as the will of the testator therein contained the following provision:

"I will and bequeath to my nephew, * * * in trust for my lawful heirs, all my estate, both real and personal, of every kind and nature, to be held by said trustee for the term of five years, and to be distributed among my lawful heirs at the end of such period."

It was held that the estate vested immediately in the beneficiaries of the trust, and that they, being in all respects competent,

were entitled to have the estate conveyed to them.

As is stated in 38 L. R. A. (N. S.) 198, in a footnote to the case just cited:

"That the beneficiary of a dry, simple, or passive trust may compel the trustee to convey the trust property before the time fixed for the termination of the trust is a proposition from which there appears to be no dissent. * * *" (Citing many cases.)

And as appears in *Sears v. Choate*, 146 Mass. 395, 15 N. E. 786, 4 Am. St. Rep. 320:

[4, 5] "There is no doubt of the power and duty of the court to decree the termination of a trust, where all its objects and purposes have been accomplished, where the interests under it have all vested, and where all parties beneficially interested desire its termination."

Some of the California authorities recognizing the principle, or supporting the rule, are *Eakle v. Ingram*, 142 Cal. 15, 75 P. 566, 100 Am. St. Rep. 99; *Ringrose v. Gleadall*, 17 Cal. App. 664, 121 P. 407; *Gray v. Union Trust Co.*, 171 Cal. 637, 154 P. 306; *Estate of Blake*, 157 Cal. 448, 108 P. 287; *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 187 P. 425; *Woestman v. Union Trust, etc., Bank*, 50 Cal. App. 604, 195 P. 944.

[6] Notwithstanding the weight of authority, which, on the whole, would indicate a reversal of the judgment herein, it is suggested by respondent that the question of the termination of a trust rests within the discretion of the trial court.

It may not be denied that, generally speaking, the rule obtains as announced in the case of *Gray v. Union Trust Co.*, 171 Cal. 637, 641, 154 P. 306, to the effect that the termination of a trust is discretionary with the trial court. See, also, *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 180, 187 P. 425. But such a pronouncement goes no further than does the ordinary principle regarding the general subject of judicial discretion; that is to say, where the facts are undisputed and the right flowing therefrom demands a certain definite action on the part of the trial court, in the absence of equitable considerations in opposing interests, or at least of some sound reason, no authority by virtue of a vested discretion in the trial court would justify an arbitrary action on its part denying the relief to which the parties ordinarily would be entitled. In the instant case it was stipulated that the beneficiaries were in all respects competent, not spendthrifts, and that all of them joined in the request that the trust be terminated. No reason of any sort based upon facts or equitable considerations was interposed by the trustees which might in any manner militate against the right of the beneficiaries of the trust in the premises. In such circumstances, we are of the opinion that it became the duty of the trial court to grant

to the plaintiffs in the action the relief for which they prayed.

It is ordered that the judgment be and it is reversed.

I concur: CONREY, P. J.

YORK, J., being disqualified, takes no part in the decision of this case.

**FIRST METHODIST EPISCOPAL CHURCH
OF SANTA MONICA v. LOS ANGELES
COUNTY. (Civ. 5381.)★**

District Court of Appeal, Second District, Division 2, California. Aug. 3, 1927.

Hearing Granted by Supreme Court Sept. 29, 1927.

1. Statutes $\S$ 185—Intention to legislate by implication will not be presumed.

Court will not presume that Legislature, omitting express declaration from statute, intended to legislate by implication.

2. Constitutional law $\S$ 29—Legislature may in furtherance of self-executing constitutional provision enact legislation to facilitate its operation and provide convenient remedies.

Even though constitutional provision is self-executing, Legislature may enact legislation to facilitate its operation and to provide convenient remedies for rights established thereunder.

3. Taxation $\S$ 249—Failure of church to file affidavit as to use of church property held not waiver of constitutional exemption from taxation (Pol. Code, $\S$ 3611; Const. art. 13, $\S$ 1½).

Failure of church owning real property containing building used solely for religious worship to make affidavit to assessor as to use of property, required by Pol. Code, $\S$ 3611, held not waiver of exemption provided for such property by Const. art. 13, $\S$ 1½, in view of absence of express provision in section 3611 for waiver or penalty, and in view of sections 3612 and 3613.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by the First Methodist Episcopal Church of Santa Monica against the County of Los Angeles. Judgment for defendant, and plaintiff appeals. Reversed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and J. A. Tucker, Deputy Co. Counsel, both of Los Angeles, for respondent.

CRAIG, J. This appeal is from a judgment sustaining a demurrer to a second amended complaint, which alleged that the appellant is a religious corporation, owning two lots in the city of Santa Monica, Los Angeles

county, upon which is situated a church building used solely and exclusively for religious worship, and that all of its real property here involved is required for the convenient use and occupation of said building. In the year 1924, the properly constituted authorities of Los Angeles county assessed and levied upon said property a tax amounting to \$849.51, without the knowledge, acquiescence or consent of appellant, of which tax appellant learned on December 1, 1924, and upon said date paid it to the tax collector under protest. The amended complaint also alleges that the assessor and his deputy at all times mentioned had actual personal knowledge of the ownership and use of the property in question as therein stated, and that the same was exempt from taxation; further, that the assessor did not at any time during the year 1924 demand, exact, or notify the plaintiff to make, verify, or file a statement setting forth property owned by it or under its possession or control. It appears that after paying the tax appellant duly claimed the return thereof, which was refused, whereupon this action was begun to recover the amount paid, upon the claim that the property is exempt from taxation under section 1½ of article 13 of the Constitution, and section 3611 of the Political Code. In resisting the suit, respondent's sole contention is that the failure to file the affidavit required by section 3611 of the Political Code amounts to a waiver of such exemption, and that the amended complaint is fatally defective in that it contains no allegation that such affidavit was filed.

Appellant's contention is that this section is intended only to provide a method of supplying evidence of the fact that the property is exempt, and that it does not provide for a waiver of the exemption in case no affidavit be filed; further, that if it were construed as requiring the filing of an affidavit in order that exemption may be secured, such provision would be unconstitutional, because, it is said, it would conflict with section 1½ of article 13 of the Constitution of this state. Section 1½ reads as follows:

"All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship shall be free from taxation; provided, that no building so used which may be rented for religious purposes and rent received by the owner therefor, shall be exempt from taxation."

The Political Code, section 3611, quoting and providing the method of procedure for acquiring exemption under the foregoing section of the Constitution, was enacted by the Legislature in the following language:

"That any person claiming property to be exempt from taxation under this section shall make a return thereof to the assessor annually, the same as property is listed for taxation, and

shall accompany the same by an affidavit showing that the building is used solely and exclusively for religious worship, and that the described portion of the real property claimed as exempt is required for the convenient use and occupation of such building, and that the same is not rented for religious purposes and rent received by the owner therefor."

[1-3] Respondent is correct in stating the issues to be, first, does the failure to comply with the provisions of section 3611 of the Political Code constitute a waiver of the exemption; and, second, so construed, is section 3611 constitutional? However, we find it unnecessary to decide the second question. We search the section in vain for any provision therein requiring that a failure to file an affidavit shall result in a waiver of the right to exemption. It contains no such express declaration. Nevertheless, respondent contends that it does not contain such provision. If so it must arise by implication. But an intention to legislate by implication is not to be presumed. *Crowell v. Gilmore*, 18 Cal. 370. No very definite reasons are assigned for believing that the Legislature meant to provide by implication that a failure to file the affidavit should result in a waiver of the right provided by the Constitution to tax exemptions. An analysis of section 3611 of the Political Code shows that the first provision of it is merely a quotation of section 1½ of article 13 of the Constitution. The appellant asserts, and the respondent concedes, that this section is self-executing. Since we think it unnecessary to a decision upon this appeal to pass upon that question, no opinion is expressed. It may be assumed, as argued by respondent, that even though a constitutional provision is self-executing, the Legislature may, and in many instances must, enact legislation to facilitate its operation, and to provide convenient remedies for the protection of the right established, and for the determination thereof and the regulation of claims thereto. Such legislation must be in furtherance of the purposes of the constitutional provisions, but, if so, it is valid and enforceable. The last provision of section 3611 is, we think, such a law. It is regulatory and places no unreasonable burden upon those entitled under section 1½ of article 13 of the Constitution to tax exemption. It creates no hardship to require of a property owner that he file an affidavit showing that the property claimed to be exempt is used solely for religious worship, that it is required for the convenient use and occupation of the building upon the premises, and that the same is not rented for such purposes and rent received by the owner therefor. If the person claiming exemption fails to make a return to the assessor by filing the affidavit contemplated, the latter acts entirely within the scope of his authority in assessing the property just as he would any other property.

of the Political Code. But respondent agrees further that the language employed is mandatory, that any one claiming exemption must comply with the section, and that unless such a construction is placed upon it the provision amounts to nothing more than a request to the taxpayer that he file an affidavit in order that the assessor may be aided in his work.

It may be that the statute would be more effective if the legislators had provided it with teeth, and annexed a penalty merely to make the law more effective and to reduce the work of the assessor, or to avoid time wasting on the part of other public officials. Even though the construction placed upon the law by respondent is not adopted, it cannot be said that the claimant has no incentive to comply with the requirement that he file an affidavit. The result of his failure to make a return to the assessor is bound to be, as in the instant case, that his property is taxed and he is put to the trouble and expense of a proceeding before the board of supervisors for a cancellation of the assessment, after being required to secure from the district attorney the latter's consent, or else he must pay his taxes under protest and apply to the board of supervisors for their refund, or, upon the refusal of the supervisors to direct such refund, he is compelled to institute an action in the superior court. In either of such proceedings the taxpayer would be required to show that the property in question was used exclusively for religious purposes and that it was not rented for such purposes. It may reasonably have been the idea of the legislators in enacting this law that such inconvenience and the loss of money and time incidentally involved would provide sufficient incentive to inspire compliance with the sections of the Constitution and Political Code in question without adding the further penalty of a loss of the exemption itself. At any rate they omitted provision for such a penalty.

Aside from consideration of the language of a statute where any substantial doubt exists as to its meaning, it is of course proper to regard extrinsic aids. One which may reasonably be given weight in this case, and which must throw great light upon the legislative intent, is a comparison of other provisions of the same chapter of the Political Code, having to do with other related exemptions. Sections 3612 and 3613 of the Political Code respectively provide for the exemption from taxation of war veterans and of educational institutions. It will be noted that each of these sections, after providing for a showing to be made by one claiming exemption similarly to that called for by section 3611, expressly add that a failure to make a return shall be deemed to constitute a waiver of the right given by the Constitution. In *People v. Buster*, 11 Cal. 221, which is not distinguishable in principle, the Supreme

Court said, at page 221: "The omission of this provision in the sections which touch cases like this is significant to show that a different intention existed." Surely, the fact that these parallel provisions for tax exemption, one immediately following the other, are distinctly dissimilar in this one provision, is indicative of the fact that the Legislature in making the difference did so intentionally and deliberately. We are satisfied that the provision of section 3611 of the Political Code requiring any person claiming property to be exempt from taxation under that section to make a return thereof to the assessor was intended to assist the assessor in determining what property should be omitted from assessment, but that it was not the purpose of the Legislature in enacting it to make a failure to comply therewith a waiver of the exemption provided in section 1½ of article 13 of the Constitution. Consequently, one entitled to such an exemption may still avail himself of it in a proper proceeding, and for that purpose the complaint filed in the instant cases states a cause of action.

The judgment is reversed.

We concur: WORKS, P. J.; THOMPSON, J.

84 Cal. App. 736

BURKE v. DILLINGHAM et al. (Civ. 4879.)

District Court of Appeal, Second District, Division 2, California. Aug. 5, 1927.

1. Carriers ⇨321(21)—Where complaint for injuries to passenger charged negligence of bus owner in collision in general terms, instruction on doctrine of *res ipsa loquitur* held proper.

In action by passenger of automobile bus for injury sustained in collision of bus with truck, where complaint charged negligence of bus company in general terms only, instruction incorporating doctrine of *res ipsa loquitur* held proper, though plaintiff introduced testimony to prove surrounding circumstances tending to establish negligence of codefendant truck owner, and refusing instruction that doctrine had no application to case was not error.

2. Carriers ⇨321(12)—Instruction that bus owners as common carriers were liable for injuries by driver whether done willfully or negligently held not erroneous (Civ. Code, § 2100).

In action by bus passenger for damages for personal injuries sustained in collision of bus with truck, instruction stating law relative to common carriers for hire, as codified in Civ. Code, § 2100, and concluding that bus owners as common carriers were liable for injuries to passengers by driver, whether done willfully or negligently, held not erroneous on ground that jury must have understood that defendants were insurers of safety of its passengers.

3. Trial ⇨74—Codefendant could not object to cross-examination of plaintiff because it was beyond legitimate confines of cross-examination.

Where plaintiff did not testify on direct examination concerning headlights of bus which struck codefendant's truck, codefendant could not object to cross-examination, wherein plaintiff testified relative to condition of headlights, on ground that it extended beyond legitimate confines of cross-examination.

4. Appeal and error ⇨206(2)—Proper ground for objection to cross-examination must be urged before error will result.

Before error will result from permitting cross-examination of witness, proper ground for objection to cross-examination must be urged.

5. Appeal and error ⇨345(1)—Where defendant served notice of intention to move for new trial on plaintiff, but not on codefendants, motion for new trial was pending, and appeal after 60 days from judgment was in time (Code Civ. Proc. § 939).

Where judgment was entered November 7, 1923, and defendant served notice of intention to move for new trial on plaintiff's counsel November 11, 1923, but did not serve it on codefendants, motion for new trial was pending, and appeal of defendant more than 60 days after entry of judgment was in time, under Code Civ. Proc. § 939.

6. Carriers ⇨320(21)—Concurring negligence of owner of truck struck by bus while stopped on highway without rear light held for jury.

In action by bus passenger for personal injuries sustained in collision of bus with truck, concurring negligence of owner of truck stopped on highway without rear light with owners of bus which struck truck from rear held for jury.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action for damages for personal injuries by L. L. Burke against E. B. Dillingham and another, copartners doing business as the Dillingham Transportation Company, and others. From a judgment for plaintiff, defendants separately appeal. Affirmed.

Saraú & Thompson, of Riverside, and W. I. Gilbert and B. P. Gibbs, both of Los Angeles, for appellants E. B. Dillingham and H. L. Dillingham.

Joe Crider, Jr., and J. S. Garnett, both of Los Angeles, for appellant Cauldwell.

R. W. Richardson, of Los Angeles, for respondent.

THOMPSON, J. On the evening of October 4, 1922, at about the hour of 7 p. m., the plaintiff was being conveyed as a passenger on one of the automobile busses owned and operated by the Dillingham Transportation Company, a common carrier of passengers between Long Beach and Whittier, when the stage collided

with a truck belonging to and operated by the defendant H. G. Cauldwell. Both vehicles had been traveling in the same direction. At the time of the accident the truck was standing upon the right-hand portion of the paved highway without a lighted tail light. Either by reason of the fact that the driver of the stage was blinded by approaching headlights (as he testified) or by reason of insufficient headlights on the stage or non-observance, the stage was driven into the rear end of the truck. The jury returned a verdict in favor of plaintiff and against all defendants in the sum of \$15,000, upon which judgment was entered. Two appeals are prosecuted from the judgment, one by the defendants E. B. Dillingham and H. L. Dillingham, copartners doing business under the name of Dillingham Transportation Company, and one by the defendant H. G. Cauldwell.

The Appeal of Dillinghams.

We shall dispose first of the appeal of E. B. Dillingham and H. L. Dillingham, copartners doing business under the name of Dillingham Transportation Company, who urge a reversal of the judgment because the court erred in giving an instruction incorporating the doctrine of *res ipsa loquitur* and refusing to instruct the jury that the doctrine had no application to the case. Appellants ground their argument in this regard upon the premise that the plaintiff introduced testimony "to prove the surrounding circumstances tending to establish negligence on the part of the defendants," and they say "in so doing he waived the application of the rule." The plaintiff introduced testimony to show that the truck was standing still on the paved portion of the highway, without a tail light and that the stage was running at a speed between 30 and 35 miles per hour. On cross-examination by counsel for the defendant Cauldwell, the owner of the truck, it was developed that the lights on the stage were rather weak, which on redirect examination was amplified by the witness with the statement that in his judgment the headlights of the stage reflected ahead from 50 to 70 feet. On cross-examination it was also testified that the driver of the bus stated in the presence of one of the defendants Dillingham that he was blinded by a stream of approaching headlights.

[1] The rule concerning the doctrine of *res ipsa loquitur*, as announced by our courts, is that where the specific acts of negligence are pleaded the doctrine has no application for the reason that, in part, it is founded upon the theory that the means of proving the specific cause of the accident are peculiarly within the power of the defendant under whose exclusive control the thing which caused the accident is shown to have been. *Connor v. Atchison, etc., Ry. Co.*, 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462; *Marovich v. Central California T. Co.*, 191 Cal. 295, 216 P. 595. This

rule is subject to the limitation that, where negligence is alleged generally and specific acts of negligence are also alleged, the plaintiff is entitled to have the instruction given, even where the allegations appear in the same count. *Roberts v. Sierra Ry. Co.*, 14 Cal. App. 180, 111 P. 519, 527; *Bourguignon v. Peninsular Ry. Co.*, 40 Cal. App. 689, 181 P. 669. The appellants have called our attention to two cases from other jurisdictions, the one being *Dentz v. Penn. R. Co.*, 75 N. J. Law, 893, 70 A. 164, the other being *Pistorio v. Washington R. & E. Co.*, 46 App. D. C. 479, wherein it was held that, where the plaintiff goes further than the rule requires and shows by proof the cause of the accident, the presumption does not arise and he is not entitled to the instruction. This announcement is at variance with the two authorities from our own jurisdiction last cited, for the reason that in those cases plaintiff introduced evidence in support of the allegations of specific acts of negligence and explanatory of the cause of the accident. In the present case the complaint charged negligence in general terms only.

Aside from that fact, however, it should be noted that plaintiff was entitled in this case to introduce testimony to support his theory of the concurring negligence of the defendant Cauldwell, and the testimony brought out by him on direct examination was pointed at the negligence of this codefendant. The instruction given was proper; the instruction refused was rightly refused.

[2] These appellants next assert that the court erred in giving an instruction as follows:

"You are instructed that E. B. Dillingham and H. L. Dillingham, copartners doing business under the name of 'Dillingham Transportation Company,' are the owners and operators of an automobile stage line, operating between the cities of Long Beach and Whittier, in the county of Los Angeles, state of California, being common carriers of passengers for hire, and as such common carriers are held to and must use the utmost care and diligence for the safe carriage of their passengers, and, as owners and operators of their stage or vehicle traveling upon any road for the convenience of passengers, are liable for injuries to any person or persons as passengers on said stage done by any person in the course of his employment as a driver while driving such stage, whether done willfully or negligently."

These appellants maintain that the jury must have understood from this that the defendants were insurers of the safety of its passengers. We do not so read the instruction. The first half of the instruction clearly and succinctly stated the law relative to common carriers for hire as codified in section 2100, Civil Code. The remaining half of the instruction was designed to inform the jury that the owners of the stage line were answerable for the negligence of their employ-

ers acting in the course of their employment. While the language employed for this purpose might have been selected so as to more clearly express this rule of law, we cannot believe that the jury put the interpretation upon it which is suggested by counsel. The addition of the words "whether done willfully or negligently" aids rather than destroys the proper construction, for while an employer is not responsible for a willful tort committed by his employee in which the employee steps outside the scope of his employment, nevertheless, no such question was involved in the present action and the only application which the jury could possibly make of the modifying words was to understand that the employers were liable for injuries done by their employees acting in the course of their employment, if done negligently. As thus stated, there was no erroneous thought conveyed to the mind of the jury.

[3, 4] As has been indicated in the recital of facts, the plaintiff did not testify on direct examination concerning the headlights of the stage, but he was permitted on cross-examination by counsel for the defendant Cauldwell and over the objection of the defendants Dillinghams to testify relative to their condition. The appellants now urge this as their last reason for the reversal of the judgment, maintaining that, inasmuch as a party has no right to cross-examine a witness upon any matter not connected with his direct examination, the reception of the testimony amounts to reversible error. It is the plaintiff who has the right to stand upon this rule of law and insist that his witness shall not be subjected to such cross-examination. He made no objection. We know of no rule of law which gives to a codefendant the right to object to the cross-examination of the plaintiff's witness. Undoubtedly these appellants would have had a right to object to the order of proof, if in fact through the pretext of cross-examination the codefendant made the witness his own witness; but no such objection was made, nor is any other reason urged on this appeal why the reception of the testimony was improper, other than to say it extended beyond the legitimate confines of cross-examination. The books abound with authorities to the effect that the proper ground for the objection must be urged before error will result.

Appeal of Defendant Cauldwell.

[5] While the defendant Cauldwell has endeavored to perfect an appeal from the judgment, it is urged by the appellants Dillinghams and assented to by plaintiff's counsel that such right was lost to him by lapse of time prior to the date he gave notice thereof. This contention is based upon the following facts: The verdict of the jury was rendered on November 6, 1923, and the judgment thereon was entered on November 7, 1923. The no-

tice of this appeal was filed on January 12, 1924, or more than 60 days after the entry of judgment, and the limit of time fixed by section 939, Code of Civil Procedure, provided no proceedings on motion for a new trial were pending. The defendants Dillinghams argue that, although the defendant Cauldwell served a notice of intention to move for a new trial on November 11, 1923, upon counsel for the plaintiff, it was not served on them, hence did not confer upon the trial court jurisdiction to pass upon the defendant Cauldwell's motion. In support of this contention counsel cites *Herriman v. Menzies*, 115 Cal. 16, 44 P. 660, 46 P. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81, and *United States v. Crooks*, 116 Cal. 43, 47 P. 870, together with additional authorities. Both of the cases named hold that, where the notice of intention is not served upon a party whose interests would be affected by the granting of a new trial, the court is without jurisdiction to grant the motion. In both cases the appeal was from an order denying a motion for a new trial. And the court in each instance did not dismiss the appeal because the court was without jurisdiction to make an order denying the motion, but did in each instance affirm the order. This would seem to argue against the contention of the appellants Dillinghams, because, unless a motion for a new trial were pending, no valid order denying it could be made and no affirmance would be proper. The same may be said of the other cases relied upon by the appellants Dillinghams. Especial attention should be directed, however, to the case of *Johnson v. Phenix Ins. Co.*, 152 Cal. 196, 92 P. 182, wherein it was distinctly stated that the appeal would not be dismissed for failure to serve all of the adverse parties, although it did furnish a good ground for the affirmance of the order denying the motion for a new trial. Our conclusion from these authorities is that a motion for a new trial was pending and the appeal of the defendant Cauldwell is in time.

[6] Using his own language, it is the position of this appellant "that according to the bus driver's own version of the accident the accident would have happened if the truck had been moving instead of standing still, and that it would have happened regardless of whether or not there was a tail light on the bus." In other words, he argues that the sole proximate cause of the accident was the negligence of the stage driver. Assuming that the lights of the stage were such that it would have overtaken and run into the truck had it been moving, it does not follow that such would have resulted, had the truck been equipped with that signal of danger, a red tail light. Nor do we think that an appellate tribunal is justified in saying that the accident would have happened had the truck been moving. These facts were submitted to the jury under appropriate instructions and they concluded from the facts that the de-

endants were concurrently negligent. Under the circumstances we are not justified by the record in saying that there was no concurring negligence on the part of the defendant Cauldwell.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

84 Cal. App. 485

SUN-MAID RAISIN GROWERS OF CALIFORNIA et al. v. MOSESIAN et al.
(Civ. 5829.)

District Court of Appeal, First District,
Division 2, California. July 19, 1927.

1. Trade-marks and trade-names and unfair competition ⚡43—Terms descriptive of manner or process by which, or ingredients with which, article is made are not subject to registration.

Use of terms, which are merely descriptive of the manner or process by which, or the ingredients with which, an article is made, is not subject to registration, and will not be protected against infringement, particularly where the process is open to the use of the general public.

2. Trade-marks and trade-names and unfair competition ⚡43—Arbitrary or fanciful words have special significance in trade-mark law and are subject to registration.

Arbitrary or fanciful words have a special significance in the language of the law of trade-marks, and are subject to registration and appropriate protection.

3. Trade-marks and trade-names and unfair competition ⚡3(4)—Language descriptive only of manufacturing process is not susceptible of exclusive appropriation.

Language which is merely descriptive of the process of manufacturing is not susceptible of exclusive appropriation.

4. Trade-marks and trade-names and unfair competition ⚡7—Generic or descriptive words cannot be made valid trade-marks by misspelling or printing in letters of foreign alphabet.

Generic or descriptive words cannot be made valid trade-marks by misspelling, or by printing in letters from the alphabet of a foreign language.

5. Trade-marks and trade-names and unfair competition ⚡16—Size and shape of carton for marketing product, or use of particular color or combination of colors, is not susceptible of exclusive appropriation and registration.

The mere size and shape of a carton for the marketing of a product is not subject to exclusive appropriation, nor is the use of a particular color or combination of colors susceptible of registration.

6. Trade-marks and trade-names and unfair competition ⚡4—Use of the sun as trade-mark may not ordinarily be monopolized by picture or word.

One may not ordinarily monopolize by picture or word the use of the sun as a trade-mark.

7. Trade-marks and trade-names and unfair competition ⚡3(4½)—Language descriptive of method of curing grapes, as sun-cured, sun-dried, or sun-made, cannot be exclusively appropriated.

Language used to describe the method of curing grapes or other products, such as sun-cured, sun-dried, or sun-made, are descriptive terms, the exclusive use of which as trade-marks the law will not protect.

8. Trade-marks and trade-names and unfair competition ⚡3(4)—Rule against exclusive appropriation of language descriptive of method of manufacture cannot be avoided by mere employment of subterfuge or play on words.

The mere employment of a subterfuge or play on words will not suffice to escape application of rule that language descriptive of method of manufacture is not susceptible of exclusive appropriation.

9. Trade-marks and trade-names and unfair competition ⚡3(4½)—“Sun-maid,” used in connection with picture of girl and sun as trade-mark for raisins, held not to mean sun-made, which use would not be susceptible of exclusive appropriation (Civ. Code, § 991).

“Sun-maid,” used in connection with a smiling, curly-haired, sunbonnet girl over the face of a radiant sun, as a trade-mark for raisins, held not used to mean sun-made, which use would be merely descriptive of process of manufacture and not susceptible of exclusive appropriation, under Civ. Code, § 991.

10. Trade-marks and trade-names and unfair competition ⚡93(3)—Reasonable doubt as to idea intended to be conveyed by picture trade-mark should be resolved in favor of party first appropriating, exclusively using, registering, and advertising such mark.

Reasonable doubt as to the idea intended to be conveyed by a picture trade-mark should be resolved in favor of the party who has first appropriated the idea and exclusively used it, and who has succeeded in registering the mark in the United States Patent Office and expended large sums of money in advertising it.

11. Appeal and error ⚡954(1)—Injunction ⚡135—Grant of preliminary injunction is within trial court's discretion and will not be disturbed except for abuse of discretion.

The granting of a preliminary injunction rests in the sound discretion of the trial court, and will not be disturbed on appeal, unless that discretion has been abused.

12. Trade-marks and trade-names and unfair competition ⚡45—Registration of trade-mark is merely prima facie evidence of a valid ownership.

The registration of a trade-mark, like the recording of any other instrument, is merely

prima facie evidence of its validity and ownership.

13. Trade-marks and trade-names and unfair competition  4—Injunction will issue to restrain infringement on use of label or picture to express idea.

An injunction will issue to restrain infringement on expression of an idea by means of a label or picture, as well as by the use of ordinary language.

14. Trade-marks and trade-names and unfair competition  70(1)—Infringement of trade-mark is not dependent on exact similarity, but on general appearance such as to deceive casual purchaser exercising ordinary care.

The test as to infringement against a trade-mark does not depend on an exact similarity in every detail, but on general appearance likely to deceive a casual purchaser who exercises ordinary care in the selection of the article which he wishes to buy.

15. Trade-marks and trade-names and unfair competition  95(1)—Preliminary injunction in suit to enjoin infringement of "sun-maid" trade-mark for raisins held properly allowed, though actual fraud or deceit was not shown (Pol. Code, §§ 3196, 3197, 3199).

Preliminary injunction in suit to restrain infringement of "sun-maid" trade-mark for raisins held properly allowed, in view of striking similarity of trade-marks and Pol. Code, §§ 3196, 3197, and 3199, notwithstanding plaintiff failed to show any actual fraud or that any purchaser was deceived by the simulation or induced to buy a brand of raisins which he did not desire.

16. Trade-marks and trade-names and unfair competition  70(1)—Imitation of trade-mark or label to degree likely to deceive casual purchasers may constitute fraud independently of actual sales.

The imitation of a trade-mark or trade label to a degree which would be likely to deceive casual purchasers exercising ordinary care in the selection of a commodity may constitute fraud in itself, independent of evidence of actual sales.

Appeal from Superior Court, Fresno County; Peter J. Shields, Judge.

Suit by the Sun-Maid Raisin Growers of California and others against Moses P. Mosesian and others. From an order granting a preliminary injunction restraining the infringement of certain trade-marks, defendants appeal. Affirmed.

Francis J. Heney, of Los Angeles, for appellants.

John H. Miller, A. W. Boyken, and F. G. Athearn, all of San Francisco, for respondents.

THOMPSON, Presiding Justice pro tem. This is an appeal from a preliminary injunction restraining the appellants from infringing upon certain trade-marks.

For the past 15 years respondents have been engaged in the business of producing, packing, and marketing raisins; with their principal place of business at Fresno. The Sun-Maid Raisin Growers of California is a co-operative association composed of some 16,000 members. During the 10 years prior to the alleged infringement this association handled a raisin business aggregating \$155,000,000 in value, which included 75 per cent. of the entire raisin grape industry of California, and in this period of time it expended some \$10,000,000 for advertising purposes. Its raisin products were largely marketed in 1-pound cartons displaying the trade-marks, the infringement of which is here involved.

These trade-marks consist of a label for raisin containers, on each side of which there appears, over a bright red background, a brilliant golden orb representing the sun, which occupies the upper portion of the carton. Across the face of the sun appears the features and bust of a laughing, curly-haired girl, wearing a red sunbonnet. In her hands the maiden holds a tray laden with grapes. Below this picture, in conspicuous white letters, is printed the following language: "California Sun-Maid Seedless Raisins."

These trade-marks were exclusively appropriated and used by respondents for many years. About 1918 the picture and the compound word "sun-maid" were separately and jointly registered in the United States patent office. In 1924 the appellants, who were also engaged in the raisin business in California, produced a label for their 1-pound raisin cartons very closely resembling in color, picture, and lettering the trade-marks of respondents. With this label the appellants proceeded to market their raisin products, until they were enjoined by respondents. Appellants also filed their label with the United States Patent Office, but its adoption was contested, and it has not been recorded.

The dominant features of the respective cartons are a picture of radiant youth over the face of a glowing golden sun, together with white lettering emphasizing the words "sunrayed raisins," which appear upon the appellants' package in lieu of "sun-maid raisins" on respondents' containers; both pictures occupy approximately the same space and relative position on each side of the respective cartons. All these features appear over a bright red background of the same shade. The similarity in the general appearance of both labels is persuasive evidence that the original trade-marks of respondents inspired the production of the appellants' designs, which were evidently created with the hope of profiting by the favorable reputation and extensive advertising of respondents' products.

Notwithstanding the similarity in colors, picture, and language, appellants seek to dis-

tinguish their label from that of respondents by the use of the features of a smiling bareheaded boy over the face of the sun, instead of the laughing red-sunbonnet girl, and in the use of the term "sunrayed" to describe the process of curing the grapes instead of "sun-maid" which is employed by respondents. On the face of respondents' carton there is printed in conspicuous white letters "California Sun-Maid Seedless Raisins," while the firm name is printed on the end of the container. On the face of appellants' carton there is printed in prominent white letters "Sunrayed Raisins, Grown Without Seeds," in addition to which there also appears in inconspicuous yellow letters the following language: "Thompson Seedless" and "Recleaned and packed by California Seedless Raisin Company, Fresno, Cal., U. S. A."

This suit was brought by respondents for infringement of their trade-marks above described and for unfair competition. The complaint contains four counts. The first alleges an infringement against the registered trade-mark consisting of the picture upon a red background of the laughing, red-sunbonnet girl and the radiant sun; the second count sets up an infringement against the separately registered trade-mark of the compound word "sun-maid"; the third count charges infringement against the entire combination of colors, picture, and language; the last count accuses appellants of unfair competition. Upon a hearing based on affidavits the trial court granted a preliminary injunction against the appellants, and their representatives, successors, and assigns, restraining them from "preparing, packing, marketing, advertising, selling, or offering for sale packages or cartons containing raisins, or raisin products in packages or cartons identical with or substantially similar to that shown in Exhibit E attached to the complaint herein, the same being generally packages or cartons having thereon the name 'sunrayed' or with the figure of a boy with the sun at his back.

* * *

Appellants seek to vacate or modify this restraining order, asserting that their trade-marks do not constitute an infringement, and that respondents have failed to specifically allege or prove actual fraud, deceit, or sales to any individual who was misled or induced to purchase cartons of raisins which he did not intend or wish to buy. Analyzing and distinguishing their picture and the language printed upon their containers, the appellants claim that respondents have no prior or exclusive right to the use of a red background with white letters printed thereon, nor to the combination of colors employed, nor to the picture of the sun. And, finally, appellants maintain that the word "sun-maid" as it is used by respondents is deceiving and misleading, and when correctly spelled *sun-made*, according to the evident intent expressed by the

picture, it is merely a term common to the trade, describing the natural process of drying and curing the raisins.

Section 991 of the Civil Code provides:

"One who produces or deals in a particular thing, or conducts a particular business, may appropriate to his exclusive use, as a trade-mark, any form, symbol, or name which has not been so appropriated by another, to designate the origin or ownership thereof; but he cannot exclusively appropriate any designation, or part of a designation, which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced, or the business is carried on."

[1, 2] It is true that the use of terms, which are merely descriptive of the manner or process by which, or the ingredients with which, an article is made, is not subject to registration and will not be protected against infringement, particularly where the process is open to the use of the general public. *L. R. A. 1916E, 633*. Arbitrary or fanciful words have a special significance in the language of the law of trade-marks, and such terms are subject to registration and appropriate protection. But in the case of *Indurated Fibre Co. v. Amoskeag Indurated Fibre Co. (C. C.) 37 F. 695*, it is said, Where such words "do not sufficiently point either by themselves or by association, to the origin, manufacture or ownership of the article produced, but that they rather indicate the quality, class, grade, or style of such article," they are not subject to exclusive use. *Goodyear Co. v. Goodyear Rubber Co., 128 U. S. 598, 9 S. Ct. 166, 32 L. Ed. 535*; *Falkinburg v. Lucy, 35 Cal. 52, 95 Am. Dec. 76*; *Schmidt v. Brieg, 100 Cal. 672, 35 P. 623, 22 L. R. A. 790*; *Spieker v. Lash, 102 Cal. 38, 36 P. 362*.

[3] It is also true that language which is merely descriptive of the process of manufacturing is not susceptible of exclusive appropriation. *L. R. A. 1916E, 633*. This rule has been applied to the following language: Hot forged hammer point nails; shredded whole wheat; Oriental Rug Renovating Company; lamb-knit; compressed yeast; flaked oatmeal; prime leaf lard.

[4] It has been held that "a generic or descriptive word cannot be made a valid trade-mark by misspelling it (as for example 'Kid Knee Kure' as applied to medicine), or by printing it in letters from the alphabet of a foreign language." *Hopkins on Trade-Marks (4th Ed.) 95*. Mr. Justice McKenna said in *Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U. S. 446, 31 S. Ct. 456, 55 L. Ed. 536*:

"The word [rubberoid], therefore, is descriptive, not indicative of the origin or the ownership of the goods; and, being of that quality, we cannot admit that it loses such quality and becomes arbitrary by being misspelled. Bad orthography has not yet become so rare or so easily detected as to make a word the arbitrary

sign of something else than its conventional meaning."

[5, 6] The mere size and shape of a carton for the marketing of a product is not subject to exclusive appropriation, nor is the use of a particular color or combination of colors susceptible of registration. *So. Cal. F. Co. v. White Star C. Co.*, 45 Cal. App. 426, 187 P. 981; *American Tobacco Co. v. Globe Tobacco Co. (C. C.)* 193 F. 1015. Nor may one ordinarily monopolize, by picture or word, the use of the sun. *Patton Paint Co. v. Sunset Paint Co.*, 53 App. D. C. 348, 290 F. 323.

[7, 8] Following the foregoing well-established rule, it must be conceded that language used to describe the mere method of curing grapes, or other products, such as sun-cured, sun-dried, or sun-made, are descriptive terms common to the trade, the exclusive use of which as trade-marks the law will not protect. It naturally follows that the mere employment of a subterfuge or a play upon words will not suffice to escape the application of the foregoing rule. Appellants insist that the purpose of respondents' picture, taken as a whole, with the glowing sun shining upon the tray of grapes held in the hands of the smiling girl, together with the use of the words "sun-maid raisins," is a pure subterfuge intended to avoid the rule of law, and at the same time convey the impression that the raisins were in fact made or cured in the sun. On the contrary, respondents contend that both their picture and the accompanying term "sun-maid" are "purely arbitrary and fanciful creations" and that the design of the young girl holding the grapes with a "radiant golden sun" beaming down upon them "was not intended to illustrate the method of preparing raisins, but is merely pleasantly suggestive of the sunshine, beauty, and abundance of our golden state of California," and that the "sun-maid" discloses an original, arbitrary, artistic, and appropriate design not commonly associated with the description of raisins, and as such should be given trademark protection.

[9] It will be noted, however, that the copyrighted term employed by respondents was not in fact spelled *sun-made*. And, while it may be argued with much force that as the term was associated with the picture of the sun and the tray of grapes, it was intended to mislead a careless purchaser to assume that it implied that "sun-maid" raisins really meant *sun-made* raisins. However, since the most prominent feature of respondents' picture is the smiling, curly-haired, sunbonnet girl, over the face of a radiant sun, immediately beneath which is the term "sun-maid," it does not seem unreasonable to conclude that the compound word "sun-maid" refers to the idea of the combination of the sun and the girl; and not to an incongruous and unnatural distorting of the word, in order to construe it

to mean a description of the process of curing the raisins.

[10] Assuming that the word is susceptible of appellants' construction, and that there is a reasonable doubt as to the true interpretation of the idea intended to be conveyed by the picture, we are of the opinion that that doubt should be resolved in favor of the party who first appropriated the idea and exclusively used it for a number of years, and who has also succeeded in registering the term in the United States Patent Office, and has expended large sums of money advertising it as a trade-mark. *N. K. Fairbanks Co. v. Ogden Packing & Provision Co. (D. C.)* 220 F. 1002.

Although the term "sun-maid," standing alone, might be subject to appellants' attack and claim that it is merely a misspelled word indicating a process of curing grapes, still as an inseparable part of a combination picture and ad, a court of equity will not draw fine distinctions to upset the discretion of a trial court in awarding a preliminary injunction where the equities are so clearly in favor of the owner of a trade-mark over which he has exercised exclusive control and use for a period of 10 years or more.

The appellants rely upon the case of *So. Cal. F. Co. v. White Star Canning Co.*, supra, wherein it is said:

"All of the resemblances arise from features that are common to the trade, or from the use of a design—the figure of a fish—to which no one has an exclusive right. * * * Plaintiff must show deception arising from some feature of its own, not common to the public."

This was an action to enjoin the sale of tuna fish, canned in tins of like size and shape common to the trade, containing a label with similar blue background, over which the only other similar feature was the picture of a fish. The conspicuous designating trademark of plaintiff consisted of the words "Blue Sea Tuna," while defendant's cans were labeled "White Star Tuna Fish." The court there said:

"Except that both labels have substantially the same blue-colored background, the figure of a fish, designated to represent the 'tuna,' and truthful, printed descriptions of the contents of the packages, the labels of the two competitors differ in almost every respect."

The following excerpt was also quoted with approval:

"A resemblance which would deceive an expert or a very cautious purchaser may still give a right of action, but a resemblance which would deceive only an indifferent or careless purchaser gives no right of action."

The foregoing language readily distinguishes that case from the one at bar.

[11] The benefits of an exclusive trademark are to create and preserve a favorable reputation, to stimulate the sale of a product,

and to distinguish it from similar competing products.

The granting of a preliminary injunction rests in the sound discretion of the trial court and will not be disturbed on appeal unless that discretion has been abused. 14 Cal. Jur. 180; Lutz v. Western Iron & Metal Co., 190 Cal. 554, 213 P. 962; Wilson & Co. v. The Best Foods, Inc. (C. C. A.) 300 F. 484.

[12] A trade-mark may consist in the exclusive use of any "description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, or wrapper," etc. Section 3196, Pol. Code. The exclusive use of a trade-mark may be secured to the owner thereof by registering it with the secretary of state. Section 3197, Pol. Code. An owner of a trade-mark may be protected in its use by means of injunctive relief, even though it may not be registered pursuant to law. Section 3199, Pol. Code. The registration of a trade-mark, like the recording of any other instrument, is merely prima facie evidence of its validity and ownership.

[13] An injunction will issue to restrain infringement upon the expression of an idea by means of a label or picture as well as by the use of ordinary language. 24 Cal. Jur. 620; Burke v. Cassin, 45 Cal. 467, 13 Am. Rep. 204; Rogers on Good Will, Trade-Marks, etc., p. 69; Aunt Jemima Mills Co. v. Blair Milling Co., 50 App. D. C. 281, 270 F. 1021; Enoch Morgan's Sons Co. v. Ward (C. C. A.) 152 F. 690, 12 L. R. A. (N. S.) 729. The value of pictures as a means of conveying an idea has been recognized since ancient times. The caveman carved his message on the walls of his cave; the Indian boasted of his conquest in pursuit of game, or in the waging of war, by means of crude pictures cut upon the bark of a tree; the modern picture play vividly portrays the story of life in its varied forms with all its joys and sorrows, its strife and tragic failures, as well as its wonderful achievements.

[14] The test as to infringement against a trade-mark does not depend upon an exact similarity in every detail, but if the general appearance is such as to deceive a casual purchaser who exercises ordinary care in the selection of the article which he wishes to buy, its use may be enjoined. Nims on Trade-Marks (2d Ed.) pp. 235, 585; Canterbury Candy Makers v. Brecht Candy Co., 54 App. D. C. 82, 294 F. 1013; Gehl v. Hebe Co. (C. C. A.) 276 F. 271; O. & W. Thum Co. v. Dickinson, 46 App. D. C. 306; National Biscuit Co. v. J. B. Carr Biscuit Co., 55 App. D. C. 146, 3 F. (2d) 87; McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828. In the last case cited it is said:

"What degree of resemblance is necessary to constitute an infringement is incapable of exact definition, as applicable to all cases. All that courts of justice can do, in that regard, is to say that no trader can adopt a trade-mark,

so resembling that of another trader, as that ordinary purchasers, buying with ordinary caution, are likely to be misled. * * * Much must depend, in every case, upon the appearance and special characteristics of the entire device; but it is safe to declare, as a general rule, that exact similitude is not required to constitute an infringement or to entitle the complaining party to protection. If the form, marks, contents, words, or the special arrangement of the same, or the general appearance of the alleged infringer's device, is such as would be likely to mislead one in the ordinary course of purchasing the goods, and induce him to suppose that he was purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection. * * *

In *Spieker v. Lash*, 102 Cal. 38, 45, 36 P. 362, 363, in which a judgment for plaintiff was affirmed, it is said:

"The evidence shows that the defendants' labels, while differing in some respects from those of the plaintiff, are a colorable imitation of them, the resemblance being such as to justify the conclusion that they were intended and adapted to lead the public generally to the belief that the manufacture of the original 'Lash's Kidney and Liver Bitters,' had been superseded. * * *

Numerous authorities show a like effort to use similar words conveying the same idea, sound, or appearance, by altering the spelling or disarranging the sequence of letters. Among these cases the following similar words have been held to constitute an infringement: *Coco-Cola*—*Extract of Coca & Kola*; *Coca-Cola*—*Take Kola*; *Holeproof*—*No-Hole*; *Lily White*—*White Lily*; *Uneeda*—*Iwanta* (*National Biscuit Co. v. Baker* [C. C.] 95 F. 135); *Sapolio*—*Sapono*; *Hostetter's Bitters*—*Host style Bitters*; *Cascarets*—*Castorets*; *Gold Bar*—*Gold Band*; *Silver Bar*—*Silver Band*; *Stove lustre*—*Stove lacquer*; *Listerine*—*Lis ter septine*; *Celluloid*—*Cellonite*; *Cottolene*—*Cottoleo*; *Cottolene*—*Chefolene* (*N. K. Fairbanks Co. v. Ogden Packing & Provision Co.*, supra); *Gold Dust*—*Gold Drop* (*N. K. Fairbank Co. v. Luckel, King & Cake Soap Co.* (C. C. A.) 102 F. 327); *Beats-All*—*Knoxall* (*American Lead Pencil Co. v. L. Gottlieb & Sons* [C. C.] 181 F. 178); *Keepclean*—*Sta-Klean*; *Crisco*—*Esco* (*Proctor & Gamble Co. v. Eney Shortening Co.*, 50 App. D. C. 42, 267 F. 344).

[15] Appellants contend that the injunction should be vacated for the reason that respondents failed to show any actual fraud, or that any purchaser was deceived by the simulation or induced to buy a brand of raisins which he did not desire.

Appellants rely upon the case of *Dunston v. Los Angeles Van, etc., Co.*, 165 Cal. 89, 131 P. 115, in which the Supreme Court reversed a final injunction which was issued by the trial court restraining the use of an exact duplication of a firm name by a competing company. The question of infringement upon

a label or simulation of a trade-mark which had been conceived and exclusively appropriated was not involved. It was there said with respect to the name "Los Angeles Van & Storage Co.":

"It is too apparent to need discussion that the name here employed by plaintiff has reference in its first words to the place of business; in the remaining words to a description of the business. Such names, titles or designations are not the subject of exclusive copy-right or trade-mark. * * * Since the plaintiff cannot acquire an exclusive property right in the associated words, * * * any relief based upon an asserted invasion of this exclusive trade-mark is without warrant."

[16] It was then held that the judgment could not be supported on the ground of "unfair trade dealing" for the reason that deceit or fraud had been neither pleaded nor proved; that the mere similarity of the firm name was insufficient to establish fraud. In the instant case respondents do not rely exclusively upon the doctrine of unfair trade dealing, but charge infringement upon the entire idea expressed in an original label, together with an euphonic simulation of the trade-mark term "sun-maid." The imitation of a trade-label or trade-mark to a degree which would be likely to deceive casual purchasers exercising ordinary care in the selection of a commodity may constitute fraud in itself independent of evidence of actual sales.

The authorities are fairly uniform to the effect that it is not necessary to prove actual fraud or deception, but this may be assumed where the facts indicate that a purchaser, exercising ordinary care, would be likely to be deceived by the imitation of a trade-mark. Nims on Trade-Marks (2d. Ed.) pp. 601, 640; Gehl v. Hebe Co., supra; Bissell Chilled Plow Works v. T. M. Bissell Plow Co. (C. C.) 121 F. 357; Wirtz v. Eagle Bottling Co., 50 N. J. Eq. 164, 24 A. 658; Von Mumm v. Frash (C. C.) 56 F. 830, 837; Florence Mfg. Co. v. J. C. Dowd & Co. (C. C. A.) 178 F. 73.

In N. K. Fairbank Co. v. Luckel, King & Cake Soap Co., supra, it is said:

"It is not essential to the right of complainant to an injunction to show absolute fraud or

willful intent on the part of the respondent. Upon familiar principles, it will be presumed that the respondent contemplated the natural consequences of its own acts. If the acts of respondent in the adoption of the name of 'Gold Drop' constituted an infringement of the trade-mark or trade-name of the complainant, and it was put on the market in such a manner as to interfere with the legal rights of complainant, to its loss and injury, it would be entitled to an injunction, irrespective of the question of any testimony as to actual fraud or willful intent. The court must determine the intent from respondent's acts and the results produced thereby."

And in the case of T. A. Vulcan v. Myers, 139 N. Y. 364, 34 N. E. 904, it is said:

"No evidence was given or offered [in this case] to show that any person had actually been deceived by the imitation of the plaintiff's trade-mark, and we think that none was necessary for the maintenance of the action. It is the liability to deception which the remedy may be invoked to prevent. It is sufficient if injury to the plaintiff's business is threatened or imminent to authorize the court to intervene to prevent its occurrence. The owner is not required to wait until the wrongful use of his trade-mark has been continued for such a length of time as to cause some substantial pecuniary loss."

Placing the cartons of the respective parties side by side, one is impressed with the striking similarity of appearance in size, color, design, form, and idea. The genius of a resourceful mind could scarcely have devised a combination of color, picture, and euphonic language more deceptively similar to respondents' label than that conceived by appellants. Without a critical examination or independent knowledge of the different brands, considering the labels as a whole, an innocent purchaser, exercising ordinary care, would be quite likely to be misled by the similarity of appearance.

We think the trial court was warranted in issuing the preliminary injunction. For the foregoing reasons the order for the preliminary injunction is affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

84 Cal. App. 714

POWELL et al. v. OAK RIDGE ORCHARDS CO. (Civ. 5208.)

District Court of Appeal, First District Division 1, California. Aug. 4, 1927.

- 1. Vendor and purchaser ⇨44—Evidence supported findings that purchasers were induced to enter into land contract by fraudulent representations by vendor regarding value and nature of land.**

In action to rescind contract for sale of land, evidence held to support findings that purchasers were induced to enter into contract as result of fraudulent representations by vendor to effect that property was of reasonable value of \$4,500, and that same was free from hardpan and was particularly adapted to raising fruit, and that said representations were false and made for purpose of deceiving purchasers and inducing them to enter into contract, and that purchaser relied on representations.

- 2. Principal and agent ⇨115(2)—Vendor was bound by representations of agent in charge of properties as ranch superintendent empowered to make sales regarding value and nature of land sold.**

Vendor was bound by representations to purchaser by vendor's agent in charge of its properties as its ranch superintendent and empowered to make sales of said properties, regarding value of land sold, and that it was free from hardpan and particularly adapted to raising of fruit, since party dealing with agent acting within scope and authority of his appointment is considered as dealing with principal himself.

- 3. Cancellation of instruments ⇨34(1)—Bill to cancel land contract for fraud within reasonable time after negotiations for settlement failed, purchaser having protested promptly, was not barred by laches.**

Where purchaser in September, 1922, which was month following discovery of soil conditions, entered into negotiations for rescission of land contract on ground of fraudulent representations, and, after waiting vainly for reply until February 15, 1923, served formal notice of rescission, and on April 21, 1923, commenced action for cancellation of contract, such action was not barred by laches.

- 4. Appeal and error ⇨1010(1)—Where conclusions whether party defrauded has rescinded promptly finds reasonable support in evidence, reviewing court will not interfere therewith.**

Question of whether or not party defrauded has rescinded promptly depends on all circumstances of particular case, and is primarily one for trial court, and, if its conclusions find reasonable support in evidence, reviewing court will not interfere therewith.

- 5. Appeal and error ⇨193(8)—Objection that complaint claimed erroneous amount due plaintiffs on rescission, made for first time on appeal, was without merit.**

Objection that complaint in action to rescind contract for sale of land stated through

inadvertence erroneous amount due on rescission, made for first time on appeal, was void of merit, where findings and judgment set forth correct amount due.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by A. L. Powell and another against the Oak Ridge Orchards Company to rescind a contract for the sale of land, in which defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals. Affirmed.

Kaufman & Martel, of Santa Ana, for appellant.

Webster & Lyon, of Paso Robles, for respondent.

KNIGHT, J. The defendant appeals from an adverse judgment in an action for the rescission of a contract for the sale of land, and for the recovery of certain payments made thereunder, one of the grounds of appeal being insufficiency of the evidence to sustain the findings.

On January 3, 1921, plaintiffs entered into the contract in question for the purchase of 10 acres of land in San Luis Obispo county belonging to defendant, for the sum of \$4,500. An initial payment of \$1,125 was made at the time the contract was executed, and it was agreed that the balance should be paid on or before January 3, 1926. The property was set out to young orchard, plaintiffs taking immediate possession and thereafter expending the sum of \$215 in caring for and cultivating the same. On February 15, 1923, plaintiffs rescinded the contract upon the ground of fraud, and on April 21, 1923, commenced the within action. Subsequently and on May 15, 1923, defendant served plaintiffs with notice to pay the taxes and the interest on deferred payments as required by the terms of said contract, or that in default thereof defendant would elect to declare immediately due the unpaid portion of the principal sum, together with interest, taxes, and other charges, and thereupon would institute suit for the recovery of the same. Answering the complaint defendant, besides denying the allegations of fraud, filed a cross-complaint to recover the balance due under said contract.

Upon the issue of fraud the court found, in conformity with the averments of the complaint, that plaintiffs were induced to enter into said contract as a result of fraudulent representations made by defendant to the effect that said property "was of the reasonable value of \$4,500, and that the same was free from hardpan and that there was no hardpan under or near the surface of said land, nor any hardpan in the district in which said land was situated, and that said land was particularly productive and was the best

of orchard and farm land, and that the soil thereof was particularly adapted to the raising of fruit." It further found that said representations were false, and that the same were fraudulently made for the purpose of deceiving plaintiffs and of inducing them to enter into said contract; that said property was in fact "entirely underlaid with hardpan from 8 to 14 inches below the surface of the land, which hardpan was of varying thickness and impervious to water; that said land was situated in a district where hardpan generally existed; that the top soil of said land was mixed with boulders and rock, and that very little, if any, of said land was, or is, suitable at all for raising fruit; that said land was not worth more than \$1,500 at the time defendant represented it to be worth \$4,500." Furthermore, the court found that plaintiffs had no previous experience as orchardists or farmers, nor did they have any knowledge as to the value or character of land, nor any experience in buying such property, and that in entering into said contract they relied wholly upon the representations made to them by defendant.

[1] In our opinion the evidence supports the foregoing findings, some of the essential facts established thereby being as follows: At the time this transaction occurred and for several years prior thereto Powell was employed as agent for the Santa Fé Railroad Company at Hanford, Cal. He had been engaged in the railroad business practically all his life, and knew nothing of fruit raising or the productivity or fertility of soil. Anticipating retirement from the railroad service he concluded to buy and operate a small fruit ranch, and with that purpose in view, and accompanied by his wife and son, he visited the property in question, where he met Fred Schutte, the superintendent of defendant's properties, who lived upon or near the properties and was authorized by defendant to make sales thereof on a commission basis. All of the business connected with the sale of the property in question to Powell was transacted with Schutte, who went over the property with Powell, and, during the tour of inspection, made the representations set forth in the findings, upon which, Powell claims, he wholly relied in buying the property. In July, 1922, which was approximately a year and a half after plaintiffs had taken possession, they observed that the fruit trees were dying, whereupon Powell, assisted by his son and certain soil experts, made an examination of the soil with an auger, with the result that, after the auger had passed through about 12 or 15 inches of top soil, they struck hardpan of solid clay formation. Before the end of the next month, August, 1922, there were 250 dead prune trees in that section of the orchard. In addition to the evidence mentioned testimony of a number of witnesses was offered, tending to prove

that the property was of little, if any, value as orchard land; that it was not adapted to the raising of fruit. Circumstances were also established from which it may be reasonably concluded that the value of the property was no more than the amount stated by the court in its findings.

With reference to the representations that the land was productive, free from hardpan, and adapted to fruit raising, the circumstances of the present case are substantially the same as those of the case of *Dickey v. Dunn* (Cal. App.) 252 P. 770, recently decided by this court, the land involved being a part of the identical tract, the sale thereof being negotiated by the same agent, and, regarding the issues of fraud, similar legal contentions were made. In ruling adversely upon these contentions the court said:

"The evidence shows that the plaintiff, who was by trade a watch maker, had no knowledge of soil conditions and was without sufficient experience to determine the truth of the representations. Where a purchaser is justified in relying, and in fact does rely, upon false representations, his right of action is not destroyed because means of knowledge were open to him (*Teague v. Hall*, 171 Cal. 668, 154 P. 851), and while it appears that the plaintiff visited the property before the transfer was made, the evidence sufficiently supports the finding that he relied upon the representations both as to its value and character. The statements as to the character of the soil and as to the water supply were clearly misrepresentations of fact. *French v. Freeman*, 191 Cal. 579, 217 P. 515; *Stone v. McCarty*, 64 Cal. App. 158, 220 P. 690. A statement as to value is not always made as a mere expression of opinion. It may be a positive affirmation of a fact, intended as such by the party making it, and reasonably regarded as such by the party to whom it is made; and when it is such it is like any other representation of fact, and may be a fraudulent representation warranting rescission. *Crandall v. Parks*, 152 Cal. 772, 93 P. 1018. Where there is a doubt as to whether or not such representation was intended and understood as the expression of an opinion or a statement of fact, the question is one for determination by the trial court. *French v. Freeman*, supra; *Stockton v. Hind*, 51 Cal. App. 131, 196 P. 122."

In further support of the conclusions reached by the trial court herein that the representations set forth in the findings as to soil conditions were representations of fact upon which plaintiffs had the right to and did rely in entering into said contract may be added the cases of *Groppengiesser v. Lake*, 103 Cal. 37, 36 P. 1036, and *Scott v. Delta Land & Water Co.*, 57 Cal. App. 320, 207 P. 389.

That the property in question was properly cared for after plaintiffs took possession was established by evidence showing that during the year 1921 plaintiffs plowed the orchard; that during the first six months of the following year, 1922, Schutte cared for the

property, and thereafter the work was performed by Powell's son until July or August, 1922, when the real condition of the soil was ascertained, after which no work was done for the reason that Powell was advised by soil and tree experts to put no more money into the place; that the land was not worth it; and the following month Powell sought a rescission of the contract.

[2] We are unable to sustain defendant's contention that it is not bound by the representations made by Schutte to Powell, and that it was error for the court to admit the same in evidence, for it is a well-recognized principle of law that a party dealing with an agent, who is acting within the scope and authority of his employment, is to be considered as dealing with the principal himself; and in case of a contract, if the agent at the time of making the contract makes any representation, declaration, or admission, whether true or false, touching the matter of the contract, it is treated as the representation, declaration, or admission of the principal himself. *Brandt v. Krogh*, 14 Cal. App. 39, 111 P. 275. As already pointed out Schutte was in charge of defendant's properties as its ranch superintendent, and was empowered to make sales of said properties, which was sufficient evidence, in our opinion, upon which to base the conclusion that, in making the sale to Powell, Schutte was acting as defendant's agent and not as a middleman.

[3] The claim of laches in rescinding the contract is also without merit. In September, 1922, which was the month following the discovery of the soil conditions, Powell went to Orange county, the residence of the defendant corporation, seeking a rescission of the contract. There, in conversation with the officers of said corporation, he offered to return everything he had received by virtue of the contract and demanded repayment to him of the money he had expended thereunder. His offer of rescission was not acted upon at that time, however, said officers informing him that his proposition would be brought before the directors of the company at its next meeting, and that as soon as a decision was reached he would be notified. After waiting vainly for a reply until February 15, 1923, he served formal notice of rescission, and, as already stated, on April 21, 1923, commenced this action. "Where a party protests promptly on discovering that he has been defrauded in making a contract, and then enters into negotiations for a peaceable settlement, which fail, a bill for cancellation of the contract, filed within a reasonable time after such failure, is not barred by laches." 2 Black on Rescission and Cancellation, § 544.

[4] Moreover, "there is no artificial rule as to the lapse of time or circumstances which will justify the application of the doctrine" of laches (*Kleinclaus v. Dutard*, 147 Cal. 245,

81 P. 516), the question of whether or not a party defrauded has rescinded promptly depending upon all the circumstances of the particular case and being primarily one for the trial court to determine (*French v. Freeman*, supra); and if its conclusions thereon find reasonable support in the evidence the reviewing court will not interfere therewith. (*Suhr v. Lauterbach*, 164 Cal. 591, 130 P. 2). Interference here, under the circumstances stated, would, in our opinion, be clearly unwarranted, it appearing that plaintiffs acted with reasonable diligence.

[5] The complaint states a cause of action. The absence of allegations explaining the delay in rescinding is accounted for by the fact that the delay was not unreasonable; and the statement in the complaint, through inadvertence, of an erroneous amount plaintiffs claimed was due them upon rescission, cannot be considered a serious matter for the reason that the formal notice of rescission served upon defendant conformed to all legal requirements by stating that plaintiffs demanded "the return to them of all moneys paid to said Oak Ridge Orchards Company or otherwise by A. L. Powell and Daphne Powell by reason of the terms and conditions of the said contract," the complaint contained an allegation to the same effect, and admittedly the findings and judgment set forth the correct amount due, providing plaintiffs are entitled to rescind. Therefore the mistake mentioned has not operated to defendant's prejudice, and since objection thereto has been made for the first time on this appeal we think it is void of merit.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

84 Cal. App. 642

PEOPLE v. SCOTT. (Cr. 1367.)

District Court of Appeal, First District, Division 1, California. July 28, 1927.

1. Robbery $\S$ 24(1)—Conviction of robbery held sustained by evidence.

In prosecution for robbery, evidence held legally sufficient to sustain conviction of defendant, though in conflict.

2. Criminal law $\S$ 159(3)—Appellate court is bound by conviction for robbery based on conflicting evidence and supported by substantial proof.

Conviction for robbery, based on conflicting evidence and supported by substantial proof, is controlling on appellate court.

3. Criminal law $\S$ 741(1), 742(1)—Credibility of witnesses and weight of testimony is exclusively for jury.

Jury is sole and exclusive judge of evidence, credibility of witnesses, and weight of their testimony.

4. Criminal law §407(2), 736(2)—Admitting witness' identification of defendant held not erroneous for want of showing defendant understood statements, which was for jury.

In prosecution for robbery, admission of prosecuting witness' testimony regarding his identification of defendant on night of robbery in presence of officers was not error for want of affirmative testimony showing defendant heard or understood statements made by prosecuting witness and was therefore not afforded opportunity to make reply, such question being for jury.

5. Criminal law §409—Admission of prosecuting witness' statements in defendant's presence and finding that statements were understood by defendant held justified by evidence.

In prosecution for robbery, circumstances under which prosecuting witness identified defendant, location of parties, and fact that defendant understood other portions of conversation justified admission of prosecuting witness' statements identifying defendant, and warranted jury in finding that statements were heard and understood by defendant.

6. Witnesses §379(2)—Accomplice's statements regarding defendant's connection with crime, made to police officer, held properly admitted to rebut accomplice's denial of knowing defendant.

In prosecution for robbery, testimony by police officer as to statements made by accomplice after he was captured and before going to defendant's room regarding defendant's connection with crime held properly admitted in rebuttal to accomplice's testimony that he had never met defendant prior to meeting after robbery.

7. Criminal law §1169(7)—Admission of accomplice's accusations, made after crime, though inadmissible as coconspirator's declaration after consummation of conspiracy, was not prejudicial, in view of proper admission of prior accusations.

In prosecution for robbery, testimony by police officer day after crime that accomplice reiterated charge that defendant assisted in commission of robbery, though inadmissible as declaration of coconspirator made after consummation of conspiracy and not in furtherance thereof, was not prejudicial error, where accomplice's previous accusations were otherwise properly admitted.

8. Criminal law §407(1)—Accusatory statements by accomplice, though inferentially denied by defendant, was properly admitted, where circumstances tended to prove defendant's denial was false.

In prosecution for robbery, admission of accusatory statements by accomplice day after robbery, which defendant inferentially denied by statement that he had never previously met accomplice, was not error, where circumstances were established tending to prove that defendant's statement was false.

9. Criminal law §407(1)—Accusatory statement is admissible, though denied, if defendant makes false statement.

Accusatory statements made in defendant's presence are admissible notwithstanding defendant's prompt and full denial of guilt if defendant in attempting to avoid effect of accusation makes statement calculated to deceive or subsequently shown to be false.

10. Robbery §23(3)—Proof that stolen property was found on another held properly admitted, where defendant was shown to be his accomplice.

In prosecution for robbery, evidence proving that stolen property was found on another's person after his arrest was properly admitted, where defendant's connection therewith was established by proof showing that defendant was accomplice in commission of crime.

11. Criminal law §768(2), 1173(2)—Refusal of instruction that juror should not be influenced by majority of jury favoring conviction held not reversible error, though it should have been given.

Instruction that juror entertaining reasonable doubt as to defendant's guilt should not be influenced to convict by mere fact that majority of jury was in favor of such verdict should have been given, but refusal to give same does not in itself constitute reversible error.

12. Criminal law §778(4)—Instruction relating to presumption of innocence held not misleading by including statement, "independent of evidence" (Pen. Code, § 1096).

Under Pen. Code, § 1096, instruction relating to presumption of innocence stating that every person is presumed innocent until proved guilty held not to have misled jury by including statement, "independent of evidence."

13. Criminal law §706—Asking defendant, not conversant with English language, successive questions before single answer was given, not assigned as error, held not misconduct.

In prosecution for robbery, asking of defendant while witness of series of successive questions before answers given, made necessary by fact that defendant was not thoroughly conversant with English language, not assigned as error, held not misconduct.

14. Criminal law §868—Court's direction without request that exhibits be delivered to jury before it retired, unobjected to, held not irregular.

Direction by court without request from jury that exhibits in prosecution for robbery be delivered to jury before it retired so as to avoid returning jury into court if jury afterwards called for exhibits, not objected to, was not irregular.

15. Robbery §27(2)—Instruction amplifying Code section defining robbery held not error.

In prosecution for robbery, instruction amplifying Code section defining robbery in first degree held not error.

Appeal from Superior Court, City and County of San Francisco; H. D. Gregory, Judge.

Peter Scott was convicted of robbery in the first degree, and he appeals. Affirmed.

Walter McGovern and A. M. Dresow, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

KNIGHT, J. The defendant was convicted of robbery in the first degree and has appealed from the judgment of conviction and the order denying his motion for a new trial, one of the grounds of appeal being the alleged insufficiency of the evidence to sustain the verdict.

The essential facts disclosed by the evidence are as follows: About the hour of 10:30 o'clock on the night of July 15, 1926, one Max Pietsch, while walking along Tehama street, between Fifth and Sixth streets, in San Francisco, was assaulted by three men, knocked down and robbed of a diamond stick pin and a wallet containing \$150 in currency, one of the robbers using an automatic pistol in perpetrating the crime. After tearing from Pietsch's neck the tie to which the diamond pin was fastened and taking his wallet containing the currency, the robbers warned him under penalty of death to lie still until they made their escape. One of them then fled in one direction and the other two in another. Pietsch arose from the ground immediately and took up the pursuit of the single robber, following him down the street a short distance, when he was captured by a police officer named LeBaron, whose attention had been attracted to the scene by the alarm given by Pietsch as he chased the robber down the street. While awaiting the arrival of the police patrol wagon the captured robber, who proved to be a man named Lane, dropped Pietsch's wallet, which was empty, and later, when searched at the prison, Pietsch's mutilated necktie and the stick pin were found in his possession. Shortly after his capture, Lane implicated a man referred to by him as "Scotty" in the commission of the crime; and thereupon several police officers, accompanied by Lane and guided by his directions, drove to the hotel where defendant resided. In response to a knock at the door of the defendant's room he inquired from within: "Who is there?" to which Lane replied, "Me;" whereupon defendant opened the door and the officers and Lane entered the room. After some preliminary conversation Lane declared in the presence and hearing of the defendant: "This is one of the men that was with me on the holdup;" to which statement defendant made no reply. The officers then told defendant, who was in his night clothes, to dress, and while doing so they searched his room, finding a loaded automatic pistol and a box of cartridges alongside of it, in the top drawer of the bureau; also a wallet containing \$80 in currency. Defendant admitted the own-

ership of the pistol, and when asked his purpose in possessing it merely shrugged his shoulders. At the trial he stated that the \$80 in currency had been given to him by friends to help defray the expense of an accident which had recently befallen him. During the conversation in the room Lane was asked in defendant's presence and hearing "who used the gun" in perpetrating the robbery, and he said that the defendant had, and that the gun found by the police was the one defendant had so used, to which statements the defendant made no reply.

Shortly afterwards Pietsch was summoned to defendant's room for the purpose of ascertaining whether he could identify Scott as one of the robbers. When he arrived there a number of police officers were present, three of them being dressed in civilian clothes and standing near the defendant. As Pietsch entered the room he was told in substance by one of the officers to point out the other man who had robbed him, if he saw him in the room. Pointing directly at Scott, Pietsch said: "That is the man here." The defendant remained silent. Pietsch again identified the defendant at the trial, declaring that he was the robber who had used the pistol, and that the pistol found in defendant's room resembled the one used in the robbery. Other circumstances were established by the prosecution tending to prove that Lane and Scott some time previously had worked together on a construction job in Alameda county, and, consequently, knew each other prior to the robbery.

[1] We are of the opinion that the foregoing evidence is legally sufficient to sustain the verdict against the defendant. True, it is not without conflict, the record showing in this respect that at times other than those above mentioned and also during trial the defendant denied any participation in the crime or of ever having any previous acquaintanceship with Lane. As a witness in his own behalf he testified in substance that he had denied all accusatory statements when made, or, if he did not, that he did not understand the import of the statements, being a foreigner with only a limited knowledge of the English language. As a further defense defendant produced witnesses by whom he sought to establish an alibi; and, regarding the case proved against him by the prosecution, he contends that Pietsch's advanced age, defective eyesight, and the circumstances under which he observed the features and appearances of the man who wielded the pistol, being only semiconscious at the time, were such as to make it impossible for him to afterwards identify the defendant as being that man. Lane, who was separately tried, was also a witness for the defendant, and, besides denying having made many of the accusatory statements attributed to him by the police, testified in effect that when he informed the police that he had been

aided in the perpetration of the crime by a man named "Scotty," he did not refer to the defendant, but to another man; and, although admitting that he and defendant had been employed at the same time on said job in Alameda county, claimed that he had never seen the defendant to know him until they met in the latter's room, in the presence of the police officers, after the robbery. He further testified in substance that by coincidence the "Scotty" he had referred to had been living at the hotel where the defendant was rooming, which accounted for the fact that he directed the police to that particular hotel.

[2, 3] It is apparent that the above facts which defendant sought to establish in defense of the charge only raised a conflict in the evidence; and, since there is substantial proof in the record to support the verdict of the jury, its decision as to the defendant's guilt must be accepted as controlling, the members thereof being the sole and exclusive judges of the evidence, the credibility of the witnesses, and the weight that shall be given to their testimony. In this latter connection it may be stated that Lane admitted while testifying that he had previously served two terms in the penitentiary; and, besides, the character of his testimony was such as to affect his credibility as a witness.

[4] Defendant assigns as error the admission of Pietsch's testimony regarding his identification of defendant at the latter's room on the night of the robbery, claiming that there is no affirmative testimony showing that defendant heard or understood the statements made by Pietsch at that time; and that, therefore, he was not afforded an opportunity to make a reply thereto. We find no merit in the point. In *People v. Yeager*, 194 Cal. 452, 229 P. 40, it is said:

"It is for the court in the first instance to determine whether the import of the statements is such that it would furnish a foundation for proof of conduct, *and it is then for the jury to decide whether the accused was aware the statements were made*, whether, under all the circumstances shown, they called for a disclaimer, whether the accused did reply to them, and whether if he did not do so, such failure showed criminal intent or a consciousness of guilt. If these propositions of fact are resolved in favor of the prosecution the item of conduct should be given the effect to which upon the entire case it is entitled." (Italics ours.)

[5] The circumstances under which the statements here were made, including the location of the parties in the room, and the fact that defendant heard and understood other portions of the conversation which was being carried on in the room at that time, were sufficient, we think, to justify the admission of said evidence, and to warrant the jury in concluding therefrom that the statements complained of were heard and understood by the defendant.

[6] Nor do we find any error in admitting the rebuttal testimony of Police Officer Dorman as to the statements made by Lane after he had been captured and before going to defendant's room, regarding the defendant's connection with the crime, for the reason that Dorman's testimony was in direct rebuttal of that given by Lane as a witness for the defendant to the effect that prior to meeting defendant in the latter's room after the robbery he had never known of or seen the defendant.

[7-9] The prosecution was allowed to prove by the testimony of a police officer, subject to defendant's objection, that on the morning following the robbery Lane and defendant were interrogated by members of the department in the assembly room of the detective bureau in the presence and hearing of each other, at which time Lane reiterated the charge that defendant had assisted in the commission of the robbery, and that defendant, upon being asked whether Lane's statement was true, replied that he had never seen Lane prior to the latter's visit to his room the night before in company with the police officers. Defendant contends that the evidence mentioned should have been excluded. With reference to Lane's statement, it is apparent that the same was inadmissible as a declaration of a coconspirator because it was made after the consummation of the conspiracy and not in furtherance thereof (*People v. Winters*, 125 Cal. 325, 57 P. 1067); and it would seem that it was also incompetent to prove guilty conduct on the part of the defendant because inferentially at least it was denied by defendant's declaration that up to the time Lane came to his room with the police he had never seen him (*People v. Ayhens*, 16 Cal. App. 618, 117 P. 789; *People v. Teshara*, 134 Cal. 542, 66 P. 798). However, the rule as to accusatory statements is subject to the qualification that such testimony is admissible, notwithstanding a defendant's prompt and full denial of guilt, if, in addition and in an attempt to avoid the effect of the accusation, he makes a statement which is calculated to deceive or is subsequently shown to be false. *People v. Cole*, 141 Cal. 88, 74 P. 547; *People v. Ayhens*, supra. Circumstances were established here tending to prove that the reply made by defendant to the effect that he had never seen Lane until after the robbery was not true, and that in fact he had known Lane while working on the construction job in Alameda county. Moreover, the record shows, as already pointed out, that on two other occasions during the trial Lane's accusatory statements to the same effect were rightfully placed before the jury, once by witnesses in describing the occurrences in the defendant's room on the night of the robbery and again by the witness Dorman in rebuttal when he related what Lane had said after he was captured and before going to the de-

fendant's room. That being so, it cannot be successfully maintained, we think, that the evidence complained of operated as a controlling influence with the jury in determining the defendant's guilt, or that its admission, if error, was prejudicial.

[10] The evidence proving that the stolen property was found upon Lane's person after his arrest was properly admitted, defendant's connection therewith being established by proof showing that he was an accomplice in the commission of the crime. *People v. Ward*, 77 Cal. 113, 19 P. 373.

[11, 12] The trial court refused to give an instruction proposed by defendant to the effect that a juror in entertaining a reasonable doubt as to defendant's guilt should not be influenced in voting to convict by the mere fact that a majority of the jury was in favor of such a verdict. The instruction should have been given (*People v. Dole*, 122 Cal. 486, 55 P. 581, 68 Am. St. Rep. 50); but, as held in a number of cases, the refusal to give such an instruction does not in itself constitute reversible error (see *People v. Grahle*, 67 Cal. App. 183, 227 P. 227, and cases cited therein). The instruction given by the court relating to the presumption of innocence, which defendant challenges, although departing somewhat from the usual form by the inclusion therein of the phrase "independent of evidence," cannot be said to have misled the jury, we think, for the reason that the objectionable phrase was followed immediately by a correct and clear statement of the law that "every person is presumed to be innocent until he is proven guilty," which is almost identical with the language used in the Code section. Pen. Code, § 1096. The presence of this latter statement of the law differentiates the instruction in the present case from the one held to be erroneous in the case of *People v. Maughs*, 149 Cal. 253, 86 P. 187, upon which defendant relies.

[13, 14] We are unable to sustain defendant's assignments of misconduct on the part of the trial court. The asking of the defendant while a witness of a series of successive questions before a single answer was given is easily explained by the fact that defendant was not thoroughly conversant with the English language. Defendant did not deem the matter of sufficient importance at the time it occurred to base an assignment of error thereon. Nor was it irregular for the court, in the absence of a request from the jury, to direct that the exhibits in the case be delivered to the jury before it retired. If the jury had made such request it would have been entitled to the possession of them (*People v. Balestieri*, 23 Cal. App. 708, 139 P. 821; *People v. Hower*, 151 Cal. 638, 91 P. 607); and, moreover, in directing the delivery of the same to the jury the court said that if there was no objection the exhibits

would at that time be turned over to the jury so as to avoid returning the jury into court in case it afterwards called for them; and no objection was made to this being done.

[15] In amplifying the Code section defining robbery in the first degree in its charge to the jury, the court did not commit error. It is not claimed that the instruction as given did not correctly state the law, and surely, it is not error to clarify a Code section relating to the degrees of crime so that the jury may more readily understand the section and apply it, in the event the defendant be found guilty.

After having fully considered the legal points presented and carefully reviewed the entire record including the evidence, we cannot say that the defendant has been unfairly or unjustly convicted. The judgment and order appealed from are therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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**AMERICAN FRUIT GROWERS, Inc., OF
CALIFORNIA v. JACKSON et al.★**
(Civ. 4529.)

District Court of Appeal, Second District, Division 2, California. July 15, 1927.

Hearing Granted by Supreme Court Sept. 12, 1927.

1. Appeal and error. $\S$ 1010(1)—Appellate court will not interfere with trial court's judgment if supported by any substantial evidence.

If there is any substantial testimony which supports the judgment of the trial court, it will not be disturbed.

2. Evidence $\S$ 222(3)—Statements charging option holder in possession of farm equipment with price held admissible against claimant in attachment as admissions that option to purchase was exercised.

Where a lessee of farm equipment attached as his property also held an option to purchase the equipment, statements charging him with the price held admissions that the option had been exercised and title to the farm equipment had passed.

3. Evidence $\S$ 222(3)—Where lessee held option to purchase farm equipment, acts and declarations of parties indicative of ownership are competent in attachment proceedings to prove option was exercised and lessee became owner.

Where lessee of farm equipment was alleged to have exercised his option to purchase the equipment, acts and declarations of the parties which would indicate ownership by the option holder are competent in attachment proceedings to prove that he had exercised his option and purchased the equipment.

4. Evidence ⇨220(2)—Acquiescence of alleged buyer who held option to statements charging him with price of farm equipment held evidence in attachment proceedings of purchase (Code Civ. Proc. § 1870, subd. 3).

In view of Code Civ. Proc. § 1870, subd. 3, providing that an act or declaration of another in the presence and within the observation of a party and his conduct in relation thereto may be proved on the trial, the acquiescence of an alleged buyer, who held an option to purchase farm equipment, to statements charging him with the price held evidence of purchase in attachment proceedings by his creditor.

5. Evidence ⇨265(5)—Evidence that option holder in possession of farm equipment attached as his property acquiesced in statements charging him with price held to sustain finding of purchase (Civ. Code, § 1140; Code Civ. Proc. § 1870, subd. 3).

Evidence that the lessee of farm equipment, who held an option to purchase, acquiesced in statements charging him with the price of the equipment held sufficient in proceeding wherein property was attached as his, in view of Civ. Code, § 1140, and Code Civ. Proc. § 1870, subd. 3, to sustain a finding that he had exercised his option and that the title had passed.

Johnson, Justice pro tem., dissenting.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Suit by American Fruit Growers, Inc., of California, against Calvin E. Jackson and the Fidelity & Deposit Company of Maryland. Judgment for defendants, and plaintiff appeals. Affirmed.

W. H. Wadsworth, J. N. Owen, and Bordwell & Mathews, all of Los Angeles, for appellant.

Scarborough, Forgy & Reinhaus, of Santa Ana, and Fred Forgy, of Berkeley, for respondents.

THOMPSON, J. This action was brought against the sheriff of Orange county and his surety to recover the value of certain farm equipment claimed by the plaintiff as its property, and which was seized by the sheriff on February 25, 1922, as the property of H. J. Osborne under a writ of attachment in an action brought by the Irvine Company, as plaintiff, against Osborne, as defendant. Subsequent to the attachment and on March 2, 1922, the plaintiff served on the sheriff a third party claim, asserting its ownership of the property and demanding its release. Surrender was refused and the plaintiff brought this action for conversion. Judgment was rendered in favor of the defendants and the plaintiff appeals.

The court found that plaintiff was not the owner of the property in dispute, but that, with certain exceptions not necessary to be noted here, the property seized belonged to

Osborne. While appellant has assigned four different reasons why the judgment should be reversed, they are in fact but one attack upon the judgment for the reason that the evidence does not support the finding. It is assumed by appellant that the court based its judgment upon the theory that certain statements of account, which were rendered by plaintiff to Osborne and retained by him without objection, created an account stated. The respondents insist that:

"The findings and judgment of the court are based on the theory that title to the property which is the subject of this action had passed to Osborne, and that statements sent Osborne to which he did not object were evidence of this fact and of the exercise of the option embodied in the farming contract."

As indicated by this quotation, there existed a written contract between the plaintiff and Osborne for the production of vegetables by the latter as a lessee of lands of the Irvine Company, under which the plaintiff agreed to furnish Osborne with the necessary stock and implements and to advance to Osborne such money as might be necessary for the production of his crop of vegetables, and Osborne in turn agreed to deliver all his vegetables to the plaintiff for sale on commission. This agreement gave Osborne an option continuing until July 1, 1921, to purchase the farm equipment at invoiced price as shown by a designated inventory. On March 17, 1921, the plaintiff rendered a statement to Osborne which showed an item under the date of February 18, reading "Trapp Estate equip. \$10,000." On April 30, 1921, another statement was sent, including the charge for the equipment item, again on July 15, 1921, and December 8, 1921, and lastly on February 14, 1922. These statements also show that Osborne was not successful in repaying the advances made to him, but was continuously in plaintiff's debt on account thereof. The plaintiff's testimony explanatory of the mailing of these statements to Osborne is in effect that plaintiff's vice president, who had charge of the finances of the plaintiff in California, wanted the information in a concrete form so that he might be guided in making his advances to the corporation. A portion of Osborne's testimony is as follows:

"Q. Did you at any time or in any way take up the matter of the option with the American Fruit Growers that is set out in that agreement?

"The Witness: Do you mean did I go to them or tell them at any time?

"Q. Yes. A. No; I didn't.

"Q. Did you ever pay the American Fruit Growers the invoice price as set forth in that agreement, or any other price for the equipment? A. No.

"Q. Which I show you as listed under paragraph 5 of the plaintiff's complaint? A. No; I never paid them any money at any time."

On cross-examination, Osborne testified that he received the statements referred to and noticed the equipment item in the March statement, and that the debit items carried forward in subsequent statements included the amount of that equipment debit, and that he made no protest. On redirect examination, the following took place:

"Q. Did you ever have any conversation with Mr. Fogg, treasurer and vice president of the American Fruit Growers, regarding your account? A. In what way do you mean?

"Q. Well, in regard to any matters? A. No; except that once in a while he would bring down a paper, and he would say, 'Do you think you will ever pull out of this?' and he would show me figures this long.

"The Court: Looked dubious to you, did it? A. It did. * * *

"Q. I will ask you, did you ever own it [the equipment] at that time? * * * A. Well, I didn't feel like I could go out and sell it.

"Q. What do you mean by that? The question is, Did you ever own the property? * * * A. Well, I never felt really clear about it myself; seemed it was charged to me, and yet I knew I hadn't paid any money on it, I had never exercised my option.

"The Court: Did you realize that the cost of celery, whatever it was, ran up so many thousand dollars, that would be taken out of it if you let the account stand that way? A. It was my choice.

"Q. Well, if you let the accounts come to you and not make any objection to the statement of your account? A. Yes; I had always figured if the cauliflower or the cabbage ever brought enough money I would buy it, but as it was, my cabbage and cauliflower never brought enough money to pay out.

"Q. Bought it at that price, even if it deteriorated down to nothing? A. To nothing; yes, sir.

"Mr. Wadsworth: If the court please, the option only ran to the 7th day of July, 1921, which was only nine months after he went into possession of it. If I may say, it would not have deteriorated to nothing, wouldn't have time in that time.

"The Court: I was just asking how—

"Mr. Wadsworth: I want to bring out he had to exercise his option by a certain time or he lost that right."

Osborne was asked, on cross-examination, whether on the day of the attachment he had not stated at the office of the Irvine Company, in the presence of J. H. Breckenridge, its secretary and treasurer, and of C. J. Cogan, assistant to the superintendent, that he was the owner of the equipment. Osborne denied that he had said that he was the owner, but stated that what he did say was that it was charged to him, and he showed the gentlemen named his contract. Mr. Breckenridge and Mr. Cogan do not precisely agree in their versions of what was said to Osborne. Breckenridge testified that Osborne said he owned the property and showed them plaintiff's statements upon which he had been charged with it. Cogan, however, testified:

"Osborne stated *he considered himself* the owner of that property as it had been charged to him on a statement which he produced."

[1] We do not agree that if the statements sent to Osborne and acquiesced in by him constitute an account stated the question in this case is concluded, but rather that the vital question is whether the statements mailed by the plaintiff and the acts and declarations of Osborne with respect thereto constitute evidence of an exercise of the option and the transfer of title. If they do, in fact, constitute evidence by way of admissions, then the explanatory testimony given by the plaintiff's witnesses merely raises a conflict in the evidence and the judgment of the trial court upon that question must be taken as final, for, as has been so many times stated, it is not the province of this court to interfere with the judgment of the trial court when there is any substantial testimony to support it. It has been decided by the Supreme Court in *Wilson v. Hotchkiss*, 171 Cal. 617, 154 P. 1, L. R. A. 1916F, 389, Ann. Cas. 1917B, 570, that where a vendee is in possession of personal property as was the case here, in one capacity, that it is sufficient to establish that possession is held in the new capacity of owner by oral declarations or by acts of dominion over the property inconsistent with his former holding. In other words, in this case so long as the option remained unexercised there was no obligation on the part of Osborne to pay any amount on account thereof, and so there was no occasion prior to the expiration of the option by limitation of time for the plaintiff to have mailed statements charging him with the purchase price, and also if the option had expired by limitation of time without exercise there was no occasion for the plaintiff to charge Osborne with the purchase price.

[2, 3] These statements constituted admissions inconsistent with the former holding by Osborne of possession of the property as a lessee. While the case of *Wilson v. Hotchkiss*, supra, is upon a somewhat different question, nevertheless its principle and declaration as to what constitutes evidence are clearly applicable here when it says:

"Where a sale is made to a vendee in possession, whatever may have been the nature of his prior possession, the law does not require a quitting of it and a retaking of possession as the new owner. *Snider v. Thrall*, 56 Wis. 674, 14 N. W. 814. All that is required is evidence showing that the possession is retained by the vendee in his new capacity of owner. And what evidence will establish this? Manifestly it may be established by proof of acts of dominion over the property inconsistent with his former holding as bailee or pledgee, but equally may it be established by his declarations that he so holds the property as owner. On principle this must be so, for it would indeed be strange if a pledgee, formally reciting the oral contract by which he had purchased the property and declaring that he held

possession of it no longer as pledgee but as absolute owner, could have the evidence of these declarations excluded from the consideration of the jury upon the ground that they were mere declarations and not a part of his acts or conduct in dealing with the property. They are essentially a part of his acts and conduct, and so we find it declared as 'well settled that any acts of the parties indicative of ownership by the vendee may be given in evidence to show the receipt and acceptance of the goods to take the case out of the statute of frauds. Conduct, acts and declarations of the purchaser may be given in evidence for that purpose.' *Garfield v. Paris*, 96 U. S. 557, 24 L. Ed. 821. And without multiplying citations, reference may be made to *Browne on Statute of Frauds*, § 321e, where he states: "The conduct of the buyer showing an acceptance * * * may be drawn * * * from what he says." And again quoting from the same author, page 433, footnote, "An examination of the cases will show that evidence has uniformly been received even in New York of the conduct of the parties, i. e., what they did and said, without in any way discriminating between acts of doing and acts of saying." See, also, *Mechem on Sales*, § 382; *Williston on Sales*, § 87."

[4] While statements made by Osborne could not be binding on the plaintiff if not made in the presence of one who could bind it, yet we feel constrained to hold that the acquiescence of Osborne to the statements is some evidence to contradict his statement that he had not purchased because in an analogous situation the Legislature has provided in section 1870 of the Code of Civil Procedure, subdivision 3, that, "An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto" may be proved on the trial. While these statements were not made literally within the presence of Osborne, nevertheless they were received by him and were such as to naturally call for a correction if they were not true. His acts and declarations with respect thereto constitute some evidence at variance with his denial of purchase. *Estate of Snowball*, 157 Cal. 301, 107 P. 598.

[5] By section 1140 of the Civil Code it is provided that:

"The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not."

It has been uniformly held that whether title passes or not is a matter of intention. *Kohler v. Hayes*, 41 Cal. 455; *Palmer v. Howard*, 72 Cal. 293, 13 P. 858, 1 Am. St. Rep. 60. Two important items in determining the intention of the parties are delivery of possession and unconditional promise of the vendee to pay. In fact, it is stated in *Benjamin on Sales* (7th Ed.) p. 373, American note, that:

It is "uniformly agreed as stated in the last note, that a delivery to the carrier of goods duly directed to the buyer, either with or without a bill of lading in his favor, ordinarily passes the title instantly, but that the seller may avoid this conclusion by appropriate acts or words. * * *"

In this case Osborne had been vested with the possession of the property and the statements sent to him and to which he acquiesced indicated an unconditional promise on his part to pay the purchase price. Hence the trial court was justified in finding from this evidence that the option had been exercised and the title transferred.

Judgment affirmed.

I concur: CRAIG, J., Acting P. J.

JOHNSON, Justice pro tem. I find myself unable to concur in the affirmance of the judgment, which, to my mind, makes a forced gift of plaintiff's property to the Irvine Company, the attaching creditor of its tenant, Osborne.

It is stated in plaintiff's opening brief that the trial court's decision was based on the theory that the accounts, submitted by plaintiff to Osborne and retained by him without objection, created an account stated, whereby title was shown to have been transferred from plaintiff to Osborne, and the defendants acquiesce in this statement. I think, therefore, that the accounts and the testimony explanatory of the equipment item should receive more attention than has been given them in the majority opinion.

Osborne leased from the Irvine Company certain farm lands which had previously been under lease to Roy D. Trapp, who had died. Part of the assets of Trapp's estate consisted of the equipment in question, which plaintiff purchased in September, 1920, for \$10,000. Under date of September 1, 1920, plaintiff and Osborne entered into their agreement whereby, among other things, plaintiff agreed to let Osborne have the use of this equipment in his farming operations, and to advance him also such money as he might need for his crops, and Osborne in turn agreed to deliver his vegetables to plaintiff for sale on commission. The agreement further gave Osborne an option until July 1, 1921, to purchase the equipment at the cost price to plaintiff.

Osborne continued his farming operations until the time of the Irvine Company's attachment in February, 1922, but did not at any time expressly or affirmatively exercise his option to purchase the equipment from plaintiff, nor did he ever receive a bill of sale or its equivalent. No transfer of title to the equipment took place by any overt act of the parties, nor was there any outward circumstance evidencing such transfer. The contention of the defendants is, how-

ever, that a change of ownership was brought about by reason of the fact that plaintiff sent Osborne certain transcripts from plaintiff's books of account and on receipt of those transcripts Osborne remained silent.

From these facts it is concluded not only that there was an exercise of the option by Osborne, but that, without payment of a single dollar, the title to \$10,000 worth of plaintiff's property was forthwith bestowed on Osborne and placed at the disposal of his creditors.

Up to February 18, 1921, whatever records were kept by plaintiff in reference to the equipment were kept in an account separate from the vegetable account of Osborne. At the date mentioned plaintiff's vice president and treasurer, Mr. Fogg, who had come from the east at the instance of what he calls plaintiff's parent company at Pittsburg, to watch the finances of the subsidiary California corporation, caused the equipment account to be combined on plaintiff's books with Osborne's vegetable account. This was done without conference with Osborne and on Fogg's own initiative; and the memorandum giving this instruction to the bookkeeper contained the following explanatory notation:

"To combine accts. This is purely a suspense item but transferred to Osborne's acct. for the purpose of showing at all times amount of money invested by A-F-G in this project."

And Fogg in his testimony said:

"I wanted this information in a concrete form to guide me in making my advances for this corporation."

It is quite apparent that there was no intention at this time on plaintiff's part to treat the equipment as having been sold to Osborne.

According to the vegetable account, as it stood at the beginning of February, 1921, Osborne had a debit balance against him of \$9,702.91 for plaintiff's advances for his farming operations. No further statement was rendered to Osborne until March 17th. The statement then rendered began on the debit side with the previous balance of \$9,702.91, and showed, besides certain money advances, the item under the date of February 18, reading, "Trapp estate equip. \$10,000." With this item added, the debit balance was made by this account to appear as \$21,340.41. The next statement dated April 30, 1921, started with the debit of \$21,340.41, and, after adding debits for further advancements and giving credits arising from sales, showed a net debit at the close of April of \$16,888.28. This included, of course, the amount of the item which had appeared in the March statement regarding the equipment. On July 15, 1921, another statement was sent to Osborne, beginning with the debit balance of \$16,888.28 shown by the previous statement, and by reason of

the excess in proceeds of sales over intermediate advances, the debit balance was shown at that time to have been reduced to \$15,112.42, including still the March item in relation to equipment. Then on December 8, 1921, there was submitted a statement beginning with the previous debit balance of \$15,112.42, and showing an increase, through additional advances, to \$21,752.41. The remaining statement introduced in evidence is dated February 14, 1922, which, taking the debit balance of the December statement and continuing the account, showed a reduction of the debit balance, through sales of vegetables, to \$18,871.52. Two copies of this statement were put in evidence, one bearing the pencil notation "Bookkeeping purposes only," the other not. If from each of the debit balances shown in the foregoing statements, beginning with that of March 17th, the sum of \$10,000, representing the cost price of the equipment, is deducted, it will be seen that on his vegetable account Osborne was continuously in plaintiff's debt, and was at no time in position to buy the equipment.

From the record I am satisfied that it appears without contradiction that on plaintiff's part there was no intention of doing anything more than to consolidate in one account, for plaintiff's own information and guidance, the records of all its outlays and all receipts from sales in connection with the Osborne contract, so as to ascertain by reference to that one account how plaintiff's expenditures compared with its receipts.

The way in which the matter was regarded by Osborne is shown by the excerpts from his testimony set forth in the majority opinion. He there says that he knew that he had never paid anything on the equipment; that he did not feel that he "could go out and sell it"; and that he had never exercised his option.

Reference is made in the majority opinion to a conversation between Osborne and representatives of the Irvine Company on the day of the attachment, at which time, according to the testimony of Breckenridge secretary and treasurer of the Irvine Company, Osborne stated that he owned the property and also exhibited plaintiff's statement of account. This conversation was not in the presence of any representative of plaintiff, and Osborne denied that he had said that he was the owner. Assuming, however, that the trial judge accepted Breckenridge's version of the conversation, I do not follow the reasoning of the learned Justices with whom I am associated in this case, that such ex parte declaration of Osborne, because inconsistent with his position as a licensee, was evidence against plaintiff of a completed sale. The cases cited in support of that view are cases wherein a controversy arose between the immediate parties to the trans-

action, involving the question whether possession originally held as a bailee or pledgee had subsequently been transformed into possession held as a vendee in the capacity of owner. In such cases declarations of the defendant admitting his ownership were, of course, admissible against him in disproof of a contention on his part that his original possession remained unchanged in character. Osborne is, however, not a party to this action; and there being no similar situation here, I am unable to perceive the applicability of the cases cited. The declarations said to have been made by Osborne to these strangers to his transaction with plaintiff were but extrajudicial expressions of opinion, and could not speak into being an ownership which did not in fact exist. *McClenahan v. Keyes*, 65 Cal. App. 467, 473, 224 P. 241.

There could have been no ownership in Osborne unless there has been an acceptance of his option accompanied by acts sufficient in law to work a transfer of title. Whether there had been such an acceptance of the option and a change of title must depend on the inferences reasonably to be drawn from the evidence as a whole; and in dealing with the evidence, we are to consider not only the nature and state of the accounts themselves in connection with the retention of them by Osborne without protest, but also the relations of the parties and the bearing of their acts and conduct upon the ownership of the equipment.

The affirmance of the judgment implies that the evidence is sufficient to justify the inference that Osborne exercised his option, and then to impose upon that inference the further inference, piled like Pelion upon Ossa, that without performing any condition of payment, Osborne became vested with absolute ownership. The basis relied upon for that ultimate conclusion is the receipt and retention of the accounts.

In so far as the statements of account are concerned, it does not follow that because they were received without objection, they were, as defendants contend, converted into accounts stated. The plaintiff and Osborne had their written agreement; and when there is a previous written agreement defining the rights of the parties, a departure from that agreement, whereby certain unwarranted charges are made in an account rendered, will not necessarily conclude the debtor, even though he keeps silent and lets the account stand as rendered. For where one rendering an account knows that he has included items against the other that he had no right under their contract to include, retention of the account does not make it an account stated or create an estoppel. *Blanck v. Pioneer Mining Co.*, 93 Wash. 26, 159 P. 1077.

In determining whether we have a stated account, or merely a bookkeeper's current

account exhibiting the excess of plaintiff's expenditures over receipts, in the account of March 17, 1921, in which the item of equipment first appeared, and which showed, with that item, included, a debit balance of \$21,340.41, we must look at the situation of the parties at that time and their relation to each other. Osborne had begun his farming operations in the preceding September. For use in cultivation under his contract, he had been supplied by plaintiff with \$10,000 worth of equipment, and plaintiff had advanced all the money for making his crops. Yet the sale of the crops had never produced enough to place a dollar to Osborne's credit on the books; and under his contract he had merely an option until July 1, 1921, to purchase the equipment at cost price to plaintiff. Apparently his only hope of being able to exercise the option and become owner of the equipment was out of the profits that might come from sales of his produce, and Osborne's ability to buy, as the trial judge remarked, "looked dubious."

The reasons for consolidating the equipment and the vegetable accounts were explained by plaintiff's vice president and treasurer, and show beyond peradventure that there was no intent on plaintiff's part to effect a transfer of title; and without mutual intent minds cannot possibly meet. Osborne's testimony shows that he and plaintiff were continuing their operations after the time limited for exercise of the option and until the time of the attachment in the hope that the situation might better itself, and while their relations continued, statements were submitted at irregular intervals. But never at any time did the parties come together and definitely agree on any balance due plaintiff, nor was anything ever done in the way of payment for any of the equipment. There was at all times an entire absence of that finality in the adjustment of the financial relations which is essential to the creation of an account stated.

Respecting the accounts the case is something like that of *Newburger-Morris Co. v. Talcott*, 219 N. Y. 505, 114 N. E. 846, 3 A. L. R. 287, where there were transactions between a shipper of goods and a factor, who made advances against the merchandise and the net value of outstanding accounts. Monthly accounts current were submitted by the factor to the shipper and passed without objection. The question in the case was whether these statements were to be treated as accounts stated. It was held that they lacked the finality essential to the statement of an agreed account between the parties. In the course of its opinion, the court said:

"Here the relation was that of principal and factor under an agreement that was to last at least a year, and indefinitely thereafter unless terminated by notice of 30 days. Not till the contract was at an end did the duty to make advances cease. * * * The debit balances

shown by these monthly statements did not, therefore, constitute a present debt. They did not speak the language of present demand for payment or adjustment. * * * They were provisional advices. They were not definitive demands. * * *

The case cited is followed in *Watson v. Gillespie*, 205 App. Div. 613, 200 N. Y. S. 191, which involved accounts between the defendants, who were a London firm engaged in import and export business, and the plaintiff, who was their New York manager, receiving as part of his compensation a share of the profits. The parties followed a system of annual accounting, which the defendants contended stated each year a final account, but which the court held to be merely accounts current, saying:

"The fundamental principles of contract law apply to accounts stated. The minds of the parties must meet. The offeror cannot render a 'current' unsettled account as a basis for subsequent liquidation and be bound on an account stated by the offeree accepting the current account as a closed, settled account between the parties. The minds of the contracting parties, in such a case, do not meet. There can be no contract. This principle of law is clearly expounded by the Court of Appeals in the case of *Lockwood v. Thorne*, 18 N. Y. 285. The court said, at pages 288, 289: 'The minds of the parties must meet upon the allowance of each item or claim allowed, and upon the disallowance of each item or claim rejected. They must mutually concur upon the final adjustment, and nothing short of this in substance will fix and adjust their respective demands as an account stated. * * * And, as the minds of both parties are supposed to meet and concur, it must necessarily be competent to show how the party rendering the account understood the transaction. If the evidence should show clearly that he did not understand that there had been any final adjustment of their respective demands between them, it would be strange, if the courts should disregard the understanding of the parties themselves, and decree an adjustment between them contrary to their own understanding in the matter.'"

The mere submission of statements while transactions are in progress, and with no intention to strike a final balance, is not sufficient to make such statements accounts stated. The element of finality is one of the attributes of a stated account, and without that element no binding effect attaches. *Mercantile Trust Co. v. Doe*, 26 Cal. App. 246, 253, 255, 146 P. 692; *Richmond D. Co. v. A., T. & S. F. Ry. Co.*, 31 Cal. App. 399, 409, 410, 160 P. 862; *Suffern v. Mandell*, 212 App. Div. 1, 208 N. Y. S. 275.

The testimony as a whole, to my view, shows clearly that there was no meeting of minds between plaintiff and Osborne in relation to purchase of the equipment, and that neither understood that there had been any exercise of the option. That being so, the account, whatever its character, cannot be made an instrument to create a liability

where none existed before. *Bennett v. Potter*, 180 Cal. 736, 746, 183 P. 156; *Stimson Mill Co. v. Hughes*, 8 Cal. App. 559, 561, 97 P. 322; *Dawson T. Co. v. Rosenberg I. & M. Co.*, 63 Cal. App. 489, 491, 218 P. 782. There had certainly been nothing evidencing in any wise an acceptance of the option when the equipment item was first entered in the account of March 17, 1921, and, in my judgment, the retention of that and subsequent statements by Osborne, without anything further, fell far short of the requirements for a transfer of title. Even if Osborne had given written notice of election to purchase, such election, standing alone, would not have operated ipso facto to change the ownership. Transfer of personal property is effected upon a sale only through a contract that has been executed. There must, in the first place, be the requisite meeting of minds in an agreement, but until the agreement is supplemented by acts of a character sufficient to vest title in the vendee, the title remains in the vendor.

I am unable to find sufficient in the evidence to justify the inference that Osborne ever became obligated for the equipment. But if, notwithstanding the circumstances surrounding the accounts, the retention of them were to be deemed tantamount to an express exercise of the option, I lack, nevertheless, the magic to distill from the evidence the elements necessary to transmogrify Osborne's original possession as a licensee into the possession of an absolute owner. The exercise of the option could do no more than create an executory contract of sale. It could not operate ipso facto to clothe Osborne with plaintiff's ownership. To have an executed sale, there must, in the first place, be the meeting of minds in an agreement, and in the second place, the agreement, when made, must be followed by performance—which is an entirely distinct phase of the transaction. The mere election could not both ripen Osborne's option into a binding agreement of sale, and then, stopping there, arrogate all the benefits of a full performance. In the law of sales, it is an elementary rule that unless the contract otherwise provides, the covenant of the buyer to pay the price and that of the seller to transfer the title are mutual and dependent covenants to be contemporaneously performed. Dealing with an option to buy land embodied in the provisions of a lease, the Supreme Court, in *Cates v. McNeil*, 169 Cal. 697, 706, 147 P. 944, 948, said:

"What the respondents acquired under the option clause was an irrevocable right of option to purchase the property at a specified price if they should at the end of 10 years elect to do so and all that was necessary on their part to do as far as the terms of the option are concerned in order to constitute a binding contract for the sale and purchase of the premises was to give notice of their acceptance of the right. This they did. Payment of the purchase price at that time was not a condi-

tion required by the option and it is not for the court to incorporate terms in it which the parties to it did not incorporate or even mention. Of course, payment would be essential before respondents would be entitled to a conveyance of the land but that is a matter pertaining to the performance of the contract of purchase and sale which had been created by the acceptance. In the absence of anything in the contract itself the obligation of the parties in the performance of the contract is governed by the law applying generally to bilateral contracts for the purchase and sale of property under which the agreement or covenant of the vendor to convey and the vendee to pay the purchase price are considered mutual and dependent covenants and are to be performed contemporaneously by the respective parties."

In the present case the agreement between plaintiff and Osborne did not undertake to fix any time for transfer of title, in case the option should be exercised. The rule governing parties under such circumstances is expressed in *Watson v. Coast*, 35 W. Va. 463, 473, 14 S. E. 249, 252, as follows:

"Having thus a contract it simply remained for the parties or the law to execute it according to its terms, and so far as it does not prescribe, as prescribed by law; and the matter of payment is in this case as in ordinary cases of executory contract. The covenant or obligation to pay and that to pass title are mutual and dependent; the one cannot be required before the other is ready to be performed."

In like manner, it is said in *Joyce v. Tomasini*, 168 Cal. 234, 240, 241, 142 P. 67, 69:

"The agreement does not fix the time for the making of the deed in case the option should be exercised, nor does it expressly declare that the defendant will execute a deed. But the contract, in that event, would become an agreement to sell the land for the stated price, and by section 1731 of the Civil Code, such an agreement binds the seller to convey the title. In the absence of anything appearing to the contrary, covenants to pay the price on the one hand and to transfer the property on the other, are deemed to be dependent, and a conveyance would be due, in this instance, upon payment of the price. 1 *Sugden on Vendors*, bottom page 239."

It is not contended by defendants that Osborne either expressly exercised his option or that he ever made any payment on the equipment.

The fact that for farming purposes Osborne had possession of the equipment as a licensee would, of course, dispense with formal delivery in furtherance of any transfer of title, but it would not relieve him of the conditions necessary to be performed by him in order to complete the purchase and acquire title. Mere possession is not such an indicium of ownership as will bind the true owner, and Osborne was never held out to the Irvine Company as owner of the equipment. His possession rested on the crop agreement, whereby he had the privilege of using the

equipment in his farming operations, and before his creditors could have legal recourse against the equipment, there would have to be an actual change of title.

It is quite a significant circumstance, indicating that plaintiff did not regard the title as being in Osborne, that plaintiff, in June, 1921, insured the equipment in plaintiff's own name as owner. If the ownership had passed to Osborne, an insurance policy in plaintiff's name as owner would have been valueless, and the very fact that plaintiff did take insurance in its own name shows that plaintiff was not recognizing any ownership in Osborne.

The findings against ownership in the plaintiff depend entirely on the inference that, because Osborne did not object to the accounts transmitted, the plaintiff forthwith lost its title, regardless of payment, and Osborne without so much as a gesture, became invested with sole, exclusive, and unconditional ownership, giving the attaching creditor a right to have the property sold at execution sale in satisfaction of Osborne's debt.

To my thinking, the evidence is wholly insufficient to support the findings; and the judgment in favor of defendants, since it has the effect of expropriating plaintiff's property to pay Osborne's debt to the Irvine Company, should not be allowed to stand.

85 Cal. App. 51

CASTLETON v. PETERSON et al.*
(Civ. 5475.)

District Court of Appeal, First District, Division 1, California. Aug. 12, 1927.

Hearing Denied by Supreme Court Oct. 10, 1927.

1. Fraudulent conveyances §80—Where debtor conveys all property in consideration of future support, conveyance is presumed fraudulent.

As against creditors no one can transfer all of his property in consideration of future support, for the law presumes such an act to be done with intent to delay creditors.

2. Fraudulent conveyances §57(3)—Where debtor conveyed all her property for inadequate consideration and future support, thereby becoming insolvent, conveyance held fraudulent as to creditor.

In action to quiet title, where it was shown that debtor conveyed all her property, reasonably worth \$8,000, to the plaintiff in consideration of \$100, the assumption of a \$2,000 mortgage, and the support of debtor by plaintiff for the rest of her life, thereby becoming insolvent and incapable of paying her debts, held that the conveyance was fraudulent as to creditor.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Norman MacDonald Castleton against P. O. Peterson, wherein the defendant filed a cross-complaint against the plain-

tiff and Louisa N. Ostwald. Judgment for plaintiff and cross-defendant, and defendant appeals. Reversed.

Marion Vecki and Gilbert D. Ferrell, both of San Francisco, for appellant.

James P. Sweeney and Frank J. Fontes, both of San Francisco, for respondents.

TYLER, P. J. Action to quiet title. The complaint is in the usual form. It alleges that defendant P. O. Peterson claims some interest in the property in question adverse to plaintiff, and a judgment is sought declaring plaintiff to be the owner in fee absolute of the same. Defendant answering admitted a claim of interest based upon an attachment against the property which was issued in an action which had been prosecuted to judgment. At the same time he filed a cross-complaint against plaintiff and joined therein one Louisa N. Ostwald as a cross-defendant. This complaint alleges in substance that on the 17th day of October, 1921, a judgment was duly given and made in the superior court in and for the county of San Mateo, where the land is situated, in favor of the defendant and cross-complainant and against cross-defendant Louisa N. Ostwald, for the sum of \$410.17 principal, \$147.66 interest, and \$24.30 costs of suit, and that the same was duly entered and docketed on October 17, 1921; that thereafter an execution issued to enforce the judgment, which execution was returned by the sheriff of the county aforesaid wholly unsatisfied, and that such return was made prior to the commencement of the present action; that on or about the 29th day of January, 1916, and prior to the entry of said judgment, but after the indebtedness upon which said judgment was rendered had been incurred, the cross-defendant Ostwald, for the express purpose of defrauding the defendant and cross-plaintiff's assignors, and to prevent him or his assignors from collecting the indebtedness upon which the judgment was founded, conveyed to plaintiff and cross-defendant Castleton all of the real estate owned by her in the county of San Mateo, being the real property described in plaintiff's complaint; that plaintiff and cross-defendant Castleton knew of said indebtedness to the assignors of defendant and cross-complainant Peterson, and received said conveyance so made with the intent and express purpose of defrauding cross-complainant and his assignors, and with the further intent and purpose of preventing the collection of the indebtedness and judgment, or any judgment that might be rendered thereon. Further allegations recite that there was no consideration for the conveyance of the said real property by cross-defendant Ostwald to Castleton, excepting a pretended agreement on the part of Castleton to support cross-defendant Ostwald during the term of her natural life; that said Ostwald after she had made the

conveyance had no other property out of which the judgment could be satisfied in whole or in part. Judgment was prayed that cross-defendants deliver up said conveyance and that the same be canceled and declared void. Cross-defendants filed an answer denying that the conveyance was made in fraud of creditors or that it was without consideration.

At the trial plaintiff identified a document which purported to be an agreement between him and Louisa N. Ostwald, cross-defendant, dated June 15, 1915, whereby she promised to convey to plaintiff all the real property described in the complaint in consideration of the payment to her by plaintiff of the sum of \$100 and the assumption of a mortgage of \$2,000 on the premises in question, and the support of her by plaintiff during the rest of her natural life. Plaintiff testified that he had paid to Mrs. Ostwald the \$100 and assumed the mortgage. He thereupon rested. Marion Vecki, defendant's assignor, testified on behalf of defendant that plaintiff called on him on January 29, 1916, and presented a document dated the day previous and signed by Mrs. Ostwald, demanding the surrender of a certain promissory note executed by her, and upon his refusal to surrender the same was informed by plaintiff that he and Mrs. Ostwald would so arrange it that he would not be paid. This promissory note was the obligation assigned to Peterson and upon which he had recovered the judgment hereinabove referred to. Plaintiff Castleton admitted that he had made such demand, but denied the statement attributed to him. Vecki further testified that the property conveyed to plaintiff by cross-defendant Ostwald was reasonably worth the sum of \$8,000. It is admitted by the pleadings that this is all the property that Mrs. Ostwald possessed.

It further appeared that the promissory note executed by Mrs. Ostwald on October 16, 1915, in favor of Vecki, was a renewal note and that part of the original obligation upon which it was based had been owing for about a year prior to the execution of the note. It also appeared that Vecki knew at the time Mrs. Ostwald executed the note that she was the owner of the property in question, and he claims that the credit extended to her was in reliance of such ownership. Upon the evidence the trial court found that the conveyance was not fraudulent, but that the same had been made in good faith, and judgment was rendered in favor of plaintiff quieting his title. Defendant and cross-complainant Peterson appeal from such decree. We are of the opinion that there is no evidence in the record to contradict the presumption that the conveyance was made with fraudulent intent.

[1, 2] As against creditors no one can transfer all of his property in consideration of future support so as to defeat any such

creditor in enforcing his claim, for under such circumstances the law presumes the act to be done with fraudulent intent to hinder and delay the creditor in the collection of his debt. *Baxter v. Baxter*, 19 Cal. App. 239, 125 P. 359; *Ceinat v. Hawes*, 59 Cal. App. 687, 211 P. 849; *Potts v. Mehrmann*, 50 Cal. App. 627, 195 P. 941. Here the evidence shows without conflict that Mrs. Ostwald at the time she made the conveyance to plaintiff was indebted to defendant's assignor on a promissory note, and the pleadings admit that by her conveyance she dispossessed herself of all of her property. By such transfer she became insolvent and rendered herself incapable of paying her debts. Such an act is a fraud upon a creditor and should not be countenanced in a court of justice. *Franck v. Moran*, 36 Cal. App. 37, 171 P. 841.

The judgment is reversed.

We concur: CASHIN, J.; KNIGHT, J.

85 Cal. App. 43

SHAHER v. FISHER et al. (Civ. 4433.)

District Court of Appeal, Second District, Division 2, California. Aug. 10, 1927.

1. Corporations ⚡306—Common count for money had and received held not to support action against corporation officer depositing in personal account plaintiff's checks as loan to corporation.

Common count for money had and received held not to support an action against a corporation officer, who indorsed checks given by plaintiff to the corporation as a loan and deposited the checks in his personal account, there being no allegation that the defendant corporation was insolvent, or that the defendant officer has secured any preference, or that plaintiff had exhausted her remedy against the corporation.

2. Creditors' suit ⚡39(4)—Creditor's bill must allege that legal remedies have been exhausted or are unavailing.

It is a necessary prerequisite to the maintenance of a creditor's bill that plaintiff allege that his legal remedies have been exhausted or are unavailing.

3. Bills and notes ⚡448—Common count for money had and received held not to support action against defendant corporation officer as indorser of check to corporation.

Common count for money had and received held not to support an action against the treasurer of a corporation by plaintiff, who had loaned money to the corporation against the treasurer as indorser of check to corporation, there being nothing in the complaint by which defendant could know that any negotiable instrument was involved, or that he was sought to be charged as an indorser.

4. Pleading ⚡387—Plaintiff cannot prove and recover on different cause than that pleaded without giving defendant opportunity to defend.

While the tendency of courts is toward liberality of pleading, a plaintiff cannot plead one cause of action and prove and recover on another without giving notice to the defendant and opportunity to defend.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action for money had and received by Grace Shafer against J. T. Fisher and another. Judgment for defendant named, and plaintiff appeals. Affirmed.

Benjamin Lewis, of Los Angeles, J. Gordon Mills, of Inglewood, and Charles P. Huey, of Los Angeles, for appellant.

Lloyd W. Moultrie, of Los Angeles, for respondent.

THOMPSON, J. The complaint in this action is in the form of a common count for money had and received by the defendants J. T. Fisher and the General Packing Corporation from the plaintiff. The judgment was that plaintiff have and recover from the defendant the sum of \$1,672.27, together with interest and costs, and that the defendant Fisher have and recover of plaintiff his costs. The appeal is from the judgment entered in favor of the defendant J. T. Fisher.

The facts as developed by the testimony are: That at the time the money was loaned by Karl F. Ross, acting as agent for the plaintiff, the defendant Fisher was assistant treasurer of the defendant corporation. A few days before the loan of \$1,000 by plaintiff, the defendant Fisher advanced to the corporation \$1,000 upon the understanding with one Scott, the president of the corporation, that when the \$1,000 was received from Ross, defendant should reimburse himself with the moneys. Accordingly, when the two checks amounting to \$1,000 were received by the defendant Fisher, they were indorsed by him and deposited in his account. Altogether the plaintiff loaned to the corporation through her agent, Dr. Ross, the sum of \$2,000, part of which had been repaid, leaving a balance evidenced by three promissory notes received and held by plaintiff, for the face of which the judgment was entered against the corporation. Two of the notes, aggregating \$1,060, bore indorsements, the first of which read, "General Packing Corp., J. T. Fisher, Asst. Treas.," and the other, "General Packing Corp., by J. T. Fisher, Asst. Treas."

The plaintiff claims that the defendant Fisher had no authority to deposit the two checks in his own account, and that, therefore, this particular transaction is void, or at least voidable, and that, the corporation

having failed to have it so declared, plaintiff as a creditor of the corporation has that right. She also contends that the defendant Fisher is personally liable by reason of the indorsements heretofore noticed, and, further, that the defendant Fisher, being a creditor of the defendant corporation, could not obtain a preference over other creditors.

[1, 2] Regardless of the merits of these assertions on the part of appellant, she cannot successfully assert them under the issues framed by the pleadings. There is no suggestion in the complaint that plaintiff has exhausted her legal remedy as against the corporation, nor any allegation that the defendant corporation was insolvent, nor that the defendant Fisher had secured any preference. A necessary prerequisite to the maintenance of a creditor's bill are allegations showing that the legal remedies have been exhausted or are unavailing. *Herrlich v. Kaufmann*, 99 Cal. 271-277, 33 P. 857; *Matteson, etc., Mfg. Co. v. Conley*, 144 Cal. 483-485, 77 P. 1042.

[3, 4] Nor is the plaintiff in a position to assert respondent's liability upon the indorsements, or either of them, upon the notes. Action was not brought upon the notes nor against this respondent upon the indorsements. There are no allegations of any character by which the defendant Fisher could be apprised that plaintiff sought to charge him as an indorser, or that any negotiable instrument was involved or had been presented or dishonored. While the modern tendency of the courts is toward liberality of pleading, it has never been suggested that a plaintiff should be permitted, upon pleading one cause of action, to prove and recover upon an entirely different cause, without giving notice to his adversary or opportunity to defend.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

84 Cal. App. 775

SWEET v. HAMILOTHORIS. (Civ. 5465.)

District Court of Appeal, First District, Division 1, California. Aug. 8, 1927.

1. Pleading ⚡236(1)—Permitting amendments to pleadings is within sound discretion of trial court.

It is within the sound discretion of the trial court to permit or refuse amendments to pleadings.

2. Pleading ⚡229—Amendments to pleading should be allowed liberally.

The court should be liberal in allowing pleadings to be amended.

3. Appeal and error ⚡959(1)—Trial court's permission to amend pleadings will be revised only for gross abuse of discretion.

The discretion of the trial court in permitting amendments will rarely be revised, and then only when a gross abuse of discretion clearly appears.

4. Pleading ⚡229—Amendments to pleadings should be allowed where they will facilitate production of facts in determination of action without causing delay or prejudice to opponent (Code Civ. Proc. § 473).

Amendments to pleadings should be permitted where it can be done without working delay or prejudice to the opposing party and will facilitate the production of facts so that the cause may be determined on its merits, in view of Code Civ. Proc. § 473.

5. Bastards ⚡49—Allowing amendment to complaint in bastardy proceedings, alleging residence of mother and child and that mother was unmarried, held proper (Civ. Code, § 196a).

Allowing amendment to complaint in bastardy proceedings under Civ. Code, § 196a, alleging the residence of the mother and child and that the mother was unmarried, where defendant filed an amended answer which set up no new denials or defenses, held not abuse of discretion.

6. Pleading ⚡420(2)—Where defendant filed answer to amended complaint and asked for no further time, he consented to submission of issues presented.

Where the defendant filed his answer to an amended complaint and asked no further time to meet the new issues thus presented, it would be deemed that he had no objection to submit those issues.

7. Appeal and error ⚡195—Where defendant is surprised by amended complaint and desires further time, he must make objection to trial court.

Where defendant is surprised by new issues raised in an amended complaint in any way entitling him to terms or delay, he must make his objection to the trial court.

8. Bastards ⚡49—Amendment to complaint in bastardy proceedings alleging residence of mother and child and that mother was unmarried held not to state new cause of action (Civ. Code, § 196a).

Amendment to complaint in action to compel support of illegitimate minor child under Civ. Code, § 196a, which merely alleged the residence of the mother and child and that the mother was not a married woman, held not to state a new cause of action.

9. Bastards ⚡49—Complaint alleging defendant was father of minor child and was never married to mother bringing action for child held sufficient under statute, notwithstanding word "illegitimate" was omitted; "illegitimate child" (Civ. Code, § 196a).

Complaint, in action for the support of illegitimate minor child under Civ. Code, § 196a, brought by the mother alleging that the defendant was the child's father and that he was

never married to the plaintiff, *held* sufficient notwithstanding the word "illegitimate" was not used therein, since a child born out of wedlock is an "illegitimate child."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Illegitimate Child.]

10. Pleading ⚡48—Complaint need only set forth facts sufficient to acquaint defendant with nature, source, and extent of action.

Plaintiff's pleading even against a special demurrer need only set forth the essential facts of the case with reasonable precision and with sufficient particularity to inform the defendant of the nature, source, and extent of the cause of action.

11. Bastards ⚡49—Where complaint stated facts warranting relief prayed for, it was not necessary to incorporate statute giving cause of action (Civ. Code, § 196a).

Where the complaint stated facts which under the law warranted the relief prayed for, there was no need of putting Civ. Code, § 196a, which authorized the cause of action, into the pleading.

12. Appeal and error ⚡1033(7)—Appellant cannot complain of error in finding favoring him.

Where an alleged error in a finding, if corrected, would have been adverse to appellant, the error will not authorize a reversal.

13. Appeal and error ⚡219(2)—Objection to findings as uncertain cannot be raised for the first time on appeal.

Where appellant made no objection to the findings for uncertainty when served, or prior to the signing of same by the court, and proposed no amendments, *held* that he could not raise the question of uncertainty for the first time on appeal.

14. Bastards ⚡92—Judgment requiring father of illegitimate child to pay "at present" \$25 per month during child's minority, if error, *held* harmless under statute (Civ. Code, § 196a).

Judgment requiring father of illegitimate child to pay "at present" \$25 per month "during the minority of said minor child for his support," if error, *held* harmless, since Civ. Code, § 196a, gives the court the same powers as in a divorce suit where any decree is an order "at present," and since the age of the child was in evidence before the court, and the father had the legal duty of supporting the child during his minority.

15. Bastards ⚡16—Father has duty of supporting illegitimate child during minority.

It is the legal duty of the father of an illegitimate child to support it during its minority.

16. Appeal and error ⚡1010(1)—Trial court's judgment will not be disturbed where supported by substantial evidence.

Where there is substantial evidence to support a judgment, it will not be disturbed on appeal.

17. Appeal and error ⚡931(1)—Where evidence conflicts, testimony of prevailing party is assumed to be true.

Where there is substantial conflict in the evidence, the appellate court must assume the testimony of the prevailing party to be true, even where the law requires clear and convincing proof.

18. Bastards ⚡70—Credibility of witnesses and weight of testimony held within trial court's province in bastardy proceeding.

In bastardy proceeding, it was within province of trial court to pass on the credibility of witnesses and the weight to be given to their testimony.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action to compel support of a minor child by Lillian Sweet, mother of David Louis Sweet, a minor; in behalf of said minor, against Louis N. Hamilothoris, otherwise known as Louis N. Hamil. Judgment for plaintiff, and defendant appeals. Affirmed.

H. D. Jerrett, of San Francisco, for appellant.

Mercer H. Farrar, of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This action is brought under section 196a of the Civil Code by Lillian Sweet, the mother of David Louis Sweet, a minor, against appellant, the alleged father of such minor, praying judgment that it be ordered and adjudged that appellant is the father and Lillian Sweet is the mother of David Louis Sweet, a minor, and that appellant pay for the support, maintenance, and education of such minor, such sum as the court shall adjudge reasonable and suitable to his circumstances, etc. Judgment was entered that appellant was and is the father and Lillian Sweet was and is the mother of said David Louis Sweet, a minor, and that defendant pay to plaintiff for and on behalf of said minor at present the sum of \$25 a month hereafter and during the minority of said minor for his support, maintenance, and education. Appellant urges four points on appeal:

(1) "The court erred in granting plaintiff leave to amend her complaint, and had no jurisdiction to proceed with the trial of the cause." (2) "The amended complaint is fatally defective, in that it fails in jurisdictional facts and does not state facts sufficient to constitute a cause of action." (3) "The material findings are against law." (4) "The judgment is not supported by pleadings or evidence."

The original complaint alleged that David Louis Sweet is a minor of about 8 months and this action is brought for and in behalf of said minor, David Louis Sweet, by his said mother. That on or about December 29, 1921,

the defendant and Lillian Sweet had sexual relations and intercourse; that at said time defendant and Lillian Sweet were not husband and wife, nor did they intermarry, nor have they intermarried at any time, or at all; that on October 8, 1922, in San Francisco, Lillian Sweet gave birth to a son, the said minor, David Louis Sweet; that the defendant was, and is, the father of said minor, David Louis Sweet. The amended complaint contained these same allegations with the additional allegations that the plaintiff David Louis Sweet is a minor of about 16 months and is, and at all times mentioned was, a resident of the city and county of San Francisco, Cal., and that the mother, Lillian Sweet, is, and at all times mentioned was, a resident of the city and county of San Francisco, Cal., and that at any of the times herein mentioned the said Lillian Sweet was not a married woman, not being married to the defendant nor to any other male person.

The action is brought under section 196a of the Civil Code providing:

"The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by its mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife."

[1-4] As to appellant's first point that the trial court erred in granting plaintiff leave to amend her complaint, it may be said that the permitting or refusing of amendments to pleadings is a matter within the sound discretion of the trial court. *Cheney v. O'Brien*, 69 Cal. 199, 10 P. 479; *Walsh v. McKeen*, 75 Cal. 519, 17 P. 673; *Fitzgerald v. Neustadt*, 91 Cal. 600, 27 P. 936; *Heilbron v. Canal Co.*, 76 Cal. 15, 17 P. 933; *McPherson v. Weston*, 85 Cal. 93, 24 P. 733; *Philbrook v. Randall*, 195 Cal. 95, 231 P. 739. Amendments should be allowed liberally, and the discretion of the trial court in permitting amendments will rarely be revised (*Pierson v. McCahill*, 22 Cal. 127; *San Joaquin, etc., v. Dodge*, 125 Cal. 77, 57 P. 687), and then only for a gross abuse of discretion, and such abuse of discretion must be made to clearly appear before the trial court's discretion will be interfered with on appeal (*Allen v. Los Molinos Land Co.*, 25 Cal. App. 206, 143 P. 253; *Kaiser v. Hancock*, 25 Cal. App. 323, 143 P. 614). Nowhere in the record have we found, nor has appellant pointed out in his brief, that the trial court, in granting plaintiff leave to amend the complaint, abused its discretion. Amendments should be permitted to pleadings where it can be done without working great delay or prejudice to the opposing party, and where such amendments will facilitate the production of all the facts bearing upon the questions involved in the action, that the cause may be

determined on its merits. *Burns v. Scooffy*, 98 Cal. 271, 33 P. 86; *Rose v. Doe*, 4 Cal. App. 680, 89 P. 135; *Green v. Gavin*, 11 Cal. App. 506, 105 P. 761; *San Francisco, etc., v. Leonard*, 17 Cal. App. 254, 119 P. 405; *Mackroth v. Sladky*, 27 Cal. App. 112, 148 P. 978; *Born v. Castle*, 22 Cal. App. 282, 134 P. 347; section 473, Code Civ. Proc.

[5-8] By the amendment to the complaint here no new cause of action was set up, no new relief asked, nor was the defendant taken by surprise in any way, nor did it prejudice him. The defendant filed his amended answer setting up no new denials or defenses, and as the amended complaint contained only such other allegations as stating the residence of the minor child and the mother as being in San Francisco, and that the mother of the minor child was not married at any time to any person, the allowance of the amendment was in no manner an abuse of the trial court's discretion and in no way injured or surprised the defendant. The amended complaint was but an enlargement of the original complaint. As the defendant filed his answer to the amended complaint and asked no further time to meet these issues, it is to be deemed that he was content to submit the issues thus presented. If defendant was surprised in any way that entitled him to terms or delay, it was his duty to make it known to the trial court. *Dieckmann v. Merkh*, 20 Cal. App. 655, 130 P. 27. By a comparison of the original complaint with the amended complaint it is apparent that the cause of action set up in the amended complaint is not foreign to the original cause of action. The relief sought arises on the same general state of facts, although more fully stated in the amended complaint, and the granting permission to file such amendment was proper. *Ford v. Ford*, 44 Cal. App. 420, 186 P. 164; *Frost v. Witter*, 132 Cal. 421, 64 P. 705, 84 Am. St. Rep. 53; *Cox v. McLaughlin*, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164; *Doolittle v. McConnell*, 178 Cal. 697, 174 P. 305; *Porter v. Fillebrown*, 119 Cal. 235, 51 P. 322.

[9] As to appellant's second point, that the complaint fails in jurisdictional facts and does not state a cause of action, there is no merit. In our opinion the amended complaint states all necessary jurisdictional facts, and facts sufficient to constitute a cause of action under section 196a of the Civil Code. *Gambetta v. Gambetta*, 30 Cal. App. 264, 157 P. 1141.

[10, 11] Appellant contends that because respondent omitted from the original and amended complaints the word "illegitimate," that the terms of the statute have not been complied with. The amended complaint alleges that appellant is the father of the minor child; that appellant and the mother of the minor child were not married; that they were not at any time, either prior or after the birth of such child, married; that the mother

was not, at the time of the alleged intercourse with appellant nor prior thereto nor at the time of the birth of the child, married to any other man. These allegations with the other allegations of the financial ability of appellant and financial inability of respondent to support the minor child, and the residence of the mother and minor, and that the action is brought by the mother in behalf of the minor, sufficiently states a cause of action. The omission of the word "illegitimate" in no way affects the pleading, nor did it in any way conceal what was charged. A child born out of wedlock is an illegitimate child. Here it is alleged that appellant is the father of the child and that the mother was not married to him nor to any other man. All that is required of a plaintiff, as a matter of pleading, even against a special demurrer, is that the complaint set forth the essential facts of the case with reasonable precision and with sufficient particularity to acquaint the defendant with the nature, source, and extent of the cause of action. *Goldstein v. Healy*, 187 Cal. 206, 201 P. 462; *Dunn v. Dufficy*, 194 Cal. 383, 228 P. 1029. When the complaint states facts which under the law warrant the relief prayed for; there is no need of putting the statute into the pleading. *People v. Common Council*, 85 Cal. 371, 24 P. 727.

[12, 13] We do not agree with appellant in his third assignment that "the material findings are against law," as the findings follow the allegations of the amended complaint and specially find each allegation to be true. If there had been a finding that the minor child was "illegitimate" included in the finding that the appellant and Lillian Sweet, not being married, were and are the father and mother, respectively, of such minor child, such finding would have been adverse to appellant, and therefore the omission of the word "illegitimate" would not constitute error authorizing a reversal of the judgment. *Rossiter v. Thompson*, 66 Cal. App. 498, 226 P. 806. As to appellant's objection that the findings are not direct, but inferential and uncertain; it may be said that so far as the record discloses, appellant proposed no amendments to the findings and raised no objection as to their uncertainty when served, or prior to the signing of the same by the court; hence he cannot raise on this appeal for the first time the question of uncertainty, or that they are not sufficiently explicit. *Warren v. Hopkins*, 110 Cal. 506, 42 P. 986; *Parke v. Hinds*, 14 Cal. 416; *Estate of Perry*, 64 Cal. App. 21, 220 P. 321.

[14, 15] Appellant also claims that the decision is against law because it provides that defendant pay "at present, the sum of \$25 a month, hereafter and during the minority of said minor child for his support," etc., and cited us to *People v. Wing*, 115 Mich. 698, 74 N. W. 179, in which the court uses this language:

"An order requiring the father of a bastard child to make certain weekly payments for its support until the further order of the court is erroneous, because it does not fix a limit to the liability."

In passing upon the question (citing decisions for and against) "we are of the opinion that the better doctrine is that the order should be definite, and fix a limit to the liability, and that it should not be left open for subsequent applications to the court."

Section 196a of the Civil Code expressly provides that "in such action the court shall have power to order and enforce performance thereof, the same as under sections 138, 139, and 140 of the Civil Code; in a suit for divorce by a wife," and in a divorce decree any order made for the support and maintenance of a minor child is an order "at present," as the court does not lose jurisdiction over the welfare and support of a minor child and has power at any time before the minor becomes of age to change or modify the decree. Here, however, the order and judgment is that payments of a sum certain per month be made "during the minority of said minor child for his support." The appellant by the wording of the judgment is not injured nor prejudiced, as it is his legal duty to support his child until the end of its minority, and the age of the child was in evidence before the court. The wording, if erroneous, is harmless and does not affect the merits of the case. *Carrington v. Smithers*, 26 Cal. App. 460, 147 P. 225.

As to appellant's fourth assignment, that "the judgment is not supported by the pleadings or the evidence," it is sufficient to say that while the evidence is conflicting and contradictory there is substantial and direct evidence to support the findings and judgment, and that the judgment is supported by the pleadings.

[16-18] Taking the testimony of the mother as a whole, nowhere does it appear that her story is inherently improbable, and when the testimony of the other witnesses for respondent is considered in conjunction with that of the mother of the minor, it cannot be said that the evidence is insufficient to support the judgment, and in such case the judgment will not be disturbed. *Lanning v. Talmage*, 66 Cal. App. 48, 225 P. 25. Where there is a substantial conflict in the evidence the appellate court must assume the testimony of the prevailing party to be true; and this is the rule even in those cases where the law requires clear and convincing proof. *Palladine v. Imperial Valley, etc.*, 65 Cal. App. 727, 225 P. 291; *Couts v. Winston*, 153 Cal. 686, 96 P. 357. It was entirely within the province of the trial court to pass upon the credibility of the witnesses and the weight to be given to their testimony, and to reject the testimony of any witness called at the trial. The result arrived at here must be interpreted to mean the rejection by the court of the testimony

of appellant and his witnesses as to his claim that he was not the father of the minor child, and as accepting the testimony of the mother and other witnesses for respondent respecting the truth of that issue.

In our opinion there is no reversible error in the record.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

PEOPLE v. SCOFIELD. (Cr. 1494.) *

District Court of Appeal, Second District, Division 2, California. Aug. 2, 1927.

Hearing Granted by Supreme Court Sept. 29, 1927.

1. Criminal law ⚡173—Jeopardy attaches when jury has been impaneled and sworn.

The jeopardy of a defendant attaches when the members of a jury have been impaneled and sworn, and the jury thus stands charged with his deliverance.

2. Criminal law ⚡178—Dismissal of count of information after jury has been sworn is equivalent to acquittal as to that charge.

Dismissal of one count of an information after the defendant has been in jeopardy under it by the impaneling and swearing of the jury is equivalent to a verdict of acquittal as to the charge contained in that count.

3. Criminal law ⚡178—Charge that defendant must be found guilty of manslaughter, if he drove car while intoxicated, placed defendant twice in jeopardy, where count as to intoxication was dismissed after jury was sworn.

Charge that defendant must be found guilty of manslaughter, if he drove car while intoxicated, is erroneous, as placing defendant twice in jeopardy, where a count of the information charging him with driving while intoxicated had been dismissed after the jury was sworn.

4. Criminal law ⚡172(6)—Error in requiring conviction of manslaughter, if driving while intoxicated, where intoxication charge had been dismissed, held not prejudicial, since it did not affect charge for failure to render aid following automobile accident.

Error in requiring conviction of manslaughter, if driving while intoxicated, where charge of driving while intoxicated had been dismissed after defendant was in jeopardy thereon, held not prejudicial since it did not affect third count of information, charging refusal to render aid following automobile accident where jury must have understood evidence of intoxication did not apply thereto.

5. Criminal law ⚡798½—Instruction as to form of verdict in disjunctive form, not requiring agreement on one of alternative charges, held error (Motor Vehicle Act, § 141).

Giving instruction as to form of verdict for failure to render aid following automobile accident, as required by Motor Vehicle Act (St.

1923, p. 562), § 141, in disjunctive form, if defendant failed to stop or to give name or address or registration number, or render assistance, held error, where no requirement was made that jury agree on at least one of alternatives.

6. Criminal law ⚡824(1)—Court must require jury to agree on one of alternative charges stated conjunctively in count of information, though defendant does not request instruction (Motor Vehicle Act, § 141).

Court must require jury to agree on at least one of alternative charges stated conjunctively in a count of an information, under Motor Vehicles Act (St. 1923, p. 562), § 141, for failing to render aid following automobile accident, even though defendant does not request any instruction to that effect.

7. Criminal law ⚡824(1)—Court's duty in criminal cases to give instructions sua sponte applies to matters involved in given, as well as omitted instructions.

Court's duty in criminal cases to give sua sponte, where they are not presented by the parties, instructions on pertinent general principles of law applies to matters involved in instructions which the court gives, as well as to those which it fails to give.

8. Highways ⚡186—Requirement that driver of vehicle in collision shall communicate information to occupant of other vehicle is inapplicable, where occupant is unconscious (Motor Vehicle Act, § 141; Civ. Code, §§ 3531, 3532).

Requirement of Motor Vehicle Act (St. 1923, p. 562), § 141, that driver of vehicle colliding with another vehicle shall stop, communicate his name, address, and car number, and render aid to the occupants of other vehicle, does not apply as to communication, where occupant is alone and unconscious, since, under Civ. Code, §§ 3531, 3532, the law does not require impossible or idle acts.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Urban A. Scofield was convicted of failing to render aid following an automobile accident, and he appeals. Reversed.

Wm. H. Campbell and W. T. Kendrick, Jr., both of Los Angeles (Wm. T. Kendrick, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

WORKS, P. J. Defendant was informed against in three counts. In the first he was charged with manslaughter. The second charged him with operating a motor vehicle while under the influence of intoxicating liquor. The third count charged that defendant, while operating a motor vehicle, which vehicle collided with one being operated by the person named as defendant's victim in the first count, caused personal injury to that person, and that defendant did "then and

there fail to immediately stop and give his name and address and the registration number of his said vehicle to the said" alleged victim, "and did then and there fail to render to" the injured man "any assistance; such person being then and there in need of assistance by reason of injuries and damage caused by said collision." All three of the charges grew, of course, out of the same transaction. After a jury was impaneled and after the prosecution had rested, the charge made in the second count, upon motion of the district attorney, was dismissed. The jury disagreed upon the charge made in the first count. Defendant was convicted under the third count and appeals from the judgment of conviction and from an order of the trial court denying his motion for a new trial.

The order dismissing the charge alleged in the second count was made in the absence of the jury from the courtroom. When the trial body returned to the box the following occurred:

"[Counsel for defendant]: Could we ask that the jury be advised what the court has done, so they will know the effect of the evidence?"

"The Court: No; that is a matter to be covered by instruction."

During the argument before the jury the record shows the following:

"[The district attorney]: And, among other things, it may be that you will receive instructions to the effect that, if the defendant was driving his vehicle in an unlawful manner * * * and one of those might have been * * * while violating the law in regard to the use of intoxicating liquor while driving an automobile, now, then, * * * regardless of whether the speed was fast or slow, there is also the question involved in this manslaughter charge that he was under the influence of liquor."

"[Counsel for defendant]: * * * I want to assign that as prejudicial error, the statement that intoxication is in issue here. * * * I assign that as error and ask that the jury be instructed to disregard any such statement. * * * That is not before the jury; driving while intoxicated is not before the jury. * * *

"The Court: That is correct; that charge is not before the jury. * * * But at the same time the question of intoxication is germane to the manslaughter charge. For that reason * * * the court will not so instruct the jury, but will give the jury the proper instruction when the time comes as to intoxication, and the definition of intoxication."

"[The district attorney]: * * * That was exactly what I had reference to, and did not mention the other matter. So * * * that, if the defendant was driving an automobile while intoxicated, or while under the influence of intoxicating liquor, and that in so driving he caused the death, the causal connection between his operation of that vehicle and the death of that human being was the reason of his use of intoxicating liquor, then he would be guilty, under the evidence, of manslaughter."

Appellant requested the trial judge to instruct the jury as follows, but the request was refused:

"The crime charged in * * * count 2 has been * * * dismissed, and you are not called upon to further consider the charge in that count. And you are further instructed that you must disregard any evidence which has been introduced, if any, showing or tending to show, that the defendant willfully or unlawfully, or feloniously drove or operated a certain motor vehicle while under the influence of intoxicating liquor, to wit: * * * [Describing the place.] And also you are instructed to disregard any evidence proving or tending to prove that [defendant] while operating the said motor vehicle was under the influence of intoxicating liquor."

The judge instructed the jury:

"The original information contains three counts. One of those counts has been dismissed. * * * The function of the jury is merely to determine on the facts: Is the defendant guilty or not guilty as charged in count 1, on which he has been tried before you? Is he guilty or not guilty as charged in count 3, on which he has been tried before you?"

But the following instruction was also given:

"If you are satisfied beyond a reasonable doubt that the deceased * * * came to his death, at the time and place charged in the information, as a result of an automobile driven by the defendant * * * colliding with an automobile in which the deceased was then seated, and that, at the time and place, the defendant * * * was driving said automobile in an unlawful manner, to wit, while the defendant * * * was under the influence of intoxicating liquor, or while the automobile was being operated by the defendant * * * at an unlawful rate of speed, or while the said automobile was being driven by the defendant * * * upon a public highway at such rate of speed as to endanger the life, limb, or property of any person, you should find the defendant * * * guilty of manslaughter."

The judge also defined to the jury the meaning of the term "under the influence of intoxicating liquor." The jury was not told, specifically, that, in determining the guilt or innocence of appellant under the third count, its members must not consider any evidence upon the question whether he was intoxicated at the time of the collision out of which the charges against him arose.

[1, 2] It is contended that the trial court erred in thus keeping the question of appellant's alleged intoxication before the jury. Of course, appellant was put in jeopardy upon the charge of driving while under the influence of liquor, for the jeopardy of a defendant attaches upon any charge "when a jury has been 'charged with his deliverance,' and the jury stands thus charged when its members have been impaneled and sworn" *People v. Hawkins*, 127 Cal. 372, 59 P. 697.

Appellant, in effect, was acquitted upon the charge pleaded in the second count of the information, that of driving while intoxicated, for a dismissal of that charge, after appellant had been jeopardized under it, was equivalent to a verdict of acquittal. *People v. Webb*, 38 Cal. 467. See, also, *In re Harron*, 191 Cal. 457, 217 P. 728; *People v. Follette*, 74 Cal. App. 178, 240 P. 502.

It was the theory of the trial court, although appellant was acquitted of the charge pleaded in the second count, that the evidence in the record which tended to support that charge could nevertheless be considered by the jury as an element aiding to a determination whether he was guilty of manslaughter. Was that theory a correct one? And, further, the jury having failed to agree upon the charge of manslaughter, and if the theory was incorrect, was the error of the court in that regard prejudicial to appellant under the charge upon which he was convicted, that or those alleged in the third count of the information?

[3] It will be observed that the trial judge instructed the jury, in the disjunctive, that appellant must be found guilty of manslaughter if—the other requisites of the law being satisfied—the jury determined that he drove his car while intoxicated, or at an unlawful rate of speed, or at such a rate of speed as to endanger life, etc. As far, then, as the question here involved is concerned, the point may be considered as if the jury had been instructed, alone, that if it found that appellant drove the automobile while under the influence of liquor he must be convicted of manslaughter. But appellant had just been acquitted of a charge of driving while intoxicated upon the same occasion. The instruction practically told the jury that he might be tried again on the charge, and it would seem for that reason to have been erroneous.

In reaching this conclusion, if finally it is to be reached, it becomes necessary to consider *People v. Wilson*, 193 Cal. 512, 226 P. 5. In that case the defendant had been charged with a misdemeanor in operating an automobile in such manner as to run down and injure a pedestrian. After jeopardy had attached upon this charge the pedestrian died because of the injuries which had been received, and the operator of the car was then charged with manslaughter. He pleaded former jeopardy under the misdemeanor charge. In disposing of the plea the Supreme Court said:

"The law upon this subject is well settled in its application to cases where the defendant has committed an act of violence, which in its immediate result amounts to a misdemeanor, but which in its after consequences upon the victim of the violent act becomes, through the death of that victim, murder or manslaughter. In such an event the second prosecution is not for the same offense as the first; and the rea-

son for this is, as is well stated in Wharton on Criminal Pleading and Practice (9th Ed.) § 476, 'that as at the time of conviction of assault there could have been no conviction of the homicide the prosecution of the homicide is not barred by the conviction of the assault.' See, also, 1 Bishop on New Criminal Law, § 1059, and cases cited. In the case of *People v. De-foor*, 100 Cal. 150 [34 P. 642], this court, while upholding the plea of once in jeopardy under the facts of that case, which did not involve the death of the injured person, nevertheless recognized the foregoing rule as applicable to cases of homicide, notwithstanding a previous trial and conviction of the defendant for the assault which subsequently resulted in the death of the injured person. In none of the cases cited by the appellant in support of his contention as to his plea of 'once in jeopardy, does the element of death, which is the essential basis of the charge of manslaughter, appear to be present; nor upon principle do we think a case can be conceived wherein a charge of murder or manslaughter could be defeated by a plea of once in jeopardy based upon a mere misdemeanor charge, trial, or conviction of the assault or offense which had later resulted in the death of the injured victim. It was therefore not error in the trial court to strike out the defendant's offered evidence in that regard or to direct the jury to find against the defendant upon his aforesaid plea." *People v. Wilson*, 193 Cal. 512, 226 P. 5.

It will be observed that the present case discloses circumstances very different from those covered by this language. Here the death of the alleged victim of appellant occurred before any charge was made against him. Here the three charges were made in the same pleading and they were all tried at the same time. Here the charge of driving while under the influence of liquor, if we consider it alone under the instruction which was given to the jury, was a necessary element in the charge of manslaughter. The latter charge was nothing without the former.

Another case deals with the question now present for consideration. In it we said:

"It, of course, is true that, if two or more offenses arise as one result from a single act, and one of them includes within itself all the others, as murder includes manslaughter, then, if the defendant has been in jeopardy for the offense which includes the others, he has been in jeopardy as to all of the offenses; and this is often true where he has been put in jeopardy for even the lowest of the offenses. In such cases more than one offense cannot be carved out of the same unlawful act." *People v. Brannon*, 70 Cal. App. 235, 233 P. 92.

We think the present case comes within this language and that it is not comparable with *People v. Wilson*, *supra*. The trial court, therefore, erred in refusing to give the instruction requested by appellant, and in giving its instruction to the effect that the evidence bearing upon the issue as to intoxication might be considered by the jury upon the manslaughter charge.

[4] The question yet remains whether this error prejudiced the rights of appellant under the charge upon which he was convicted, that pleaded in the third count of the information. In considering this point, and forgetting entirely the manslaughter charge, we cannot forbear to remark that it would have been better if the trial judge had given the instruction requested by appellant. Nevertheless, we think appellant's rights under the third count of the information were not jeopardized by the two instructions which are set forth above as having been given. We think the jury must have seen that the evidence as to intoxication bore no natural relation to the charge pleaded in the third count, and in this they were aided by the instruction to the effect that they were to consider the evidence in determining the manslaughter charge. We think this instruction operated as a limitation of their right to consider the evidence and that they must so have viewed it. It is also to be observed that in the colloquy which occurred before the jury during the final argument, the judge and the district attorney used language from which the jury must have understood that its members were to consider the evidence as to intoxication as bearing upon the manslaughter charge alone.

[5] The charge contained in the third count of the information was based on section 141 of the Motor Vehicle Act, so-called (Stats. 1923, p. 562; Deering Gen. Laws, Act 5128, part 1, p. 1895). It will be observed that it was the duty of the jury to convict under the charge as pleaded, if it were proven beyond a reasonable doubt that appellant failed to stop immediately after the collision in which his car was engaged, and then and there failed either to give to the man who was injured in the collision his name or his address, or the registration number of his automobile, or then and there failed to give assistance to the man who was injured; he being then and there in need of assistance. Section 141, supra; *People v. Kaufman*, 49 Cal. App. 570, 193 P. 953. Notwithstanding this state of the law, the trial judge instructed the jury:

"There have been prepared two forms of verdict for you as to each of the two counts. * * * As to the third count, the body of one form, reads: 'We, the jury * * * find the defendant guilty of violation of section 141 of the California Vehicle Act, a felony, as charged in count 3 of the information. * * * If your verdict be a verdict of guilty as to count 3, that is the form you will use. * * * If your verdict be 'not guilty,' use this form: 'We, the jury * * * find the defendant not guilty,' etc.

[6, 7] There was no instruction that, in order to find appellant guilty, the members of the jury must agree upon at least one of the alternative charges pleaded in the third count; that is, that he either failed to stop, or

to give his name, or to give his address, or to give the registration number of his car, or to render necessary assistance. Appellant contends that the trial judge erred in giving the instruction which was given as to the form of verdict and in failing to instruct that the members of the jury must agree upon at least one of the alternatives pleaded in the third count before a conviction could result. We cannot avoid the conclusion that this claim of error is well founded. It is true that appellant requested the giving of no instruction as to the form of verdict, or as to the necessity for an agreement by the members of the jury upon some single element of the general crime charged in the information, but we think he need not have done so. "It is the duty of a court in criminal cases to give, sua sponte, where they are not proposed or presented in writing by the parties themselves, instructions on the general principles of law pertinent to such cases." *People v. Peck*, 43 Cal. App. 638, 185 P. 881. We think this rule applies to such matters of law as that covered by the instruction which the judge gave, as well as to those contemplated by such an instruction as that which he failed to give. Certainly, as it seems to us, when the judge gave the instruction as to the form of verdict to be used in the event that the jury found appellant guilty, it became incumbent upon him to instruct that the form could not be employed unless the members of the jury agreed upon at least one of the alternatives charged in the information. Under the provisions of section 141 of the Motor Vehicle Act it seems to make no difference that the alternatives were charged in the conjunctive. The harm which might well have resulted from the errors of the court is apparent. In a case presenting a somewhat similar question the Supreme Court said:

"A verdict of guilty could have been rendered * * * although no two jurors were convinced beyond a reasonable doubt, or at all, of the truth of the charge, as to any one of these separate offenses." *People v. Williams*, 133 Cal. 165, 65 P. 323.

[8] The evidence shows without dispute that appellant stopped his automobile, but that the man whose car was struck by that of appellant was so seriously injured that he was incapable of receiving the information which it is made the duty of a driver of an automobile, by section 141 of the Motor Vehicle Act, to give. The injured man was unconscious from the moment of the collision and his death occurred a few hours thereafter. He was driving alone and it was therefore impossible for appellant to comply with the language of section 141 to the effect that the information must be given "to * * * the occupants of the vehicle collided with." "The law never requires impossibilities. * * * The law neither does nor re-

quires idle acts." Civ. Code, §§ 3531, 3532. The trial judge instructed the jury:

"The duty imposed upon a driver of an automobile which collided with another vehicle to stop, render assistance, and furnish the information required by the law is a duty which he must perform in all cases, and it is immaterial whether such accident was caused by the carelessness of such driver, the carelessness of the driver of the vehicle collided with, or both, or was an unavoidable accident, such duty arises whenever such a collision occurs."

To the contention that this instruction was erroneous in that it told the jury that the information required by the law to be imparted must be given "in all cases," the Attorney General responds that the instruction "could not have been understood by the jury to mean that the defendant was required under any circumstances to do that which was either physically impossible or which would have been absurd." Notwithstanding this suggestion, we think the instruction was erroneous. Considering, however, the nature of some of the errors already pointed out, we find it unnecessary to determine to what extent the instruction last mentioned was prejudicial to the interests of appellant.

Appellant makes several other points, but we think it unnecessary to decide them.

Judgment and order reversed.

We concur: CRAIG, J.; THOMPSON, J.

84 Cal. App. 707

PEOPLE v. BRADFORD et al. (Cr. 1349.)★

District Court of Appeal, First District, Division 2, California. Aug. 3, 1927.

Hearing Denied by Supreme Court Sept. 29, 1927.

1. Criminal law § 167(1)—Omission in information charging forgery of stock certificate for failure to state certificate was indorsed, if error, held harmless (Pen. Code, § 470).

In prosecution under Pen. Code, § 470, information charging forgery of a stock certificate, without specifically stating that the certificate was indorsed, if defective, was not prejudicially so, notwithstanding that it appeared that the certificate was transferable only when properly indorsed.

2. Criminal law § 37—Where accused is lured into commission of offense charged in order to prosecute him, no conviction may be had.

Where one person attempts to entrap another into the commission of an offense in order to prosecute him therefor, and the criminal intent originates in the mind of the entrapping person, no conviction may be had if the trap is successful.

3. Criminal law § 564(1)—In prosecution for forging stock certificate, evidence held to support venue (Pen. Code, § 470).

In prosecution for forging a stock certificate in violation of Pen. Code, § 470, evidence held

to show offense was committed where venue of prosecution was laid.

4. Criminal law § 834(1)—Striking out statement in instruction defining "utter" and "publish" in forgery law, held no error, part stricken being misleading.

In an instruction given in a forgery case defining the words "utter" and "publish" as to declare or assert, directly or indirectly, by words or actions, that the forged instrument is genuine, striking out a statement in the instruction that the mere act of delivering a forged instrument to a coconspirator, with intent that the coconspirator should pass it, is insufficient (to constitute the offense) held no error, since omitted phrase made instruction misleading.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Publish; Utter.]

5. Criminal law § 545—Deposition taken at preliminary examination on complaint charging forgery with intent to defraud bank held admissible, notwithstanding forgery was with intent to defraud bank and corporation.

Deposition of a witness, taken at preliminary examination upon a complaint charging forgery of a stock certificate with intent to defraud bank, held admissible, notwithstanding that the forgery was committed with intent to defraud not only the bank, but also the corporation which was purported to have issued the certificate; no variance being shown between complaint and information.

6. Criminal law § 543(2)—Whether prosecution showed due diligence in finding absent witness held for determination of trial judge permitting use of deposition.

Whether the prosecution in a forgery case had used due diligence in order to find an absent witness before offering his deposition held for the determination of the trial judge permitting the deposition to be used.

7. Criminal law § 944—Motion for new trial, based on affidavit of codefendant unworthy of belief and contrary to uncontradicted evidence at trial, held properly refused.

Motion for new trial in forgery prosecution, based on the affidavit of a codefendant, who was shown at the trial to be unworthy of credence, and which alleged facts contrary to evidence at trial which neither defendant nor affiant had contradicted, held properly refused.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

One Ammerman and Robert Bradford were convicted of violating Pen. Code, § 470, concerning altering, forging, or counterfeiting stock certificates and other instruments. Robert Bradford appeals. Affirmed.

Melvin, McClure & Sullivan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

NOURSE, J. The defendants Bradford and Ammerman were jointly tried on an information charging them with a violation of

the provisions of section 470, Penal Code. The jury returned a verdict finding both defendants guilty as charged, and the defendant Bradford alone has appealed upon a type-written record from the judgment following the verdict and from the order denying his motion for a new trial.

The information charged that on November 27, 1925, the defendants, with the intent to prejudice, damage, and defraud the Anglo & London Paris National Bank and the Owl Drug Company, feloniously made, altered, forged, and counterfeited a certificate calling for 500 shares of the capital stock of the said Owl Drug Company. This certificate was then pleaded in *hæc verba*, and the information charged that the defendants, knowing the certificate to be false and forged, willfully, feloniously, falsely and with the intent to damage and defraud the two corporations named, published and passed the said certificate as true and genuine to the said Anglo & London Paris National Bank.

On October 3, 1925, the defendant Bradford visited the office of the Owl Drug Company in the city and county of San Francisco and asked to see a canceled stock certificate, stating that he was interested in the purchase of preferred stock of that corporation in the open market and desired to examine the terms and conditions under which such stock was issued. The young lady in charge of the office handed him a book of unissued certificates, which he retained in his possession for approximately fifteen minutes and then returned it to her. Sometime thereafter two of these blank certificates were found to be missing from the book. On November 12, 1925, the defendant Bradford suggested to one Bergman that they could make about \$25,000 through the use of some railroad stock held by a friend of his and which the defendant stated had been properly indorsed, but had not been issued by the company. The proposition made by the defendant Bradford to Bergman at that time was that, though these certificates were not legitimate, they could be sold or used as collateral for a loan from some bank or broker's office and that if this were done the money would be divided among Bradford, Bergman and the holder of the certificates. Bergman communicated this information to one Roberts who advised him to go ahead with the transaction with a Mr. Klinker of the Anglo & London Paris National Bank, and soon thereafter Bergman again called on defendant Bradford, who informed him that the stock he had in mind was stock of the Owl Drug Company and not of a railroad corporation as previously stated. Bergman having expressed a willingness to go through with the deal with the defendant Bradford, the latter proposed that in order to provide an easy method for the negotiation of the stock he would cause an advertisement to be inserted in the San Francisco Examiner seeking a hotel manager, and that when this

advertisement appeared Bergman was to call at a designated hotel brokerage office where he would meet George E. Melton, who would express a desire to buy a hotel with money to be raised on the stock. Melton, it appeared, was no other than the defendant Ammerman, and the purpose of this entire plan relating to the purchase and management of a hotel was to create an atmosphere in order to facilitate Bergman's efforts to secure a loan upon the stock. This meeting was carried out as scheduled and Ammerman there told Bergman that he had some Owl Drug Company stock in his possession which he wished to negotiate in order to enable him to purchase a hotel and that if Bergman could arrange this loan he would be assured the position of manager. A few days later the two defendants and Bergman met again in Bradford's apartment. Bergman informed Bradford that he had been to the bank and felt sure that he would be able to secure a loan of \$25,000 on the stock. Bradford then informed him that the certificate was in Ammerman's possession and that it had not been indorsed by Melton whose name appeared upon the face of the certificate as the owner. Bradford refused to allow the certificate to be indorsed in his apartment and instructed defendant Ammerman to take it to the Bank of Italy and indorse it there. When this certificate had been thus indorsed by Ammerman in the name of Melton it was delivered by him to Bergman, who took it to the bank, where he delivered it to Mr. Klinker, telling him that it was the stock which he had previously talked to him about. Mr. Klinker examined the certificate and told Bergman that they would have a note made out for a \$25,000 loan on the stock and that he should bring Mr. Melton in to sign the note. Such a note was prepared and handed to Bergman, who took it across the street to where Ammerman was waiting for him and told him it was necessary in order to secure the loan that he, Ammerman, should sign the note. At that time defendant Bradford approached Bergman and Ammerman and asked if everything was proceeding smoothly. While these three were engaged in conversation police officers approached and arrested them.

[1] On this appeal it is argued that the information fails to charge a public offense, because it does not appear therefrom that the certificate of stock pleaded in the information was indorsed upon the reverse side. The argument is that if this certificate was not indorsed then the act of defendants in forging the names of the officers of the corporation and in attempting to dispose of the certificate was an idle act, because it appears from the face of the certificate that it was transferable only when surrendered properly indorsed. In support of the point the appellant cites *People v. Thornburgh*, 4 Cal. App. 38, 87 P. 234, where it was held that an indictment charging the forging and utterance of a

check payable to the maker without charging the forgery of the indorsement thereof is insufficient. Other cases of the same purport are cited, but they are all far wide of the mark. Here the information charged Bradford and Ammerman with forging and uttering a certificate of stock issued in the name of one Melton, but it does not appear on the face of the pleading that Melton was a fictitious person. There was no demurrer to the information and no objection to the introduction of the evidence which disclosed that Melton was in fact Ammerman, the man who actually forged the signatures of the officers of the corporation, and there was no objection to the receipt in evidence of the original stock certificate which disclosed the indorsement on the reverse side in the name of Melton. Thus, if there was any defect in the pleading in this respect which could have been reached by special demurrer, that course should have been followed, but the defect, if any, is one which could not under any possible view have prejudiced the appellant in the conduct of the trial.

[2] It is argued that no public offense was committed by the appellant because the feigned accomplice Bergman and his confederates, Roberts, Klinker and Mullins, originated the intent to commit the offense and consented to all the acts proved. The complete and effective answer to the point is that the whole plan of securing the stock certificate, forging the signatures of the officers of the corporation thereto and using it for purposes of sale or security for a loan was conceived by the appellant and his confederate Ammerman and that what was done by Bergman, Roberts, Klinker and Mullins was done for the purpose of apprehending Bradford and his confederate so that this forged certificate could be secured and the means of perpetrating a fraud upon some innocent person could be taken from those charged with the forgery. The evidence of appellant's activities in the conception and prosecution of the conspiracy is uncontradicted, neither he nor his confederate having taken the stand in their behalf, while the theory upon which appellant's counsel tendered this defense was fully protected by the trial judge in his instructions to the jury. This instruction really states the rule of law involved in a case of this kind, and it is unnecessary to discuss the cases cited by the appellant where the intent to commit the crime originated in the minds of the party who was endeavoring to trap the one charged with the offense. In this connection the trial court instructed the jury as follows: "You are instructed that where the criminal intent originates in the mind of the entrapping person and the accused is lured into the commission of the offense charged in order to prosecute him therefor no conviction may be had."

[3] It is argued that the verdict of the jury is contrary to the evidence because it does

not appear that the certificate of stock was forged in the city and county of San Francisco, or that the appellant aided or abetted in the forgery of it. Appellant's codefendant, Ammerman, admitted in his confession that the signatures of the officers of the Owl Drug Company were appended to the certificate in his room in San Francisco, and that in filling in the blanks on the face of the certificates he used a typewriter which was in this same room. There is no direct testimony as to which one of the parties actually signed the names of these officials, but all the inferences go unmistakably to show that this was done by Ammerman at the special instance and direction of this appellant. This evidence of the acts done in San Francisco fully covers the question of venue.

[4] It is argued that the trial judge erred in striking the words appearing in parenthesis in the following instruction:

"You are hereby further instructed that the words 'utter' and 'publish,' in the law of forgery, are synonymous, for the meaning of both is 'to declare or assert, directly or indirectly, by words or actions,' that the forged instrument is genuine. To constitute the offense of uttering, it is necessary that some overt act be committed toward uttering. (The mere act of delivering a forged instrument to an agent or coconspirator, with the design that the agent or coconspirator should utter or pass it, is insufficient.)"

The omitted words would have served no other purpose than to have confused the jury and would have nullified the correct statement of the law covering the law of uttering and publishing a forged instrument.

[5, 6] It is argued that the trial court erred in admitting the deposition of the witness Bergman because the deposition was taken at his preliminary examination upon a complaint charging forgery of the certificate with intent to defraud the Anglo & London Paris Bank, whereas in fact it was an attempt to defraud the Owl Drug Company as well as the Anglo Bank. From this it is argued that Bergman's deposition was not taken in a preliminary examination upon a charge which was heard before the committing magistrate. The argument is based upon the theory that there is a variance between the complaint and the information. But there is no variance. The information merely pleaded additional facts supplementing the main charge of forgery. It is also suggested that the trial court erred in admitting this deposition because the prosecution failed to show due diligence to find the witness Bergman in this state. The determination of whether due diligence was shown in this regard was imposed upon the trial judge, and from our examination of the record we cannot say that any error was committed in this respect.

[7] The motion for a new trial was based upon the affidavit of Ammerman in which he stated that the certificate was forged by him in the state of Nevada, that he alone procur-

ed the two blank certificates from the office of the Owl Drug Company, and that the appellant had no knowledge of the forgery or of the plan to pass the certificate. Prior to the trial this affiant had made two separate confessions or statements to the police which were contradictory, and which were in conflict with the statements in his affidavit. Though he did not take the stand as a witness, he was shown at the trial to be unworthy of credence. It is now argued that this testimony outlined in the affidavit, having been discovered by appellant after the close of the trial, was sufficient to require a new trial in his behalf. Evidence was offered at the trial to show that the signatures were attached to the certificate under appellant's direction in the county of San Francisco, that he alone had called at the office of the Owl Drug Company and had secured the blank certificates, and that he had planned the entire transaction. He made no effort to controvert any of this testimony which he must have anticipated would be brought out by the state. The appellant has not shown the diligence necessary to justify an order granting a new trial.

The judgment and order are affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

84 Cal. App. 669

DUNHAM, CARRIGAN & HAYDEN CO. v. THERMOID RUBBER CO. (Civ. 5805.)★

District Court of Appeal, First District, Division 2, California. Aug. 1, 1927.

Rehearing Denied Aug. 31, 1927. Hearing Denied by Supreme Court Sept. 29, 1927.

1. Principal and agent ⇨41—Evidence of letters and conduct held to support finding that tire manufacturer and distributor extended distribution agreement.

Evidence of letters and conduct held to support finding that tire manufacturer and distributor agreed that a one-year written contract for handling of tires by the distributor should be extended for year.

2. Contracts ⇨4—Making of agreement may be proved by conduct, as well as by words.

Making of an agreement may be inferred by proof of conduct, as well as by proof of the use of words.

3. Frauds, statute of ⇨118(4)—Letters between tire manufacturer and distributor held sufficient memorandum, within statute of frauds, to extend written distribution contract.

References in letters between tire manufacturer and distributor to unexecuted renewal of written contract for prior year held sufficient memorandum, within statute of frauds, for continuation of contract for an additional year.

4. Principal and agent ⇨29—Provision in distribution contract with tire manufacturer, requiring distributor to sell given volume, held condition, not limitation, on power of renewal.

Clause in contract between tire manufacturer and distributor, providing for renewal on the distributor's selling certain volume of tires, held to be a condition on distributor's right to renewal, but not a limitation on the parties' power of renewal.

5. Principal and agent ⇨41—Evidence held sufficient to support finding that volume requirement was not contained in renewal of contract between tire manufacturer and distributor.

Evidence held sufficient to support finding by the court that clause in contract between tire manufacturer and distributor, requiring certain volume to be sold by distributor, was not contained in the renewal agreement.

6. Principal and agent ⇨41—Evidence held to support finding that volume clause, in contract between tire manufacturer and distributor, was waived.

Evidence held sufficient to support finding by the court that clause in a contract between tire manufacturer and distributor, requiring certain volume to be sold, was waived by the manufacturer.

7. Principal and agent ⇨29½—Tire distributor's letter to manufacturer held sufficient notice of termination of contract and tender of stock on hand.

Tire distributor's letter to manufacturer, notifying it of desire to terminate contract for purchase and sale of tires, and of insistence that manufacturer take back tires on hand pursuant to contract, held sufficient notice and tender.

8. Appeal and error ⇨843(2)—Appellate court would not determine question of tire distributor's lien on tires, where question became moot by sale of tires by stipulation.

Whether tire dealer's claim of a lien, on tires in its possession, arising out of alleged obligation of manufacturer to repurchase unsold tires, was valid, became a moot question, and would not be decided, where, by sale had pursuant to agreement of the parties, the tires were sold during the pendency of the suit and the money paid to plaintiff.

9. Principal and agent ⇨26½, 29—Distributor's handling of tires held sufficient consideration for extension, renewal, or modification of contract with manufacturer.

Handling and distribution of manufacturer's tires held sufficient consideration for extension, renewal, or modification of contract with distributor.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action for damages for breach of contract by the Dunham, Carrigan & Hayden Company against the Thermoid Rubber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

★Rehearing denied. Hearing denied by Supreme Court.

J. H. Morris, of San Francisco, for appellant.

J. R. Pringle and Clarence A. Shuey, both of San Francisco, for respondent.

KOFORD, P. J. Appellant is a manufacturer of automobile tires. Towards the end of the year 1919 it solicited respondent as jobber and distributor to carry as its leader, and push the sale of, Thermoid tires and tubes manufactured by appellant. A written contract was signed by the parties in December, 1919, which by its terms covered the period ending December 31, 1920. The contract contained numerous provisions regulating the course of conduct of the parties in their business relationship, such as discounts, terms, of settlement, extent of territory, exchange of goods, adjustments, and the like, together with other clauses which will be hereinafter more specifically referred to.

The parties carried on the business contemplated by the contract during the year 1920 in substantial fulfillment of its terms. Towards the end of the year respondent returned to appellant a considerable quantity of tires, which it had held for almost five months. These tires were said to be growing obsolete, and were returned in conformity with a clause of the contract permitting respondent to exchange, for new stock, tires which had not been in respondent's possession for more than five months. Appellant's representative declared that the return of these tires for exchange at that time would be a great embarrassment to appellant. He persuaded respondent to take them back again, by giving assurance that, regardless of the five months' limitation of the exchange privilege contained in the contract, respondent would be extended this privilege at any time and the five months' limitation would be waived. Respondent agreed to this, and took back the tires it had offered in exchange, and attempted to sell them from time to time during the year 1921 as requested by appellant, and many of them were exchanged with appellant for new ones from time to time during the year 1921.

There was no formal renewal of the written contract for the year 1921, but during the course of 1921 and the close of 1920 the parties acted towards each other in all respects as though the contract were a continuing one. They continued doing business in all substantial particulars as in 1920, and as required by the contract for that year. During the close of 1920 representatives of the two parties conversed together concerning the contemplated business of 1921. They discussed a new advertising campaign for 1921. Preparations were made by respondent in 1920, for this campaign, and it was carried out in 1921. During the year 1921 respondent continued to carry on hand a large stock of tires, and towards the latter part of 1921 still had on hand a large stock, including some of the

old tires, which it had previously sought to exchange in 1920 as above stated. Toward the end of 1921 respondent gave notice of cancellation of the contract, and, according to its provisions, demanded that appellant take back at cost all tires in the hands of respondent at the date of expiration of the contract. Appellant refused to do so, and this action followed. The trial court awarded respondent damages against appellant for failure to take back and pay for the said tires.

The expiration clause of the contract read as follows:

"This agreement shall commence on December 22, 1919, and continue in force until December 31st, 1920, inclusive, unless sooner terminated; it being expressly understood that it may in any event be canceled by either party at any time by 30 days' notice in writing, and upon the event of cancellation you [appellant] agree to take back, and we agree to return to you, all tires and tubes in our stock at the date of expiration, at our cost, we to pay the return charges, in the event that we canceled same."

[1, 2] The complaint alleged, and the court found to be true, the following allegation:

"That subsequent to January 10, 1920, and prior to November 29, 1921, respondent and appellant did agree that the life of said agreement of purchase and sale should be for the year 1921, as well as for the year 1920."

Our examination of the record convinces us that this finding is supported by the evidence. A representative of respondent testified that in January, 1921, he asked a representative of appellant where the new contracts were, and the latter replied:

"That it was not necessary; that we were going along on this; that is the one we were going along under at that time."

Aside from this, there seems to have been used by the parties no direct and express words of agreement to this effect, but the agreement is well established by their course of conduct and the letters which they exchanged during the period of time they did business together. The dealings between the parties during the year 1921 and the nature of the letters they exchanged are very convincing that both sides fully believed that the 1921 contract was in force for 1921. The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words. Williston on Contracts, vol. 1, § 3.

Appellant's obligation to take back and pay for tires and tubes in respondent's hands at the expiration of the contract (1921) is attacked by appellant as void under the statute of frauds. It claims that the 1920 agreement could not be extended for 1921 by parol agreement, unless fully executed, and that such an agreement by its very nature could not be fully executed until the very end of 1921. Respondent claims that appellant is

estopped to raise the statute of frauds by its conduct in permitting and encouraging respondent, both in 1920 and 1921, to continue to hold on hand a large stock of merchandise, and otherwise to fulfill the covenants of the contract in the belief that a valid return privilege existed. There is good authority supporting this argument. *Carpy v. Dowdell*, 115 Cal. 677, 687, 47 P. 695; *Seymour v. Oelrichs*, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154; *Rockhill v. Parker*, 22 Cal. App. 367, 372, 134 P. 720; *Reed v. McDonald*, 22 Cal. App. 701, 705, 136 P. 506; *Flint v. Giguere*, 50 Cal. App. 314, 195 P. 85; *Price v. Smith Manufacturing Co.*, 53 Cal. App. 303, 200 P. 53; 12 Cal. Jur. (Statute of Frauds), §§ 102, 103.

[3] But it is not necessary to invoke the doctrine of estoppel in this case, because, as contended by respondent, there is a sufficient note or memorandum subscribed by the party to be charged acknowledging the contract and satisfying the statute of frauds. Respondent's letters to appellant in 1921 contain numerous references to "our contract with you." These, of course, are not subscribed by appellant; but in one of appellant's letters to respondent, written October 31, 1921, referring to a proposed renewal contract for 1922 it is stated:

"In view of the fact that our contract with you in a measure expires December 1, and in further view of the fact that the factory is desirous of having new contracts issued each year, we will send you * * * our regular contract form. * * * There will not be very many changes in it, with a possible exception of some very minor changes in territory."

This reference to the contract is very brief, but is also very comprehensive, and satisfies the statute of frauds. A similar reference to an unexecuted written contract has been directly held to be a sufficient acknowledgment under the statute of frauds in *Walsh v. Standart*, 174 Cal. 807, 810, 164 P. 795. In view of this holding, it is not necessary to consider other arguments made by appellant and respondent respecting the statute of frauds.

[4] Appellant contends that respondent cannot recover under the contract because it has not fulfilled the volume and renewal clauses reading as follows:

"Volume.—It is understood that we are to give you under this agreement minimum purchases of \$250,000.

"Renewals.—And the renewal to be based upon our fulfilling this agreement to your entire satisfaction, with an increase of 20 per cent."

It is appellant's contention that, if the contract was by any means extended through 1921, these clauses had the effect of obligating respondent to buy from appellant in 1921 20 per cent. more than \$250,000 worth of tires, and that this is a condition which must be

fulfilled before a recovery upon the contract can be had. We think the renewal clause is not self-operative, but is a covenant which bound the appellant to renew the contract if respondent satisfactorily fulfilled the agreement for 1920 and agreed to increase the sales in 1921 as specified. It is a condition upon respondent's right to a renewal, but is by no means a limitation upon the parties' power of renewal. If the parties both wished to renew the contract without the volume clause, this renewal clause furnished no obstacle. So far as the volume clause is concerned, the court found against the contention of appellant.

[5, 6] Appellant sought damages by a cross-complaint herein for its violation in the year 1920, but the court found that appellant was unable to furnish sufficient tires in that year to enable respondent to fulfill the clause, and that the clause was by the mutual consent of the parties canceled and abrogated. With respect to the contract as applying to the year 1921, and upon which the court awarded respondent damages, the court's finding is that respondent performed all terms and conditions of the contract on its part to be performed. This finding may mean either that the clause did not exist as a part of the contract or that it was waived and abrogated, as in 1920. The evidence sustains the finding either way. Throughout the year 1921 nothing was stated between the parties concerning the volume of sales requirement. The large volume now claimed essential by appellant appears from the evidence to have been so far beyond all reasonable expectation at that time that it was never mentioned. On July 5, 1921, appellant wrote to respondent to the effect that its previous suggestion that respondent order tires was not made from any selfish reason, but because a tire shortage existed, that the factory was about a month behind with its orders, that the appellant had no "kick coming," and generally to the effect that the only reason for respondent to place orders at that time was to protect itself from running short. The evidence also shows that the general trend of the tire business was at that time quite poor, and that the mutual efforts of all were directed to biding time in some fashion until conditions improved.

Appellant contends that the complaint fails to make sufficient allegations of notice of cancellation of the contract and tender of the tires on hand. We see no merit in the contention. The complaint sufficiently alleges notice of cancellation, demand that defendant take back the tires, and the refusal of the defendant to comply with the demand.

[7] The sufficiency of the evidence, as well as the sufficiency of the complaint, is by appellant challenged upon the same grounds. The plain meaning and purpose of the expiration or take back provision was obviously to justify the distributor's keeping on hand an

adequate stock of tires (which under the circumstances here meant a large one), so that, in the event of the expiration of the contract, either by cancellation or failure to renew, the distributor would not be left with a large stock on its hands without the protection of the manufacturer, furnished and provided by the several covenants in the contract, and by the comities of the trade existing by virtue of the relationship between manufacturer and distributor. The letters of respondent fairly and timely informed appellant of its decision to terminate the contract and to insist on the "take back" provision. It was a written offer, and was itself a sufficient tender, if any tender were necessary, under the contract and conditions then existing. We have examined the letters of respondent, notifying appellant of its decision to terminate the contract, and we do not see that their polite phraseology, nor respondent's expressed willingness to talk it over at appellant's request, had the effect of making the notice and demand equivocal and uncertain.

[8] Appellant insists that its demurrer to the complaint should have been sustained, instead of overruled, and particularly urges that the complaint was insufficient to show that respondent had a lien upon the stock on hand for the damages claimed on account of the failure of appellant to take or buy back the same. The original complaint was drawn in part upon the theory that respondent had a vendor's lien, dependent upon possession and prayed for a foreclosure of this lien. It alleged that plaintiff had suffered detriment by reason of defendant's breach of obligation to repurchase the stock on hand in the sum of \$65,540.26, and prayed for damages in that sum, or so much thereof as remained as a deficiency after foreclosure sale. The complaint was at least sufficient as a statement of a cause of action for damages for breach of contract. After defendant's demurrer was overruled, plaintiff applied to the court for an order to sell the stock on hand, described in the complaint, upon the ground that the same was depreciating by time and light. The parties signed a written stipulation that such order and sale might be made. After the sale, plaintiff filed a supplemental complaint, alleging the sale under the order of court made by consent, alleging that the net proceeds thereof had been paid to plaintiff by the sale commissioner, alleging that by reason thereof plaintiff's claim for detriment had been reduced by \$24,683.91, and praying for the balance of the detriment. In view of this state of the record, we must hold that the lien questions raised by the original pleadings are now moot, even though respondent does not raise the point.

It is true that the stipulation for the order of sale contained very full provisions to the effect that it should not in any way prejudice the rights of the parties, whether of sub-

stance or of pleading; but we are unable to give this part of the stipulation effect. The plain fact is that the sale has been made, the money paid to plaintiff, a supplemental complaint filed, and a trial had thereon. There is no longer any question of lien in the case, either of pleading or substance. If we should decide with appellant that there was no lien, there would nevertheless be nothing for the trial court to do, but deduct, as it did, the net amount of the sale from plaintiff's damages. This is exactly the same operation that would have to be followed, if a lien did exist. In other words, whether the tires were sold under a lien or without a lien, the plaintiff would have to give credit for the amount derived from the sale. Appellant nowhere contends that the amount realized from the sale is inadequate.

[9] We see no force in appellant's contention that there was no consideration moving to appellant, either for the extension or renewal of the contract or the waiver of the volume clause. It seems obvious, from the nature of the contract and relations between the parties, that the handling and distribution of appellant's tires by the respondent was a sufficient consideration for the extension or renewal of the contract. Appellant's inability to supply all the tires ordered, or respondent's continuing to act as distributor, was a sufficient consideration for the waiver of the volume clause, if it existed at all in the 1921 contract. There are so many reciprocal rights, duties, and privileges arising from the contractual relation between the parties hereto that it seems idle to designate one covenant as a consideration for another. The mutual covenants are the consideration for the contract, and also for any voluntary modification of the same.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

84 Cal. App. 627

SAN LEANDRO CANNING CO., Inc., v.
PERILLO et al. (Civ. 5793.)★

District Court of Appeal, First District, Division 2, California. July 27, 1927.

Rehearing Denied Aug. 8, 1927. Hearing Denied by Supreme Court Sept. 22, 1927.

1. Corporations §617(5) — Notwithstanding corporation's rights were suspended for failure to pay license tax while its appeal was pending, court will hear appeal after rights are restored (Deering's Gen. Laws, pt. 1, p. 554, § 11).

Notwithstanding that while its appeal was pending plaintiff corporation's rights were suspended under Deering's Gen. Laws, pt. 1, p. 554, § 11, providing that all rights of a corporation should be suspended for failure to pay license tax, held that the court would hear the appeal after the corporation's rights were restored.

2. Corporations ⇨319(5)—Corporation is proper party to complain for misappropriation of its treasury stock.

In an action by a corporation against its directors and another corporation for an alleged sale of its stock in return for the assets of the other corporation at an excessive value, *held* that the corporation was the proper party plaintiff.

3. Corporations ⇨312(3)—Constitutional provision making corporation directors liable for money misappropriated by officers held inapplicable to purchase at excessive price of assets of another corporation (Const. art. 12, § 3).

Constitutional provision making corporation directors liable for money misappropriated or embezzled by the officers of a corporation *held* inapplicable to the purchase at an excessive price of assets of another corporation in which the directors of the purchasing corporation owned all the stock.

4. Corporations ⇨577—Where company's stockholders promote new corporation to take over assets of old company, old company held promoter in fiduciary relation with new.

Where all the stockholders of a company agreed to promote a new corporation to take over the assets of the old company and reorganize it, the old company was *held* to be a promoter of the new and to assume a fiduciary relation to it.

5. Corporations ⇨580—Where corporation's stockholders organize new corporation to which old corporation sells assets, burden of disproving presumption of inadequate consideration is on old corporation (Civ. Code, § 2235).

Under Civ. Code, § 2235, where it is shown that the stockholders of a company organized a new corporation to which the old company sold its assets, in an action against the old company by the new claiming the assets were sold at an excessive price, the burden of disproving the presumption of inadequate consideration and undue influence is on the old company.

6. Corporations ⇨580—Where company's stockholders organize new corporation to which old company sells assets at grossly exorbitant price, undue influence and insufficient consideration are presumed (Civ. Code, § 2235).

Under Civ. Code, § 2235, where all the stockholders of a company organize a new corporation to which the old company sells its assets at grossly excessive price, in an action by the new corporation undue influence and insufficient consideration are presumed.

7. Corporations ⇨580—Complaint alleging that company sold its assets at excessive price to new corporation organized by company's stockholders held not subject to demurrer by company (Civ. Code, § 2235).

Complaint alleging that defendant company sold its assets at an excessive price to a new corporation organized and controlled by the company's stockholders *held* to state a cause of action and not to be subject to demurrer, in view of Civ. Code, § 2235.

8. Corporations ⇨310(1)—Corporate directors must act carefully, honestly, and within scope of their powers.

The directors of a corporation must exercise that degree of care which men ordinarily take of their own concerns, must not act fraudulently, and are bound to confine their activities within the scope of their lawful powers.

9. Corporations ⇨319(6)—Complaint alleging that corporation directors defrauded corporation by purchasing assets of another corporation which they controlled at an excessive price held not subject to demurrer.

Complaint alleging that corporation directors conspired to defraud the corporation and purchased at an excessive price the assets of another corporation of which they were the sole stockholders *held* to state a cause of action and not to be subject to demurrer.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by San Leandro Canning Company, Inc., against L. Perillo and others. Judgment for defendants, and plaintiff appeals. Reversed.

Edwin H. Williams, of San Leandro, for appellant.

Roscoe D. Jones, of Oakland, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants to recover a judgment for money. The defendants appeared jointly and filed a joint demurrer, the joint demurrer was sustained, and a judgment based thereon was entered. From that judgment the plaintiff has appealed.

[1] The defendants interposed a preliminary objection to the hearing of this appeal. The objection rested on the fact that the plaintiff had failed to pay its corporate license tax and that its rights as a corporation were suspended February 27, 1926. The point is without merit. The record before us shows that the action had been tried in the lower court, an appeal had been taken, the transcript filed, and all briefs filed, prior to the 1st day of May, 1925. True it is that the rights of the plaintiff were suspended February 27, 1926. However, it is equally true that on May 16, 1927, its rights were wholly restored. It thus appears that during the period of time during which its rights were suspended, the plaintiff was inactive, and neither of the parties, nor the court, was called upon to take any action. Under these circumstances the statute has not been violated. Deering's General Laws, pt. I, p. 554, § 11; Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446.

The San Leandro Canning Company, hereinafter called the old company, was incorporated on December 11, 1919. It had a capital stock of \$100,000, divided into 1,000 shares of a par value of \$100 each. J. C. Toffelmier,

L. J. Toffelmier, and L. Perillo were its directors. It transacted a canning business for a short time and then it transpired that it needed additional capital.

On November 18, 1920, L. J. Toffelmier, J. C. Toffelmier, L. Perillo, J. E. Faustina, Allen E. Pelton, A. Felizianetti, Sr., and F. Stenzil owned all of the stock of the old company. On that date they entered into an agreement to reorganize the old company by incorporating a new company, the plaintiff herein, and did incorporate it, with a capital stock of \$1,000,000, and transferred the properties of the old company to the new company under an arrangement by which the new company took over all of the assets of the old company and assumed its debts in exchange for a block of stock in the new company of the par value of \$135,000. The stock taken in exchange was delivered to the old company and it divided the stock among the individuals above named. The directors of the new company were the individuals above mentioned. It is alleged that it was a part of the agreement that \$150,000 of the stock of the new company would be sold to the public and that \$69,000 was so sold at par to certain individuals mentioned.

The old company was, by decree of court, dissolved May 15, 1922, and the first three individuals above mentioned were appointed trustees for the purpose of liquidating the old company. The new company became insolvent in April, 1922, and at that time its books were experted, and from the report of the experts the plaintiff learned the above facts.

It is alleged that at the time the new company took over the assets of the old company the said assets exceeded the liabilities to the amount of \$20,000. The plaintiff deducts that \$20,000 from \$135,000, the value of the stock delivered to the old company, and claims damages in the sum of \$115,000.

It is alleged that F. Stenzil is dead, and it will be noted that he is not a defendant.

In connection with the foregoing facts the plaintiff alleges that the defendants were promoters; that they conspired and that they concealed the facts from the plaintiff as to the true valuation of the properties received from the old company. It is not alleged that any false representations were made. It is not alleged that the defendants committed any overt acts of concealment by making any false entries in the records of either the old company or the new company, nor that they omitted to make full and complete entries in said records. The case rests, therefore, on whether the defendants in any instance failed to speak and disclose fully and completely all facts concerning the value of the assets of the old company when it was their legal duty to do so.

It is not claimed, and, indeed, it may not be claimed, that ordinarily one who purchases stock in a corporation occupies the position

of cestui que trust and as such ipso facto stands in a fiduciary relation to the seller of the stock. However, certain combinations of facts may arise which will indicate that status. Promotion schemes sometimes present an example. The plaintiff cites and relies on *Ex-Mission L. & W. Co. v. Flash*, 97 Cal. 610, 32 P. 600; *Burbank v. Dennis*, 101 Cal. 90, 35 P. 444; *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 97 P. 10, 18 L. R. A. (N. S.) 1106; *California-Calaveras Min. Co. v. Walls*, 170 Cal. 285, 149 P. 595; and *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 P. 243. The defendants contend that those cases are not in point. An examination of each case will disclose that the alleged promoters were attempting to develop a scheme in which it was the intention to purchase property for the purpose of a company thereafter to be formed and to sell to that company the properties so purchased at an advance without a full disclosure of the facts. In the instant case it will be noted that the old company was, and had been for some years, the owner of the property involved. When such fact exists there is authority for the contention that no duty rests on the owner of property to disclose the profit, if any, he is making in the transaction. *Densmore Oil Co. v. Densmore*, 64 Pa. 43; *Tompkins v. Sperry*, *Jones & Co.*, 96 Md. 560, 54 A. 254; *Blum v. Whitney*, 185 N. Y. 232, 77 N. E. 1159; *Old Dominion Copper Co. v. Lewisohn*, 210 U. S. 206, 28 S. Ct. 634, 52 L. Ed. 1025; *Vasey v. New Export Coal Co.*, 89 W. Va. 491, 109 S. E. 619; *Berry v. Simpson*, 194 Ky. 545, 239 S. W. 1049; 1 *Thomp. Corp.* (2 Ed.) §§ 108 and 123. The distinction which we have just indicated is clearly pointed out by the Supreme Court in *Burbank v. Dennis*, 101 Cal. 90, at page 98, 35 P. 444.

[2] The third point made by the plaintiff is that the plaintiff is the proper party to complain for the misappropriation of its treasury stock. *Ex-Mission L. & W. Co. v. Flash*, supra, supports it in this contention.

[3] The plaintiff makes some contention at least that its cause of action rests on section 3 of article 12 of the Constitution. That contention may not be sustained. Since this action was commenced the Supreme Court, in *Dean v. Shingle*, 198 Cal. 652, 246 P. 1049, 46 A. L. R. 1156, has carefully analyzed and defined the meaning of that section. An examination of that case will disclose that the facts of this case do not bring it within the purview of the provision of the Constitution just cited.

[4-6] What we have just said, however, does not dispose of the case. The plaintiff's pleading presents other facts which must be considered. The old company, through J. C. Toffelmier, L. J. Toffelmier, and L. Perillo, its board of directors, organized the new company and installed as its board of directors J. C. Toffelmier, L. J. Toffelmier, L.

Perillo, Allen E. Pelton, J. E. Faustina, A. Felizianetti and F. Stenzil. The persons so installed constituted and were all of the stockholders of the old company. After the new company was formed the old company transferred to the new company its assets and took over from the new company a block of stock at par value amounting to \$135,000. It is not alleged that the new company had any independent advice. It is patent that in the transfer or exchange the new company did not have an independent board of directors to determine, in the interest of the new company, whether the terms of the exchange were fair or otherwise. The transaction between the trustee, the old company, and its beneficiary, the new company, during the existence of the trust, by which the trustee obtained an advantage from the beneficiary, it is presumed was entered into by the latter without sufficient consideration and under undue influence. The complaint contains no allegations to the contrary. As the record stands, the burden rests on the old company to come forward and plead and prove such facts as will show that the new company was not overreached. Failing to come forward and make the showing above mentioned, the old company is liable to the plaintiff. The views which we have just stated find full support in *Thomp. Corp.* (3d Ed.) § 118, and specially in *Lagunas Nitrate Co. v. Lagunas Syndicate* (1899) 2 Ch. 392. That case is very long, but the facts in all material respects are parallel to the facts presented in the record before us. The syndicate had become the owner of a large plant located in Chile. It was known as *Lagunas Nitrate Works*. After operating it for a time the syndicate proceeded to separate the mining department from the factory department and to organize the *Nitrate Company* to take over and operate the factory. To do this it formed the plaintiff company. The new company had a capital of £900,000. Out of that capital £300,000 were to be delivered to the syndicate in fully paid-up shares; and stock in the sum of £550,000 was to be sold to the public for cash and that cash was to be delivered to the syndicate. The company was organized with a board of directors, including the seven directors of the syndicate and two other persons selected by them. The latter two were agents of the syndicate selected by it to fill out the board of directors. After the organization of the company the syndicate transferred to it for £400,000 property which had cost the syndicate £110,000. These transactions occurred in June, 1894. The venture was not successful. When it transpired that the enterprise was about to fail, the stockholders elected a new board of directors, and then commenced an action against the syndicate and the original board of directors to obtain relief. This action was heard and determined by *Romer, judge*. From his judgment an appeal was taken to

the Court of Appeal. All of the judges concurred in deciding that the syndicate was the promoter of the company and as such that it had assumed a fiduciary relation toward the company, and as to this part of the case the court cited and followed *Erlanger v. New Sombrero Phosphate Co.*, 5 Ch. D. 73, 3 App. Cas. 1218. It further held that the relation of trustee and beneficiary continued until the transfer had been fully consummated.

[7] It is patent, therefore, that the facts of this case, which we have recited above, show that as to the plaintiff company the old company was a promoter and assumed a fiduciary relation to the plaintiff. Such being the facts, it is settled by the provisions of section 2235 of the Civil Code that the plaintiff has its remedy against the old company. The demurrer of the trustees of the old company should have been overruled.

[8] This brings us to a consideration of the liability of the six individuals who are also made defendants in this case. They were the directors of the new company. As such they were bound to exercise that degree of care which men of common prudence take of their own concerns; they were bound to act honestly and not fraudulently; and they were bound to confine their activities within the scope of their lawful powers. 2 *Thomp. Corp.* (3d Ed.) § 1429; 4 *Fletch. Cyc. Corp.* §§ 2504, 2505, 2941, and 3024; *Lagunas Nitrate Co. v. Lagunas Syndicate*, supra; *Scott v. Depeyster*, 1 *Edw. Ch. (N. Y.)* 513, 543; *Savings Bank's Assignee v. Caperton*, 87 Ky. 306, 8 S. W. 885, 12 *Am. St. Rep.* 488, 497; *San Pedro Lumber Co. v. Reynolds*, 121 *Cal.* 74, 81-82, 53 P. 410.

[9] Having ascertained the duties and liabilities of the said individuals to the new company, it becomes necessary to turn to the complaint and ascertain the allegations it contains with reference to the individuals. The complaint contains much irrelevant matter. As a ruling on a motion to strike is not before us, we will not pause to pick out each irrelevant statement and show wherein it is irrelevant. However, the complaint contains some allegations which, in the face of a demurrer, are not irrelevant. It alleges that the assets of the old company were of a net value of \$20,000 and that they were transferred to and accepted by the new company at a value of \$135,000. In this same connection it is alleged that the directors entered into a conspiracy to transfer the properties of the old company to the new company, "with the intent and for the purpose of defrauding the plaintiff corporation," and that the new company was caused to issue the block of stock to the old company at an exorbitant price "for the purpose of cheating and defrauding" the new company. Bearing in mind that the individual defendants, as directors of the new company, stood in a fiduciary relation to the new company, the allegations

just quoted sufficiently pleaded fraud. *Woodruff v. Howes*, 88 Cal. 184, 187-190, 26 P. 111; *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 573, 126 P. 351, 42 L. R. A. (N. S.) 125. For the reasons last stated, the demurrer of the directors of the new company should have been overruled.

The judgment is reversed, with directions to the trial court to overrule the demurrer and allow the defendants to answer.

We concur: CASHIN, J., Acting P. J.; NOURSE, J.

84 Cal. App. 635

SAN LEANDRO CANNING CO., Inc., v. PERILLO et al. (Civ. 5794; S. F. 11475.)★

District Court of Appeal, First District, Division 2, California. July 27, 1927.

Rehearing Denied Aug. 26, 1927. Hearing Denied by Supreme Court Sept. 23, 1927.

1. Corporations ⚡319(6)—Allegations showing that stock sales were made unlawfully held not to show salesmen were unlawfully paid, making directors liable for unlawful expenditures (Const. art. 12, § 3).

In an action against corporation directors by the corporation to recover for the payment of commissions to certain salesmen, including the defendant directors, allegations showing that stock sales were made in an unlawful manner held not to show that the salesmen were unlawfully paid, so that the directors were liable under Const. art. 12, § 3, for making unlawful expenditures.

2. Licenses ⚡39—Violation of Corporate Securities Act in making sales will not give corporation right to recover commissions paid stock salesmen (Corporate Securities Act).

Violation of the Corporate Securities Act (St. 1917, p. 673), as to the manner of making sales, will not constitute a cause of action in favor of the corporation to recover commissions paid to its salesmen.

3. Licenses ⚡39—Violation of Corporate Securities Act in making sales will not constitute cause of action against directors for paying salesmen (Corporate Securities Act; Const. art. 12, § 3).

A violation of the Corporate Securities Act (St. 1917, p. 673), as to the manner of making sales, will not give the corporation whose salesmen have violated the act a cause of action, under Const. art. 12, § 3, against its directors, for alleged unlawful expenditures in paying commissions to the salesmen.

4. Licenses ⚡39—For wrongful acts of salesmen in making sales, Corporate Securities Act gives no cause of action to corporation (Corporate Securities Act).

The Corporate Securities Act (St. 1917, p. 673), gives no cause of action to corporation for wrongful acts of its salesmen in making sales in violation of its provisions.

5. Corporations ⚡308(10)—Payment to directors for selling stock held not unlawful, notwithstanding no prior agreement to pay was shown.

In an action by a corporation to recover commissions paid to certain of its directors for selling stock, in the absence of allegations of fraud, held that the payment was not void or voidable notwithstanding no prior agreement to pay was shown.

6. Corporations ⚡79—That corporation salesman falsely represented they sold without receiving commissions will not give corporation right to recover commissions paid, where no detriment to corporation is shown.

The fact that salesmen of a corporation in making sales falsely represented that they were not receiving any commissions for their services will not give the corporation a right to recover back all compensation paid for making the sales, where no facts showing detriment to the corporation are shown.

7. Corporations ⚡79—Where corporation is damaged by misrepresentations of its stock salesmen, injuries pleaded fix amount of recovery.

Where a corporation is damaged by misrepresentations made by its salesmen, the amount of its recovery is fixed by injuries set forth in the pleadings, and unless injuries are so pleaded there can be no recovery.

8. Corporations ⚡79—Corporation having seven directors cannot recover commissions paid to two stock salesmen merely because they were directors.

Commissions paid to two salesmen cannot be recovered by the corporation merely because the salesmen were also directors, where there were five other directors and it was not shown that the claims for commissions were not passed upon and approved by the disinterested directors.

9. Corporations ⚡319(6)—Corporation's allegations that permit to sell stock allowed only 15 per cent. commissions and more was paid held to state cause of action against directors for unlawful expenditures (Const. art. 12, § 3).

In an action by a corporation against its directors to recover for commissions alleged to have been unlawfully paid, allegations that the permit from the corporation department provided that commissions for the sale of stock should not exceed 15 per cent. and that the amount paid for selling \$69,249.61 worth of stock was \$19,551.76 held to state cause of action against the directors for unlawful expenditures, under Const. art. 12, § 3.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by San Leandro Canning Company, Inc., against L. Perillo and others. Judgment for defendants, and plaintiff appeals. Reversed.

Edwin H. Williams, of San Leandro, for appellant.

James M. Koford, of Oakland, for respondents.

STURTEVANT, J. The plaintiff commenced an action to recover moneys from the defendants. The defendants interposed a demurrer which pleaded that the plaintiff's second amended complaint did not state facts sufficient; that plaintiff's alleged cause of action was barred by the provisions of subdivision 4 of section 338, section 359, and subdivision 1 of section 338 of the Code of Civil Procedure; and certain other matters not necessary to be stated. The demurrer was sustained, the plaintiff declined to amend, and thereupon judgment was entered in favor of the defendants. From that judgment the plaintiff has appealed and has brought up the judgment roll.

The defendants interposed a preliminary objection to the hearing of this appeal. That objection was based on the same facts and involved the same provisions of law as the preliminary objection made in *San Leandro, etc., Co. v. Perilo et al.* (No. 5793, Cal. App.) 258 P. 666, this day filed.

From an inspection of the judgment roll it appears that the action was commenced on the 21st day of March, 1924. The action was not barred on said date by any statute of limitations.

On November 8, 1920, the plaintiff was a corporation having an unissued capital stock of \$1,000,000, divided into 100,000 shares of the par value of \$100 each. It had a board of directors of seven members, the six defendants and another, F. Stenzil, who was deceased at the time this action was commenced. The directors entered into a plan to purchase the plant of another corporation for \$135,000 to be paid for in the corporate stock of the plaintiff and to sell \$150,000 of the treasury stock. It applied to the corporation department and obtained a permit. The permit, among other things, provided that the compensation to be paid for the sale of said shares should not exceed 15 per cent.; nor should any commission or compensation be paid in connection with any sale made within this state except to an agent or broker holding a certificate from the commissioner of corporations, then in effect, authorizing him to act as plaintiff's agent; that a true copy of the permit be exhibited and delivered to each prospective subscriber before his subscription should be taken. The permit authorized the sale of the stock for 25 per cent. cash, and the balance of the purchase price to be evidenced by promissory notes payable on or before 7½ months. Thereafter stock in the sum of \$69,249.61 was sold by Allen E. Pelton, J. E. Faustina, L. B. Mills, P. K. Braly, G. A. Prosser, F. B. Cross, and W. J. Justin. The first two were directors and are made defendants. The other persons were not directors and are not made defendants. It is alleged that commissions amounting to \$16,193.66 were paid the director-defendants as commissions for the sale of said stock, but it is not alleged how many shares were sold

by each of the director-defendants, nor how many shares were sold by any one of the other salesmen, although it is alleged that the other salesmen were paid \$3,358.10. It is not alleged how many shares were sold.

[1-3] It is alleged: (1) That no one of the salesmen "was an agent or broker holding a certificate then in effect from the commissioner of corporations authorizing him to act as plaintiff's agent"; (2) that no one of the salesmen "exhibited or delivered to any prospective purchaser of, or subscriber to, said stock" a copy of the commissioner's permit; (3) that the defendants prepared and printed a prospectus, but in this connection it is alleged that said prospectus "was not filed in the office of the corporation commissioner and that its contents was concealed from said commissioner." Relying on these allegations, the plaintiff contends that the payment of all commissions was unlawful and that for making unlawful expenditures these defendants are liable. Const. art. 12, § 3. The contention is too broad. The alleged facts do not show that the expenditures for commissions were unlawful. They show, at most, that the sales were made in an unlawful manner. Those allegations show a violation of the Corporate Securities Act (St. 1917, p. 673), as to the manner of making sales and might justify, against the salesmen, the criminal proceedings mentioned in that act, but they did not constitute nor tend to constitute a cause of action in favor of the plaintiff to recover the commissions back, nor to make these defendants responsible therefor.

[4] For the alleged wrongful acts of the salesmen the Corporate Securities Act gives no cause of action in favor of the plaintiff. The facts alleged show how the new purchasers of stock may have been wronged and how such purchasers may have had a cause of action against the salesmen, but not against the directors who did not act as salesmen. But no facts are pleaded showing a cause of action in favor of the plaintiff corporation.

[5] As to the two director-defendants, it is alleged that neither of them had a prior contract or agreement with said corporation whereby they or either of them, was to be paid a commission for making sales of the corporate stock. As we understand the argument of the appellant, it is to the effect that the claims for compensation of the two director-defendants were, therefore, ultra vires the corporation and could not legally be paid. If this were an action by said directors to recover compensation for the value of their services so rendered, it will be conceded at once that a prior authorization would be of importance. But that rule is not without limitation. In *Bassett v. Fairchild*, 132 Cal. 637, 643, 64 P. 1082, 1084 (52 L. R. A. 611), the court said:

"Now, it has been held that directors of corporations cannot, without previous express contract, receive compensation for such ordinary

services as are usually rendered by directors without pay, for the common understanding, as declared by judicial decisions, is, that such services are presumed to be rendered gratuitously. But that presumption does not apply to those onerous services performed by officers and agents of a corporation, though they be also directors, for which compensation is usually demanded and allowed, and which could not reasonably be expected to be performed for nothing."

See, also, *Hughes v. Pacific Wharf, etc., Co.*, 188 Cal. 210, 216, 205 P. 105. But we are running afield. This is not an action by a director to recover compensation. The complaint alleges that the directors have already been paid. This is an action to recover back those payments. Counsel do not cite any authorities, and we know of none, to the effect that, in the absence of allegations of fraud, the mere averment that without a prior authorization the payment to a director for services admittedly rendered would be either a void or a voidable transaction.

[6, 7] It is alleged the defendants caused to be printed and circulated a prospectus which stated in effect that the new company was itself selling its shares of stock and in this manner was saving to the company the cost and expenses of hiring solicitors to make the sales. As stated above, the corporation was, in truth and in fact, paying commissions authorized in the sum of 15 per cent. Assuming, although it is doubtful (*Blewitt v. McRae*, 88 Wis. 280, 60 N. W. 258), that the representation so made was a material false representation, the alleged facts might be of importance in an action by one of the new purchasers of the stock; but one of the new purchasers is not maintaining this action. This action is brought by the new company against its former directors. It is not pleaded that by reason of the false representations the plaintiff failed to make sales. It is not pleaded that by reason of the false representations litigation was commenced against the plaintiff. In short, no fact or facts are pleaded showing that the plaintiff was injured in any respect whatsoever by reason of the false representations. The case, therefore, stands as follows: The company authorized agents to sell its stock; the agents did so and in making the sales falsely represented that they were acting gratuitously; purchasers bought and paid for the stock and are not complaining of their bargain. The company accepted the payments and retained the same, and does not make any contention that it did not get value received; but in this action it seeks to recover back all of the compensation paid to its agents for making the sales. In making this attempt it has pleaded no facts showing wherein it has suffered detriment. In *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, at page 571, 126 P. 351, 355 (42 L. R. A. [N. S.] 404), the court said: "It is fundamental, of course, that no matter what

the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action." Those injuries must be pleaded as they fix the amount, if anything, which the plaintiff may recover. 7 *Labatt's Master and Servant*, § 2595; 2 C. J. 734, § 400.

[8] In this connection we have not overlooked the argument that the director-defendants employed and paid themselves. But estimating the pleading with that argument in mind, the complaint is seriously defective in failing to allege other material facts. It appears that the plaintiff had a board of seven directors. It is alleged that two of the directors were interested. That would leave five directors who were not interested. There is not a trace of averment that the claims for compensation presented by the two director-defendants were passed on by those two interested defendants, nor that said claims were not passed and approved by a full quorum of disinterested qualified directors of the plaintiff corporation. Under those circumstances the plaintiff would have no reason to complain. *Wickersham v. Crittenden*, 93 Cal. 17, 32, 28 P. 788; *Wickersham v. Crittenden*, 106 Cal. 327, 39 P. 602.

The plaintiff cites and relies on *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 P. 496. In that case the plaintiff was seeking to recover secret profits from the defendant executor of *Arthur R. Briggs*, deceased. *Briggs*, in his lifetime, was president of the *Western States Life Insurance Company*. As such, in a stock deal, he had secretly obtained large profits. Not until after his death did the corporation or any of its other officers learn any of the facts. In the instant case no kindred facts are alleged but, on the contrary, it appears that all of the facts were fully disclosed and were entered on the books of the plaintiff corporation and that the present officers of the plaintiff obtained from those books all of the facts which they pleaded in this complaint. Under these circumstances there was no secrecy or concealment in the sense that those factors are material in alleging a cause of action as for fraud. *Thomp. on Corp.* (3d Ed.) § 119; *Fletcher, Cyc. Corp.* § 136; *Blood v. La Serena Land & Water Co.*, 134 Cal. 361, 370, 66 P. 317. The case is not in point.

It thus appears that, considered in the light of each of the foregoing theories contended for by the plaintiff, its complaint fails to state a cause of action against all of the defendants or any of them. But the facts pleaded present another theory, which we will now take up.

[9] The ordinary meaning of the language used in the complaint is that the defendants sold treasury stock at par for \$69,249.61 and collected that amount in cash. If so, they sold 692.49 shares. If so, the total of the lawful costs of those sales measured by the terms of the permit, would be 15 times

629.49 or \$10,387.35. But it is alleged the defendants have paid \$19,551.76 as the costs of those sales. It follows they paid out unlawfully \$9,164.41. For those unlawful expenditures the directors are liable to the plaintiff. *Dean v. Shingle*, 198 Cal. 652, 246 P. 1049, 46 A. L. R. 1156. All that we have said on this point is based on the language used by the plaintiff in framing its complaint. It may transpire that the costs on the sale of no single share were in excess of the amount authorized by the permit, and, in that event, there would be no unlawful expenditure. However, such facts are not presented by the record in its present form. The demurrer should have been overruled.

The judgment is reversed.

We concur: CASHIN, J., Acting P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a hearing by this court after decision by the District Court of Appeal in and for the First Appellate District, Division Two, reversing judgment herein, is denied. In denying the same, however, we withhold our approval as to that portion of said decision which indicates that upon the trial of said action the limit of the plaintiff's recovery would be the sum of \$9,164.41. Upon the question as to what amount the plaintiff would be entitled to recover upon proof of the facts averred in his complaint we express no opinion.

84 Cal. App. 750

GRASS v. RINDGE CO. (Civ. 5060.)★

District Court of Appeal, Second District, Division 1, California. Aug. 6, 1927.

Rehearing Denied Aug. 31, 1927. Hearing Denied by Supreme Court Oct 3, 1927.

1. Appeal and error ⇨973—Trial court's action on motion to dismiss action for want of prosecution will not be disturbed, unless discretion has been grossly abused (Code Civ. Proc. § 583).

Action of trial court on motion to dismiss an action for want of prosecution, under Code Civ. Proc. § 583, will not be disturbed on appeal, unless court's discretion has been grossly abused.

2. Dismissal and nonsuit ⇨60(6)—Refusal to dismiss action for want of prosecution for more than four years, where defendant consented to some continuances, held not abuse of discretion (Code Civ. Proc. § 583).

Refusal to dismiss action where plaintiff had failed to prosecute same for period of more than four years and three months after filing of answer because plaintiff hoped to settle case out of court, where defendant consented to some continuances, held not abuse of discretion, under Code Civ. Proc. § 583.

3. Appeal and error ⇨1002—Finding of jury on value of attorneys' services on conflicting evidence closed issue.

Where attorneys, competent and experienced in character of litigation, testified the rea-

sonable value of services to be as low as \$7,500 and as high as \$55,000, issue as to value of attorneys' services was closed by finding of jury.

4. Attorney and client ⇨167(2)—Whether client and attorney agreed that payment for services was full, unless attorney by future proceedings saved client something, held for jury.

In action for attorney's fees, question whether or not, in view of situation of parties and their relation to entire transaction, it was likely or probable that they contracted that sum paid should constitute full payment for all services theretofore performed or thereafter to be performed by attorney in every proceeding for or connected with opening of street through lots of defendant, unless attorney should by future proceedings save defendant something that it would otherwise lose, held for jury.

5. Appeal and error ⇨1011(1)—Where evidence is conflicting, if there is substantial evidence to support conclusion reached by trial court, conclusion cannot be reviewed on appeal.

Where evidence is conflicting, if there be substantial evidence to support conclusion reached by trial court, conclusion is not open to review on appeal.

6. Attorney and client ⇨166(1)—In action for attorney's fees, in which defendant claimed sum paid was full payment, evidence held to support verdict for plaintiff.

In action for attorney's fees, in which defendant claimed that sum paid was full settlement for services, unless attorney in future proceedings saved defendant something, evidence held sufficient to support verdict for plaintiff.

7. Attorney and client ⇨167(3)—In action for attorney's fees, instruction that burden was on client to prove that arrangements theretofore existing between parties had later been changed as defendant claimed held not error (Code Civ. Proc. § 1869).

Under Code Civ. Proc. § 1869, providing that each party must prove his own affirmative allegations, instruction in action for attorney's fees, in which defendant set up new contract as affirmative defense, that burden was on defendant to prove by preponderance of evidence that arrangements which had theretofore existed between defendant and attorney, namely, that he was to work for what his services were reasonably worth, had been later changed in respects claimed by defendant, held not error, especially in view of other instructions.

8. Interest ⇨19(1)—Instruction permitting allowance of interest, in suit on quantum meruit for attorney's fees, prior to decision, held erroneous.

In action on quantum meruit for attorney's fees, instruction allowing jury, if they found for plaintiff, to allow interest prior to decision of case, held erroneous.

9. Appeal and error ⇨1068(4)—Instruction erroneously allowing interest prior to decision held cured by remittitur.

In action for attorney's fees on quantum meruit, where erroneous instruction permitted jury to allow interest prior to decision of case, error was cured by remittitur of interest.

★Rehearing denied. Hearing denied by Supreme Court.

10. Trial $\S$ 243—Instruction permitting allowance of interest prior to decision held not in conflict with instructions restricting damages to amount stated in complaint.

Instruction permitting allowance of interest on quantum meruit prior to decision of case held not in conflict with instructions restricting damages to be allowed to amount prayed for in complaint, since jury was told to add interest to whatever amount they found.

11. Attorney and client $\S$ 167(3)—Instruction that evidence of conversations subsequent to payment of sum, which defendants claimed was in full settlement of attorney's services, unless attorney saved them something, could not make contract pleaded, held correct.

In action for attorney's fees, instruction that evidence of conversations with attorney subsequent to payment of certain sum, which clients claimed attorney had agreed to accept in full settlement, unless he thereafter saved clients something, could not make contract such as was pleaded, but could be considered only as bearing on question whether statement of defendants' manager as to conversations testified to by him as having occurred with attorney were true, held correct.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action for attorney's fees by E. E. Grass against the Rindge Company, in which defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals. Affirmed.

Wheaton A. Gray and Grant Jackson, both of Los Angeles, for appellant.

Chandler, Wright & Ward and Meserve & Meserve, all of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for respondent.

McLUCAS, Justice pro tem. This is an appeal by the defendant from a judgment in favor of the plaintiff as assignee of Meserve & Meserve, attorneys at law, for a balance due of attorney's fees for services rendered by Edwin A. Meserve to defendant corporation. The complaint alleged that defendant employed Edwin A. Meserve and Shirley E. Meserve as its attorneys to represent said defendant in all proceedings connected with and growing out of the Broadway opening proceedings in the city of Los Angeles, soon after said proceedings were initiated in the spring of 1913; that the said Edwin A. Meserve and Shirley E. Meserve, and particularly the said Edwin A. Meserve, under said employment rendered services for said defendant in various proceedings before the city council of Los Angeles and in various actions commenced in the superior court of Los Angeles county, some of which were appealed to the District Court of Appeal and to the Supreme Court of the state of California; that the said services so rendered were and are of the reasonable value of \$32,500, which said sum the defendant agreed to pay there-

for; that no part of said sum has been paid other than the sum of \$6,250, which was paid by said defendant on account, the balance of \$26,250 remaining unpaid; that on or about the 19th day of January, 1917, at the special instance and request of said defendant, said Edwin A. and Shirley E. Meserve ceased to be attorneys for the said defendant in the matter of the said opening of Broadway. The answer alleges that defendant employed Edwin A. Meserve alone to perform the services set forth in the complaint; denies that said services were or are of the reasonable value of \$32,500, or any sum in excess of the sum of \$6,250 actually paid to said Edwin A. Meserve; denies that defendant agreed to pay said sum of \$32,500, or any other sum in excess of \$6,250; and denies that the said sum of \$26,250, or any other sum, remains unpaid. For a separate defense, the defendant alleged that at the time of the employment of the said Edwin A. Meserve no agreement was made as to what he should receive for his services; but that some time thereafter, on or about May 6, 1914, a retainer fee of \$1,250 was paid to said Edwin A. Meserve, at his special instance and request, by the defendant; that thereafter, on or about July 28, 1914, the said Edwin A. Meserve requested the defendant to pay him the further sum of \$6,250 for the services performed and to be performed by him in said litigation referred to in the complaint; that the said Edwin A. Meserve stated that he would charge defendant nothing more whatever, unless by virtue of the future proceedings he should save defendant something; that said Edwin A. Meserve did not succeed in saving any sum for the defendant; that thereafter and before the proceedings in the matter were concluded he insisted upon retiring from the case and refused to proceed further with the case unless he should be paid at once the sum of \$5,000, and thereby compelled the substitution of another attorney and thereby failed and refused to proceed to a conclusion of said proceedings, or to a point where it could be determined that he (the said Meserve) had saved anything for the defendant, and that he has in fact saved no sum or thing for the defendant; that thereafter and subsequent to the payment of the said sum of \$6,250 defendant heard nothing from said Edwin A. Meserve touching the matter of fees in said case for nearly two years, or until the month of March, 1916, when the defendant received two letters from the said Edwin A. Meserve, notifying the defendant that it would be necessary for the said Meserve to go to San Francisco and appear before the Supreme Court on a petition for a rehearing in said case, presenting a bill for \$200 to cover a fee and expenses for the trip to San Francisco, as being separate from the regular work of the case; that defendant, relying upon said representation that said trip was separate from the regular work of

the case, paid to said Meserve the said sum of \$200. Defendant further alleged that all of defendant's agreements have been fully performed, and all of plaintiff's demands sued for have been fully paid, and that no interest is due or payable on any claim sued upon. By way of cross-complaint, the defendant sues upon an account stated for a balance of \$296.23. The case was tried before a jury and a verdict for plaintiff was returned in the sum of \$25,795.22. Judgment was entered accordingly on March 14, 1924, and reduced to \$17,200 by order of court on April 10, 1924.

On June 28, 1921, defendant moved the court to dismiss the action upon the ground that plaintiff without reasonable excuse had failed to prosecute the same for a period of more than four years and three months after the filing of the answer on March 8, 1917. In support of the motion for dismissal, defendant filed the affidavits of Wheaton A. Gray, attorney for defendant, and F. B. Scotton, manager for defendant corporation. It appears from the affidavit of Wheaton A. Gray that on July 19, 1917, said cause was duly set for trial on January 2, 1918, and thereafter continued 13 times by agreement of the parties; that said continuances were as a rule made at the suggestion of plaintiff's attorney; that on October 4, 1920, said case, on motion of plaintiff, went off calendar; that on June 15, 1921, defendant was served by plaintiff with a notice of motion to set the case for trial; that these various apparent efforts to bring the case to trial, followed by the numerous continuances had, were generally accompanied by positive declarations that the case would be immediately pressed to trial, unless some settlement of it should be had in the meantime. According to the affidavit of Scotton, no officer or representative of defendant corporation ever had any purpose or intention to settle said case, but that they at all times had stated to all persons that they would not settle the case. Plaintiff filed counter affidavits of J. P. Chandler and Edwin A. Meserve, attorneys for plaintiff, and also the affidavit of Howard W. Wright, employed in J. P. Chandler's office. It is stated in the affidavit of J. P. Chandler that Edwin A. Meserve had been trying to settle the case because he was reluctant to try an action against a former client for legal services; that the different continuances were not all made at the request of plaintiff; that several of said continuances were at the request of the defendant; one at the request of a mutual friend of Edwin A. Meserve and the stockholders of the defendant corporation, in order that the case might be settled if possible; "that each time that the case was set for trial and the time for trial approached, Judge Wheaton A. Gray rang up affiant and asked of affiant if Edwin A. Meserve desired to try the above-entitled case at the time for which the same was set; that each time af-

flant stated that he would see Mr. Meserve and after seeing said Edwin A. Meserve, affiant stated to Judge Gray exactly what Mr. Meserve had stated, namely, that he would rather not try the case if it could be avoided, in the hopes that the same might be settled, and if the defendant was willing and did not itself care to try the case, he (Meserve) would like to have the same continued for trial, each time in the hopes that a settlement might be arrived at; that upon affiant thus stating the matter to Judge Gray, each time Judge Gray stated in reply, in effect, that the case could be continued and reset for trial; that the said case was last continued on the 17th day of May, 1920, at which time his honor, Judge Paul McCormick, in his department of the superior court, stated that, if counsel did not try the case at the time to which it would be continued, the court would be obliged to strike the case from the calendar, to be reset on motion, that he could not again consent to carry the case along in that way; that defendant was advised of this position of Judge McCormick and the case, with that understanding between the parties, was continued to the 4th day of October, 1920; that shortly prior to said 4th day of October, 1920, affiant and said Wheaton A. Gray again had a conversation over the telephone in regard to the trial of the case, at which time Judge Gray again asked of affiant as to whether plaintiff desired to try the case at this time; that affiant told Judge Gray that he would consult with Edwin A. Meserve, which he did, and thereupon advised Judge Gray of what said Edwin A. Meserve had stated, namely, that he (said Edwin A. Meserve) still had hopes that the case would be settled without being tried, and that, if Judge Gray was willing, he would again prefer to have the case continued even if it had to go off the calendar to be reset; that thereupon Judge Gray stated, in effect, that he was willing that such should be the course, he being then advised that the case would not be continued by Judge McCormick to a definite date, but would be ordered off the calendar to be reset; that never at any time was there the slightest suggestion of any kind or character that plaintiff did not intend to try said case in the event the same could not be settled, on the contrary, each and every time that affiant talked with Judge Wheaton A. Gray, the attorney for the defendant, about a continuance or about the case not being tried at the time for which the same was set, or about its being off the calendar, affiant stated in effect to said Wheaton A. Gray that said Edwin A. Meserve still hoped that the case might be settled without the necessity of trial, and Judge Gray each time was informed, in effect, that, if the same could not be settled, the case would have to be tried." Edwin A. Meserve in his affidavit states:

"That at one time affiant was approached by Mr. George I. Cochran, president of the Pacific

Mutual Life Insurance Company, a friend of affiant's and a friend and business associate of the four stockholders of the defendant corporation; that said stockholders are all members of one family, namely, the Rindge family; that Mr. Cochran stated to affiant that, if said action could not be continued, he would have Mr. Fred Rindge come to Los Angeles and confer with affiant to see if said action could not be settled; that affiant conferred with Mr. Rindge and told him the minimum amount at which he would settle; that Mr. Rindge was not willing to pay said amount; that the conference between affiant and Mr. Rindge was very agreeable and pleasant, and, so far as the same was personal, did not even take on the form of a dispute; that affiant stated to Mr. Rindge that he could not settle said dispute or claim for any less than the amount which affiant then stated to Mr. Rindge; that from time to time thereafter it was suggested to affiant, by friends of both parties, that the same could still be settled without litigation, and among those who stated said fact to affiant was Mr. Henry W. O'Melveny, through whom affiant was employed in the actions resulting in the claim for attorney's fees presented in this action; that whenever the case was set for trial and before the time when the case was to be called for trial, affiant was consulted by Mr. J. P. Chandler, who stated that he had talked with Judge Wheaton A. Gray, and that Judge Wheaton A. Gray wanted to know whether or not affiant would want said case tried on the day for which the same was set; that affiant each time told Mr. Chandler to state to Judge Gray that he was still in hopes said case could be settled, that he did not desire to try that kind of a case if it could be avoided, and that, therefore, it would please him if the case could be continued to some later date in the hopes of such a settlement."

Howard W. Wright, an attorney associated with J. P. Chandler, made affidavit that affiant was present in court on May 17, 1920, after being informed by J. P. Chandler that it was the desire of the parties that the trial be continued to October, 1920, "and informed the court that the parties to the above-entitled action had agreed that the trial of the same might be continued until some date in October, 1920; whereupon the court announced that, if the said case was not tried upon the 4th day of October, 1920, the court would order the said cause off the calendar to be restored upon motion of either party. That on or about the 3d day of October, 1920, affiant was informed by Jefferson P. Chandler, Esq., that negotiations for a settlement of the above-entitled action were pending, and that it was understood between the parties thereto that the matter might go off calendar, and that, therefore, it was unnecessary for any one to be present in court on the 4th day of October, 1920. That affiant further states that on or about the 22d day of June, 1921, he examined the minute orders of the clerk in department 15 of the above-entitled court, and that said minutes show that on the 4th day of October, 1920, the above-entitled cause went off calendar, to be restored upon motion of either

counsel, and the following order was thereupon made: 'E. El. Grass v. Rindge Co., etc., et al., No. B 47645. No one appearing, cause off calendar, to be restored upon motion of either counsel.'" Wheaton A. Gray made affidavit in rebuttal:

"That as attorney for the defendant in the above-entitled action he received no instructions from his client, or from any other source at any time to the effect that the said Rindge Company desired a continuance of said cause, nor did he receive any instructions to continue the case, nor did he ever request or desire a continuance on his client's account, or at his client's desire. He was, however, at all times ready and willing to grant a continuance and did consent to all the continuances that were had, except the last, which were each and all made at the request of the plaintiff and her attorney. That while the plaintiff or her attorney frequently requested a settlement of the case this affiant always replied to the offer of settlement to the effect that his client would not under any circumstances consent to any settlement, and would not pay to the plaintiff a single dollar in the way of settlement. That this affiant carefully avoided holding out any hope to the plaintiff or her attorneys that any settlement of the case whatever could be had short of an absolute dismissal of it on the part of the plaintiff without the payment of any money whatever. That this affiant knows that the officers, attorneys, and agents of the defendant each and all were of the firm purpose at all times to refuse to and abstain from paying any sum whatever to the plaintiff or to her assignor on account of the matter set up in the complaint. That affiant stated the same as emphatically as it could be stated to the attorney for the plaintiff every time said attorney said anything to him about settlement. That since said suit was begun there never has been any negotiation for a settlement or a compromise of this case entered into in which defendant or any of its officers, agents, or attorneys took any part whatever. That each and all of the same have at all times declared that no settlement or compromise of the case could be had and they have each and all taken particular pains to impart to the plaintiff, her assignor, agents, and attorneys a knowledge of their purposes and intentions in this regard. That no attorney for the defendant was present on the 17th day of May, 1920, at which time his honor, Judge Paul McCormick, stated that, if counsel did not try the case at the time to which it would be continued, the court would be obliged to strike the case from the calendar. That this affiant is the only attorney of the defendant, and that neither this affiant, nor any other representative of the defendant, was present at the time said case was dropped from the calendar. That he received notice over the telephone from Mr. Chandler that it was so dropped. That affiant was not advised in connection with said case going off the calendar that it would be ordered off the calendar to be reset, but, on the contrary, he was advised by Mr. Chandler after it had been ordered off the calendar that it had been so ordered off the calendar and nothing was said by Mr. Chandler at that or any other time about its ever being thereafter reset or about its being thereafter to be set, nor did affiant ever agree or stipulate orally or in writing that the case should again

be reset for trial after it was ordered off the calendar by Judge McCormick for failure to prosecute as aforesaid, and that while as a fact, and as alleged in Mr. Chandler's affidavit, he, as attorney for plaintiff, did frequently inform this affiant that said case would have to be tried unless it was settled, this affiant met all such statements with the reply that there was no possibility of ever settling the case; that he had talked with Mrs. Rindge, the president of the corporation defendant; that he knew she would never consent to any settlement; and that Mr. Meserve was acquainted with Mrs. Rindge and ought to know her well enough to know that when she said there would be no settlement no settlement could be had."

The motion for dismissal was denied. On July 19, 1917, on plaintiff's motion, the case was set down for trial on January 2, 1918, and was thereafter continued by consent of the parties eight times until, on January 27, 1922, the trial of said action, by consent, went off calendar, and on said day the parties entered into a stipulation in writing that said case was set for trial on February 3, 1922; that the five years within which the action must be brought to trial under section 583, Code of Civil Procedure, will expire on the 7th day of March, 1922; and that the attorney for the defendant had requested the plaintiff to continue said trial. It was stipulated as follows:

"Now, therefore, in consideration of consenting to such continuance by plaintiff, it is hereby stipulated that the period of time which shall expire between the date of this stipulation and the trial of said action shall not be considered, should any question arise in said cause concerning the prosecution thereof, and that said plaintiff shall not be held to have failed to prosecute said action during said period covered by this stipulation. It is further stipulated that the time provided by section 583 of the Code of Civil Procedure of the state of California, for the bringing of an action on for trial after the filing of an answer is hereby extended and enlarged so as to include the time when said action shall hereafter be brought on for trial, and so as not to in any way be a bar to the plaintiff hereafter bringing said action on for trial whether the same be now reset for a later date or go off the calendar to hereafter be set on further motion. It is the understanding of the parties hereto and the intent of this stipulation that when said cause is finally tried it shall then be deemed to have been tried within the statutory time as provided in section 583, Code of Civil Procedure."

Said stipulation was approved by the court and the court ordered the time extended for the bringing of said action on for trial as in said stipulation provided. On May 20, 1922, said action was set down for trial on the 10th day of July, 1922. On May 26th the case was continued, at the request of defendant, to December 18, 1922, subject to the stipulation of January 27, 1922. Thereafter said case was continued seven different times, subject to said stipulation of January 27, 1922; two of said continuances being on request of

defendant. On March 4, 1924, the case went to trial, and the trial proceeded without any objection from the defendant.

Appellant assigns as error the denial of the motion for dismissal, basing its argument upon the provisions of section 583 of the Code of Civil Procedure, which reads:

"The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended."

Appellant asserts that while this section of the Code gives the court discretion in the matter, yet this discretion is not an arbitrary discretion to be exercised just as the judge may desire, whether or not any excuse for the delay is offered; that the true rule is:

"That where a delay is had for a period exceeding two years, and no reasonable excuse is offered for it, the case must be dismissed whether the judge wants to dismiss it or not, and the burden is on the plaintiff to show and satisfy the mind of the court not only that he had an excuse for this long delay, but that such excuse was what is known in law, and is considered in the decisions of the court heretofore rendered a reasonable excuse."

In *Andersen v. Superior Court*, 187 Cal. 95, 200 P. 963, it was held that, in the absence of a written stipulation that the time be extended, the provisions of section 583, Code of Civil Procedure, requiring dismissal of the action unless such action is brought to trial within five years after the defendant has filed his answer, are mandatory and that the trial court was without discretion to refuse an order of dismissal in such case. But the court further said:

"The distinction between a mandatory and discretionary act is illustrated by the two provisions of section 583. The first clause provides a discretionary ground of dismissal for want of diligent prosecution of an action after two years, and the action of the court in granting or refusing to dismiss could not be controlled by mandamus or certiorari, at least in the absence of clear abuse of discretion; while the second clause makes a fixed and arbitrary rule that requires the performance of 'an act which the law specially enjoins' and which gives jurisdiction for the exercise of the writ of mandate under section 1085 of the Code of Civil Procedure."

[1] Upon examination of the foregoing affidavits, we are unable to say that there was any abuse of discretion on the part of the trial court in denying the motion for dismissal. The affidavits are conflicting in many

particulars, especially in regard to compromising the litigation; but it does appear without question that the case was continued many times with the consent of the defendant before the denial of the motion to dismiss on June 27, 1921. Under the authorities and the provisions of section 583 of the Code of Civil Procedure, dismissal would have been mandatory upon motion of the defendant and notice to the plaintiff, or by the court on its own motion, unless the action had been brought to trial within five years after the defendant had filed his answer, except where the parties have stipulated in writing that the time may be extended, as was done in the case at bar. But here the motion for dismissal was made before such five years had expired, and dismissal of the action was not mandatory on the court, but discretionary under the provisions of section 583 of the Code of Civil Procedure. In our opinion, under the showing made at the hearing on the motion, it cannot be held as a matter of law by this court that the trial court failed to exercise a sound discretion in the denial of such motion for dismissal. Appellant's claim that section 583 of the Code of Civil Procedure was adopted to strengthen the rule requiring the plaintiff to bring the case on for trial "within two years" unless the plaintiff "has some excuse for (not) bringing it on which appeals to the court's sense of justice" is untenable. In *Romero v. Snyder*, 167 Cal. 216, 138 P. 1002, it was held, under the provisions of section 583, Code of Civil Procedure, that in an action where an answer has been filed the court should not dismiss the action for want of prosecution, unless the plaintiff has delayed for two years thereafter to bring the action to trial; that after two years of such inaction a dismissal is discretionary, but that when it is continued for five years the action "shall be dismissed." See, also, to similar effect: *Johnston v. Baker*, 167 Cal. 260, 139 P. 86. In *Bailey v. Taafe*, 29 Cal. 423, 424, the term "discretion" is defined as follows:

"The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case, this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit in *foro legis*, when examined under those rules of law by which judges are guided to a conclusion, the judgment of the court below will not be disturbed. If, on the contrary, we are satisfied beyond a reasonable doubt that the court below has come to an erroneous conclusion, the party complaining of

the error is as much entitled to a reversal in a case like the present as in any other."

The foregoing definition was quoted with approval in *Ferris v. Wood*, 144 Cal. 426, 428, 77 P. 1037, 1038, and in *Raggio v. Southern Pacific Co.*, 181 Cal. 472, 475, 185 P. 171, 172. The general rule is that the disposition of a motion to dismiss an action for want of prosecution rests in the discretion of the trial court, and that its action on such motion will not be disturbed here unless such discretion has been grossly abused. *Marks v. Keenan*, 148 Cal. 161, 82 P. 772; *Martin v. City and County of San Francisco*, 131 Cal. 575, 63 P. 913; *First National Bank v. Nason*, 115 Cal. 626, 47 P. 595; *Seymour v. Wood*, 63 Cal. 81; *Grigsby v. Napa County*, 36 Cal. 585, 588, 95 Am. Dec. 213. In *Rickey Land, etc., Co. v. Glader*, 153 Cal. 179, 180, 94 P. 768, 769, the court said:

"In every case where a dismissal of the action has been denied, the discretionary ruling of the trial court has been upheld. *Neihaus v. Morgan* [5 Cal. Unrep. Cas. 391] 45 P. 255; *Rosenthal v. McMann*, 93 Cal. 505, 29 P. 121; *In re McDevitt*, 95 Cal. 17, 30 P. 101; *Marshall v. Taylor*, 97 Cal. 422, 32 P. 515; *San Jose R. Co. v. San Jose L. & W. Co.*, 126 Cal. 322, 58 P. 824."

In *Witter v. Phelps*, 163 Cal. 655, 126 P. 593, the court holds that in reversing an order dismissing an action for undue delay in serving summons, in so far as affidavits presented by the respective parties were conflicting, it must be assumed that the court below found the facts to be as asserted by the prevailing party. In *First National Bank v. Nason*, 115 Cal. 626, 628, 47 P. 595, it was held that, when the delay had been at the instance and request of the defendant, the court would properly refuse to dismiss. *Wheaton A. Gray* in his affidavit stated that the continuances as a rule were made at the suggestion of plaintiff's attorney. *J. P. Chandler* in his affidavit states that the different continuances were not all made at the request of plaintiff, but that to the best of his recollection several of such continuances were at the instance and at the request of the defendant. In his affidavit in rebuttal *Wheaton A. Gray* declares that all of the continuances were at the request of plaintiff and her attorney, but that defendant consented to all of the continuances that were had, except the last. Thus a direct conflict appears in the affidavits as to which party requested the continuances. There is likewise some conflict as to the efforts to compromise the litigation. The affidavits of *J. P. Chandler*, *Edwin A. Meserve*, and *Howard W. Wright* tend to show that some effort was being made to compromise the case and that, each time a continuance was discussed between the attorneys for the parties and consented to by defendant's attorney, the desire and hope of plaintiff that the case could be

settled without trial was communicated to Wheaton A. Gray, attorney for defendant, and that, upon each continuance so consented to by defendant, Wheaton A. Gray was informed that if the case could not be settled it would have to be tried. Wheaton A. Gray in his affidavit in rebuttal states that plaintiff and her attorney frequently requested a settlement of the case, but that he always replied to the offer of settlement to the effect that his client would not under any circumstances consent to any settlement. In *Ferris v. Wood*, 144 Cal. 426, 429, 77 P. 1037, the Supreme Court held that the discretion of the trial court in dismissing the action was improperly exercised. In that case an offer of settlement had been made by the defendant, while here no offer of settlement was made by the defendant. In that case the summons was not served until two years and one month after the complaint was filed. The court said, page 429 (77 P. 1038):

"The judgment upon which the action is brought is unpaid. An effort to compromise that judgment was in progress by the parties after the summons issued, and for this reason plaintiff caused the delay in the service. To have served the summons pending these negotiations might, as plaintiff feared, embarrass the settlement. It seems to us that the delay was reasonably accounted for and excused, and that the order of the court did not tend to subvert, but rather to impede or defeat, the ends of substantial justice."

[2] While in the case at bar there was no offer of settlement by either party, yet the desire of the plaintiff to settle the case was communicated to the defendant as a ground for the continuances, and the defendant thereupon consented to the continuances. Paraphrasing the language quoted above, to have pressed the case to trial pending these negotiations might embarrass a possible settlement. To so find, under all the circumstances in this case, would not, in our opinion, be an abuse of discretion on the part of the trial court, when the defendant consented to the many continuances under these circumstances. We have examined the cases cited by defendant, holding the defendant not to be under any duty to bring the case to trial and affirming judgments of dismissal in those cases, but do not believe them to be controlling in the case at bar, since the action of the trial court in this and in similar cases is to be determined by an exercise of sound discretion. It was held under the facts in those cases that there was no abuse of discretion on the part of the trial court in granting a dismissal. In this case we hold there was no abuse of discretion under the facts in the case on the part of the trial court in refusing a dismissal.

In this case, after the motion to dismiss was denied on January 27, 1922, the parties entered into a stipulation which recited, among other things, that the defendant did

not desire to try said action February 3, 1922, and requested plaintiff's attorneys to continue said trial. In consideration of consenting to such continuance by the plaintiff, it was stipulated:

"That when said cause is finally tried it shall then be deemed to have been tried within the statutory time as provided in section 583, Code of Civil Procedure."

After further continuances, subject to said stipulation, the case was called for trial on March 5, 1924, and no objection whatever to the trial of said action proceeding was made by the defendant, and defendant did not at said trial, nor at any time since June 28, 1921, in any manner object to said case going to trial, or to any of the proceedings being taken to continue said action for trial, or continuing the same on the calendar; nor did defendant at any time during the trial of said action in any manner object to the trial of said action proceeding, or make any suggestion that the trial of said action had been so long delayed that the same should not proceed. Respondent urges that, in view of the stipulation made by defendant and of the trial itself without any objection, defendant is now estopped to claim error on the part of the trial court in denying the motion to dismiss. However, for the purposes of the decision of this case, we do not deem it necessary to hold that defendant is thus estopped.

[3] It is the contention of appellant that the verdict is not supported by the evidence. The complaint, as we have seen, is for the value of attorneys' services, alleged to be of the reasonable value of \$32,500, on which the sum of \$6,250 had been paid, leaving a balance of \$26,250. The verdict of the jury was for \$25,795.22. An examination of the evidence as to the value of the services discloses that there was a sharp conflict between the witnesses for appellant and those for respondent as to such value. Attorneys competent and experienced in this character of litigation testified the reasonable value of said services to be as low as \$7,500 and as high as \$55,000. Under such circumstances, the issue as to the value of the services was closed by the finding of the jury. In *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25, where a judgment for attorney's fees in the sum of \$300,000 was affirmed, the court said (page 251 [228 P. 29]):

"The question as to the reasonable value of the services rendered by the plaintiff was submitted to a number of able and competent attorneys, who testified in the case. Some of them advanced a lower figure than that claimed by him, but others fixed their value at amounts far in excess of that established by the verdict. Consequently the issue as to the value of the services may be considered as having been closed by the finding of the jury."

In *Estate of Duffill*, 188 Cal. 536, 206 P. 42, the court held that a fee of \$75,000 was not

unreasonable. It is contended in the case at bar that the services rendered by Mr. Meserve after the payment of the sum of \$6,250 were of no value to appellant. In this connection the Supreme Court said in *Estate of Duffill*, supra, at page 553 (206 P. 49):

"The fact that in certain branches of the litigation the trustees were unsuccessful does not necessarily exclude the services performed by its attorneys in connection therewith from the consideration of the court when fixing the attorney's fee."

It appeared from the record that Mr. Meserve had been engaged in the practice of law since 1886, and had tried a large number of condemnation cases, appearing for the owners of the property sought to be condemned. In this case the value of the property involved was large. The litigation was difficult and skill was required. The sum allowed for the property taken was \$426,000, and the sum assessed for benefits to the property not taken was \$150,000. The work done included preliminary appearances before the city council; services in the preparation and trial of the condemnation suit; appearances before the city council in the matter of a protest; a certiorari case and an injunction case; subsequent protests and appearances before the city council; a second certiorari case, and the filing of a petition before the Supreme Court; and services in a second injunction proceeding. In 3 California Jurisprudence, p. 698, the following rule is declared:

"In determining what constitutes a reasonable fee, the court will take into consideration the following factors: The nature of the litigation, its difficulty, the amount involved, the skill required, the skill employed, the attention given, the success or failure of the attorney's efforts, and the attorney's skill and learning, including his age and experience in the particular type of work demanded."

The important question in the case is whether as alleged in the answer, on July 28, 1914, subsequent to the original employment "It was agreed and understood between said Edwin A. Meserve and this defendant that the said sum of \$6,250 then and there paid by this defendant to said Edwin A. Meserve should be and constitute full payment and satisfaction of and for all the services theretofore performed, or thereafter to be performed, by said Meserve in any and every proceeding for or connected with opening of said Broadway through the lots and land of defendant, unless said Edwin A. Meserve should by the proceedings to be brought in the future save the defendant something that it would otherwise lose." It will serve no good purpose to attempt a minute review on the evidence submitted in the case in the court below. The evidence is sharply conflicting. The case of the plaintiff on this branch of the case rests largely upon the tes-

timony of E. A. Meserve, who was an interested witness; likewise the witnesses for the defense were interested. E. A. Meserve testified as a witness for the plaintiff:

That he was employed by H. W. O'Melveny, who was acting as attorney for the defendant in other matters; that there was no agreement made as to compensation; that he received a retainer of \$1,250 on May 6, 1914; that on July 31, 1914, he received a check on account of fees in the sum of \$6,250; that he had no recollection of any conversation with his clients relating to this payment, either immediately prior or immediately subsequent to its receipt, but that on July 24, 1916, he had written a letter to defendant requesting a further payment of the sum of \$5,000 on account; that Mr. Scotton, manager for defendant company, called at his office on July 28, 1916, and "stated to me that Mrs. Rindge was surprised that I should request a further payment on account of fees, stating that she and Fred understood that when the \$6,250 payment was made I would not expect any more pay, or ask for any more pay until all the cases were over and the whole thing was at an end, and then only in the event I had won more money for them."

The witness further testified:

"Mr. Scotton then stated that Mrs. Rindge and Fred recollected very distinctly that I had stated that there would be no further payment on account of fees until all the work was done, and then only in the event I succeeded in getting something for them in addition to the award. I said, 'Well, Mr. Scotton, I don't see how that could be so, or what it was I could have said that Mrs. Rindge heard, or how any conversation of that kind occurred, or what could have been said in it, for at the time that check was paid there was no proceeding of any kind or character contemplated except the proceeding in the condemnation suit and the carrying of that case on, with all the work that would have to be done in perfecting the appeal in that case and getting up the transcript.'"

F. B. Scotton testified:

That he was assistant manager of defendant corporation and secretary to Mrs. Rindge; that "upon July 28th, shortly after the noon hour, Mr. Meserve telephoned to the Rindge Company office and I answered the phone. He asked me to get a check for him from the Rindge Company for \$6,250 on account of fees in the Tenth and Broadway Case, and I told him that I would do so. After having hung up the phone, I went and explained the matter to Mrs. Rindge, who was in the front office. * * * I told Mr. Meserve that Mrs. Rindge had refused to sign the check for \$6,250, the call that he had made, and the reason was that it was too large a check for the services that he had rendered. Mr. Meserve stated, or told me to tell Mrs. Rindge, that he thought that was the right size of check, or the right amount to pay at that time, and that he wished very much to have payment made to him, especially at that time, and if the payment was made that that would be all that there would be that the Rindge Company would have to pay, unless he saved them something or made them something. * * * After having seen Mrs. Rindge I had another conversation with Mr. Meserve when I handed

him the check for \$6,250 that had been signed by the Rindge Company. I told him that Mrs. Rindge had signed the check after I had explained to her his statement to me as to what the check would cover."

The witness further testified:

"Q. by Mr. Gray: Now, after that, did you have any conversation with Mr. Meserve about his compensation? A. Yes, sir; about two months afterwards. Mr. Meserve, Mrs. Rindge, Mr. Fred Rindge, and myself were present in Mr. Meserve's office. Mr. Meserve told Mrs. Rindge, Mr. Fred Rindge, and myself that in connection with that check for \$6,250, that the Rindge Company had paid him before he went away on his vacation, that that check was to cover all of his services in the Tenth and Broadway Case unless he saved the Rindge Company something or made them something."

The witness further testified:

"I had a talk with Mr. Meserve in July, 1916, when he called for the \$5,000 installment. Mr. Meserve and myself were the only ones present at that conversation. After the call had been made by Mr. Meserve for \$5,000, which was on or about the 20th or the 24th of July, 1916, upon the request of Mrs. Rindge I went to Mr. Meserve's office, and told him that Mrs. Rindge objected to the payment of the \$5,000 call fee that he had made, because she did not consider that there was any payment due him, because he had not saved the Rindge Company anything or made them anything in the litigation that had taken place since July, 1914, and there was no reason why the Rindge Company should make any further payment until he had saved or made them something. Mr. Meserve stated at that time that he could not understand or remember what he could have said to us that would have led us to have any such idea as that in our minds. I told him that he did make such a statement and that I had repeated it to Mrs. Rindge, and that the Rindge Company had acted upon that basis ever since."

Frederick H. Rindge testified that he was vice president and a stockholder in defendant corporation; that after the payment of the \$6,250 check, and after Mr. Meserve had returned from his vacation about a month or six weeks later, "Mr. Meserve stated that he would not charge us any more for this bunch of cases unless he saved us something or made us something." Mrs. May K. Rindge testified that she was president and manager of the Rindge Company; that after Mr. Meserve had returned from his vacation she was in his office with her son, Fred Rindge, and Mr. Scotton, and had a conversation with Mr. Meserve about the \$6,250 check. The witness further testified:

"I think Mr. Meserve said it was a big check, but that there would be nothing more to pay unless he won something for us, or unless he saved something for us. * * *

Edwin A. Meserve testified in rebuttal:

"Q. by Mr. Chandler: You heard the testimony of Mr. Scotton as to a conversation at the

time of the delivery of the check to you? A. I did. That conversation did not occur. No conversation of any kind occurred at that time on that subject with Mr. Scotton.

"Q. Did you have any talk with Mr. Scotton, Mrs. Rindge, or Fred Rindge, in the presence of Mr. Scotton, or Mr. Scotton and Mr. Fred Rindge or Mr. Scotton and Mr. Fred Rindge and Mrs. Rindge before December 14, 1914, regarding any possible or probable action to be brought by the Rindge Company, or on its behalf, attacking or affecting any question of assessments? A. I did not. * * *

"Q. Did Mr. Scotton, either before or at the time he brought the check for \$6,250 to you, tell you what Mrs. Rindge had said regarding the same, or that Mrs. Rindge had said anything regarding it? A. He did not.

"Q. Did you tell Mr. Scotton, Mr. Fred Rindge, and Mrs. Rindge as testified to by Mr. Fred Rindge, that that fee would take care of the whole batch of those cases, or the batch of cases? A. I did not. * * *

"Q. by Mr. Chandler: Was there ever any discussion at any time between you and Mr. Scotton and Mrs. Rindge and Mr. Fred Rindge about all of these cases, considered as a whole, until the controversy arose in the summer and fall of 1916 regarding your fee? A. There was not. * * *

"Q. Was there ever any discussion about a contingent fee to be made out of the settlement, except such as arose after the controversy about your fees in 1916? A. There never was any discussion or conversation regarding a contingent fee of any kind or character at any time.

"Q. When you wrote the letter in the summer of 1915, asking for the payment of \$5,000 on account, did you then know that the Rindge Company or Mrs. Rindge or any member of that company then understood or believed that you were not to charge any fee to that company in addition to the \$7,500 which you had already been paid? A. No; I did not.

"Q. Was there ever any conversation between you and Mr. Scotton, or between you and any other member of the Rindge Company in which you agreed that the \$7,500 already paid would cover all your fees unless you made something for the Rindge Company?

"The Court: Or saved something for them? A. There was not.

"Q. July, 1914, when you received the check for \$6,250, had there been any talk whatever of or concerning any possible litigation in the matter of the opening of Broadway, except the condemnation suit? A. There had not.

"Q. Up to that time had there been any talk about saving or making any money for the Rindge Company? A. Not after the entry of the judgment in the condemnation suit. That was not the purpose of the prosecution of the appeal."

[4-6] All of the circumstances of the employment of respondent's assignor by the appellant were placed before the jury in extenso. Whether or not, in view of the situation of the parties and their relation to the entire transaction, it was likely or probable that they contracted in the manner claimed by appellant was the peculiar province of the jury to determine. Where the evidence is in conflict, if there be substantial evidence to

support the conclusion reached by the trial court, the conclusion is not open to review on appeal. In our opinion, there was sufficient evidence in the present case to support the verdict. In *Treadwell v. Nickel*, supra, the Supreme Court said:

"The sufficiency of the evidence to establish a given fact, even where the law requires proof of the facts to be clear and convincing, is primarily a question for the trial court and the jury, and if there be substantial evidence to support the conclusion reached below, the finding is not open to review on appeal. *Steinberger v. Young*, 175 Cal. 81, 84, 165 P. 432. We are not called upon to say that the evidence in the record is entirely plain and convincing. To the extent that its determination rests upon a mere preponderance of evidence, or upon the consideration of conflicting or contradictory evidence, the finding in the lower court is not subject to review in this court. *Wadleigh v. Phelps*, 149 Cal. 627, 638, 87 P. 93; *De Kahn v. Chase*, 177 Cal. 281, 283, 170 P. 608."

[7] The trial court instructed the jury that the burden was upon the defendant to prove by a preponderance of the evidence that the arrangements which had theretofore existed between defendant and Mr. Meserve, namely, that he was to work for what his services were reasonably worth, had been at a later time changed in the respects claimed by the defendant. Other instructions of similar import were given. Appellant assigns the giving of such instructions as error. The answer sets up the new contract as an affirmative defense. The rule with respect to burden of proof is well settled. When plaintiff proved the extent and character of services and the reasonable value thereof, if no evidence had been offered on the part of defendant, judgment must have gone for plaintiff. The defendant in setting up an affirmative defense as a rule assumes the full burden of proof on such issue. 24 Cal. Jur. p. 774; 10 Cal. Jur. p. 787, and cases cited. Section 1869 of the Code of Civil Procedure provides: "Each party must prove his own affirmative allegations." In *Wilson v. California C. R. R. Co.*, 94 Cal. 166, 29 P. 861, 17 L. R. A. 685, it is said:

"As a general rule, the burden is on the defendant to prove new matter alleged as a defense (*Osborn v. Hendrickson*, 8 Cal. 31; *Piercy v. Sabin*, 10 Cal. 22 [70 Am. Dec. 692]; *Kuhland v. Sedgwick*, 17 Cal. 124; *Bryan v. Maume*, 28 Cal. 244; *Mulford v. Estudillo*, 32 Cal. 131), even though it requires the proof of a negative. It makes no difference therefore, whether the actor is plaintiff or defendant, so far as concerns the burden of proof. If he undertakes to make a case, whether affirmative or negative, this case must be made out by him, or judgment must go against him. Hence it may be stated, as a test admitting of universal application, that whether the proposition be affirmative or negative, the party against whom judgment would be given as to a particular issue, supposing no proof be offered on

either side, has on him, whether he be plaintiff or defendant, the burden of proof, which he must satisfactorily sustain. If there is a case made out against a defendant, on which, if the plaintiff should close, a judgment would be entered against the defendant, then the defendant has on him the burden of proving a case by which the plaintiff's case will be defeated.' *Wharton on Evidence*, § 357, and authorities cited."

In *Prince v. Kennedy*, 3 Cal. App. 404, 85 P. 859, the court says:

"The burden is on the party alleging an affirmative defense to prove it."

To the same effect, see *Bettens v. Hoover*, 12 Cal. App. 313, 107 P. 329.

We have examined the case of *Scott v. Wood*, 81 Cal. 398, 22 P. 871, relied upon by appellant, but we do not think it decisive of the case at bar, for the reason that the facts and pleadings in that case are to be distinguished from the present case in many respects. Under all the circumstances of this case, we find no error in the instructions as to burden of proof, especially in view of the fact that the court summed up the instructions as follows:

"Going over practically the same thing again, if you find that no contract was entered into between Mr. Meserve and the Rindge Company on the 31st day of July, 1914, as alleged in defendant's answer, and that plaintiff is entitled to recover payment beyond the \$7,500 paid, then, and in such event, plaintiff in this case is entitled to a verdict at your hands for such amount as would be a reasonable fee to have been charged by Mr. Meserve for all of the services rendered by him, crediting thereon the \$7,500, and the other amount that I have told you to credit, and figure in the interest on the amount you find up to date."

In this case the contract of employment was admitted, and the jury was instructed that the burden rests upon the plaintiff to prove his services and the value of his services.

[8-10] It is next claimed that the court erred in its instructions as to interest. The jury was instructed that if they found for plaintiff they should allow interest from January 22, 1917. The instruction was clearly erroneous. No interest is allowable on a quantum meruit prior to decision of the case. *Macomber v. Bigelow*, 123 Cal. 532, 56 P. 449. The question was raised on the motion for new trial. The court stated that he was satisfied from the authorities presented by appellant that interest was not allowable, to which Mr. Meserve acceded and stated "that \$17,200 figured at 7 per cent. per annum between the two dates named in the instruction brings it to a cent"; whereupon the court ruled:

"The motion for a new trial will be granted unless the plaintiff consents to reduce the judgment to \$17,200."

Mr. Meserve then consented and the court denied the motion for new trial. No objection was then made by appellant to the amount of the reduction in the judgment. The reduction of the judgment in the sum of \$8,595.22 cannot be injurious to appellant. If the jury allowed interest, then the reduction was proper. If the jury did not allow interest, appellant has not been injured. Where interest has been allowed by the jury improperly, a remittitur of interest will cure the error. 29 Cyc. 1024, and cases cited. Neither was the erroneous instruction for the allowance of interest in conflict with the instructions restricting the damages to be allowed to the amount prayed for in the complaint, since the jury was told to add the interest to whatever amount they found.

[11] Appellant complains of the following instruction:

"The evidence given by Mrs. Rindge and Mr. Fred Rindge of a claimed subsequent conversation between them and Mr. Meserve would not and could not make a contract such as is pleaded in this case, but can be considered only by you as bearing upon the question of whether or not the statement made by Mr. Scotton, as to the conversations testified to by him as having occurred with Mr. Meserve, were or were not true, because the conversations which Mrs. Rindge and Mr. Fred Rindge claim were had in their presence were subsequent to the time that defendant admits the check was delivered to Mr. Meserve, and such conversations with Mr. Meserve, if they occurred, thus made subsequent to such time and subsequent to the payment to Mr. Meserve of the \$6,250, would and could not have the effect of creating a contract between Mr. Meserve and the defendant, and are to be considered by you only as evidence bearing upon the question of whether or not the testimony of Mr. Scotton, as to the conversation which he had with Mr. Meserve, was or was not true."

We find no error in the foregoing instruction. It was alleged in the answer that the express contract between Mr. Meserve and the defendant company to limit the fee to \$6,250 was made on or about July 28, 1914, at the time payment of the \$6,250 was made. The conversations with Mrs. Rindge and Fred Rindge, mentioned in the instruction, occurred about two months thereafter, and were admissible only for the purposes stated in the instruction.

We have reviewed the many other objections of appellant to the instructions of the court and its rulings during the trial, but find no prejudicial error therein.

It is ordered that the judgment be affirmed.

I concur: YORK, J.

I concur in the judgment: HOUSER, J.,
Acting P. J.

84 Cal. App. 519

JENSEN v. SPRIGG. (Civ. 5492.)★

District Court of Appeal, First District, Division 1, California. July 21, 1927.

Hearing Denied by Supreme Court Sept. 19, 1927.

1. Trial $\Leftrightarrow$ 139(1)—That court would grant new trial on motion does not authorize directed verdict.

Verdict may not be directed merely because evidence is such that court would grant new trial on motion, as court may do so, even where there is substantial evidence to sustain verdict, if it believes that evidence preponderates against verdict.

2. Trial $\Leftrightarrow$ 139(1)—Directed verdict is proper when evidence is wholly insufficient to sustain contrary verdict.

Directed verdict is proper when evidence is wholly insufficient to sustain contrary verdict, in which case court would be compelled to order new trial and may do so on its own motion.

3. Negligence $\Leftrightarrow$ 136(14)—Negligence is ordinarily question for jury.

Existence or nonexistence of negligence is ordinarily a question of fact to be determined by jury.

4. Trial $\Leftrightarrow$ 139(1), 141—Court may direct verdict only where evidence is undisputed or so conclusive as to require court to set aside contrary verdict.

Court may withdraw case from jury and direct verdict, only where evidence is undisputed or so conclusive that court, in exercise of sound judicial discretion, would be compelled to set aside contrary verdict.

5. Limitation of actions $\Leftrightarrow$ 199(1)—Court may direct verdict in action barred by statute.

Court may direct verdict for defendant, where action is barred by statute of limitations.

6. Limitation of actions $\Leftrightarrow$ 104(2)—Attorney's failure to inform client of holding that remedy by personal judgment was lost because of bankruptcy order held not fraudulent misrepresentation or concealment tolling statute barring action for negligence, where he informed client of bankruptcy adjudication nearly three years before (Code Civ. Proc. § 339).

That attorney sued for negligence in handling claim, did not inform plaintiff, in letter answering inquiry as to facts regarding loss of appeal, that Supreme Court held that judgment would not run personally against debtor, because of order in bankruptcy, was not act of fraudulent misrepresentation or concealment, preventing discovery of negligence until short time before filing action, otherwise barred by Code Civ. Proc. § 339, where attorney informed plaintiff nearly three years before that defendant was adjudged bankrupt.

7. Limitation of actions $\Leftrightarrow$ 104(1)—To suspend statute until discovery of fraudulent concealment or misrepresentation, facts must be unknown to aggrieved party.

To suspend statute of limitations until discovery of facts constituting fraudulent conceal-

ment or misrepresentation, facts must be unknown to aggrieved party.

8. Limitation of actions ⚡55(3)—Cause of action for attorney's negligence, resulting in loss of remedy, accrues when delay results in injury to client.

Client's cause of action against attorney for loss of remedy by personal judgment because of neglect accrues when delay results in damages or injury to plaintiff.

9. Limitation of actions ⚡55(3)—Client's cause of action against attorney for negligence, resulting in loss of remedy by personal judgment because of bankruptcy order, accrued at time of adjudication, known to plaintiff over two years before bringing action (Code Civ. Proc. § 339).

Client's cause of action against attorney for negligent delay, resulting in loss of remedy by personal judgment because of order in bankruptcy, accrued at time of adjudication in bankruptcy, known to plaintiff over two years before beginning action, and hence was barred by Code Civ. Proc. § 339.

10. Limitation of actions ⚡100(8)—Client's failure to discover fraud or misrepresentation by attorney within time for bringing action for negligence may be excused (Code Civ. Proc. § 339).

Where confidential relationship, such as that between attorney and client, exists, failure to discover facts constituting fraud or misrepresentation by attorney, within time prescribed by Code Civ. Proc. § 339, for bringing action for neglect of duty, may be excused.

11. Limitation of actions ⚡104(2)—Attorney's failure to notify client of fact, already known to latter, is not fraudulent concealment tolling statute barring action for negligence (Code Civ. Proc. § 339).

Attorney's failure to notify his client of fact already within his knowledge is not fraudulent concealment, preventing discovery of attorney's negligence in handling claim within time prescribed by Code Civ. Proc. § 339, for bringing action.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Lawrence Jensen against Patterson Sprigg, after whose death Rodney Searle Sprigg, as administrator of his estate, was substituted. Judgment for defendant, and plaintiff appeals. Affirmed.

Jesse George and Clarence S. Preston, both of San Diego, for appellant.

Wright & McKee, Fred O'Farrell, and Eugene Daney, all of San Diego, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from a judgment on an instructed verdict in favor of respondent in an action brought by appellant against respondent, an attorney at law, for alleged negligence in handling a claim placed in his hands for col-

lection. Respondent in his answer denies the alleged negligence and as a separate defense sets up the statute of limitations.

It is charged in the action and urged by appellant in his brief on appeal the following acts as constituting the negligence complained of: (1) Delay in filing suit on the claim and pressing it to trial and final judgment; (2) failure to record and preserve the lien of plaintiff against the yacht in the custom house; (3) negligence in failing to require a bond sufficient in its provisions to protect plaintiff in a certain injunction proceeding to restrain the removal of the yacht from San Diego harbor and from the jurisdiction of the superior court of San Diego county; negligence in failing to take possession of said yacht when it was afterwards tendered to him in compliance with the conditions of said bond; negligence in thereafter attaching said vessel and failing to hold it under such attachment, thus waiving the conditions of said bond if they were still valid and had not been complied with by the tender of the vessel; and negligence in thereafter bringing suit upon said bond to collect the amount of plaintiff's claim and judgment, abandoning every other remedy; (4) negligence in failing to have execution issued upon the final judgment obtained on said claim, and allowing it to become dormant and unenforceable; and it is further alleged in the complaint and urged by appellant in his brief that the defendant by means of fraudulent concealment and misrepresentation prevented plaintiff from discovering his negligence and the resulting damage until July 30, 1920.

Appellant contends that he was only required to make prima facie proof of the facts constituting negligence, want of skill, and fraudulent concealment to entitle him to have his case submitted to the jury and was not required to make out a case by such a preponderance of the evidence as would compel the court to refuse to set aside the verdict and grant a new trial upon motion of the defendant, if the verdict had been in his favor.

[1-4] "The rule as to directed verdicts is not that a verdict may be directed whenever the evidence is such that upon motion the court would grant a new trial. The court may grant a new trial even when there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict. It is under compulsion to order a new trial, and may do so on its own motion when the evidence is wholly insufficient to sustain the verdict. This is the meaning of the language of Estate of Baldwin, 162 Cal. 471, 123 P. 267, where it is said that a directed verdict is proper 'whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence.' Estate of Caspar, 172 Cal. 150, 155 P. 631. The existence or nonexistence of negligence is ordina-

rily a question of fact to be determined by a jury, and while the court may withdraw the case from the jury and direct a verdict, it can do so only where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of sound judicial discretion, would be compelled to set aside a contrary verdict. *Davis v. California St. C. R. Co.*, 105 Cal. 131, 38 P. 647; *Estate of Baldwin*, 162 Cal. 471, 123 P. 267; *Diamond v. Weyerhaeuser*, 178 Cal. 541, 174 P. 38." *Duggan v. Forderer* (Cal. App.) 249 P. 533.

[5] Paralleling the facts in the instant case with the law quoted we incline to the view that the trial court in the exercise of sound judicial discretion was justified in directing the verdict for the defendant. It is, however, unnecessary to review the evidence on this question, for in our opinion the action was barred by the statute of limitations, and, if so, the right of the court to direct the verdict cannot be questioned.

Under section 339 of the Code of Civil Procedure, a cause of action against an attorney for neglect of duty in the management of an action is barred at the expiration of two years after the neglect occurred. *Hays v. Ewing*, 70 Cal. 127, 11 P. 602; *Boyer v. Barrows*, 166 Cal. 757, 138 P. 354.

[6] Appellant concedes, in fact, he alleges in his complaint that the acts or remissions complained of which form the basis for his action would have been barred by the statute, but for the fact that respondent by means of fraudulent concealment and misrepresentation prevented him from discovering the alleged negligence until July 30, 1920, a short time prior to his filing the action.

In support of his contention in this respect appellant has directed our attention to various appeals taken from the superior court of San Diego county from judgments in cases in which appellant was represented by respondent as his attorney and to the facts and findings in such cases, which by stipulation are made a part of the record. These cases show the litigation carried on and the actions prosecuted for appellant by respondent in an attempt to collect a claim due appellant from one Fred Dorr for building the yacht *Yankee Girl*. Our attention is particularly directed to *Jensen v. Dorr*, 159 Cal. 742, 748, 116 P. 553, 556, from which appellant quotes the following language:

"While plaintiff may have been entitled to enforce the liens on the vessel regardless of the bankruptcy proceedings, he was not entitled to a personal judgment against the defendant in the face of such a decree, and * * * it cannot be doubted that it is an abuse of discretion for a trial court to refuse leave to a defendant to set up by supplemental answer a bankruptcy discharge obtained subsequent to the commencement of the action, as a bar to any personal judgment, where proper application is made therefor within a reasonable time after obtaining such discharge."

As proof of the concealment of all knowledge of this decision and of the loss of appellant's remedy by personal judgment against Dorr and other acts complained of, appellant relies on and directs our attention only to a letter written by respondent to appellant under date July 13, 1911, and the following testimony of appellant, Jensen:

"Q. Now, Mr. Jensen, did Mr. Sprigg ever show you a copy of this judgment—do you remember whether he ever showed you a copy of this judgment, or did he just state to you what the judgment was—the judgment of Judge Sloane? A. I never saw a copy.

"Q. You never saw a copy of it? A. No.

"Q. Did you or did you not as a matter of fact know that that judgment didn't run personally against Fred Dorr? A. I did not.

"Q. You did not know it. Did he ever tell you you didn't have personal judgment against Fred Dorr? A. No."

Respondent's letter of July 13, 1911, referred to and addressed to appellant, Lawrence Jensen, is as follows:

"I am in receipt of your favor of July 5th, and note its contents. You ask me what I propose to do with regard to *Yankee Girl*. I thought I made myself plain when you were here in regard to this. The Supreme Court held that my complaint was perfectly good, but that the superior court erred in ruling that the supplemental answer attempted to be filed by counsel for Dorr should have been filed. The Supreme Court also held that we should have proved that the various claims were assigned to you. Otherwise our judgment would have been perfectly good. I propose to proceed to trial on the same complaint and make this proof as required by the Supreme Court. I have no doubt but that judgment obtained with this proof will be sufficient and the lien we claim against *Yankee Girl* is perfectly valid. On last Saturday Mr. Carroll Allen came to San Diego, as he told me, with a view of settling the case. We had a conference on Sunday, at which time I stated to him if he would pay me \$4,000, we would settle the case. This offer I made conditional upon your accepting the same. He stated to me that he believed the case should be settled, and that he would return to Los Angeles, consult with Mr. Lynn Helm, the referee in bankruptcy, and that he believed a settlement could be had. * * *

Appellant claims that this letter was both negative concealment and positive misrepresentation—that it shows on its face that it was in answer to an inquiry by letter from appellant as to the facts regarding the loss of his appeal; that the most important thing in the decision of the Supreme Court affecting appellant's interests was that appellant by virtue of the order in bankruptcy had lost his right to a personal judgment against Dorr.

The fact that respondent did not tell appellant in his letter of July 13, 1911, that the Supreme Court held that by virtue of the order in bankruptcy the judgment did not run personally against Dorr was not an act of fraudulent misrepresentation or conceal-

ment, because, as testified to by appellant himself, respondent informed him in 1908 that Dorr was adjudged a bankrupt.

"Q. Mr. Jensen, you knew that Mr. Fred Dorr was declared a bankrupt some time in 1908, didn't you? A. Yes.

"Q. That information was not kept from you? A. No; Mr. Dorr told me himself he was going broke.

"Q. Mr. Sprigg told you, too, didn't he? A. Yes."

Respondent could not well be held responsible for concealing a fact from his client, which his client for nearly three years had known and concerning which he himself had informed him.

In October, 1909, respondent made a motion in the superior court in the action of Jensen v. Dorr for a judgment on the pleadings. About the same time Dorr asked permission to file a supplemental answer setting up the fact that he had been adjudged a bankrupt, which was denied, and respondent's motion for judgment on the pleadings was granted. This judgment was reversed on May 12, 1911.

[7] Respondent's statement in his letter that the Supreme Court held "that the superior court erred in ruling that the supplemental answer attempted to be filed by the counsel for Dorr should have been filed" was evidently inadvertently made in dictating the letter, as he follows with a statement that, "I have no doubt but that judgment obtained with this proof will be sufficient and the lien we claim against Yankee Girl is perfectly valid," and, further, that he was conferring through Mr. Carroll Allen with Mr. Lynn Helm, the referee in bankruptcy, attempting to effect a settlement. If he were relying on a personal judgment against Dorr and the loss of such personal judgment was vital, why should he be concerned about the lien on Yankee Girl? And unless Dorr was bankrupt, why should he be trying to effect a settlement with the referee of his bankrupt estate? In any event, appellant could not be misled by the statement complained of, for he knew Dorr was a bankrupt; that he was declared to be such in 1908. He was informed of such fact by both Dorr and respondent. In order to suspend the statute until the discovery of the facts constituting the fraudulent concealment or misrepresentation, the facts must be unknown to the aggrieved party. *Whitten v. Dabney*, 171 Cal. 621, 154 P. 312; *Beal v. Smith*, 46 Cal. App. 271, 189 P. 341.

[8, 9] Appellant urges that "plaintiff's cause of action for the loss of this remedy by personal judgment against Dorr, resulting from the neglect of defendant, accrued when the delay resulted in damages or injury to plaintiff," and cites *Lally v. Kuster*, 177 Cal. 783, 171 P. 961, in support of his contention. We agree with appellant in his contention, but it is apparent that the loss of his remedy by personal judgment against Dorr and the dam-

age or injury resulting from such loss accrued when Dorr was adjudged a bankrupt, and that as appellant had knowledge of such adjudication in 1908, the statute had run before he began his action.

[10, 11] Unquestionably, where confidential relationship, such as the relationship between attorney and client, exists, failure to discover the facts constituting fraud or misrepresentation may be excused, but we know of no authority holding that failure on the part of an attorney to notify his client of a fact already within his client's knowledge is fraudulent concealment.

In our opinion, the action was barred by the statute of limitations, and being barred no error was committed in directing a verdict for defendant.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

84 Cal. App. 721

KINNEAR v. MARTINELLI. (Civ. 5830.)★

District Court of Appeal, First District, Division 2, California. Aug. 4, 1927.

Hearing Denied by Supreme Court Oct. 3, 1927.

1. Municipal corporations ⇨706(8)—There being no evidence to contrary, instructions that law presumed pedestrian killed by automobile acted with due care should have been given.

Where there was no evidence to contrary, instructions to effect that pedestrian who was killed by automobile while crossing street was presumed to have acted with due care and caution should have been given.

2. Municipal corporations ⇨706(3)—Burden was on defendant to prove contributory negligence of pedestrian killed by automobile.

In action for damages for death of plaintiff's husband killed by automobile while crossing street, burden was on defendant to prove affirmatively contributory negligence of deceased, where it was not admitted by pleading or established by evidence of plaintiff.

3. Trial ⇨252(2)—Instructions should be based on evidence adduced or on reasonable inference from evidence record discloses.

Instructions should be based on evidence actually adduced or on reasonable inference from evidence disclosed by record.

4. Appeal and error ⇨1066—Instruction that deceased pedestrian was under duty to look along street before crossing, in absence of evidence showing deceased's conduct during period covered by instruction, held fatal error.

In action for damages for death of plaintiff's husband by automobile while crossing street, instruction that deceased was under duty of looking along street before crossing to center line of street to ascertain whether vehicles were approaching, where there was total absence of any evidence showing conduct of de-

ceased during period covered by instruction, held fatal error.

5. Municipal corporations ☞705(10)—Only ordinary care is required of pedestrian crossing street.

Ordinary care is all that is required of pedestrian in crossing the street.

6. Municipal corporations ☞705(10)—In determining whether pedestrian used ordinary care in crossing street, jury should consider location, traffic, view and other facts.

In determining whether pedestrian used such due care as is commensurate with apparent present dangers in crossing street, jury should consider location involved, existing state of traffic, opportunity for obtaining clear view of street from every direction whence approaching vehicles might endanger an attempt to cross street, presence of obstructions to the view, such as buildings, passing cars, driving storms, clouds of dust, or darkness, and other facts.

7. Municipal corporations ☞705(2)—Neither pedestrians nor vehicles have superior right to use of street.

Neither pedestrians nor vehicles have any superior right to use of public street; each must exercise privilege of its use with due regard to the other.

8. Municipal corporations ☞705(1)—Degree of prudence required of pedestrians and drivers of vehicles must be determined from facts surrounding particular case.

Degree of prudence required of both pedestrians and drivers of vehicles in using public streets must ordinarily be determined from facts surrounding each particular case.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Eunice E. Kinnear, administratrix of the estate of Charles Albert Kinnear, deceased, against Lorenzo Martinelli. From a judgment for defendant, plaintiff appeals. Reversed.

Haswell & Martin, of San Francisco, for appellant.

Cooley & Gallagher, of San Francisco, for respondent.

THOMPSON, Presiding Justice pro tem. This is an appeal from a verdict in favor of defendant, in an action for damages for the death of the husband of plaintiff which occurred as the result of coming in contact with an automobile while crossing a city street.

The plaintiff complains of the giving of a certain instruction, and the refusal of others.

March 7, 1924, about 9:30 at night, the defendant, in company with an associate, was driving his open Buick automobile easterly along Mission street in the city of San Francisco. They were going to the Ferry Building, and had reached a point in the vicinity of

Acton street, traveling at the rate of 15 or 18 miles per hour, along a course midway between the most easterly rail of the track and the easterly curbing. Suddenly they observed midway in the block, some 20 or 25 feet distant a pedestrian hastening across Mission street from the westerly to the easterly side where his car was parked. He had just passed the easterly rails of the track, and apparently neither heard nor saw the approaching machine. The street was poorly lighted at this point. The lights from the automobile disclosed objects only 50 or 60 feet ahead of the machine. There were no other vehicles or pedestrians in sight. There were no witnesses to the accident, except the occupants of the defendant's machine, and the evidence is uncontradicted to the effect that the defendant immediately upon seeing the pedestrian sounded the horn and applied his foot brake. There is no evidence of any attempt to use the emergency brake. The deceased was struck by the left front fender of the machine, which was badly damaged; the left plate glass windshield on the machine was shattered from the impact; the machine ran some 40 feet after the brake was applied before it was stopped. The body of the deceased lay upon the easterly rail of the track from 10 to 20 feet from the rear of the car. He was unconscious, and was taken by the defendant to the hospital. An immediate examination by the hospital physician disclosed the fact that the injured man was suffering from a basal fracture of the skull; a broken fibula of the right leg; and numerous bruises and contusions about the face and head. He was also bleeding from the nose and ears. There was no evidence of liquor on his breath. He never recovered consciousness, and died from the effects of these injuries a few days later.

The uncontradicted evidence of expert witnesses indicates from actual experiments that a similar Buick automobile traveling on a level pavement at the rate of 20 miles an hour could be stopped within 17 feet by the application of the foot brake alone; that the same machine traveling at the rate of 15 miles per hour could be stopped within the space of 12 feet; and that properly adjusted headlights should disclose objects 200 feet in advance of the car.

At the request of defendant the following instruction was given to the jury:

"I instruct you that, in the exercise of ordinary care for his own protection, the deceased was under the duty of looking to the south on Mission street before he crossed to the east of the center line of Mission street in order to ascertain whether any vehicles were approaching from the south, and, if so, whether any such vehicle was within such a distance as would make it hazardous for the deceased to attempt to cross in front of such vehicle. If you find from the evidence that the deceased negligent-

ly failed to use such ordinary care for his own safety and protection, and that such failure, if any, proximately contributed to the accident, then your verdict must be in favor of the defendant."

This instruction was given the full literal force of its language by a refusal to give the following instructions requested by plaintiff: (a) "I instruct you that in the absence of evidence to the contrary, there is a legal presumption that the deceased used due care on his part"; and (b) "I instruct you that, in the absence of any evidence to the contrary, the law presumes that the deceased did everything that a reasonable, prudent man would have done under the same circumstances for the protection of his own safety."

[1] Plaintiff's last two instructions, which were refused, correctly stated the law (*Crabbe v. Mammoth Channel G. Min. Co.*, 168 Cal. 500, 143 P. 714; *Blackwell v. American Film Co.*, 189 Cal. 689, 698, 209 P. 999), and were proper instructions under the evidence of this case, for the reason that no human witness saw the deceased until after he had passed the center of Mission street, and suddenly appeared to the defendant 20 or 25 feet ahead of him easterly of the rails on his way across the street. For aught that the evidence shows, and, for aught that any living person knows, the deceased may have stopped and cautiously looked up and down Mission street before he entered the street, and before he attempted to cross the center line thereof. For aught that the evidence shows, he may have seen the defendant's car approaching at such a distance that, in the exercise of all due care, he would have been justified in assuming he had ample time to cross the street ahead of the machine, if it had been running at a lawful rate of speed. Since no witness testified, and no one knows what the deceased did for his own protection before he reached the center of Mission street, it was particularly appropriate, in the absence of evidence to the contrary, that the jury should have been instructed that the law presumed that he acted with due care and caution. He was entitled to the benefit of this presumption, in the absence of evidence to the contrary.

[2-4] The first instruction above quoted was given at the request of defendant, and was addressed to his special affirmative plea of contributory negligence. The burden is upon the defendant to prove affirmatively contributory negligence of the deceased, unless it is admitted by the pleading or established by the evidence of plaintiff. 19 Cal. Jur. 687, § 119. There is absolutely no evidence in the record as to whether the deceased did or did not look south along Mission street "before he crossed to the east of the center line" thereof—the presumption of law in this particular case is that he did so look to the south. Instructions should be based upon evidence actually adduced or upon reasonable inference from the evidence disclosed by the record.

24 Cal. Jur. 830, § 95; *Risdon v. Yates*, 145 Cal. 210, 78 P. 641; *Hirshberg v. Strauss*, 64 Cal. 272, 28 P. 235. The only evidence in this record with respect to the conduct of the deceased was that he was first seen easterly of the rails of the track walking rapidly in an easterly direction across the street, and that he did not look up while the defendant's car traversed the intervening space of 20 or 25 feet until he was struck. To conclude, from this circumstance, that he had therefore not looked easterly along Mission street before he reached the center thereof is mere speculation, and contrary to the presumption of law. We are of the opinion that the giving of this instruction under the facts of this particular case where there is a total absence of any evidence to show the conduct of the deceased during the period covered by the instruction is fatal error. The burden was on the defendant to show that the deceased failed to look easterly along Mission street "before he crossed to the east of the center line"; defendant failed to meet this requirement; there was no evidence in the record of the conduct of the deceased at that particular time; the presumption of law refutes this charge of negligence. The instruction is therefore not applicable to the facts and is erroneous.

In the case of *Nickell v. Rosenfield* (Cal. App.) 255 P. 760, the facts were similar in most respects to those of the instant case. A rehearing of that case was denied by the Supreme Court. A judgment for the defendant was reversed for the erroneous giving of the following instruction:

"In crossing Figueroa street, it was the duty of plaintiff in the exercise of ordinary care for her own protection to look to the left and to the right as well as ahead of her, and to particularly direct her attention to her left while she was crossing the easterly side of Figueroa street, and this duty was not fully performed by merely looking to the left as she stepped from the curb to the street, but the duty to exercise ordinary care in this respect was imperative upon her during all the time that she was crossing; and, therefore, if you believe from the evidence that the plaintiff failed to perform this duty, and that her failure so to do was a proximate cause of the accident, and the injuries sustained by her, then your verdict must be in favor of the defendant. * * *"

The vice of the foregoing instruction which was pointed out by the court is that it attempts to specify in too great detail, as a matter of law, the precise acts of a pedestrian in attempting to cross a street, which would constitute negligence. The court there said:

"The placing of too high a duty upon plaintiff might leave the jury generally impressed that the degree of care incumbent upon her for her own protection was far greater than the law required."

[5, 6] Ordinary care is all that is required of a pedestrian in crossing a street. The ques-

tion of the exercise of ordinary care is largely a question of fact to be determined by the jury from all the circumstances surrounding the particular case under consideration. In determining whether a pedestrian used such due care as is commensurate with apparent present dangers, the jury should consider the location involved, the existing state of the traffic, the opportunity for obtaining a clear view of the street from every direction whence approaching vehicles might endanger an attempt to cross the street, the presence of obstructions to the view such as buildings, passing cars, driving storms, clouds of dust, or darkness, and, from these and all other facts and circumstances present, determine whether the particular pedestrian used that degree of care which would be required of an ordinarily prudent person under like circumstances.

In *Burgesser v. Bullock's*, 190 Cal. 673, 214 P. 649, it is said:

"The question of whether or not the pedestrian is negligent in crossing a street is one which, in the absence of express statutes regulating his conduct, must ordinarily be left to the jury, for the conduct of an ordinarily prudent person under such circumstances must be largely determined by the condition of the traffic at the particular time and place in question." *Geist v. Pacific Gas & Electric Co.*, 192 Cal. 621, 627, 221 P. 376.

[7, 8] The rule is firmly established that neither pedestrians nor vehicles have any superior right to the use of a public street. *Mayer v. Anderson*, 36 Cal. App. 740, 173 P. 174. Each must exercise the privilege of its use with due regard to the other, and subject to such reasonable restrictions as may be imposed. The degree of prudence required of both pedestrians and drivers of vehicles must ordinarily be determined from the facts surrounding each particular case.

In support of the foregoing objectionable instruction given to the jury in this case the respondent relies upon *Sheldon v. James*, 175 Cal. 474, 166 P. 8, 2 A. L. R. 1493; *Klusman v. Pacific Electric Ry. Co.*, 190 Cal. 441, 213 P. 38; *Chrissinger v. Southern Pacific Co.*, 169 Cal. 619, 149 P. 175; *Davis v. Breuner Co.*, 167 Cal. 683, 140 P. 586; *Ogden v. Lee*, 61 Cal. App. 493, 215 P. 122; *Mayer v. Anderson*, supra; and *Moss v. H. R. Boynton Co.* 44 Cal. App. 474, 186 P. 631. None of these cases are predicated on facts similar to the one at bar. Based upon the particular facts of the respective cases, they merely stated that in crossing a street congested with traffic a pedestrian "must look both ways," and "on neither side of a congested street is one relieved from exercising ordinary care for his own protection," and "it was a duty devolving upon plaintiff, as the act of an ordinarily prudent man, immediately before placing himself in a position of danger, to look in the direction from which danger was to be expected"; that this requirement "was a continuous duty,

not met by looking once, and then looking away"; "that a pedestrian must be alert and watchful, and must look up and down the street"; and that it is not sufficient for one to merely "look straight ahead" upon entering a danger zone of a congested street. In each of these cases, however, there was evidence upon which the court was warranted in making use of such declarations.

Finally, the respondent cited with confidence in support of this objectionable instruction, the concurring statement of the Supreme Court in denying a rehearing in the case of *Finkle v. Tait*, 55 Cal. App. 425, 432, 203 P. 1031, 1034; in which a directed verdict in favor of the defendant was affirmed. The Supreme Court said:

"It [the accident] occurred after dark on a public street; the headlights of the automobile were lighted and would have been plainly visible to him [the plaintiff] if he had looked. * * * The only evidence on the subject shows that the headlight was in good order and that it was clearly visible at a considerable distance. It follows, therefore, that he either failed to take the trouble to look for automobiles on that side of the street as he crossed, or that he saw the automobile and carelessly walked in front of it. There was evidence that he was carrying a box of raisins twenty-three inches long, thirteen inches wide, and ten inches thick on his shoulder in such a position that it may have obscured his vision. If that was the case, then it was negligence for him to attempt to cross the street with his vision obstructed in that manner. * * *

The opinion of the appellate court, which was approved in this case, was written chiefly upon the theory that plaintiff failed to establish proof of any negligence on the part of the defendant. In denying the rehearing, the Supreme Court, however, does assert that the deceased was guilty of contributory negligence, and stresses the fact that at the time of the accident he carried upon his shoulder a box, which the court apparently assumed obscured his view, and the carrying of which under such circumstances, might constitute negligence. We do not understand that the Supreme Court meant to infer that, merely because a pedestrian was struck, while crossing a street at night, by an automobile with lights in good condition, that therefore the pedestrian must have seen the machine, and hence was guilty of negligence. Clearly, this would be speculation, and would be usurping the province of the jury. But what the court did say, and what seems entirely logical, was that a pedestrian crossing a street in the dark, with his view obscured by a box which he carried on his shoulder, would be guilty of negligence under the particular facts of that case.

But under no circumstances can that case furnish authority in support of the problem involved in the instant case, for in the *Finkle Case* the defendant was not deprived by the refusal of appropriate instructions of the

benefit of the presumption of law to the effect that, in the absence of evidence to the contrary, he was deemed to have acted with reasonable prudence. Nor was an instruction given in the Finkle Case, based upon a total absence of evidence, charging the deceased with contributory negligence for the omission of an act, the burden of proving which rested on the defendant.

Because of error in the giving and refusing of the instructions heretofore referred to, we are of the opinion that the judgment should be reversed. It is so ordered.

We concur: NOURSE, J.; STURTEVANT, J.

85 Cal. App. 1

LORENZ v. ROUSSEAU et al. (Civ. 5463.)★

District Court of Appeal, First District, Division 1, California. Aug. 9, 1927.

Hearing Denied by Supreme Court Oct. 3, 1927.

1. Mechanics' liens §281(5)—In action to foreclose mechanics' lien, evidence held to sustain finding that owner did not have notice of work (Code Civ. Proc. § 1192).

In an action to foreclose mechanics' lien for work performed for tenant, where it was claimed that owner had notice thereof through his alleged agent and that his interest in the premises was liable because he failed to file notice of nonresponsibility of Code Civ. Proc. § 1192, evidence held to sustain finding that owner had no notice of the work.

2. Appeal and error §1011(1)—Finding on conflicting evidence will not be disturbed by appellate court.

Where finding is based on conflicting evidence it will not be disturbed by the appellate court.

3. Trial §404(1)—Findings must be construed favorably to judgment.

Findings must be construed so as to support the judgment rather than to defeat it.

4. Mechanics' liens §281(5)—In action to foreclose mechanics' lien, evidence held to sustain finding that owner's alleged agent was not such agent that his knowledge of improvement bound owner (Code Civ. Proc. § 1192).

In action to foreclose mechanics' lien, where it was claimed that the owner had notice of the work through his agent and that his interest in the premises was liable because he did not file notice of nonresponsibility under Code Civ. Proc. § 1192, evidence held to sustain finding that his alleged agent was not such agent that his knowledge of the improvement would bind the owner.

5. Mechanics' liens §72—That broker leased premises held not to make knowledge of improvement for which lien was claimed binding on owner (Code Civ. Proc. § 1192).

In action to foreclose mechanics' lien claimed under Code Civ. Proc. § 1192, the fact that owner's broker had leased premises to tenant held not to make broker's knowledge of

performance of work for the tenant for which lien was claimed, acquired on subsequent visit to collect rent, binding on the owner.

6. Mechanics' liens §72—Knowledge of improvement for which lien was claimed, acquired by one calling to collect rent, held not chargeable to owner (Code Civ. Proc. § 1192).

In action to foreclose mechanics' lien claimed under Code Civ. Proc. § 1192, knowledge of the improvement acquired by one calling to collect rent at the request of the owner's bookkeeper held not chargeable to the owner.

7. Principal and agent §178(1)—Principal is chargeable only with such knowledge of agent as pertains to subject-matter of agency (Civ. Code, § 2315).

In order for a principal to be bound by the knowledge of a fact by his agent, the fact must arise from or be connected with the subject-matter of the agency, under Civ. Code, § 2315, providing that agent has such authority as principal confers upon him.

8. Mechanics' liens §55(1)—Statute providing for mechanics' lien against owner's interest for improvements with his knowledge is not to be extended by judicial construction (Code Civ. Proc. § 1192).

Code Civ. Proc. § 1192, providing that certain improvements with knowledge of the owner of the premises shall be held to have been done at the instance of the owner and that his interest shall be subject to mechanics' lien unless he give notice that he will not be responsible, is based on the doctrine of estoppel, which is not to be extended by judicial construction.

9. Estoppel §118—Estoppel is not favored and must be clearly proved.

An estoppel is not favored by the courts, and clear proof thereof is necessary.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action to foreclose mechanic's lien brought by F. A. Lorenz against A. F. Rousseau and another. From the judgment, plaintiff appeals. Affirmed.

Orville C. Pratt, Jr., of San Francisco, and George F. Jones, of Oroville, for appellant.

Cullinan & Hickey, of San Francisco (William T. Sweigert, of San Francisco, of counsel), for respondent.

CAMPBELL, Justice pro tem. Respondent A. F. Rousseau was the owner of certain premises on Market street in San Francisco. The Mother Goose Confection Company was the lessee in possession of the premises and had engaged appellant, F. A. Lorenz, to perform certain alterations and installation work. The work was performed by appellant, but was never paid for by the Mother Goose Confection Company, which had in the meantime become insolvent. Appellant filed his claim of lien upon the premises and sub-

sequently brought this action to foreclose the lien against respondent, the owner of the property. It is not contended that respondent had anything to do with the work, that he ever met the appellant contractor, or that he had any personal knowledge of the work being done. It is, however, claimed that one George H. McCarthy had knowledge of the work being performed upon the premises and that McCarthy was such an agent of respondent Rousseau as to make the knowledge of McCarthy his knowledge.

[1] Appellant urges that:

"The sole point involved is whether or not the respondent Rousseau, who owns the building on which appellant's work was admittedly done under a contract with a tenant in possession, had actual or constructive notice of such work during its progress. If he had, he should have filed a notice of nonresponsibility under section 1192 of the Code of Civil Procedure, or else he must suffer his interest in the building to be subjected to a lien for the value of appellant's work done thereon."

It would appear, however, from the record that there are two points involved instead of one, as suggested by appellant. One, did McCarthy himself have knowledge of the work being done? and the other, if McCarthy did have knowledge of the work, was he such an agent of respondent that knowledge by him would bind respondent? Obviously, the question of the agency of McCarthy is important only in so far as it assumes that McCarthy himself had knowledge. On this latter question there is a conflict in the evidence. Appellant testified that he saw McCarthy around the premises where he did the work at least a half dozen times. Mr. Holland, the tenant, a witness called on behalf of plaintiff, testified that McCarthy came to the premises two or three times while the work was in progress to collect the rent, while McCarthy himself testified that he did not believe he went to the premises until the work was finished; that his first recollection of the place was that it was all finished up; that Mr. Holland called his attention to some fellow who was painting in the gallery; that he saw no work performed, excepting some painters painting "Mother Goose" rhymes.

This testimony of McCarthy that he had no knowledge of any work being done on the premises until "it was all finished up" and that the only work he saw being done then was the painting of some "Mother Goose" rhymes, even assuming McCarthy to be the agent of respondent Rousseau, is sufficient to sustain the finding of the trial court "that at all the times herein mentioned the said defendant Rousseau had no knowledge and notice, or knowledge or notice of the making of said improvements, installations, and repairs."

[2, 3] The rule is well settled that when a finding is based upon a conflict in the evi-

dence the appellate court will not disturb such finding on appeal. It is also well settled that findings must be so construed as to support rather than to defeat the judgment (*Breeze v. Brooks*, 97 Cal. 72, 31 P. 742, 22 L. R. A. 257; *Leist v. Dierssen*, 4 Cal. App. 634, 88 P. 812; *Vasey v. Campbell*, 4 Cal. App. 451, 88 P. 509).

[4] On the question of McCarthy's authority as an agent of respondent Rousseau, the testimony of Rousseau may be summarized as follows: McCarthy was an independent real estate broker; Rousseau's building was vacant, and McCarthy received permission to put a sign on the building in question. The renting or leasing was an open proposition, Rousseau having no exclusive agent. Seeing the sign, Holland (the tenant) came to McCarthy about leasing the premises. McCarthy had no authority to lease or contract for Rousseau in any manner whatever. He did not have charge of the building. Even when taking a deposit from Holland he took it subject to the acceptance of Rousseau. He went to Rousseau, who prepared the lease. He took the lease to Holland for his signature. He then returned the lease to Rousseau for his signature. McCarthy was paid a commission for his services by Rousseau. Holland went into possession. Subsequent to the closing to the lease the bookkeeper asked McCarthy to go over to the building and collect the rent. McCarthy was not a regular rent collecting agent. He went, however, to collect the rent only, and was unable to do that. He neither had nor pretended to have authority to do anything else with regard to the premises and had no authority to order or authorize any repairs or improvements. Rousseau was an extensive realty operator and had no exclusive agent. McCarthy was merely one of a number of brokers active in seeking tenants for his properties. At the time the building was leased to the Mother Goose Confection Company other signs than McCarthy's were put up—it is hard to say how many. Almost every large real estate business in town leased his property or had signs on it at different times. Coldwell, Cornwall & Banker had the most signs; Mr. McCarthy was long in the minority; Madison & Burke and Von Rhein and Center & Spader rented property for him. Even if McCarthy did have knowledge of the work, this evidence is sufficient to sustain the conclusion that he was not such an agent of respondent Rousseau that knowledge by him would bind Rousseau.

[5, 6] To say that McCarthy, simply because he acted as a broker in leasing the particular premises, could afterwards bind Rousseau by knowledge gained on a subsequent visit to the premises to collect rent, is not tenable. If he could, so also could the numerous other agents who performed a like service for Rousseau. As to the point now discussed

the question seems simply to be: Can knowledge of improvements being made on certain premises acquired by one who is merely requested to call and collect rent be imputed to the owner so as to bind the owner under the provisions of section 1192 of the Code of Civil Procedure? Both authority and reason answer that it cannot.

In *Wieboldt v. Best Brewing Co.*, 163 Ill. App. 246, the court says:

"The knowledge of an agent can be imputed to the principal only when it relates to facts within the scope of the agency [citing authorities]. The only authority *Haberer & Snow Company* had to act for appellee was that given in the lease that was assigned to Westendorf, which was to receive the rents from Fabish, Kramer and Dumas up to the time they assigned their lease and after that from their assignee, Westendorf. They had no authority to receive rents from any one else or to consent to the change of the terms of the lease, or to a substitution of tenants or occupants. Whatever knowledge they acquired, therefore, as to who were occupying the premises or how, to whom, or when the rents were being paid by the occupants, other than Westendorf himself, was in relation to facts wholly outside of the scope of their authority as agents of appellee, and their knowledge of such matters cannot be imputed to him."

In *Renton, Holmes & Co. v. Monnier*, 77 Cal. 449, 19 P. 820, the court held that notice to the owner's architect of the contractor's assignment of his claims for payment under his contract was not notice to the owner, the court saying:

"Agencies are general or special, and an agent has such authority as the principal actually or ostensibly confers upon him (Civ. Code, § 2315). In this case it is not claimed that the architect had any other authority than that expressly conferred upon him by the written contract for the construction of the building."

[7] It is elementary that the principal can only be charged with knowledge of the agent, when such knowledge is of matters pertaining to the particular transaction in which the agent is authorized to act. *Second National Bank v. Curren*, 36 Iowa, 555. "Not being her agent in any manner connected with the purchase or payment of materials, the architect's knowledge, if any he had, that these were being obtained of plaintiff, was not chargeable to the owner." *Chicago Lumber & Coal Co. v. Garmer*, 132 Iowa, 282, 109 N. W. 780.

In the instant case it would be a departure from the established rule and do violence to the reason on which it is based to hold that knowledge of an ordinary rent collector that work is being done on certain premises is knowledge that is imputed to the owner and binding upon him under section 1192 of the Code of Civil Procedure. In order to bind the principal the fact or knowledge concerning such fact must arise from or be connected with the subject-matter of the agency. *Ren-*

ton, Holmes & Co. v. Monnier, supra. Notice to an agent is not notice to the principal unless such knowledge is of a matter concerning which the agent has authority. *Alabama Western R. Co. v. Bush*, 182 Ala. 113, 62 So. 89; *Moon Bros. Carriage Co. v. Devenish*, 42 Wash. 415, 85 P. 17, 7 Ann. Cas. 649; *Strauch v. May*, 80 Minn. 343, 83 N. W. 156; *Daly v. Arkadelphia Milling Co.*, 126 Ark. 405, 189 S. W. 1053; *Green v. McDonald*, 70 Vt. 372, 40 A. 1035; *Missouri, K. & T. Ry. Co. v. Belcher*, 88 Tex. 549, 32 S. W. 518; *German Ins. Co. v. Goodfriend* (Ky.) 97 S. W. 1098; *Donham v. Hahn*, 127 Mo. 439, 30 S. W. 134; *Topliff v. Shadwell*, 68 Kan. 317, 74 P. 1120; *Collins & Toole v. Crews*, 3 Ga. App. 238, 59 S. E. 727; *Royle Mining Co. v. Fidelity & Casualty Co.*, 161 Mo. App. 185, 142 S. W. 438.

[8, 9] Counsel for appellant urges that it was "the duty of the court below to stretch rather than constrict the scope of McCarthy's agency when it was seeking to infer from his admitted functions what his authority, or lack of authority, might be to receive notice of improvements on respondent's behalf," and cites us to *Gentle v. Britton*, 158 Cal. 332, 111 P. 9; *Harmon Lumber Co. v. Brown*, 165 Cal. 197, 131 P. 368; *Allen v. Wilson*, 178 Cal. 678, 174 P. 661; and *Western Well Works v. Cal. Farms Co.*, 60 Cal. App. 756, 214 P. 491, in support of his contention. In our opinion the cases cited do not establish the principle contended for, but, on the contrary, *Allen v. Wilson* and *Gentle v. Britton*, referring specially to section 1192 of the Code of Civil Procedure, hold that this section is based upon the doctrine of estoppel, and it is well settled that estoppel is not favored and must clearly be proved. *Franklin v. Merida*, 35 Cal. 558, 95 Am. Dec. 129. Furthermore, the tendency of the law is, not to extend the doctrine of imputed notice, but to keep it confined within narrow and necessary limits. *Wittenbrock v. Parker*, 102 Cal. 103, 36 P. 374, 27 L. R. A. 197, 41 Am. St. Rep. 172; *Trentor v. Pothén*, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225; *Hargadine v. Krug*, 2 Neb. (Unof.) 52, 96 N. W. 286.

In the cases cited by appellant the facts are not the same as they are here. In *National Lumber Co. v. Whalley*, 162 Cal. 224, 121 P. 729, the question of the scope or extent of an agency was not involved. In *Pacific Lumber Co. v. Wilson*, 6 Cal. App. 561, 92 P. 654, the agent whose knowledge of improvements was held to bind the owner was an agent with general authority to look after the business of the owner. In *Jefferson v. Leit-hauser*, 60 Minn. 251, 62 N. W. 277, the agent was an agent with authority to generally look after the particular property in question.

In our opinion there is no merit in the appeal. The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

BROWN et al. v. CITY COUNCIL OF CITY OF LONG BEACH et al. (Civ. 5033.)★

District Court of Appeal, Second District,
Division 1, California. Aug. 4, 1927.

Hearing Granted by Supreme Court Oct. 3, 1927.

1. Certiorari $\S$ 70(5)—On appeal from order denying issuance of writ of certiorari, appellate court cannot decide merits of original controversy.

On appeal from an order of the superior court denying issuance of writ of certiorari to review acts of city council and others in connection with an annexation election, so far as decision by appellate court was concerned merits of original controversy were not involved.

2. Certiorari $\S$ 70(6)—On appeal from order denying writ of certiorari, all material facts well pleaded in petition must be presumed true.

On appeal from order denying issuance of writ of certiorari, all material facts well pleaded in petition for writ must, by appellate court, be presumed to be true.

3. Municipal corporations $\S$ 29(4)—Petition for writ of certiorari held to show city was not authorized to annex territory because of its uninhabitaney or noncontiguity (St. 1915, p. 305).

Petition for writ of certiorari to review acts of city council and others in connection with annexation election held to state facts showing that entire territory embraced within strip annexed could not be considered either as inhabited or as contiguous to any portion of area included within existing boundaries of city, and that city was not directly authorized to annex to itself such territory, under St. 1915, p. 305.

4. Corporations $\S$ 28(2)—“De facto corporation” may exist only where organizers have made colorable compliance with law authorizing formation of corporation.

A “de facto corporation” may exist only where its organizers, though failing in some particular, in good faith have attempted to comply, and have actually made colorable compliance, with requirements of valid law authorizing formation of corporation, and thereupon such organization has entered on transaction of authorized business of corporation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, De Facto Corporation.]

5. Statutes $\S$ 195—Inclusion of one thing in statute excludes others.

In construing statute, inclusion of one thing in statute excludes others.

6. Municipal corporations $\S$ 17—De facto corporation could not result from unauthorized annexation of noncontiguous uninhabited territory.

No corporation, de facto or otherwise, could result from acts of city council of Long Beach in attempting to annex a strip of noncontiguous uninhabited territory, if no law existed under provisions of which municipality of Long

Beach might have reorganized in manner in which it attempted to do.

7. Evidence $\S$ 65—Intending reorganizers of municipal corporation were presumed to know law with reference to annexing new territory (St. 1915, p. 305).

Intending reorganizers of municipality of Long Beach were presumed to have known that unless territory sought to be annexed, within meaning of St. 1915, p. 305, was inhabited, and that it was either contiguous to boundaries of existing municipal corporation or contiguous to an inhabited and contiguous portion of territory proposed to be annexed to such municipality, so far as such uninhabited and noncontiguous territory was concerned, no corporate existence could be created, since every one is presumed to know the law.

8. Municipal corporations $\S$ 17—Attempted annexation of noncontiguous uninhabited territory held not to show good faith necessary to create municipal corporation de facto (St. 1915, p. 305).

Attempt, under facts alleged in petition for writ of certiorari, to reorganize city of Long Beach to include territory that was not inhabited and was neither contiguous to boundaries of existing municipal corporation nor contiguous to an inhabited and contiguous portion of territory proposed to be annexed, within meaning of St. 1915, p. 305, held not to show good faith which is essential to creation of municipal corporation de facto.

9. Municipal corporations $\S$ 17—No municipal corporation de facto came into existence by unauthorized annexation of territory, notwithstanding user.

Where there was no law under which municipal corporation was authorized to reorganize as it attempted to do, and where, in attempted reorganization, element of good faith was lacking, under facts alleged in petition for certiorari to review city council's acts, notwithstanding user by pretended corporation of corporate powers, no municipal corporation de facto came into legal existence.

10. Municipal corporations $\S$ 33(8)—Certiorari lies to review council's acts on petition for election on annexation of territory without jurisdiction (Code Civ. Proc. $\S$ 1068).

Where city council in acting on petition presented to it, praying for holding election for purpose of determining whether proposed new territory should be annexed to city, is exercising judicial function, and because of facts involved no jurisdiction exists in city council as to such territory, writ of certiorari will lie to review acts of city council, under Code Civ. Proc. $\S$ 1068.

11. Certiorari $\S$ 70(5)—Denial of certiorari where facts tend to favor issuance is subject to review by appellate court.

Denial of writ of certiorari to review acts of city council in connection with annexation election where all facts tend in favor of issuance of writ is subject to review by appellate court, since in such circumstances principle of judicial discretion has no application.

Appeal from Superior Court, Los Angeles County; C. W. Guerin, Judge.

Application by A. C. Brown and others against the City Council of the City of Long Beach and others for a writ of certiorari to review the acts of the defendants in connection with an annexation election. From an order denying the writ, petitioners appeal. Reversed.

Bauer, Wright & MacDonald and Alexander MacDonald, all of Los Angeles, for appellant Barnes.

L. D. Uhlman, of Long Beach, for other appellants.

Bruce Mason, City Atty., and Denio & Hart, all of Long Beach, for respondents.

Jess E. Stephens, City Atty., and Lucius P. Green, Asst. City Atty., both of Los Angeles, for City of Los Angeles, *amicus curiæ*.

HOUSER, J. This is an appeal from an order denying a petition for a writ of certiorari.

It appears that, in accordance with the provisions of the "Annexation Act of 1913," as amended (Stats. 1915, p. 305; Stats. 1917, p. 26), an "initial" ordinance was passed by the city council of the city of Long Beach by which an election was noticed and held, by virtue and in pursuance of which certain territory was presumably annexed to said city. Thereupon the appellants herein sought, but were refused by the Attorney General of this state, a writ of quo warranto for the purpose of testing the ultimate question of the validity of the annexation proceedings. Thereafter, by means of an application for a writ of certiorari, petitioners applied to the superior court for substantially the same relief. After a hearing upon such application the issuance of the writ was denied; whereupon the petitioners therein appealed to this court from the order of the superior court in the premises.

The record shows that the territory sought to be annexed, in addition to comprising a comparatively small area of an inhabited community, included therein a strip of land (commonly and hereinafter designated as a "shoe-string strip") 100 feet in width, which connected at one end thereof with one of the boundaries of the city of Long Beach, and extended therefrom in the same width, in an irregular line, encircling or encompassing an uninhabited territory of some 33 square miles, and finally again connecting with another of the boundaries of said city.

The law under which the proceedings herein were instituted and which authorizes the annexation by a city of territory lying contiguous to the municipality proposing such annexation is to be found in the Statutes of 1915, p. 305. The provision of such statute having an important bearing upon the decision of this matter is as follows:

"The boundaries of any municipal corporation may be altered and new territory annexed thereto, incorporated and included therein, and made a part thereof, upon proceedings being had and taken as in this act provided. Any such new territory so proposed to be annexed to a municipal corporation must be contiguous thereto. * * *

In addition to the statutory requirement that any "new territory" proposed to be annexed by a municipality must be "contiguous thereto," another prerequisite (under the procedure adopted by respondents), as determined by a judicial construction of existing statutes, is that such "new territory" must be inhabited. *Capuchino Land Co. v. Board of Trustees, etc.*, 34 Cal. App. 239, 167 P. 178; *People v. City of Lemoore*, 37 Cal. App. 79, 174 P. 93; *People v. City of Monterey Park*, 40 Cal. App. 715, 181 P. 825.

The petition in the superior court for the writ of certiorari contains allegations which in their ultimate effect show that within the intent of the statute, and the decisions by the court of this state, in no proper sense could the entire territory embraced solely within the "shoe-string strip," which encompassed and imprisoned 33 square miles of unincorporated and uninhabited territory, be considered either as inhabited, or as contiguous to any portion of the area included within the existing boundaries of the city of Long Beach, or even as contiguous to that portion thereof proposed to be annexed which in reality was inhabited; also, that at no time did the city council of said city ever find, ascertain, or determine that such questioned territory was either inhabited, or that it was contiguous either to the city of Long Beach as then constituted, or contiguous to that portion of the admittedly inhabited area proposed to be annexed. Among other things, it also appears that the "shoe-string strip" sought to be annexed does not constitute a single body of territory lying contiguous to said city of Long Beach, or to territory contiguous thereto, but in fact, by reason of natural boundaries and diversity of uses, is composed of 82 separate and distinct parcels or tracts of land; that of said 82 parcels, on each of 72 parcels thereof no person resided, and as to the remaining 10 parcels none of them was inhabited by more than 10 persons; that in several of said 82 parcels the line of the "shoe-string strip" cut houses into two parts, and in other cases divided houses from other buildings on such parcels of land; and that some of the uninhabited parcels of land consisted of portions of rights of way of different railroad companies or of portions of county highways. However, it also inferentially appears that each of the connecting ends of the "shoe-string strip" is contiguous either to an existing boundary of the city of Long Beach, or to a parcel of "inhabited" territory.

[1, 2] This being an appeal from an order of the superior court denying the issuance of the writ of certiorari, so far as the decision by this court is concerned the merits of the original controversy are not here involved. The matter stands in a situation similar to that presented by a demurrer to a complaint. All the material facts well pleaded in the petition for the writ must by this court be presumed to be true.

The principles of law applicable to the situation presented by the assumed facts herein are considered in each of the cases of *Capuchino Land Co. v. Board of Trustees, etc.*, 34 Cal. App. 239, 167 P. 178, *People v. City of Lemoore*, 37 Cal. App. 79, 174 P. 93, and *People v. City of Monterey Park*, 40 Cal. App. 715, 181 P. 825, and therein in effect it is ruled that no validity can attach to a proposed annexation by a city of new territory in the face of a situation such as it set forth in the petition and to which reference has been had herein.

In the *Capuchino Case* (34 Cal. App. 239, 167 P. 178) the territory proposed to be annexed consisted of two separate parcels, one of which was "inhabited" and contiguous to the boundaries of the city seeking the annexation, and the other parcel, although "uninhabited," adjoined the first parcel. It was held that in such circumstances the proceedings for annexation were invalid.

In the *Lemoore Case* (37 Cal. App. 79, 174 P. 93) the following language occurs:

"We consider it manifestly unjust and inequitable under the circumstances described by the complaint for the electors residing in the two inhabited parcels Nos. 4 and 9 to determine the annexation of the other parcels against the will of their owners."

In the case of *People v. Monterey Park*, 40 Cal. App. 715, 181 P. 825, where this court considered a situation in many respects similar to that presented herein, it is said, in part:

"On these facts it is too plain to admit any doubt that the annexation proceedings were on their face an attempt by the flimsiest subterfuge to treat as inhabited various uninhabited tracts of land, and to annex them to the city of Alhambra under the form of proceedings prescribed by a statute which applies solely to annexation of inhabited territory. It is likewise clear that such proceedings were a palpable fraud upon the inhabitants of the community through whose lands the cord of connection [likewise a 'shoe-string strip'] was run from the land adjoining Alhambra to the limits of the new sewer farm. The annexation petition showed on its face that several of the parcels included were public highways and that therefore they could not be inhabited territory."

[3] On the face of the record, therefore, we have the legally admitted facts that, as regards the provisions of the statute and the decisions of the courts of this state, the city

of Long Beach was not directly authorized to annex to itself the territory included within the "shoe-string strip."

But the point is raised by respondents that the writ of quo warranto is the exclusive remedy, if any, that is available to the petitioners, and especially that certiorari will not lie in the instant case. Many authorities bearing generally upon the question are submitted by respondents in support of their contention. On the other hand, several other equally eminent and fully as persuasive authorities are cited by appellants which indicate that at least in the circumstances of the instant case certiorari is a proper remedy. As may hereinafter become apparent, a consideration of the appropriateness of either of such remedies, as applied generally to conditions of a nature similar to that here involved, becomes unnecessary.

It is conceded by both appellants and respondents that the act of adding new territory to a city amounts to a reincorporation of the municipal corporation. It is also at least inferentially admitted by respondents that as to the "shoe-string strip" herein involved, because of its state of uninhabitancy and its noncontiguity features, as hereinbefore referred to, a corporation de jure was impossible of organization. The result is that, as affecting such "shoe-string strip," the most that may possibly be claimed by respondents is that by the perfecting of the annexation proceedings in presumably attempted compliance with the provisions of the statute, and, by user, the municipal corporation acquired a de facto existence. With so much in mind, respondents urge that under the provisions of section 803 of the Code of Civil Procedure and section 358 of the Civil Code the only remedy available to petitioners was by quo warranto, and that, by virtue of the refusal of the Attorney General of this state to institute such a proceeding, the petitioners had no standing in court and were entitled to no relief. The language of the statutes on which respondents thus rely is as follows:

"An action may be brought by the Attorney General, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into or unlawfully holds or exercises any franchise, within this state. * * *" Section 803, Code Civ. Proc.

"* * * The due incorporation of any company claiming in good faith to be a corporation under this part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party; but such inquiry may be had at the suit of the state on information of the Attorney General. * * *" Section 358, Civ. Code.

While by no means conceding that respondents' point is well taken, but, to the contrary, resisting the claim with much vigor and earnestness, supported by eminent authority, appellants contend that, if it may be shown that, far from being a corporation de jure (which is admitted by respondents), the municipality in its attempted reorganization as a corporation does not constitute a corporation de facto, the statutes and authorities upon which reliance is placed by respondents have no application.

The first question, then, in that connection to be determined is whether the situation as presented warrants the conclusion that as to the "shoe-string strip" the city of Long Beach has a de facto existence as a municipal corporation.

[4] By the definitions as contained generally in the authorities, and as stated by authors well versed in the law, a de facto corporation may exist only where its organizers, although failing in some particular, in good faith have attempted to comply, and have actually made a colorable compliance, with the requirements of a valid law authorizing the formation of the corporation, and thereupon such organization has entered upon the transaction of the authorized business of the corporation.

It thus appears that, aside from the requirement of user of the corporate franchise—which in the instant case, if not specifically admitted by appellants, is not denied by them—the two remaining essential elements in the creation of a corporation de facto, to wit, a valid law under which even a corporation de jure might be created, and an attempted compliance in good faith with the requirements of the law by the organizers of the corporation, remain for consideration.

[5] It would seem a superfluity to state that, if under the provisions of an enabling statute a corporation de jure may not be created, the creation of a corporation de facto, which in its organization admittedly must be lacking in some particular regarding the requirements of the impotent statute, would be an utter impossibility. So that, if it be accepted as final that which is apparently conceded by respondents, to wit, that after even a substantial compliance by the organizers of a municipal corporation with the formal requirements of the statute a corporation de jure did not result, it would inevitably follow that no corporation de facto could come into being as an outcome of the acts of the organizers, which in the instant case admittedly amounted to something less than a full and complete compliance with the full demands of the statute. But aside from such admission, with its attendant consequences, it may be useful to inquire somewhat into the essential principles underlying the existence of a de facto corporation. Considering, then, first, the necessity of a valid law under the provisions of which the pos-

sibility of the creation of such a corporation may be had, it will be remembered that by the express terms of a part of the statute, as well as by judicial construction of other provisions thereof, before a municipal corporation may be reorganized, as affecting territory to be added to a municipal corporation already in existence, there must be present the two features of inhabitancy of the proposed added territory, together with its contiguity to the existing territory of the municipality proposing the annexation. Such being the requirements of the statute under whose provisions the annexation of the "shoe-string strip" was attempted, and by virtue of the facts set forth in the petition in the lower court for the writ of certiorari (which in this proceeding we are bound to assume as true), to the effect that as to such "shoe-string strip" neither the element of inhabitancy nor contiguity thereof was present, and invoking the maxim of construction of a statute that the inclusion of one thing excludes others, the conclusion must be reached that under the provisions of the statute under consideration the organization of a municipal corporation de facto, as affecting the territory embraced within the "shoe-string strip," was a legal impossibility. The law under which the respondents proceeded contains no provisions which permit the annexation to a city of "new territory" which is uninhabited and not contiguous either to the existing boundaries of such city or contiguous to a portion of the "new territory" sought to be annexed.

"It is fundamental that even a corporation de facto cannot exist in the absence of a law authorizing such corporation. On the same theory, for a corporation de facto to exist, the particular purpose for which such corporation is attempted to be organized must be authorized by law. That is, if a statute authorized corporations for certain specified purposes, a corporation organized under such a statute for a different purpose cannot be a de facto corporation. Thus, where a rifle club was organized under a statute authorizing corporations for scientific purposes only, it was held not to be a corporation de facto, as the purpose for which it was organized was not within the statute. So, in Indiana, a corporation organized for the purpose of buying and selling bonds was held not to be a de facto organization under a statute authorizing corporations for the purpose of buying and selling merchandise and conducting mercantile operations, as the term 'merchandise' did not include bonds"—citing authorities. Thompson on Corporations (3d Ed.) § 253.

[6] If no law existed under the provisions of which the municipality of Long Beach might have reorganized in the manner in which it attempted to do so, it is manifest that no corporation, de facto or otherwise, could result from its acts in the premises.

[7-9] The additional element of good faith in the attempted compliance by the organizers of the proposed corporation with the de-

mands of the statute, so essential to the creation of a municipal corporation de facto, also requires some attention. Every one is presumed to know the law. Consequently the intending reorganizers of the municipal corporation, as affecting the proposed "new territory," knew, or should have known, that unless such territory within the meaning of the statute was inhabited and that it was either contiguous to the boundaries of the existing municipal corporation or contiguous to an inhabited and contiguous portion of the territory proposed to be annexed to such municipality, so far as such uninhabited and noncontiguous territory was concerned, no corporate existence could be created. Notwithstanding such assumed knowledge on the part of the intending reorganizers of the corporation, and in what must be legally regarded as a deliberate and intentional violation of the law as applied to the facts, such reorganizers proceeded with an attempted compliance with the remaining requirements of the statute. In such circumstances, it is plain that the term "good faith," as applied to the acts of the organizers, has no application. It necessarily results that both because there was no law under which the municipal corporation was authorized to reorganize as it attempted to do, and because in its attempted reorganization the element of good faith was lacking, notwithstanding the user by the pretended corporation of corporate powers, no municipal corporation de facto came into legal existence.

The effect of the ruling in the case of *Brandenstein v. Hoke*, 101 Cal. 131, 35 P. 562, is that, where an attempted organization of a corporation is had under an unconstitutional statute, such organization does not constitute a corporation de facto and its existence is even subject to collateral attack. Likewise, in *Martin v. Deetz*, 102 Cal. 55, 36 P. 368, 41 Am. St. Rep. 151, it is held in effect that the existence of an organization claiming to be an organization de facto, but which has no legal standing as such, may be attacked collaterally in a private action.

The question next to be considered is: Assuming the nonexistence of a municipal corporation de facto, together with the admitted fact that the remedy to petitioners by means of a writ of quo warranto was refused and denied them by the Attorney General of the state, is the writ of certiorari available in the premises?

"A writ of review may be granted * * * when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer. * * *" Section 1068, Code Civ. Proc.

That the various acts of the city council of the city of Long Beach in connection with the annexation proceedings here under consideration, as set forth in the petition

presented by petitioners to the lower court, were done in the exercise of a judicial function, is illustrated in the case of *Capuchino Land Co. v. Board of Trustees of the City of San Bruno*, 34 Cal. App. 239, 167 P. 178. It is there held that the initial action of the board of trustees of a city (or what in the instant case would be the city council) in determining the sufficiency of a petition for annexation of "new territory" to a city "was essentially judicial in its nature, and hence was and is the proper subject of review in this proceeding." And the following authorities were cited as sustaining such conclusion: *Stumpf v. Board of Supervisors*, 131 Cal. 364, 63 P. 663, 82 Am. St. Rep. 350; *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 P. 35; *People v. Oakland*, 123 Cal. 598, 56 P. 445; *Levee District v. Farmer*, 101 Cal. 178, 35 P. 569, 23 L. R. A. 388; *People v. Ontario*, 148 Cal. 625, 84 P. 205.

[10] Assuming that, in acting upon the petition presented to the city council of the city of Long Beach praying for the holding of an election for the purpose of determining whether the proposed "new territory" should be annexed to said city, the said city council was exercising a judicial function, and that, because of the assumed facts herein and under the terms of the statute as hereinbefore set forth, no jurisdiction existed in said city council as to such "new territory" hereinbefore referred to as the "shoe-string strip," it would follow that the writ of certiorari would lie.

The case of *Miller & Lux v. Board of Supervisors*, 189 Cal. 254, 260, 274, 208 P. 304, 307, is also authority for the proper use of the writ of certiorari in the instant case. It is there said in part:

"It is contended that under this amended section the only way in which the validity of the order and of the formation of the district can be inquired into is in a quo warranto proceeding instituted by the Attorney General. The difficulty with respondents' contention in that regard is that the jurisdiction of this court and of the superior court to entertain writs of review is given by the Constitution (art. 6, §§ 4, 5), and this power cannot be taken away by the Legislature. *Cameron v. Kenfield*, 57 Cal. 550; *Farmers' Union v. Thresher*, 62 Cal. 407; *City of Tulare v. Heyren*, 126 Cal. 226, 58 P. 530; *Pacific Telephone, etc., Co. v. Eshleman*, 166 Cal. 640, 652, 137 P. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822; *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 186, 149 P. 35. * * * The respondents contend that where the district has been exercising the powers of a de facto corporation, after the electors of the district have voted for incorporation, it is too late to inquire into the validity of the order calling the election by a writ of review. There is nothing in this contention."

[11] It is suggested by respondents that the denial of the writ by the lower court was wholly discretionary, and consequently an act not subject to review by this court. But

It is clear that, before a discretionary power may be exercised, some opposing facts or some sound legal reason must exist upon which such power may act. In the instant case, necessarily all the facts tend in favor of the issuance of the writ, and the law as applied thereto indicates no other course. In such circumstances the principle of judicial discretion has no application.

It is ordered that the order from which the appeal is herein taken be and it is reversed.

We concur: CONREY, P. J.; YORK, J.

84 Cal. App. 506

FIDELITY & CASUALTY CO. OF NEW YORK v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 5369.)★

District Court of Appeal, First District, Division 1, California. July 20, 1927.

Hearing Denied by Supreme Court Sept. 14, 1927.

1. Master and servant ⇨403—Employee contracting contagious or infectious disease has burden of showing greater exposure than commonality to recover compensation.

Employee contracting contagious or infectious disease has burden of showing affirmatively that he was subjected to exposure exceeding that of commonality to recover compensation.

2. Master and servant ⇨373—Illness from contagious or infectious disease cannot be held proximate result of injury arising out of employment, without showing special exposure.

In absence of affirmative showing that employee, contracting contagious or infectious disease, was subjected to exposure exceeding that of commonality, his illness or death cannot be said to have been proximately caused by injury arising out of his employment.

3. Master and servant ⇨417(7)—Whether employee contracting typhoid fever was subjected to greater exposure than commonality is fact question for Industrial Commission.

Whether employee, contracting contagious or infectious disease, was subjected to exposure in excess of that of commonality, is question of fact for Industrial Accident Commission.

4. Master and servant ⇨417(7)—Industrial Commission's finding on evidence that employee contracting typhoid fever was subjected to greater exposure than commonality, is conclusive.

Industrial Accident Commission's finding, reasonably supported by evidence, that employee contracting contagious or infectious disease was subjected to exposure exceeding that of commonality, cannot be disturbed on certiorari.

5. Master and servant ⇨417(7)—Reviewing court cannot determine weight of evidence in workmen's compensation proceeding.

Appellate court is without power to determine weight to be given the evidence, or which

of two opposing inferences should be drawn therefrom, in workman's compensation proceeding.

6. Master and servant ⇨417(7)—Industrial Commission's award must be affirmed, unless there was no evidence to support findings.

Findings of Industrial Accident Commission need not accord with preponderance of evidence in appellate court's opinion, but award must be affirmed, unless there was no evidence reasonably sufficient to support findings.

7. Master and servant ⇨405(4)—Industrial Commission's finding that employee contracting typhoid fever was subjected to greater exposure than commonality held supported by evidence.

Industrial Accident Commission's conclusion that employee, dying from typhoid fever contracted in Chile or Peru, where his employers sent him with knowledge of prevalence of such disease, to which evidence showed that natives were less subject than foreigners, was subjected to exposure in excess of that of commonality, held reasonably supported by evidence.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act (St. 1917, p. 831), by Marie E. Gardiner for compensation for the death of Alexander S. Gardiner, employee, opposed by Balfour-Guthrie & Co., employer, and the Fidelity & Casualty Company of New York, insurance carrier. To review an order of the Industrial Accident Commission of California awarding compensation, the insurance carrier brings certiorari. Award affirmed.

Chickering & Gregory, of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CASHIN, J. A proceeding in certiorari to review an order of the Industrial Accident Commission awarding compensation for the death of Alexander S. Gardiner.

The petitioner was the insurance carrier for a copartnership known as Balfour-Guthrie & Co., by whom the deceased was employed at the time of his death.

The deceased had been an employee of the insured for several years, and in June, 1926, was sent by his employers from San Francisco to Valparaiso, Chile, to represent them at a nitrate conference to be held in the latter city. Although the primary object of the trip was to attend the conference, the deceased was also instructed to visit various concerns in South America with whom his employers were interested in a business way.

Pursuant to his instructions, the employee left San Francisco on June 12, 1926, stopping at several places en route to Valparaiso, where he arrived on July 8, and where he remained until July 18, 1926. Upon the completion of his duties there he visited several

places and ports where nitrate is produced and shipped, arriving at Illa on July 25, where he showed signs of illness, and at Arequipa, Peru, on July 27, at which place he was taken to a hospital, where his death occurred on August 11, 1926. According to the diagnosis of physicians by whom he was treated, his death was caused by typhoid fever.

It was found by the commission that the employee sustained an injury arising out of and in the course of his employment, to wit, the contraction of the disease mentioned, which was the proximate cause of his death, and made an award to his widow.

It is contended by petitioner that the disease contracted by the deceased was due to a risk of the commonalty, and as a consequence did not arise out of nor was it proximately caused by the employment, and, further, that at the time the disease was contracted the deceased was not performing a service for his employers.

The testimony shows that one of the employers at least was familiar with health conditions in Chile and Peru, and that through him the deceased was warned of the danger of contracting the disease and advised as to the precautions to be taken to avoid it. It further appears that the disease, while not epidemic in the places visited, was prevalent there and, owing to sanitary conditions, a constant source of danger. It is clear from the testimony that the employers were aware of the danger and that the employee, during the period which elapsed between the arrival at Valparaiso and the date he reached Arequipa, was engaged in performing the duties of his employment, and the evidence reasonably supports the conclusion that the disease was contracted during that period.

[1-4] While an employee who contracts a contagious or infectious disease has the burden of showing affirmatively that he was subjected to an exposure in excess of that of the commonalty and in the absence of such showing his illness or death cannot be said to have been proximately caused by an injury arising out of his employment (*Pattiani v. Industrial Accident Commission*, 199 Cal. 596, 250 P. 864), the question is one of fact for the commission, and its finding thereon if reasonably supported cannot be disturbed (*Engels Copper, etc., Co. v. Industrial Accident Commission*, 183 Cal. 714, 192 P. 845, 11 A. L. R. 785).

In *Pattiani v. Industrial Accident Commission*, supra, the employee was sent by his employers from San Francisco to several Eastern cities, including New York. Typhoid was epidemic in the latter city, but, so far as shown, the condition was unknown to the employers. The employee contracted the disease, and it was claimed that the infection was caused by his having eaten contaminated oysters while in New York. The finding of the commission was adverse to the claim, and the court in affirming the order said:

"The Commission found against that contention and by so doing must be held to have negatived the conclusion that the applicant contracted said disease because of the existence of such epidemic, in said city, or by any contact with such prevailing disorder."

The court refers in its opinion to the cases of *Dryden v. Lachman Bros.*, 8 Cal. I. A. C. 14, *Shepard v. A. Schilling & Co.*, 11 Cal. I. A. C. 57, and *Miller v. Simon-Newman Co.*, 12 Cal. I. A. C. 276, decided by the commission, in which petitions for writs of review were denied. In each of these cases, as well as in the case then being considered, certain of the probative facts were similar to those of the instant case; but with the exception of *Miller v. Simon-Newman Co.*, the conclusion drawn therefrom by the commission was adverse to the claimant, and, unlike the case at bar, it was not shown that the employer was aware of the prevalence of the disease contracted by the employee, or the danger of infection in the place to which the employee was sent. In the latter connection the court said:

"In arriving at our conclusion in the instant case we are not to be understood as announcing a rule which might be applicable to a case wherein the employer directs his employee to go to a place wherein within the knowledge of the employer there is prevalent a contagious or infectious disease."

In affirming the orders of the commission in the foregoing cases the review was limited to a determination of whether there was evidence supporting the findings (*Southern Pacific Co. v. Industrial Acc. Comm.*, 177 Cal. 378, 170 P. 822), and it cannot be said that had the conclusions of the commission been otherwise the awards would have been annulled.

[5, 6] The court is without power to determine the weight to be given the evidence (*Dearborn v. Industrial Accident Commission*, 187 Cal. 591-594, 203 P. 112), or which of two opposing inferences should be drawn therefrom (*Western Pacific R. R. Co. v. Industrial Accident Commission*, 193 Cal. 413, 224 P. 754). Moreover, it is unnecessary that the findings in its judgment shall accord with the preponderance of the evidence (*San Francisco v. Industrial Accident Commission*, 183 Cal. 273-282, 191 P. 26), and unless it can be said that there was no evidence reasonably sufficient to support the findings, the award must be affirmed.

[7] In the instant case the conditions shown were not unlike those in *Miller v. Simon-Newman Co.*, supra, wherein a writ of review was denied; and in addition it appears that the employers were aware of the prevalence of the disease contracted by the employee in the localities which he was directed to visit. Furthermore, the evidence sufficiently shows that the inhabitants of these localities, while not immune from the disease, were less subject to infection there-

from than foreigners, and we are unable to say that the conclusion of the commission that the employee was subjected to an exposure in excess of that of the commonalty was not reasonably supported.

The award is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

85 Cal. App. 26

LEVINSON et ux. v. CONTINENTAL NAT. BANK OF LOS ANGELES et al.*
(Civ. 5084.)

District Court of Appeal, Second District, Division 1, California. Aug. 10, 1927.

Hearing Denied by Supreme Court Oct. 5, 1927.

1. Guaranty $\Leftrightarrow$ 104—Guarantor of note, secretary of maker corporation, having purchased note together with collateral of co-guarantor, could not profit by transaction, being a fiduciary.

Where guarantor of note, secretary of maker corporation, purchased note together with collateral of co-guarantor, she was not entitled to profit in any way by the transaction, being a fiduciary.

2. Pledges $\Leftrightarrow$ 44—Facts held to show sales of collateral by note purchaser sufficient to satisfy note; hence remaining collateral note and deed were discharged.

Facts held to show that guarantor, purchaser of note, had received from sale of collateral a sum sufficient to satisfy the note; hence co-guarantor's remaining collateral note and deed of trust held by purchaser were discharged.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by S. Levinson and wife against the Continental National Bank of Los Angeles and Edna Elbow. Judgment for plaintiffs, and defendant Elbow appeals. Affirmed.

Janeway, Beach & Pratt, of Los Angeles, for appellant.

Shapiro & Shapiro, of Los Angeles, for respondents.

HOUSER, J. The judgment from which the appeal herein is presented to this court was rendered in an action brought for the purpose of enjoining the enforcement of a deed of trust on certain real property, as well as for having it declared that the deed of trust had been satisfied and paid.

From the findings of fact made by the trial court, as well as from evidence adduced at the trial, it appears that the plaintiffs and defendant Elbow were the owners of the entire outstanding stock of Fashion Hat Company, a corporation (hereinafter styled the corporation), of which stock plaintiffs owned 71 shares and defendant Elbow owned 15 shares; that one of the plaintiffs was the president and that defendant Elbow was the secretary of the corporation; that the corporation bor-

rowed from the defendant Continental National Bank (hereinafter termed the bank) the sum of \$4,000, evidenced by the promissory note of the corporation, attested by its said president and its said secretary, and as security therefor the 71 shares of stock owned by plaintiffs, an assignment to the bank of "accounts receivable" of said corporation amounting to approximately \$5,000, and the trust deed of plaintiffs on certain real property were deposited with the defendant bank; and that the said deposit of securities was also made security for a prior indebtedness of \$750 owing by the corporation to the bank. It further appeared that the corporation was also indebted to the defendant Elbow in the sum of \$3,000, evidenced by a promissory note in her favor; also, that at the time the \$4,000 loan was made by the bank to the corporation both the plaintiffs and the defendant Elbow personally guaranteed the payment thereof; and as security for her said guaranty, defendant Elbow deposited with the bank a certified check in her favor for the sum of \$4,000, which check was immediately cashed by the bank and its own cashier's check for the same amount in favor of said defendant Elbow was issued, but which check the bank retained in its possession. The record further discloses the facts that after the sum of \$2,097.14 had been collected by the bank from the "accounts receivable" of the corporation and applied by the bank toward the discharge of the indebtedness owing by the corporation to the bank, for a consideration of the sum of \$2,652.86, which was the total amount then owing to the bank, both on the \$4,000 note and the \$750 note of the corporation, the bank sold and assigned to an agent representing defendant Elbow the two promissory notes of the corporation to the bank and delivered to such agent all the securities which had been deposited by the corporation with the bank on account of said total indebtedness—the cashier's check for the sum of \$4,000 deposited with the bank by defendant Elbow as security for her guaranty of the payment of the loan to the corporation at the same time being delivered to defendant Elbow. Within a few days following such sale and assignment, the said agent of defendant Elbow, acting within his assumed and purported powers as holder of said promissory note and as pledgee in connection therewith, conducted a "pretended auction" sale of said note and said securities held by him, at which sale defendant Elbow, in her own name, became the purchaser thereof for the exact sum which her agent in her behalf had theretofore paid to the bank for such notes and securities. Shortly thereafter she sold and delivered to certain other persons the said 71 shares of stock belonging to the plaintiffs, together with her own 15 shares of stock, for the sum

of \$4,000, which money, together with whatever sums might be collected on the "accounts receivable" of the corporation, were placed in a trust account for the purpose of paying creditors (other than defendant Elbow, and the balance of \$750 on the former note of the corporation to the bank) of the corporation—after the claims of all such creditors had been paid, the balance remaining from the \$4,000 paid for such stock and the money received from the "accounts receivable" to be applied toward the payment of the \$3,000 note owing by the corporation to defendant Elbow—which arrangement was carried out, the defendant Elbow receiving therefrom, to her own use, an amount approximating \$2,400.

The trial court further found as facts:

"That the said defendant Edna Elbow is the holder of said promissory note and the said deed of trust, signed by said S. Levinson and Tillie Levinson, as aforesaid, and that the moneys realized by the said Continental National Bank of Los Angeles, a corporation, from the outstanding accounts and the moneys realized subsequently by the defendant Edna Elbow for the shares of stock in said Fashion Hat Company, a corporation owned by said plaintiffs, together with the moneys realized by said Edna Elbow from said outstanding accounts, is more than sufficient to fully pay and satisfy the said promissory notes of the said Fashion Hat Company, a corporation, and that the said \$4,000 promissory note, made, executed, and delivered by the plaintiffs, S. Levinson and Tillie Levinson, husband and wife, on the 12th day of December, 1921, in favor of the Continental National Bank of Los Angeles, a corporation, and secured by the said deed of trust of said date of December 12, 1921, covering the real property heretofore described, and the interest thereon, is fully paid and satisfied."

Appellant complains principally that "this case fails to sustain or justify the finding of the trial court to the effect that the trust deed note here involved has been fully paid; nor would it support a finding that anything had been paid on said note. * * *" Appellant also questions one other finding to the same effect, that the "moneys realized by the defendant bank from the accounts receivable, together with the moneys realized by Mrs. Elbow from said accounts, was more than sufficient to fully pay and satisfy the trust deed note. * * *"

[1, 2] In the circumstances of this case, the effect of the sale and assignment by the bank to the agent of appellant of the \$4,000 note and the securities therefor should be regarded as a sale directly to appellant. Besides being the secretary of the corporation, Mrs. Elbow was a guarantor of the payment of the note, and she should be permitted to make no profit from the transaction. The facts adduced from the evidence show that, aside from her arrangement with the final purchaser of the outstanding shares of stock of the corporation to pay off the debts of the corpo-

ration, for those shares of stock she received in trust the sum of \$4,000, to be used for the purpose of paying certain debts of the corporation; that at that time the amount unpaid on the \$4,000 note of the corporation was approximately \$1,900; and that defendant Elbow personally received the sum of \$2,400. While it is true that defendant Elbow paid to the bank the sum of \$2,652.86 for the note and the securities therefor, it should be remembered that such amount included payment of the former indebtedness of \$750, also owing by the corporation to the bank. Added to this circumstance, the evidence and the findings by the court disclose the fact that after the final sale of the shares of stock of the corporation had been made by defendant Elbow she received in payment of certain "accounts receivable" the sum of \$603.39, which amount, however, was included in the \$2,400 received by her, to which reference has been had. The trust deed and the note appurtenant thereto were given primarily as security for the principal note evidencing the loan of \$4,000 made by the bank to the corporation. All payments made to the bank by the corporation were credited to the principal note. The sale by defendant Elbow of the entire outstanding stock of the corporation was primarily for the sum of \$4,000. In view of the implied agency of defendant Elbow in the premises, it is apparent that defendant Elbow having received the sum of \$2,400 net for the 71 shares of stock belonging to the plaintiffs, and the 15 shares of stock of which defendant Elbow was the owner, it would follow that at least the plaintiffs should be entitled to a credit of 71/86 of the \$2,400, or the sum of \$1,981.39, which would be more than sufficient to satisfy the balance remaining due on the principal note given to the bank and for which the trust deed and its accompanying note were deposited as a guaranty. The fact that under the arrangements made by defendant Elbow with the purchasers of the stock to the effect that out of the moneys to be paid for such stock, together with any sums received on "accounts receivable" (which actually amounted to \$603.39), it would be necessary to pay creditors of the corporation (other than defendant Elbow, and the sum of \$750 owing by the corporation to the bank as a balance due on the promissory note given at a time preceding the date of the principal note here under consideration), should not militate against the conclusion reached by the trial court to the effect that the principal note was paid, and as a consequence that no further obligation existed on the part of the plaintiffs to satisfy the trust deed and the promissory note of which such trust deed was the security.

It satisfactorily appearing from the evidence that the principal indebtedness has been fully paid and discharged, it follows that the trust deed and its note should also be

so regarded. As hereinbefore indicated, the evidence shows that sufficient money was received from the sale of the stock of the corporation and its "accounts receivable" not only to pay the balance of the indebtedness owing by it to the bank on the principal obligation, but as well to discharge certain other obligations of the corporation, which by computation are found to amount to the sum of \$2,203.39. This court is therefore convinced that the findings of the trial court to which appellant objects are sustained by the evidence.

Other objections made by appellant to certain other findings require no consideration for the reason that they are either included in the findings already considered herein, or, as suggested by appellant, they are really immaterial and unnecessary to a decision of the case.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

84 Cal. App. 560

THOMPSON v. MANSFIELD et al.
(Civ. 5206.)

District Court of Appeal, First District, Division 1, California. July 26, 1927.

1. Mortgages $\S$ 32(6)—Mortgagor's reconveyance is not conclusively shown to be mortgage by fact that mortgagor remains in possession and price fixed is equivalent to pre-existing indebtedness.

Reconveyance from mortgagor to mortgagee is not conclusively shown to be given as security by fact that consideration may have been fixed by pre-existing indebtedness, or that mortgagor remained in possession after reconveyance, or that interest was charged by mortgagee upon sums which he expended.

2. Mortgages $\S$ 32(5)—Where facts and circumstances show continuation of debtor and creditor relationship, deed absolute in form may be held mortgage (Civ. Code, $\S$ 2924).

Deed absolute in form may be shown to have been intended as security for debt under Civ. Code, $\S$ 2924, where facts and circumstances, taken in connection with conduct of parties, show existence of indebtedness at time of transaction and continuation of relationship of debtor and creditor.

3. Mortgages $\S$ 294—Discharge of mortgage debt by conveyance made subsequent to mortgage in consideration for discharge of mortgage debt, and where transaction is fair and honest without fraud and no unconscionable advantage is taken of mortgagor's position such consideration is sufficient.

Mortgagor may transfer title to mortgagee by conveyance made subsequent to mortgage in consideration for discharge of mortgage debt, and where transaction is fair and honest without fraud and no unconscionable advantage is taken of mortgagor's position such consideration is sufficient.

4. Mortgages $\S$ 38(1), 86(3)—Finding that mortgagor's reconveyance of mortgaged property was made voluntarily and not intended as security held supported by evidence, in mortgagee's action to recover possession (Civ. Code, $\S$ 2924).

In action by mortgagee to recover possession of property after mortgagor's reconveyance and failure to exercise option to repurchase, finding of trial court that mortgagor's reconveyance was made freely and voluntarily and was not intended as security under Civ. Code, $\S$ 2924, held supported by evidence, though mortgagor retained possession thereafter under option agreement.

5. Mortgages $\S$ 38(2)—Evidence to establish that deed absolute on its face is mortgage must be clear and convincing (Civ. Code, $\S$ 2924).

Clear and convincing evidence is required to establish that deed absolute on its face is in fact mortgage, under Civ. Code, $\S$ 2924.

6. Appeal and error $\S$ 1009(1)—Whether evidence is sufficiently clear and convincing to prove deed absolute on its face is in fact mortgage is for trial court.

Whether evidence offered to change ostensible character of deed absolute on its face by showing instrument was in fact mortgage is sufficiently clear and convincing is question for trial court.

7. Appeal and error $\S$ 1011(1)—Findings upon conflicting or contradictory evidence are not reviewable.

Trial court's determination as to which of two opposing inferences shall be drawn from evidence or finding in favor of either party upon conflicting or contradictory evidence is not reviewable.

Appeal from Superior Court, Los Angeles County; Paul Burks, Judge.

Action by Cromwell C. Thompson against Ellen F. Mansfield and another, in which defendants interposed a cross-complaint. Judgment for plaintiff, and defendants appeal. Affirmed.

Wm. Neblett and John Dickinson, both of Los Angeles, for appellants.

Edward Winterer, of Los Angeles, for respondent.

CASHIN, J. An appeal from a judgment in an action to recover the possession of certain real property situated in Los Angeles county.

The plaintiff alleged title with the right to possession and averred that the defendants were wrongfully in possession of the property. These allegations were denied by the defendants, who by their cross-complaint alleged that they were the owners of the property; that a conveyance thereof executed by them to plaintiff's predecessor in interest and under which plaintiff claimed title was a

mortgage to secure the payment of the sum of \$3,695.

The court found for the plaintiff and against the allegations of the answer and cross-complaint, and entered judgment accordingly. The defendants appealed from the judgment, and urge as grounds for reversal that the evidence was insufficient to support the findings.

Defendant Soyer is the daughter of the defendant Mansfield, and the plaintiff is the son of T. Arthur Thompson.

In March, 1922, the property was conveyed to the defendants by T. Arthur Thompson in exchange for a parcel of land owned by them. The conveyance was made subject to two incumbrances thereon, namely, a mortgage for \$6,500 and a deed of trust to secure the sum of \$3,500, both held by George V. Kirkwood. The defendants as part of the consideration for the transfer executed to T. Arthur Thompson a second deed of trust thereon to secure the payment to him of \$2,250 in quarterly installments of \$250 each, the total amount of incumbrances on the property being the sum of \$12,250. The first installment, secured by the second trust deed, was in default in July, 1922, and at about the same time proceedings were commenced by Kirkwood to sell the property under the trust deed held by him. The plaintiff, who was acting as the agent for his father, was then advised by defendants that they would be unable to pay the installment or the amount due under the Kirkwood deed of trust. After considerable negotiation it was suggested by the attorney representing the defendants that the latter convey the property to Thompson, subject to the liens thereon, except the deed of trust held by him, and that the defendants be given an option to repurchase on or before January 1, 1923, subject to the above incumbrances, upon the payment of an amount with interest equal to the indebtedness to Thompson and such sums with interest thereon as might be expended by him to protect the property against foreclosure under the Kirkwood liens.

The defendants thereupon conveyed the property to Thompson subject to the mortgage in the sum of \$6,500 and a deed of trust executed thereon by Thompson as a part of the transaction to the Union Mortgage Company to secure a loan of \$3,850, which was used to pay the amount secured by the deed of trust held by Kirkwood. At the same time a reconveyance of the interest acquired by Thompson under the deed of trust held by him was made, the note secured thereby was surrendered, and an agreement was executed by the latter granting the defendants the right and option to purchase the property on or before the date mentioned, subject to the above incumbrances, upon the payment to him of the sum of \$3,695; it being further provided therein that the defendants should retain possession until that time free of rent.

The sum last mentioned represented that originally secured by the Thompson deed of trust, which, with interest to January 1, 1923, would have amounted to \$2,395, and included the interest paid and to be paid by Thompson on the mortgage mentioned, expenditures made by him to satisfy a mechanic's lien on the property, certain personal demands against the defendants due to third persons, and interest to the above date on the sums so expended.

On December 29, 1922, the defendants, by their attorney, made a written request for an extension of time under the agreement, which was granted, the request being as follows:

"Dear Mr. Thompson: Mrs. Miriam M. Soyer has asked me to communicate with you and request that the option on the premises 1630 North Wilson avenue, San Marino, California, be extended to February 1, 1923, with the understanding that she will not request a further extension of this option beyond that time. If this is agreeable to you may I ask you to notify Mrs. Soyer of this extension. Very truly yours, John Dickinson."

The option was not exercised, and some time after the date mentioned in the above communication demand was made for possession of the premises, which was refused by defendants, and on April 26, 1923, Thompson and his wife conveyed the property to the plaintiff, by whom a like demand was made and refused.

[1] Defendants contend that the evidence shows that the consideration for the deed was inadequate and that the price fixed for the reconveyance was equivalent to the pre-existing indebtedness; that interest was charged after the conveyance upon the sums expended by Thompson; and, it being admitted that the defendants remained in possession of the property, the only conclusion which can be reasonably drawn therefrom is that the deed was given as security. Such facts when shown are relevant to the issue and are circumstances to be considered with other evidence in the case, but, as held in the following cases, are not conclusive of the question: *Farmer v. Grose*, 42 Cal. 169-174; *Montgomery v. Spect*, 55 Cal. 352; *Vance v. Anderson*, 113 Cal. 532-541, 45 P. 816; *Emery v. Lowe*, 140 Cal. 379-383, 73 P. 981; *Lynch v. Lynch*, 22 Cal. App. 653, 135 P. 1101.

It is further urged that advantage was taken of the ignorance and necessitous condition of the defendants.

No direct evidence of the market value of the property was adduced, but it was testified by the plaintiff that he listed the property in the exchange for approximately \$18,000, and that its value on September 30, 1922, was about the same as when the exchange was made. The value placed thereon by the defendants does not appear, but it was shown that their efforts to sell the property were unavailing.

The consideration for the reconveyance included not only the amount of the pre-existing debt, but also the sums expended and to be expended by the creditor as stated above, and it is clear from the evidence that no interest thereon was paid or to be paid unless the option should be exercised. Furthermore, the evidence fails to show that an unconscionable or any advantage was taken of his position by the creditor. On the contrary, it appears that instead of exercising the power of sale under his deed of trust and thus on the expiration of the time provided for notice under section 2924 of the Civil Code depriving the defendants of all interest in the property (*Penryn F. Co. v. Sherman-Worrell F. Co.*, 142 Cal. 643, 646, 76 P. 484, 100 Am. St. Rep. 150; 25 Cal. Jur. "Trust Deeds," § 79, p. 95), the above transaction was entered into at their suggestion and the time for performance thereunder further extended at their request.

The contention that advantage was taken of the ignorance of the defendants cannot be fairly sustained. They were advised by competent attorneys from the commencement of the negotiations, and, moreover, it is apparent from the testimony of the defendant Soyer, the only witness called by the defense, that she was not ignorant of the nature of the transaction. As the court remarked during the course of her examination: "The court is impressed by the thought that this witness has a more clear understanding than she is willing to admit."

[2] A deed absolute in form may be shown to have been intended as security for a debt or obligation (Civ. Code, § 2924; *Keese v. Beardsley*, 190 Cal. 465, 213 P. 500, 26 A. L. R. 1538), and whether such was the intention is to be determined from all the facts and circumstances taken in connection with the conduct of the parties after the execution of the deed and the central facts to be found are the existence of an indebtedness at the time of the transaction and that the relations of debtor and creditor continue (*Montgomery v. Spect*, supra).

[3] There is nothing to prohibit a mortgagor from transferring the title to his mortgagee by a conveyance made subsequent to the mortgage, and a discharge of the debt where the transaction is fair and honest and without fraud and where no unconscionable advantage has been taken of his position by the mortgagee is a sufficient consideration for the transfer. *Watson v. Edwards*, 105 Cal. 70, 38 P. 527; *Bradbury v. Davenport*, 120 Cal. 153, 52 P. 301; *Garwood v. Weaton*, 128 Cal. 399, 60 P. 961.

[4] The plaintiff testified that the convey-

ance to Thompson was intended as a discharge of the debt, and the testimony of the defendant Soyer, who testified in effect that the debt was paid when the conveyance was made, supports the conclusion that such was her understanding. The testimony of these witnesses was conflicting, however, as to the intended effect of the option agreement, but that of the plaintiff, which the court believed, taken in connection with the significant facts that the instruments evidencing the agreement imposed no obligation upon the defendants (*Henley v. Hotaling*, 41 Cal. 22-29), and that in the written request for an extension the agreement was referred to as an "option on the premises," was sufficient to support the conclusion that a mortgage was not intended.

The facts of the case of *Malone v. Roy*, 94 Cal. 341, 346, 29 P. 712, cited by defendants, differ from those of the instant case in that as testified by the grantee of the mortgaged property by whom an option for a repurchase was given, the grantor agreed to pay the amount of the original debt within the period covered by the option, and, it appearing from the testimony without substantial conflict that the parties intended the deed as security, it was held that the finding of the trial court to the contrary was not justified by the evidence.

[5, 6] In order to establish that a deed absolute on its face is a mortgage requires clear and convincing evidence (*Woods v. Jensen*, 130 Cal. 200-203-206, 62 P. 473), but whether or not the evidence offered to change the ostensible character of the instrument is clear and convincing is a question for the trial court (*Brisson v. Brisson*, 90 Cal. 323-337, 27 P. 186; *Mahoney v. Bostwick*, 96 Cal. 53, 30 P. 1020, 31 Am. St. Rep. 175).

[7] In such cases, as in others, this determination as to which of two opposing inferences shall be drawn from the evidence (*Western Pacific R. R. Co. v. Industrial Accident Commission*, 193 Cal. 413, 224 P. 754), or a finding in favor of either party upon conflicting or contradictory evidence is not open to review on appeal (*Sherman v. Sandell*, 106 Cal. 373, 39 P. 797; *Wadleigh v. Phelps*, 149 Cal. 627-637, 87 P. 93).

From a review of all the evidence we are satisfied that the contention that the conduct of plaintiff or his predecessor in interest was fraudulent or oppressive or that the conveyance was not made freely and voluntarily cannot be sustained and that the findings of the trial court are fully supported.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

85 Cal. App. 46

GODFREY v. GODFREY. (Civ. 5043.)

District Court of Appeal, Second District, Division 2, California. Aug. 10, 1927.

1. Deeds ⇨71—Husband securing deed from wife after nagging, threats, and attempting to sell bonds of her daughter held not guilty of "duress" (Civ. Code, § 1569, particularly subd. 2).

Husband, who secured a deed from wife by means of nagging, threats to deny paternity of expected child, and by taking and attempting to sell bonds held in trust by wife for her daughter, held not guilty of "duress," within meaning of Civ. Code, § 1569, particularly subdivision 2 providing that unlawful detention of property of one illegally restrained is duress.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Duress.]

2. Deeds ⇨210—Finding that husband secured deed from wife without consideration warranting recovery of property held sustained by evidence.

In action to recover real property brought by wife against her husband, evidence held to sustain finding that the husband secured the deed to the property by threats, undue influence, and extortion, and hence deed was without consideration.

3. Appeal and error ⇨1011(1)—Finding and judgment founded on conflicting evidence will not be disturbed by appellate court.

Where finding of fact and judgment are founded upon conflicting evidence, they may not be questioned by the appellate court.

4. Appeal and error ⇨173(10)—Issue of laches in delaying to commence action to recover real property cannot be raised for first time on appeal.

Where at the trial defendant did not raise the issue of laches in delaying 9 months to commence an action to recover real property, he might not raise the issue on appeal.

5. Contracts ⇨75(1)—One, taking property in which he has no interest, by restoring it does not give consideration for property received from third person.

Where one takes and withholds personal property of another in which he has not the slightest interest, the restoration thereof is not a legal consideration for a contract by which he receives other property from a third person.

6. Contracts ⇨75(1)—That one taking property in which he has no interest subsequently claims ownership in legal proceedings does not make restoration a consideration for property received from third person.

Where one takes personal property of another, in which he has not the slightest interest, and withholds it, that he subsequently claims ownership of the property in a legal proceeding does not make the restoration of the property any consideration for a contract by which he receives other property from a third person.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action to recover real property brought by Bertie H. Godfrey against John Phillips Godfrey. From a judgment for plaintiff, defendant appeals. Affirmed.

Turnbull, Heffron & Kelly, of Los Angeles, for appellant.

Wm. J. Clark and Claude Morton, both of Los Angeles, for respondent.

CRAIG, J. [1] The plaintiff and respondent instituted this proceeding for the recovery of a certain parcel of real property situated at Beverly Hills, in Los Angeles county, which she alleged that appellant had obtained from her by coercion, threats to impugn her character and chastity, duress, undue influence, and extortion.

The appellant and respondent intermarried on February 3, 1922, at which time the latter possessed and held in trust Liberty bonds of the value of \$15,000, and other personal property belonging to her infant daughter, issue of a former marriage, named Ruth Meloy, and which were on deposit in a safe deposit box at the Los Angeles Trust & Savings Bank. On March 3, 1922, appellant purchased and caused to be conveyed to respondent the real property involved in this suit as a wedding present. Shortly thereafter appellant commenced, both personally and through friends and relatives of the respondent, a persistent course of urging and persuasion to induce Mrs. Godfrey to deliver the Liberty bonds to him for investment, which she repeatedly refused to do. Appellant then prevailed upon his wife to share with him the use of her safe deposit box, for which purpose she permitted him to register at the bank, but retained the key, which she concealed in a portfolio at home. On or about April 19, 1922, appellant surreptitiously abstracted the key from the portfolio, without the knowledge or consent of respondent, proceeded to the bank, and withdrew the Liberty bonds, which he delivered to and listed in his own name with a firm of stock and bond brokers, with instructions to sell them and to pay the proceeds to himself. Upon discovering the fact that the Liberty bonds of her daughter were missing, respondent accused Godfrey of having stolen them, which he at first denied, but finally admitted, stating that he would not relinquish them unless respondent would deed to him the real property above mentioned. Respondent caused Godfrey's arrest and filed an action in replevin for recovery of the securities; upon his release from custody, appellant apparently pursued a relentless campaign of argument, harassment, and threats that he would make respondent trouble unless she should consent to deed him the realty. Mrs. Godfrey testified at the trial that from the day that appellant obtained the bonds until the commencement

of this suit, and thereafter, he constantly coaxed, nagged, and tantalized her about a deed; that upon one occasion appellant admitted that he was aware of the fact that the Liberty bonds belonged to Ruth, but that he told her, "I have asked you for the house, and you wouldn't give it to me, and I have taken the bonds, and will give them back to Ruth as soon as you deed the house over to me;" that he stated to the brokers, "I know they are her daughter's bonds, but she has a piece of property of mine, and when she deeds the property back to me, I will return the bonds." It appears that during all of this controversy the respondent was believed to be expecting an heir, and she alleged in her complaint, and testified, that following a protracted course of such attacks, appellant asked her in the presence of a witness, who corroborated much of her testimony, if she had "had enough of it," if she was "ready to sign over the deed," and that when refused again, Godfrey said:

"Well, then, we will have a little more." "You will either deed over that house to me, or I will cause you a lot of trouble; I will simply say that I am not the father of this child that you are expecting; and, besides, you won't get the bonds until you deed over the house."

The voluminous record before us teems with such unconscionable statements, demands and threats, and it appears that this incessant embarrassment and menace ultimately resulted in a physical and mental breakdown, which Mrs. Godfrey believed would cost her life and that of her unborn child. She and other witnesses testified that on April 29, 1922, respondent visited her attorney; that she was then in a highly nervous and distracted condition, and stated that she could no longer bear the anxiety, oppression, and fear of being accused of infidelity, and that she felt compelled to convey the property to Godfrey in order to protect Ruth's securities, and to save her life and that of her expected child. Her counsel swore that "she was crying; tears were running down her face; she stated that the controversy with her husband was killing her; that if it was not stopped immediately she would not live." Finally, having concluded that she must submit to appellant's demands, though acting contrary to the advice of her counsel, respondent executed a deed to the stenographer in her attorney's office, who in turn deeded the property to Godfrey, the bonds were returned, and the replevin suit was dismissed.

The trial court rendered judgment herein for the plaintiff, and the defendant appealed. It is insisted that the return of the Liberty bonds, conveyance of the real property, and dismissal of the replevin suit was a legitimate compromise of pending litigation, and that it constituted a contract between the parties; that the evidence does not tend to show such a degree of duress as would entitle the plaintiff to rescind, and hence that the judgment

should be reversed. Appellant cites but few authorities, none of which is applicable to the case at bar. He seeks to rely upon subdivision 2 of section 1569 of the Civil Code, which defines duress as the unlawful detention of the property of a person illegally restrained, and *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 P. 938, holding that a mere threat to withhold a legal right, which one may legally enforce, does not constitute duress.

[2, 3] It is true that the acts of appellant did not consist of duress as defined by the section of the Civil Code cited in his brief, nor was the clandestine abstraction of the bonds and offering them for sale a mere threat to withhold them. But this is unimportant, for although the term "duress" was incidentally pleaded as a ground for recovery by the plaintiff and respondent, it was also alleged, the evidence strongly indicated, and the trial court found, that appellant's acquisition and retention of the Liberty bonds was unlawful and indefensible, and that he obtained a mere record title to the realty by threats, undue influence, and extortion, and hence without consideration; from which it results that had the technical term "duress" been entirely omitted from the pleadings, plaintiff's prayer that the deed be set aside entitled her to recover. The finding below reads as follows:

"That no benefit was conferred or agreed to be conferred upon the plaintiff to which the plaintiff was not lawfully entitled by reason of said deed, nor was any prejudice suffered or agreed to be suffered by said defendant other than such as he at the time was lawfully bound to suffer. That plaintiff did not receive any consideration or anything of value by reason of her said deed to Marion G. Wilson, and that there was not any consideration whatever for said deed. That said deed was not the free and voluntary act of plaintiff, but was extorted from plaintiff by defendant by the said threats and statements of defendant, and was executed by her under fear of the same. That said plaintiff would not have executed said deed to defendant, excepting for said acts, threats, and statements of defendant."

[4] Appellant denied both in his answer and upon the stand the essential allegations and testimony of respondent upon this issue, but the trial court found, and we think justly, that there was no consideration for the conveyance of the real property to him, and it is not within the province of this court to question a finding and judgment founded upon conflicting evidence. It is asserted in appellant's brief that the respondent was guilty of laches in delaying nine months to commence this action, but laches was not an issue at the trial, and cannot be raised for the first time on appeal. *Parkside Realty Co. v. MacDonald*, 166 Cal. 426, 137 P. 21.

[5] It is contended that evidence of the contents of the answer filed by appellant in the civil suit brought by respondent to secure the return of her daughter's bonds was improper-

ly refused admission in this case. The reason assigned for this claim is that the answer would have shown the contention of appellant in the former action, and that this would have established that respondent, through her attorney, had knowledge of such claim, and that proof of such contention and of respondent's knowledge thereof would have tended to show that in the settlement of the former suit appellant relinquished a right which constituted consideration for the settlement between the parties. The mere statement of this argument is sufficient to show its utter lack of logic. It is surely a novel suggestion that one, who, without the slightest interest in personal property of another, takes and withholds it, may make its restoration a legal consideration for a contract by which a third person parts with other property to the thief. This, of course, would merely legalize extortion.

[6] If such a transaction cannot be recognized in law, the mere fact that appellant, who, without right, took the personal property of respondent's child, afterwards had the assurance and brazenry to make a claim of ownership thereof in a legal proceeding surely cannot create a consideration where none existed.

No other points are presented which require discussion. The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

MICHENER v. HUTTON et al. (Civ. 5063.)★

District Court of Appeal, Second District, Division 1, California. Aug. 12, 1927.

Hearing Granted by Supreme Court Oct. 10, 1927.

1. Negligence ⇐121(2)—Doctrine of "res ipsa loquitur" is rule that accident is evidence of negligence of person in charge of work causing injury.

The doctrine of "res ipsa loquitur" is the rule that under some circumstances the fact of an accident which causes an injury is of itself evidence of negligence on the part of the person in charge of the work or structure from which the accident or injury proceeds.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Res Ipsa Loquitur.]

2. Negligence ⇐121(2)—Control of thing causing injury essential element of doctrine of res ipsa loquitur.

In order for the doctrine of res ipsa loquitur to apply, person sought to be held liable must have had control and management of the thing causing the injury.

3. Negligence ⇐121(2)—Doctrine of res ipsa loquitur is inapplicable, where cause of damage is matter of surmise.

Where it is a matter of surmise only that the damage was due to a cause for which the

defendant is liable, the doctrine of res ipsa loquitur is inapplicable.

4. Negligence ⇐136(6)—Evidence of plumbing contractor's negligence as to carpenter showing merely pipe fell held insufficient for jury.

Evidence of plumbing contractor's negligence where a carpenter was injured by the falling of a 30-inch piece of vent pipe, which had been securely placed in position extending through roof of house on day before by plumbing contractor, and which must have been moved by some person unknown, held insufficient for jury; doctrine of res ipsa loquitur being inapplicable.

Appeal from Superior Court, Los Angeles County; Harold Louderback, Judge.

Action for personal injuries brought by W. H. Michener against C. R. Hutton and another. From a judgment for plaintiff, defendants appeal. Reversed.

James, Pace & Smith, of Los Angeles, for appellants.

Jennings & Belcher, of Los Angeles, for respondent.

CONREY, P. J. The judgment rests upon the verdict of a jury, which awarded damages in the sum of \$2,000. Defendant Hutton was the plumbing contractor for a residence building in course of construction; defendant Goekler was his employee who did the actual plumbing work; plaintiff was a carpenter at work on the same building. Defendants appeal from the judgment.

[1] On the 27th day of September, 1922, Goekler was engaged in the installation of a vent pipe running from the bathroom on the second floor and out through the roof of the building. The pipe was run up in sections, each one of which was bell-shaped on the upper end, so that the section next above it rested in the bell-shaped top of the one next below and was fitted therein. The top piece, about 30 inches in length, extended through the roof and above it a distance of one foot. According to the uncontradicted testimony of Goekler, when he left his work he had installed this top piece in the manner above described. On the 28th day of September Michener was engaged in doing carpenter work on the ground floor, and was nailing in between the studding certain pieces known as fire stops. The plumber had not been on the building during that day. It is clear that the top piece of vent pipe could not have fallen out of place where Goekler had left it, and there is no evidence showing when or how it had been removed from position. Nevertheless, it is a proved fact that on the afternoon of the 28th, while Michener was at work as above stated, a 30-inch piece of vent pipe fell from the floor above and hit and injured Michener. It was then found that the top

piece of the vent pipe had disappeared from its position, and apparently it was this piece which struck Michener. If it had been removed from position and left loosely at some place from which it rolled off and fell to the ground below, this must have been done by some one other than the defendants, and the defendants would not be responsible for the consequent injury. Therefore the judgment must rest in part upon an implied finding by the jury that Goekler's testimony describing his work and the condition in which he had left this piece of pipe was not true. In this condition of the case the plaintiff brought to his aid the doctrine of *res ipsa loquitur*, which in substance is the rule that, under some circumstances, the fact of an accident which causes injury is itself evidence of negligence by the person who was in charge of the work or structure from which the accident or injury proceeded.

If the rule above stated was applicable to this case, then the mere fact that the pipe fell upon the plaintiff and injured him would constitute evidence legally sufficient to overcome Goekler's testimony showing that he had left the pipe in an entirely safe position. The court adopted plaintiff's theory of the law on the question indicated, and in accordance therewith gave its instructions to the jury. Instruction XIV reads as follows:

"If you find, however, from the evidence that the plaintiff was injured by the falling of the pipe, and if you further find that the pipe was under the management and control of the defendant, and that under such circumstances the pipe would not ordinarily have fallen, had the defendants exercised ordinary care in its control and management, then the mere fact that said pipe fell, if you so find, furnishes reasonable evidence that the accident, if any, arose as a result of negligence on the part of those having the control and management of the pipe, unless those having the control and management, by the evidence, explain the cause of the accident, if any, in such manner as to show that the accident was not the result of the want of ordinary care or negligence on their part."

Instruction XV repeated the same rule substantially to the same effect as shown by instruction XIV.

Appellants contend that the rule of *res ipsa loquitur* has no application to the facts of this case, and that without the aid of that rule the evidence is not sufficient to sustain the verdict. We are unable to agree to the claim of counsel for respondent that because, according to the testimony, none of the other workmen on the house were above the ground floor on the day the accident occurred, therefore "in whatever position Goekler left the pipe there it must have remained until the plaintiff's act of sawing or hammering dislodged it, causing it to fall." There is no evidence that the house was not accessible to in-

truders between half past 4 o'clock in the afternoon of the 27th when Goekler left the job, and the morning hour when the carpenters took up their day's work on the 28th.

[2-4] A recent decision by Division 2 of this court contains a brief and sufficient statement showing a limitation which is pertinent to the present case, in the application of the rule now under consideration. In that case plaintiff sought to recover damages for injuries to his automobile, while it was in possession of the defendant for the purpose of having the car washed. The court said:

"The cause of the injury in this case is undetermined. It may have been one over which the defendant had control, and it might have been one with which he had nothing to do. In order that the maxim *res ipsa loquitur* may apply it must first be shown that the person held liable had control and management of the thing in question. * * * In the instant case, aside from the occurrence of the accident, there is no further showing of negligence on the part of the defendant, except the testimony above referred to that high motor speed *could* cause the damage which resulted. To hold the defendant liable under these circumstances would be to merely conjecture that he had conducted himself negligently and thus caused the injury. Where it is a matter of surmise only that the damage was due to a cause for which the defendant is liable the doctrine is inapplicable. *O'Connor v. Mennie*, 169 Cal. 217 [146 P. 674]." *Scellars v. Universal Service Everywhere*, 68 Cal. App. 252, 228 P. 879.

"No general rule can be laid down that the mere occurrence of an accident is or is not sufficient proof of actionable negligence; for each case must depend upon its own circumstances." *Ingalls v. Monte Cristo Oil & Development Co.*, 23 Cal. App. 652, 661, 139 P. 97, 100.

In the case at bar, if the pipe as erected had fallen from the position where it was placed by the plumber, this might be taken as evidence that it had been insecurely fastened. Or if there had been evidence that the plumber left any loose pipe not yet placed in the structure, its falling off might be taken as a fact sufficient to prove negligence in leaving such pipe where it probably might roll off. But here the only testimony showing that the plumber left the pipe on the premises fails to show that he left it anywhere except in a place from which, as is conceded, it could not fall. We are of the opinion that, in the absence of any other proof of facts which would lay a foundation for an inference of negligence on the part of defendants, the mere fact that the pipe fell, after being moved (as it must have been), by some person unknown, cannot be accepted as evidence that any act or omission of defendants caused the plaintiff's injuries.

The judgment is reversed.

We concur: HOUSER, J.; YORK, J.

84 Cal. App. 787

WILLIAMS et al. v. FIRST NAT. BANK OF SAN DIEGO et al. (Civ. 4540.)

District Court of Appeal, Second District, Division 2, California. Aug. 8, 1927.

1. Banks and banking ⇨102—Authority which could not be delegated to officer could not be implied from fact that he was officer of bank.

Where authority to negotiate loan from another bank's customer could not be delegated to vice president of bank because such authority would have been *ultra vires*, such authority could not be implied from mere fact that he was vice president and chief executive officer of bank.

2. Banks and banking ⇨99—Where officer of national bank and wife guaranteed note for bank's customer, wife, having paid indebtedness, could not recover from bank, since bank could not have guaranteed notes or bound itself to secure her against loss.

Where vice president of national bank and his wife guaranteed note of bank's customer to another bank to assist him in obtaining loan, and customer used money obtained to pay debt due bank wife, having been compelled to pay indebtedness, could not recover from bank on ground that husband's negotiations were conducted in his official capacity and constituted acts of bank, and that her obligations were incurred as accommodation to bank, since bank could not have guaranteed notes or legally bound itself to secure wife against loss in transaction, and direction of verdict for defendants was proper.

3. Banks and banking ⇨227(3)—Evidence that customer obtained money on notes, which plaintiffs paid as guarantors, and paid debt due defendants did not support count for moneys received.

Evidence that bank's customer obtained money from another bank upon his promissory note, which plaintiffs guaranteed and later were compelled to pay, and used such money to pay debt to bank, did not support count for moneys had and received by defendant bank.

4. Appeal and error ⇨1041(1)—Refusing permission to include name of coplaintiff in prayer of complaint held not prejudicial error, verdict being for defendant.

Where trial court granted leave to amend prayer of complaint to include coplaintiff's name in prayer, but subsequently declined to permit amendment, refusing permission *held* not prejudicial error where verdict was directed for defendant and addition of prayer for judgment in favor of coplaintiff would have afforded him no added relief except that he might join in appeal.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Mina W. Williams and husband against the First National Bank of San Diego and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

L. E. Dadmun, of Los Angeles, for appellants.

Eugene Daney and Frederick W. Stearns, both of San Diego, for respondents.

CRAIG, J. The appellants C. L. Williams and Mina W. Williams are husband and wife. On and prior to January 29, 1917, one M. D. Goodbody was indebted to respondent American National Bank of San Diego (hereafter for convenience called the American Bank), of which appellant C. L. Williams was vice president and chief executive, in amounts aggregating \$70,000, for which it held promissory notes signed by Goodbody, or by one Charles K. Voorhees, who had charge of Goodbody's financial affairs; the American Bank was not authorized to carry an obligation of any firm or individual in such a large amount, and Williams was required by the bank to curtail Goodbody's loans, whereupon Williams negotiated with the Security Commercial & Savings Bank of San Diego (hereafter called the Security Bank) to take up two of Goodbody's notes, amounting to \$10,000, for which Williams received from the Security Bank, and delivered to the American Bank, a cashier's check, and Goodbody executed and delivered to the Security Bank his promissory note for \$10,000; Williams and Voorhees executed and deposited with the latter bank their notes for \$10,000 and \$3,000, respectively, as collateral security for Goodbody's paper; all three notes were dated January 29, 1917, and made payable six months from date. The Security Bank required further guaranties in the nature of real estate security, and Williams later deposited with his note a deed to certain real estate in San Diego county, but ultimately, and on September 28, 1918, all of the notes were canceled, and in their stead appellants executed two notes for \$7,000 and \$3,000, respectively, secured by a mortgage on real property of the appellant Mina W. Williams, and thereafter she was compelled to pay them both. During the month of December, 1917, the American Bank sold all of its assets to, and consolidated with, the respondent First National Bank of San Diego, and appellant C. L. Williams' connection with the bank then terminated.

Appellant Mina W. Williams, joining her husband as a party plaintiff, instituted this action against both of the respondents, alleging in her complaint the Goodbody indebtedness and the loan by the Security Bank above mentioned, and, further, that C. L. Williams' negotiations with the latter bank were conducted in his official capacity and constituted acts of the American Bank; that appellants' obligations to the Security Bank were incurred as an accommodation to the American Bank; that the latter received the \$10,000; and that since the plaintiff was compelled to pay such indebtedness with interest, the American Bank or its successor owed her

\$10,875, for which she prayed judgment, and each of the plaintiffs testified to all of the facts so alleged.

The respondents contended that Williams extended excessive credit to Goodbody on behalf of the American Bank, and that when reminded of that fact he personally obtained credit for Goodbody at the Security Bank, without requesting or receiving authority to bind his own bank, in which transaction it had no interest and received no consideration.

The case was tried before the superior court and a jury. Appellants' witness Dorland, president of the Security Bank, testified: That Williams personally applied for the loan of \$10,000, and made no mention of the American Bank. That following the consolidation he returned and said that he had severed his connection with the bank, and, further: "I don't want you to worry about this loan you have in here as that is my personal obligation." "So that you will feel entirely safe about it, I want to leave this deed with you to this piece of real estate which you will find is ample to cover it, and I expect soon to take up the note." That Williams then stated that it was not a bank matter, and that thereafter, upon another occasion, he said: "Well; you need not be apprehensive about that matter you carry, because I will personally take care of it." Voorhees, called by the plaintiffs, swore that he had been requested by Williams to take charge of Goodbody's financial affairs, and that he always considered himself in the employ of the American Bank, although he received his salary from Goodbody; that the latter's loans from the bank through Williams "ran up into the thousands"; and that when Goodbody was unable to obtain further credit, he (Voorhees) or some other person, would sign notes upon which money or credit was then furnished to Goodbody; that the witness' financial condition was practically insolvent, and his notes were valueless, but that Williams willingly accepted them, doubtless knowing of his irresponsibility; that he received nothing for executing the notes, and did not intend that he would be called upon to pay them. There is evidence tending to support the foregoing statement of facts. An officer of the First National Bank, testifying for the plaintiffs, stated that Goodbody's loans were greatly in excess of the amount which a national bank was by law permitted to carry for one individual; that he demanded that Williams have them reduced, that the bank had no authority to allow its own credit to be used for such purpose, and did not in fact agree to do so. It appears that neither of the respondents indorsed or took any part in obtaining credit upon the notes which were executed to the Security Bank, unless it can be said as a matter of law that the acts of its vice president even though ostensibly unofficial created an implied contract with appellants upon the

part of the bank to save them harmless from any loss which they might incur in obtaining credit elsewhere for one of its patrons; Williams did not sign any of the documents mentioned in the name of the American Bank when obtaining or extending the \$10,000 loan. Nearly two years thereafter, and after Williams' services and official connection with the American Bank had been terminated, he and his wife executed new notes and a mortgage as security therefor to the Security Bank, and it was insisted at the trial that Mrs. Williams was assured by her husband that the American Bank would guarantee that she should lose nothing through the transaction.

Thus it at once appears that there was presented a case for the jury to decide upon conflicting evidence, unless, regardless of Williams' power to bind the bank, or thereafter to bind the consolidated banks, they or either of them could not legally authorize him to do so in this instance, and that a verdict for the plaintiffs could not be sustained upon any theory. At the close of the plaintiffs' evidence the defendants moved for an instructed verdict, and after extensive argument upon the law and the facts, the motion was granted, and the plaintiffs appealed.

Each of the parties directs our attention to section 5200 of the Revised Statutes of the United States (Stats. 1906; Barnes' Federal Code, § 9234 [12 USCA, § 84]) which limits the liability which any person, firm or corporation may incur with a national banking association. That section prohibits any such liability in excess of 10 per centum of the amount of the actually paid-up capital stock of a national bank which remains unimpaired, and 10 per centum of its unimpaired surplus fund. The capital stock of the American Bank was \$200,000, and its surplus was about \$100,000. Hence, under the statutes, the utmost that this bank could legally have loaned to Goodbody, and the maximum liability which he could have been permitted to incur, was about \$30,000, whereas he borrowed upon promissory notes of his own and of others, some of which were worthless, amounts aggregating \$40,000 more than the federal statutes allowed.

But we are not here concerned with the question as to whether or not the American Bank, or Williams, violated the law in extending excessive credit, and it is not necessary to afford it more than passing attention for whatever evidentiary value it may have, coupled with the other facts presented, as an indication of Williams' knowledge and intent when negotiating with the Security Bank. Unless the plaintiffs were entitled to a verdict of the jury, this proposition may be eliminated.

We are convinced by an abundance of authority that neither of the respondent banks could have guaranteed Goodbody's notes, or have legally bound itself to secure Mina W.

Williams against loss in the transaction here involved. In *Bowen v. Needles National Bank*, 94 F. 925, 36 C. C. A. 553, which was an appeal from the Southern District of California, facts strikingly similar to those of the instant case were presented. The only difference of consequence is that there the defendant bank did in fact guarantee in writing that the obligations would be met at maturity. It was an attempt to finance the business of another, on paper, and without finances. The Circuit Court of Appeals for the Ninth Circuit, affirming a judgment for the defendants, said, in part:

"It may be stated in general that no banking corporation has the power to become a guarantor of the obligation of another, or to lend its credit to any person or corporation, unless its charter or governing statute expressly permits it. *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125 [69 Am. Dec. 678]; *Morford v. Bank*, 26 Barb. [N. Y.] 568; *Thomp. Corp.* § 5721. Under section 5136 of the Revised Statutes [12 USCA, § 24] national banking associations are given the power to 'make contracts' and 'to exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title.' There is in these provisions no grant of power to guarantee the debt of another, nor can such guaranty be said to be incidental to the business of banking. It has been so held in *Seligman v. Bank*, 3 Hughes, 647, Fed. Cas. No. 12642; *Norton v. Bank*, 61 N. H. 589 [60 Am. Rep. 334]; and *Bank v. Pirie*, 82 F. 799, 27 C. C. A. 171. An apparent exception is recognized in the case of the discount of promissory notes by national banks which may be transferred with a guaranty, but it rests upon the ground that the guaranty of such paper is but an ordinary incident to its transfer in the course of banking. In *People's Bank v. National Bank*, 101 U. S. 181 [25 L. Ed. 907] the court said: 'To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named.' There can be no doubt that the guaranty in the present case was *ultra vires*. It was aside and apart from the business of banking. The case is not that of an officer of a bank exceeding the powers delegated to him, but it is a case where the banking association itself has exercised powers in excess of those which were conferred upon it by statute. The plaintiff, equally with the defendant bank, was bound to take notice of the statute."

There are many other authorities which hold that an attempted guaranty by a national bank of the fulfillment of another's obligation in which the bank has no interest is *ultra vires* and void. *Thilmany v. Iowa Paper Bag Co.*, 108 Iowa, 333, 79 N. W. 68; *Farmers', etc., Bank v. Smith*, 77 F. 129, 23

C. C. A. 80; *Barron v. McKinnon* (C. C.) 179 F. 759; *Merchants' Bank v. Baird*, 160 F. 642, 90 C. C. A. 338, 17 L. R. A. (N. S.) 526; *Flannagan v. California National Bank* (C. C.) 56 F. 959, 23 L. R. A. 836. In the case at bar it is not contended that the American Bank transferred Goodbody's notes to the Security Bank, or that it indorsed them or discounted them. Williams merely obtained elsewhere the sum of \$10,000 and refunded to the American Bank a portion of the moneys which it had loaned. Goodbody executed and delivered to the Security Bank a promissory note for \$10,000, for which apparently a friend gave additional security, and it became a distinct transaction which the American Bank was prohibited from underwriting or guaranteeing.

[1, 2] It is obvious, therefore, that in the most favorable light which can be cast upon appellants' theory of the case, had the American Bank given to Williams express written authority to negotiate a loan, and agreed to protect him or any guarantor whom he might select against loss, which it is not contended here to have done, such authority or guaranty would have been *ultra vires* and void. If the bank could not delegate authority to do that which it in fact was itself precluded from doing, the inevitable result is that such authority cannot be implied from the mere fact that Williams was vice president and chief executive officer of the bank. It is argued that the American Bank had at other times so guaranteed commercial paper, and had negotiated, accepted, and paid such obligations through appellant Williams. This fact does not, however, alter the legal status of the present case. Appellants were therefore not entitled to demand reimbursement from either of the respondents, and a judgment in their favor would have been without legal foundation. The motion for a directed verdict against the plaintiffs was therefore properly granted.

[3] Appellants also pleaded by a common count an alleged cause of action for moneys had and received by the respondents. As we have seen, the amount received by respondents was in satisfaction of a debt due them from Goodbody, and was obtained upon the promissory note of Goodbody, which he executed and delivered to the Security Bank. No money was received by either of the respondents from Mina W. Williams, or from C. L. Williams, and this count was therefore not supported by the evidence.

[4] The appellant Mina W. Williams merely joined her complaint in the title of her complaint, and the prayer demanded judgment for her alone. Following the conclusion of the plaintiffs' evidence, and during argument, their counsel asked leave to amend the prayer of their complaint, and to include the name of C. L. Williams therein, which the trial court announced was granted. After the close of argument by the respective parties, the court declined to permit such amendment,

and instructed the jury to return a verdict for the defendants. This is assigned as a ground for reversal. The trial court had full power and control over its orders and rulings during the trial, and reversed itself only after extensive argument of the facts and the law, which are embraced in the record before us. It may well have appeared that the requested amendment, including both plaintiffs in the complaint, when neither was entitled to judgment, would be futile and would avail them nothing. Had the motion been granted, the addition of a prayer for judgment in favor of C. L. Williams would afford him no added relief, except that he also might join in an appeal. Since we are impelled to hold in favor of the respondents, an affirmance of the judgment leads to the patent conclusion that appellants were not prejudiced by the subsequent ruling.

Appellants cite many authorities holding that where the plaintiffs make out a case they are entitled to have it passed upon by the jury, and that in making loans, discounting notes, or other legitimate banking business within the scope of the federal statutes permitting such transactions, the institution will be presumed to have knowledge of, and acquiesce in, and will be bound by, the acts of its officers. However, such a case is not here presented, and appellants cite no authority in conflict with those which do control in the instant case, and which have been cited as a basis for this decision.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

85 Cal. App. 31

HATHAWAY v. MATHEWS et al. ★
(Civ. 5059.)

District Court of Appeal, Second District, Division 1, California. Aug. 10, 1927.

Hearing Denied by Supreme Court Oct. 3, 1927.

1. Master and servant ☞330(2)—Evidence of conversations held admissible to show defendant owner riding with driver had loaned automobile injuring pedestrian.

In pedestrian's action for injuries from being struck by an automobile, testimony of conversations between defendant owner and defendant driver, showing that when the accident occurred the owner was riding as a guest of the driver to whom she had loaned the automobile, held admissible as against objection that they were hearsay, self-serving, and immaterial.

2. Appeal and error ☞907(2)—Where trial court made finding of automobile driver's negligence, evidence would be assumed to support finding, though not appearing in record on appeal.

Where the trial court made a finding of negligence on the part of an automobile driver,

it would be assumed that there was evidence sufficient to support such finding, although it was not set out in the record on appeal.

3. Master and servant ☞330(3)—Evidence held insufficient as matter of law to prove owner riding in automobile allowed negligent driving (Motor Vehicle Act, § 19).

In pedestrian's action for injuries when struck by an automobile, evidence that the owner was in the automobile and that the driver was negligent held insufficient as matter of law to prove that owner had any opportunity to control the driver so that she could be said to have allowed a violation of the Motor Vehicle Act (St. 1915, p. 406), § 19.

4. Appeal and error ☞909(1)—Where trial court found automobile owner not liable for accident, appellate court must assume she could not prevent driver's negligence, nothing to contrary appearing (Motor Vehicle Act, § 19).

Where trial court found that the owner of an automobile was not liable for negligence in injuring plaintiff, though owner was in the automobile at the time of the accident, the appellate court must assume that she had no opportunity to prevent the negligence of the driver, and hence was not liable under Motor Vehicle Act (St. 1915, p. 406), § 19.

5. Master and servant ☞330(1)—Ownership of automobile establishes prima facie case against owner because of presumption that driver is agent.

The fact of ownership in an automobile negligence case, regardless of the presence or absence of the owner at the time of the accident, establishes a prima facie case against the owner because of the presumption that the driver is the owner's agent.

6. Master and servant ☞330(1)—Presumption that automobile driver was owner's agent is rebuttable.

The presumption in an automobile negligence case that the driver is the agent of the owner may be overcome by evidence which convinces the court to the contrary.

7. Master and servant ☞332(1)—Whether presumption of automobile driver's agency for owner riding was overcome held for trial court.

In pedestrian's action for injuries when struck by an automobile, where there was evidence that owner was guest of driver to whom she had loaned car, whether presumption of agency was overcome held for trial court.

8. Appeal and error ☞1010(1)—Trial court's finding on evidence that negligent automobile driver was not owner's agent held not reviewable.

Trial court's finding from the evidence that negligent automobile driver was not driving as the agent of the owner who was in the car at the time, held not reviewable.

9. Municipal corporations $\Leftrightarrow$ 706(5)—Evidence held insufficient as matter of law to show joint enterprise between owner and driver of automobile injuring pedestrian (Civ. Code, § 1714).

Evidence that automobile owner at the time of injuries to pedestrian was riding as guest of driver to whom she had loaned the automobile held insufficient as matter of law to show master and servant or principal and agent relation existing between her and the driver, so that the negligence of the driver could be imputed to owner under Civ. Code, § 1714, on the theory that she was engaged in a joint enterprise.

Appeal from Superior Court, Los Angeles County; J. J. Trabucco, Judge.

Action by Maude Hathaway against Neal Mathews and Lillian Grant. Judgment for plaintiff against Neal Mathews only, and plaintiff appeals. Affirmed.

Merton A. Albee and C. E. Spencer, both of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondents.

McLUCAS, Justice pro tem. Plaintiff appeals from a judgment rendered for defendant Lillian Grant in a suit brought for the recovery of damages for personal injuries.

This appeal presents but a single question, namely, whether the owner of an automobile is liable for the negligence of the driver committed while the owner was riding in the automobile at the invitation of the driver to whom the owner had loaned the automobile. The trial court gave judgment for plaintiff against the driver, Neal Mathews, who was the owner's codefendant. Defendant Mathews testified that he telephoned the defendant Miss Grant the evening before the accident and asked if he could borrow her car the next day to go to the beach; that he went to her home the next morning about 7:30; that:

"Miss Grant was employed at the time at the Berendo intermediate high school, located one block north of Pico and two blocks, I believe, beyond Vermont. When I arrived at the house she had her hat on coming out of the house. I told her I was coming and would take her. We got in the car together. I was driving the car. She told me over the telephone the day before that she would leave the key to the car by a certain tree in the yard, so that I would know where to get it. I thought she had gone to school that morning, but when I arrived and I found her getting ready to take the street car, I asked her to get into the car and ride with me, as I was going in the same direction and almost by the school, and that I wished her to ride with me, and she did get in the car, and I drove the car without any directions whatever from her, as to how to drive it, or what course to take, and I was driving the car at the time of the accident. Just after we crossed the intersection and just before the accident the plaintiff appeared suddenly in front of the car

when I was within about six feet of her and Miss Grant screamed."

Defendant Lillian Grant testified:

"He called me up and talked about various things, and he asked me if I was going to use the car the next day. Well, I told him that I was not going to use the car, and he asked for it; I told him I would be glad to let him have it. * * * Next morning I left the key in the same hiding place and started to go out, get the car—get the street car—it passed our house, and I met him right at the corner. By hiding place for the key I mean the place by the tree in the yard where I had told him that I would leave it for him the next morning. * * * He told me he was going down to the beach; he said he would drive me by the school, as it was right on the road he was taking. I had intended to take the street car, which was the more direct route and more convenient for me usually, but when he asked me to ride, he stated that he would take me by my school; I rode with him. I was glad to go. I got in the car. I remember as we approached the intersection, the accident. He was driving the car."

[1] Appellant assigns as error the admission of the foregoing testimony over plaintiff's objection that the conversations between defendants were hearsay, self-serving, incompetent, irrelevant, and immaterial. We see no force in this objection, since defendants were entitled to show the circumstances under which the defendant Grant was riding in the car at the time the accident occurred as an offer of proof that she, as the owner, had loaned her car to some other person.

The findings were that the defendant Lillian Grant was, on the 4th day of November, 1921, the owner and in possession of one certain Ford coupé. The court further found:

"II. That on the 3d day of November, 1921, said Lillian Grant agreed gratuitously to let the defendant Neal Mathews have the use of said Ford coupé on the 4th day of November, 1921, and, pursuant to said agreement, on said 4th day of November, 1921, and prior to the accident hereinafter mentioned, defendant Lillian Grant gratuitously loaned to defendant Mathews and defendant Mathews borrowed of defendant Lillian Grant the said Ford coupé, for the purpose on the part of defendant Mathews of driving in the same upon his own business to Venice, Cal.

"III. That on said 4th day of November, defendant Mathews went to the residence of defendant Lillian Grant for the purpose of obtaining said automobile, as aforesaid, and there saw defendant Lillian Grant and invited her to ride with him in said automobile to the Berendo junior high school in the city of Los Angeles, in said county, at which school defendant Lillian Grant was then and there employed as a teacher; and defendant Lillian Grant accepted said invitation and was riding in said automobile and sitting beside the defendant Mathews on the way to her said place of employment at the time of the accident hereinafter mentioned. That there was no other or further agreement between said

defendants with reference to the use or control of said automobile at said time other than as hereinbefore found.

"IV. That the defendant Lillian Grant did not exercise or attempt to exercise any actual or physical control over the driving or operation of said automobile between the time of said lending of the same and the occurrence of the accident hereinafter mentioned.

"V. That defendant Neal Mathews thereupon drove and operated said automobile from said city of South Pasadena into the city of Los Angeles, and westerly upon and along North Broadway, a public street of said city of Los Angeles.

"VI. That Daly street, a public street of said city of Los Angeles, then intersected and now intersects said North Broadway in a northerly and southerly direction at a point where, for some distance, said North Broadway extended and extends in an easterly and westerly direction. That at said place double tracks of the Pacific Electric Railway extended upon and along the central portion of Daly street, and double tracks of the Los Angeles Railway extended upon and along the central portion of North Broadway, and the east-bound street cars of the Los Angeles Railway Company habitually stopped for the purpose of taking on and discharging passengers at a place on the southerly track on North Broadway, immediately west of the intersection of said street with said Daly street. That at said location Daly street was and is a narrow street and North Broadway a wide street; and said intersection and the territory adjacent thereto was within and constituted a 'business district' as the same was defined at said time by the Vehicle Act.

"VII. That at the hour of 8 o'clock a. m. on said 4th day of November, 1921, the plaintiff proceeded in a careful and prudent manner southerly across North Broadway from a point a short distance west of the west property line of Daly street, toward an east-bound street car of the Los Angeles Railway, which was then and there standing at the stopping place above described taking on and discharging passengers for the purpose of doing the same. That the entrance to said car was at the rear end, on the right side thereof. That plaintiff so proceeded to within two or three feet of the rear step on the left side of said street car, and was proceeding toward and near the rear end of said car, touching said car with her left hand, at the time of said accident.

"VIII. That at about said time the defendant Mathews was negligently and heedlessly driving said Ford coupé westerly along the northerly side of North Broadway, and up to the moment of the impact with plaintiff, and in so doing suddenly, negligently and at said speed, drove and operated said automobile from behind and past another automobile proceeding in the same direction, without first sounding or giving any audible or other signal or warning thereof, so that said Ford coupé emerged suddenly from behind said preceding automobile and passed the same; and defendant Mathews continued to so negligently drive and operate said automobile without sounding any warning of its approach that by reason thereof it ran against, upon, and over plaintiff, who was then and there unaware of its approach.

"IX. That by and through said negligence of defendant Mathews and his said careless and reckless operation of said automobile, the plaintiff was dangerously and grievously injured, in the following particulars, to wit: * * *

"XI. That by reason of all the premises, plaintiff has been damaged in the sum of \$5,500, no part whereof has been paid."

As a conclusion of law from the above facts the court found that the plaintiff was not entitled to any judgment against the defendant Lillian Grant, and that plaintiff was entitled to judgment against the defendant Neal Mathews in the sum of \$5,500, and judgment was entered accordingly.

Appellant takes the position that defendant Lillian Grant is liable under the express provisions of the California Vehicle Act, as well as under general principles of law, and that the particular findings upon which the court concluded as matter of law that defendant Lillian Grant was not liable, if they do call for such a construction, are to that extent unsupported by the evidence, and that, on the other hand, the findings as they now stand call for judgment against defendant Lillian Grant as matter of law. In view of this position taken by plaintiff, we have herein quoted substantially all of the evidence contained in the bill of exceptions, and substantially all of the findings, in so far as the same are material to the decision of this case. The question for decision is whether or not, as matter of law, this court can decide on the record before it that the trial court should have rendered judgment for plaintiff against defendant Lillian Grant, the owner, as well as against her codefendant, the driver of the automobile. Appellant argues that judgment should have been given against Miss Grant for the reason that section 19 of the Motor Vehicle Act at the time this accident happened provided as follows:

"No person shall allow a motor vehicle owned by him or under his control to be operated by any person * * * in violation of the provisions of this act." St. 1915, p. 406.

We find nothing in the foregoing section which would assist us in determining the question at issue favorably to appellant. There is no word of evidence in the record, nor any finding made by the court, to the effect that defendant Lillian Grant, as owner, ever allowed her automobile to be operated by her codefendant in violation of the provisions of the Motor Vehicle Act. The only evidence contained in the bill of exceptions as to the manner in which the car was being driven at the time of and before the accident is the testimony of Mathews, the driver, as follows:

"* * * But when I arrived and I found her getting ready to take the street car, I asked her to get into the car and ride with me, as I was going in the same direction and almost by the school, and that I wished her to ride with me, and she did get in the car, and I drove the

car without any directions whatever from her, as to how to drive it, or what course to take, and I was driving the car at the time of the accident. Just after we crossed the intersection and just before the accident the plaintiff appeared suddenly in front of the car when I was within about six feet of her, and Miss Grant screamed."

[2-4] The foregoing is not sufficient evidence on which to predicate a finding of negligence on the part of either the driver or the owner. Inasmuch as the trial court made a finding of negligence on the part of the driver, it may be assumed that there was additional evidence as to the manner in which the automobile was being driven sufficient to support a finding of negligence on the part of the driver; but there is no such testimony in the record before us. It can scarcely be said that this court can, as matter of law, without any evidence before it, determine that the defendant Grant was guilty of negligence because she, as owner, sat in the machine while it was negligently driven by another, without any evidence appearing in the record showing whether the owner had any opportunity to control the driver as to the manner in which the machine was driven. It does not appear from the evidence before us, nor from the findings of the court, when the negligence of the driver commenced, except that Mathews was driving negligently at about the time plaintiff was proceeding toward the standing street car. The trial court, having all the evidence in the case before it, found the defendant Lillian Grant not liable, and it therefore must be concluded from the testimony that the defendant Grant had no opportunity to prevent the negligence of the driver. This court is bound by that conclusion, in the absence of anything to the contrary in either the bill of exceptions or the findings. In *Rocca v. Steinmetz*, 189 Cal. 426, 208 P. 964, cited by appellant, the defendant is not sued as the mere owner of the automobile, but he is sued as the owner who has allowed his son to drive his automobile, knowing that his son is a reckless and careless driver. No proof of any such knowledge appears in the record before us, nor is there any finding of such knowledge made by the trial court.

[5-7] Appellant's contention that judgment should have been rendered against defendant Lillian Grant on general principles of law, independent of the Vehicle Act, cannot be sustained. While generally the fact of ownership alone, regardless of the presence or absence of the owner, as held in the cases cited by appellant, establishes a prima facie case against the owner, for the reason that the presumption arises that the driver is the agent of the owner, yet this presumption may be overcome by evidence which carries conviction to the mind of the court. *Dierks v. Newsom*, 49 Cal. App. 739, 194 P. 518; *McWhirter v. Fuller*, 35 Cal. App. 288, 170 P.

417; *Frierson v. Pacific Gas & Elec. Co.*, 55 Cal. App. 397, 203 P. 788. It cannot be held in this court as matter of law on the record before us that there was not sufficient testimony to overcome this presumption of agency. In *Randolph v. Hunt*, 41 Cal. App. 739, 183 P. 358, cited by appellant, there was evidence that the driver had borrowed the car to seek employment, and that he invited the owner to go along to recommend him; but notwithstanding this testimony, respondent contended that there were two theories, upon either of which the verdict of the jury might be justified:

"The first is that the jury was warranted in rejecting the story as untrue and holding that there was no such arrangement between Hunt and Triggs, whereby the car was loaned to the latter. The second is, that if said car was borrowed, appellant did not part with control of it, and that it was his duty as owner and occupant to see that it was operated in a careful and prudent manner, and that he is responsible for the consequences of his violation of this duty."

The Court of Appeal said:

"As to the first of these contentions, it cannot be said here that the jury was bound to accept the statement of said witnesses as true. Being the exclusive judges of the weight of the evidence and the credibility of the witnesses, if the testimony did not carry conviction to their minds, they had the legal right to reject it. We must assume that they did not believe the story, and we cannot say, in the absence of any showing to the contrary, that the jury acted arbitrarily, or otherwise than in good faith and with an honest purpose. We would not be justified by the record in branding the statement of these witnesses as false, although there are certain circumstances that tend somewhat to discredit it, but we are not in a position to interfere with the jury's discretion in that particular."

The Supreme Court, in denying a petition for rehearing, said:

"In denying a rehearing in this case we deem it proper to say that we limit our approval of the opinion of the district court of appeal, on the question of the liability of the owner, to the first of the reasons assigned therein as cause for affirmance of the judgment, that is to say, the reason summarized therein as follows: '1. The question of the alleged agreement with Triggs was submitted to the jury; it was resolved against appellant on conflicting evidence, and this finding cannot be reviewed by this court.' As to the soundness of the other reasons set forth by the district court for the existence of such liability, we express no opinion. The petition for rehearing is denied."

[8] So in the case at bar, the question of the alleged agreement between the driver and the owner was submitted to the court. It was resolved against appellant on the evidence, and that finding cannot be reviewed by this court. Appellant in her closing brief cites *Bosse v. Marye* (Cal. App.) 250 P. 693, wherein a rehearing was denied by the Su-

preme Court, as being decisive of this case. We cannot agree. In that case the sole liability attaching to defendant Rudolph Spreckels was conceded to be a statutory one, namely by reason of his having signed the application for the issuance to his minor daughter of a driver's license. In that case Miss Spreckels had driven the car to San Francisco, and on the return trip invited a companion to drive the machine. The accident occurred while the companion was driving and Miss Spreckels was seated in the automobile. The Court of Appeal said by way of obiter dictum, quoting from *Randolph v. Hunt*, supra, language on which the Supreme Court had refused to express an opinion, as follows:

"In this respect, we think the responsibility of a licensee is no different from that of an owner who turns over the wheel of his automobile temporarily to another, but continues to ride with the person entrusted with the driving. In such a case, it is said: 'Again, if the owner of an automobile lends his machine to another and on invitation becomes a passenger therein, in the absence of any agreement to the contrary, the owner has the right, and indeed, it is his duty to prevent, if possible, the driver from operating the machine in a reckless and dangerous manner and in violation of law. He cannot sit idly by and refrain from remonstrance, at least, while knowing that the driver is thus endangering the lives of others. If he has the opportunity to restrain the driver and fails to take advantage of it, he should be held responsible for the consequences. This is the just view, and it is supported by the authorities. The general rule is stated in 28 Cyc. 38, as follows: "Where an injury is inflicted by the use or operation of a motor vehicle, upon the public highway, the owner thereof is liable to respond in damages therefor, if the vehicle was being operated by such owner or was under his control. * * * In all cases where the owner is present he will be responsible for injuries sustained by third persons, unless the operator disobeys instructions as the owner is in law in control of the vehicle."' *Randolph v. Hunt*, 41 Cal. App. 739 [183 P. 358]."

In the present case there is no evidence in the record nor any finding that the owner sat idly by and refrained from remonstrance, or that she knew the driver was endangering the lives of others, or that she had opportunity to restrain the driver.

[9] Finally, appellant urges that Miss Grant should be held liable as engaged in a joint enterprise with Mr. Mathews. In *Pope v. Halpern*, 193 Cal. 168, at page 174, 223 P. 470, 473, it is said:

"The decisions are not in accord as to what constitutes a joint or common enterprise, but

it has been held in this state that the passenger must exercise some control over the driver, or, in law, may be said to possess the right of such control, before it will be held that they are engaged in a joint enterprise. *Bryant v. Pacific Elec. Ry. Co.* [174 Cal. 737, 164 P. 385] supra. In *St. Louis & S. F. Ry. Co. v. Bell*, 58 Okl. 84, 159 P. 336 (L. R. A. 1917A, 543), the court said: 'Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interests in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management.' It will be seen from these two decisions that in order that there be such a joint enterprise it is not sufficient merely that the passenger of the machine indicate the route, or that both parties have certain plans in common, such as a 'joy ride,' but the community of interest must be such that the passenger is entitled to be heard in the control and management of the vehicle. In *Bryant v. Pacific Elec. Ry. Co.*, supra, the court, after referring to the case of *Wentworth v. Town of Waterbury*, 90 Vt. 60, 96 A. 334, where apparently the only basis for the imputation of negligence of the driver of an automobile to the plaintiff was the circumstance that they were both engaged in the common purpose of taking two ladies for an afternoon's drive to view a lake, said: 'In our opinion, the doctrine of imputable negligence should not be so loosely applied. To do so leaves the law in an uncertain state. The better view is expressed by *Nonn v. Chicago City Ry. Co.*, 232 Ill. 378, 83 N. E. 924, 122 Am. St. Rep. 114: "There can be no such thing as imputable negligence, except in those cases where such a relation exists as that of master and servant or of principal and agent. In order that the negligence of one person may be properly imputed to another they must stand in such relation of privity that the maxim *qui facit per alium facit per se* directly applies." Indeed, no other rule is consistent with section 1714 of the Civil Code, wherein it is declared that every one is responsible for an injury occasioned to another by his want of ordinary care "except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself."'"

Tested by these principles, we are of the opinion that it cannot be held as matter of law from the evidence or findings before us that either the relation of master and servant or principal and agent existed between Miss Grant, the owner, and Mr. Mathews, the driver of the automobile.

The judgment is affirmed.

We concur in the judgment: HOUSER, J., Acting P. J.; YORK, J.

84 Cal. App. 592

STOWE v. MAXEY, County Auditor.
(Civ. 3285.)

District Court of Appeal, Third District, California. July 22, 1927.

1. Counties ⇐103—Statute empowering board of supervisors to acquire and maintain property for public purposes held inapplicable to holding county fair (Pol. Code, § 4041, subd. 6).

Pol. Code, § 4041, subd. 6, empowering county board of supervisors to acquire and maintain an exposition building or buildings, public pleasure ground, public parks, or property for other public purposes, *held* inapplicable to holding county fair and improving property for that purpose.

2. Counties ⇐50—Board of supervisors cannot delegate to corporation discretionary powers for holding county fair so as to render county liable for corporation's expenditures (Pol. Code, § 4041, subds. 6, 7; Const. art. 11, § 18).

The county board of supervisors must itself exercise the discretionary powers given by Pol. Code, § 4041, subds. 6, 7, for holding a county fair, and cannot delegate these powers to a private corporation so as to render county liable for deficiency incurred by such corporation in handling the fair, contrary to Const. art. 11, § 18.

3. Counties ⇐103—Statute authorizing supervisors to levy taxes to exploit county's resources held not to authorize holding county fair (Pol. Code, § 4056b, and § 4041, subd. 33).

Pol. Code, § 4041, subd. 33, and section 4056b, authorizing the county board of supervisors to levy taxes to exploit the county's resources and to create a fund to prepare and maintain and exploit the county's products in industries, *held* not to authorize improving fair grounds and erecting new buildings for holding county fair.

4. Counties ⇐50—Supervisors having no authority to delegate power to corporation to hold county fair could not ratify corporation's action thereunder (Civ. Code, § 2312).

Where the county board of supervisors had no authority to delegate to a private corporation its power to maintain grounds for county fair and erect new buildings, it could not ratify the corporation's actions under an attempted delegation of power, especially in view of Civ. Code, § 2312, so as to render county liable for expenditures incurred by corporation.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by C. A. Stowe against John D. Maxey, as the Auditor of the County of San Joaquin, to restrain defendant from drawing his warrant on the county treasurer. Judgment for plaintiff, and defendant appeals. Affirmed.

Louttit, Stewart & Louttit and Tye & Edwards, all of Stockton, for appellant.

Gumpert & Mazzera, of Stockton, for respondent.

PLUMMER, J. This is an action in equity brought to restrain the defendant, as the auditor of the county of San Joaquin, from drawing his warrant upon the treasurer of said county, in payment of a certain claim allowed by the board of supervisors in favor of the San Joaquin County Fair Association. The plaintiff had judgment and the defendant appeals.

The transcript shows that in 1919 the San Joaquin County Fair Association was incorporated as a nonprofit corporation, for the purpose of advertising, exploiting and making known the resources of San Joaquin county, etc. During that year a county fair was held by said association in said county at a site called "Oak Park." Prior to the incorporation of the association just referred to and at all times since said date, the county of San Joaquin was and has been the owner of certain premises known as and called the fair ground site near the city of Stockton, upon which are located a race track, stables, exhibition buildings, and a grandstand. During the years 1920, 1921, 1922, 1923, and 1924 the San Joaquin County Fair Association has conducted fairs upon the premises last herein referred to. These fairs have been conducted upon said premises with the knowledge and consent of the individual members of the board of supervisors of San Joaquin county, but it does not appear from the transcript that the board of supervisors either expressly or impliedly took any legal action in reference to the use and occupation of said grounds by the San Joaquin County Fair Association, or with reference to the improvements and expenditures thereon made by the association.

The transcript shows that after taking possession of the fair grounds the association proceeded to make many improvements thereon in the erection of buildings, fences, barns, turnstiles, installation and conduct of a cafeteria, and generally doing all those things necessary to the conduct of a county fair upon said premises. It further appears from the transcript that the fair association proceeded to collect moneys from the sale of admission tickets and otherwise, and applied the same toward the payment of the expenses of conducting the fair and in the erection and furnishing of the buildings referred to, and in the purchase of personal property deemed necessary in the conduct and maintenance of county fairs.

It further appears that with the conclusion of the county fair held by the San Joaquin County Fair Association in the year 1924 the expenses at that time showed an excess of some \$15,000 over receipts. For the purposes of paying off the deficit incurred by

the San Joaquin County Fair Association, a corporation, in the conduct of the fairs referred to, a claim for approximately \$15,000 was filed against the county of San Joaquin, the expenses making up this claim appear to have been incurred during the years 1923 and 1924. Upon the presentation of this claim the board of supervisors on the 12th day of January, 1925, adopted the following resolution:

"Whereas, the county of San Joaquin is the owner of that certain real property, and the improvements thereon, known as Agricultural Park, which said property has been heretofore acquired by said county and improved with exposition buildings, race track, stadium, and other recreation and amusement park features; and

"Whereas, the San Joaquin County Fair Association, a private corporation heretofore, with the sanction and consent of said board of supervisors, took charge of and made certain improvements in and about said Agricultural Park for the purpose of improving same as a public recreation ground and park and rendering same more suitable for the carrying on of a county fair for the purpose of collection, preparing, and maintaining exhibitions of the products and industries of the county of San Joaquin as a domestic exposition, and for the purpose of exhibiting and advertising the agricultural, mineral, and other resources of said county, and did, in the month of August, 1924, hold, at said Agricultural Park, in said county, a domestic exposition known as the San Joaquin County Fair, for the purposes aforesaid; and

"Whereas, said San Joaquin County Fair Association, a private corporation, has presented, or caused to be presented to this board of supervisors certain demands against the treasurer of the county of San Joaquin for allowance and payment for certain debts incurred by said San Joaquin County Fair Association for and on behalf of the county of San Joaquin; and

"Whereas, it further appears to this board that the hereinafter specified claims and demands are legal charges against the county of San Joaquin pursuant to subdivision 6 of section 4041 of the Political Code of the state of California empowering boards of supervisors to pay out of the general fund the expenses of improving public pleasure grounds, public parks, and to preserve and take care of the same, as to such of said claims hereby so designated to be paid out of the general fund, and that the remainder of said claims hereinafter so designated to be paid out of the immigration fund are similarly legal charges against the county of San Joaquin pursuant to section 4056b of the Political Code of California, also subdivision 33 of section 4041 of the Political Code of the state of California, authorizing and empowering boards of supervisors to levy certain taxes for the purposes of creating a fund to be used for collecting, preparing, and maintaining an exhibition of the products and industries of the county for the purpose of advertising, exploiting, and making known said resources for the purpose of inducing immigration and increasing the trade and commerce of said county, and providing said claims and demands are, by appropriate resolution, ratified by this board of supervisors as having been incurred for and

on behalf of said county of San Joaquin for its use and benefit, now therefore:

"It is hereby resolved and ordered that the incurring of the hereinafter designated claims and demands heretofore incurred by the San Joaquin County Fair Association, a private corporation, as aforesaid, be and the same hereby are ratified by the board of supervisors of the county of San Joaquin as having been incurred for its use and benefit for and on its behalf, and the same are hereby approved, allowed, and ordered paid to the following named persons, firms, and corporations, in the amounts set out after their respective names, from the general fund and the immigration fund of said county of San Joaquin, as hereinafter designated."

This resolution is the first official action taken by the board of supervisors in relation to the county fairs held in said county by the San Joaquin County Fair Association, a corporation.

The manner in which the fair association took general charge of the fair grounds and proceeded with its improvement of the same, the erection of buildings, and the holding of county fairs, is fully shown by the testimony of W. L. Douglas, the manager of the fair association. His testimony is as follows:

"My introduction to the board of supervisors was in June, 1920, when they came out to the fair grounds and the board of directors of the fair association and the board of supervisors and myself met on the grounds. I think it was June 16, 1920. Now, at that time, they had a tentative agreement that they would go ahead and expend some money in the improvement of the grounds. The fair association had been organized for two years and held a fair at Oak Park in 1919. The supervisors said they would expend a certain amount of money on cattle barns and a certain amount of money on the pumping plant. There was no resolution made at that time; there was no written agreement; but it was agreed at that time among themselves—the fair association directors and the board of supervisors—that the fair association would go ahead, run the fair, put on a fair during the year 1920, after this money had been expended. Since that time, each and every year, we have had various and numerous meetings with the supervisors, sometimes in their office, sometimes at the fair grounds. We have all been to the fair grounds together. The board of supervisors have gone out there and gone over the whole grounds with me. I showed it to them, told them what we were doing, showed them the improvements, asked their advice in various matters and various things that should be done and they have always been constantly apprised of what the fair association was doing towards improving and conserving the property on the San Joaquin county fair grounds. I called upon the board of supervisors one time and asked them to change the name from Agricultural Park to San Joaquin County Fair Grounds. I know of that resolution and the question came up of renting the stalls on the grounds. They sent me a letter advising me to go ahead and collect stall rent—rent stalls and collect money therefor. Those are the only resolutions that I have any record of, but the supervisors meeting with them

at various times—they have always been advised what we are doing.”

In 1924, in preparation for the 1924 fair, the transcript shows that the association furnished materials and supplies, constructed fences about the race track, cared for the grounds, repaired the buildings, installed a pump and turnstiles, and performed other work considered necessary in connection with the holding of the county fair.

The trial court found, among other things, that in all matters connected with or pertaining to the construction, repair, furnishing, improving, preserving, managing and controlling the buildings and improvements on said premises, in the purchasing and furnishing of materials, supplies, etc., the San Joaquin Fair Association used and exercised its judgment and discretion and the judgment and discretion of its officers; that the county of San Joaquin and the board of supervisors of said county and the members of said board of supervisors did not exercise or use any judgment or discretion therein, nor did any officer of the county exercise any judgment or discretion in relation to said matters, and, summarizing the findings of the court which are quite lengthy, it is found that all the work of construction, repairs, furnishing, improvements, preservation, management, control, etc., the quantity and quality of the work to be done, the amount to be paid therefor, and everything practically connected therewith, was done and performed upon the initiative of the San Joaquin County Fair Association, without any action whatever on the part of the board of supervisors, or any purchasing agent of said county.

The first official action of the board of supervisors relative to the expenditures made and indebtedness incurred by the San Joaquin County Fair Association, a corporation, was the passage of the resolution which we have herein set forth. The transcript further shows that during all the times mentioned herein the county of San Joaquin had a duly appointed and acting purchasing agent, as provided for in subdivision 21 of section 4041, Political Code, and therefore, as provided for in subdivision 7 of said section, in order to require bids for furnishing materials, supplies, and work for the county, the aggregate sum to be expended under the contract must exceed the sum of \$1,000. The court in this case has found that the contracts exceeded said sum.

[1] The appellant's contention in the first instance is based upon the provisions of subdivisions 6 and 33 of section 4041 of the Political Code and section 4056b of said Code. The inapplicability of subdivision 6 of section 4041 is apparent, however, as it nowhere relates to the holding of fairs or performing the acts generally done and performed by the San Joaquin County Fair Association, as

shown by the testimony set forth in the transcript.

Subdivision 6 of section 4041 of the Political Code empowers the board of supervisors to purchase, receive by donation, lease, or otherwise acquire water rights, or real or personal property necessary for the use of the county, for a courthouse, jail, hospital, historical museum, art gallery, art institute, stadium, and almshouse, an exposition building or buildings, public pleasure ground, public parks, and other public purposes, and also property upon which to sink wells, etc. Provision is made as to the manner of acquiring such property. The method therein provided for was not followed in the case at bar, if the section were otherwise applicable.

Subdivision 33 of section 4041 authorizes boards of supervisors to levy a special tax not exceeding two cents on the hundred dollars of the assessed valuation of all property within the county to be used for advertising, exploiting, and making known the resources of the county for the purpose of inducing immigration to, and increasing the trade and commerce of, said county, or for the purpose of exhibiting or advertising the agricultural, mineral, or other resources of the county, and further specifying that, if the taxes so levied do not raise the sum of \$5,000, the board of supervisors may appropriate from the general fund of the county an amount sufficient to make up the deficit between the amount received from the taxes and the said sum of \$5,000.

Section 4056b of the Political Code empowers the board of supervisors of the several counties of the state of California to levy a special tax on the taxable property within their respective counties for the purpose of creating a fund to be used for collecting, preparing, and maintaining an exhibition of the products and industries of the county at any domestic or foreign exposition, etc., specifying, however, that the total tax for any such purposes in any one year shall not exceed six cents on each \$100 of taxable property, and providing that such taxes shall only be levied by a two-thirds vote of the members of the board. The transcript does not show compliance with any of the sections or subdivisions of the sections of the Political Code.

Section 18 of article 11 of the state Constitution prohibits counties from incurring indebtedness or liability for any purpose exceeding in any one year the income and revenue provided for such year, without the consent of two-thirds of the qualified electors thereof, voting at an election held for such purpose.

There is no allegation in any of the pleadings in this action, nor in the briefs, indicating compliance with the sections of the Code relative to raising money for the holding of expositions, but it would inferentially

appear that no such action was taken by the board of supervisors of the county of San Joaquin, from the fact that the first official act in relation thereto or pertaining to any of the matters involved in this action was the passage of the resolution dated January 12, 1925.

We are thus brought to a consideration of the questions whether the board of supervisors of the county of San Joaquin could legally delegate to the San Joaquin Fair Association the performance of the work, the holding, conducting, management of county fairs, making such expenditures as the association saw fit, exercising its own judgment, as found by the trial court, and then, after all such expenditures have been incurred, ratify the same so as to make the difference between the money received and the money paid out by the San Joaquin County Fair Association, a corporation, a valid claim upon the treasury of the county of San Joaquin.

The answers to these questions are so clearly and distinctly set forth in the opinion filed by the learned judge of the trial court that we take the liberty of quoting therefrom in extenso:

"This is an action brought by the plaintiff, a citizen and taxpayer of this county, to restrain the county auditor from drawing on the county treasurer of this county warrants in payment of certain claims that were, on or about the 12th day of January, 1925, approved and allowed by the board of supervisors of this county in the sum of \$14,988.25, all of which were in favor of San Joaquin County Fair Association, a corporation, with the exception of \$95.25 in favor of one F. A. Groom. * * * The expenditures on which the claims of the fair association are based were made by the association during the year 1924, and were made, as shown by the testimony, in the construction of permanent improvements on certain premises used for fair ground purposes, and owned by the county of San Joaquin, and also in the purchase, by the association, of certain personal property for the equipment and necessary use on such property. * * * The first official cognizance, however, that was taken by the board of supervisors of the county of the making of these improvements, or the procuring and furnishing of this personal property, was on January 12, 1925, when the board of supervisors * * * made and entered its resolution wherein it 'resolved and ordered that the incurring of the hereinafter designated claims and demands heretofore incurred by the San Joaquin County Fair Association, a private corporation, as aforesaid, be and the same hereby are ratified by the board of supervisors of the county of San Joaquin as having been incurred for its use and benefit for and on its behalf, and the same are hereby approved, allowed, and ordered paid to the following named persons, firms, and corporations, in the amounts set after their respective names, from the general fund and the immigration fund of said county of San Joaquin, as hereinafter designated: From general fund, San Joaquin Co. Fair Ass'n, as per bill of items attached, \$2-366.03; F. A. Groom, Stockton, Calif., as per

bill of items attached, \$95.25; * * * San Joaquin Co. Fair Ass'n, as per bill of items attached, \$2,706.79; San Joaquin Co. Fair Ass'n, as per bill of items attached, \$3,800; San Joaquin Co. Fair Ass'n, as per bill of items attached, \$4,245.09; from immigration fund * * * San Joaquin Co. Fair Ass'n, as per bill of items attached, \$1,785.54.' * * * In view of the resolution passed by the board of supervisors, plaintiff's sole claim in this proceeding is that the claims in question were not in the first instance incurred in the manner limited and required by law defining the powers of boards of supervisors, and that consequently the board of supervisors was without power or jurisdiction to subsequently approve and ratify the making of the expenditures upon which the claims were based. Therefore, since the charges and allegations of plaintiff's complaint go to the extent of attacking the jurisdiction and powers of the board of supervisors to create a claim against the county by the subsequent attempted ratification of acts and conduct which the board in the first instance was without power to perform, this action on these grounds, and on these grounds alone, was within the power and right of the taxpayer to commence. For it involves solely and entirely a question of the law touching the proper limits of the board of supervisors, and not merely a question of fact in the exercise by the board, in a proper and legal manner, of its vested powers. Consequently this controversy involves more than a question of mere personal or private rights of citizens, but involves the manner of exercise by the board of supervisors of its limited powers in the expenditure of public funds. It is for this reason that the merely subsequent approval by the board of supervisors of the claims in question under the allegations of this complaint will not protect the auditor or the treasurer in the drawing or cashing of the warrants in question. As stated by our Supreme Court in the case of *Walton v. McPhetridge*, 120 Cal. 440, at page 443, 52 P. 731, 733: 'If illegal claims are allowed by the board it will be the duty of the auditor to refuse to draw warrants therefor (*Linden v. Case*, 46 Cal. 175); and the auditor ought not to draw his warrant for an illegal demand, even though allowed by the board, and if he does so knowingly and willfully he is personally responsible, and may be made to refund the money thus illegally paid (*Merriam v. Board of Supervisors*, 72 Cal. 519 [14 P. 137]). The case at bar is not one merely involving the findings of fact by a board with respect to a claim clearly chargeable against the county and within the jurisdiction of the board to allow or reject. In such a case, the conclusion of the board is final, and the auditor has no discretion to disregard it. Here the question is not one of fact, but whether or not the claim is in its nature one which the board had jurisdiction to allow. The mere introduction of the written claim which appellant presented to the board, with the indorsement of allowance, does not make a prima facie case. It does not show upon its face that it is a claim chargeable against the county, and, when viewed in the light of the complaint, the contrary appears.' See, also, *Biggart v. Lewis*, 183 Cal. 660, at page 672, 192 P. 437, 442; *Reclamation District v. Riley*, 192 Cal. 147, 218 P. 762; *San Christiana Inv. Co. v. City and County of San Francisco*, 167 Cal. 762, 769, 770, 141 P. 384, 52 L. R. A. (N. S.) 676.

"Or, as succinctly stated in the case of *Jacks v. Taylor*, 24 Cal. App. 667, at page 674, 142 P. 121, 124: 'The mere fact that the claim was allowed by the board would not invest it with a validity which it did not theretofore possess.'

"As already noted, it appears in this case that the ownership of the fair grounds property with all its improvements, valued at over \$200,000, was vested in the county of San Joaquin, and the duty of the care and control thereof during the year 1924 was vested in the board of supervisors. Furthermore, the power and duty of the making of improvements thereon, together with the manner of proceeding thereunder, was by statute delegated as a trust by the people, through their Legislature, to the board of supervisors. Section 4041, pars. 6 and 7, specifically provides that 'the boards of supervisors, in their respective counties shall have jurisdiction and power, under such limitations and restrictions as are prescribed by law: * * * To purchase, receive by donation, * * * real or personal property necessary for the use of the county, for * * * an exposition building or buildings, public pleasure ground, public parks, and other public purposes, * * * and to improve, preserve, take care of, manage and control the same; * * * to construct * * * build or rebuild, furnish or refurnish or repair, * * * exposition building or buildings for exhibiting and advertising, farming, mining, manufacturing, live stock raising, and other resources of the county, * * * and to provide all necessary officers, employees, attendants, and supplies for the proper maintenance of the same. * * * Whenever the cost of construction of * * * exposition building or buildings, stadium or other public buildings, or the cost of any repairs thereto or furnishing thereof shall exceed the sum of five hundred dollars, such work shall be done by contract, and any contract therefor shall be void unless the same shall be let as hereinafter provided.' Then follows specific directions touching plans, specifications, and bids, and proviso that 'in counties employing a purchasing agent, that furnishings, materials and supplies used in the work mentioned in this subdivision costing not more than one thousand dollars, may be purchased by said purchasing agent,' etc. And also to the board of supervisors is delegated the trust 'to purchase, acquire, construct, equip and maintain all necessary tanks, reservoirs, pumps, apparatus, motor vehicles and other machinery necessary or proper to facilitate the performance of the work in the county.' Paragraph 9. And, furthermore, by an amendment to this act passed by the Legislature in 1909 (St. 1909, pp. 126, 756), by subdivision 21 of said section 4041, they were specially authorized by the people of the state to delegate a portion of their own heretofore delegated powers to the extent that they might employ a purchasing agent 'whose duty shall be to purchase for the county and the officers thereof * * * and all other supplies; to purchase machinery, implements, material, and all other personal property, material or supplies, the same to be purchased only upon a proper requisition therefor. * * *'

[2] "The foregoing being the powers delegated to the board of supervisors, it appears without conflict, and, in fact, by the direct testimony of the manager of the fair association corporation, as well as by the recitals in the

resolution of the board of supervisors of January 12, 1925, that all the expenditures which form the basis of the fair association's claim were made upon the initiative and judgment of the directors of such association, and under the sole direction of their manager, as regards the determining of the amount thereof, the kind, character, and extent thereof, as well as the cost thereof, and from whom and by whom purchased, and the manner and method of the purchase thereof, and that at no time and in no manner did the board of supervisors, acting as a board, assume any control thereof, or exercise any discretion in regard thereto, or in any way assume any authority or control thereof, or by original resolution or otherwise, authorize or direct the activities of the fair association in regard thereto. And, furthermore, an examination of the many various items and the general subject-matter of the claims fully shows that the purchase of the articles set forth therein, and the making of the improvements shown by the testimony to have been made through the use of the labor and material set forth therein, comprised and consisted of, to the extent of every dollar thereof, improvements, repairs, furnishings, and equipment upon county property which the law provides could be made only by the board of supervisors, and, furthermore, only by the supervisors by the use, in a legal manner and under legal forms, of their own judgment and discretion, and, furthermore, it appears from the testimony touching the amount, nature, kind, and character of the improvements made and personal property purchased, that the court must find that the use and employment by the board of supervisors of their own discretion and sound judgment in the first instance, and on the very originating of this work, was one of the duties imposed by law upon the board of supervisors. That permeating the very spirit of our government, so far at least as concerns municipal bodies, is the rule that officers to whom duties involving the use of judgment and discretion are allotted, must themselves use that judgment and discretion in the performance of their delegated trusts, and are themselves absolutely without power, under the law, to delegate to others the use of their own official judgment and discretion. In other words, for better or worse, the people are entitled to the services of their chosen servants to be exercised in the manner and to the full extent of their employment under the law. Consequently, to put the matter concretely, it would seem, as shown by the testimony herein, that the ways and means and purposes of the expenditure during the year 1924 (principally in the county's fair grounds) was a matter that in its details of planning, purchasing, and managing involved the exercise of judgment and discretion, and of a judgment and discretion of the kind and character pre-eminently and unquestionably possessed by a board of supervisors, and its own ministerial agent. It appears that these expenditures were not made by the people's delegated servants or trustees, but were made by others who had accepted, by their own implication, an assumed delegation from servants who under the law had no right or power to give such delegation.

"It is a canon of law, as well as of common sense, that a subsequent ratification cannot give validity of an act or a conduct which, in the first instance and in its inception, was without valid-

ity, or, as stated in our Civil Code (section 2312), 'A ratification is not valid unless, at the time of ratifying the act done, the principal has power to confer authority for such an act.' Now, as already indicated, the act which the resolution of January 12, 1925, seeks to ratify, is the act of the fair association (in every respect public-spirited, disinterested, and well-intentioned, it may be assumed) in accepting—and that by implication only—a direction from the board of supervisors to use their own judgment and discretion in devising, planning, executing, and paying for certain improvements on county property, and in the selection, bargaining for, and purchasing of furnishings—all in the sum of about \$15,000. And that such was the act sought to be ratified is shown not only by the testimony, but is not in conflict with the recitals in the resolution of January 12, 1925.

* * *

"Now, it may be conceded (without reference to any questions involving advertising or the use of the purchasing agent), as contended by learned counsel, that the board did, as a matter of fact, have authority under the statute to have in the first instance planned and carried out this work, and to have made all the expenditures that were made. But from this it does not follow, in law or in fact, that the board had the power to do the act indicated above, and which the resolution itself of January 12th, clearly implies was done; which act was an attempted unlawful vesting in an unofficial body of the judgment and discretion vested in and delegated by the law to the board of supervisors. Also learned counsel placed some reliance upon language used by Justice Henshaw in the case of *Power v. May*, reported in 114 Cal. 207, 46 P. 6, and 123 Cal. 147, 55 P. 796. That was a case where an attorney at law applied for a writ of mandate against the treasurer of Tulare county to pay his claim based upon professional services rendered by him to the county. It was conceded in that case that the county had, in the first instance, power under the law to employ an attorney to render his professional services. And it further appeared that the only informality in regard to his employment (in addition to some matters of fraud and collusion which were afterwards satisfactorily explained) was 'that there was no previous formal resolution of the board authorizing plaintiff to perform the service; that there was an understanding to that effect, which for some unexplained reason was not entered upon the minutes of the board.' And it was in reference to this informality that the following language relied upon by counsel was used by the court: 'Can the board of supervisors legally allow a claim for the beneficial use of money, labor, or property, although the formalities necessary to bind the county have not been employed? Without entering into an elaborate consideration of this question, it is sufficient to say that this may at times, and under certain circumstances, be done, provided the power to do so be not withheld in the grant of powers to the board, and provided further that the service has been bestowed, or the money expended for the benefit of the county in a manner authorized by law. Under such circumstances, if the board had original power in the premises, it may cure informalities or irregularities in procedure by a subsequent ratification and recognition of its liability.' 114 Cal. 208, 46 P. 7.

"And in the final decision of the case the court disposed of the matter in the following language: 'While in all matters of such importance we think the board should act formally by resolution spread upon the minutes, still, as they had the power to act and the services were performed and the board did in fact subsequently approve the bill for the services and order it paid, we know of no reason why the subsequent ratification and order of payment should not be treated as equivalent to previous authority regularly given.'

"But, as already noted in the case at bar, there was neither any original contract of employment, nor was the act sought to be ratified anything more than an implied delegation, at the most, of authority to the claimant to give employment in the use of its discretion to other people. And therefore, in principle, the case at bar should not be governed by the case cited; but the doctrine applied in the later case of *Knight v. City of Eureka*, 123 Cal. 194, 55 P. 769. That also was a case where an attorney at law brought suit against a municipality to recover compensation for professional services of concededly high value and benefit to the city. But in that case the claimant was not obliged to rely upon mere ratification of a previous contract of employment. He was able to rely upon a resolution of the council which was passed before he accepted the employment or entered upon the duties thereof, and it was conceded in that case also that the city had authority, if properly exercised, to initiate the employment, and to be obliged to pay therefor. But in that case the resolution upon which the attorney relied was a resolution by which the council authorized and directed its own city attorney, with whom it had a contract, to employ such San Francisco counsel as he might deem necessary. In other words, the resolution upon which the attorney relied failed to show that the council made use of its own judgment and discretion in exercising its legal power to employ counsel, but delegated the use of that judgment and discretion to another party; just as in the case at bar, if it be assumed that there was any direction given to the claimant here which can be the basis of any implied contract, it was a direction which was a mere delegation of the use of the board's own judgment and discretion in the placing of permanent improvements on the county's property, and the purchasing of necessary furnishings therefor.

"Also, in deciding the case, the court enunciated and relied upon basic principles of law which it would seem are specially applicable in the case at bar, the following being some of the language used:

" 'Practically, the authority here delegated left with the agent of the council the discretion to determine the necessity for employing an assistant and to fix his compensation. These were powers which, in our opinion, the council alone could exercise, and therefore could not be delegated.'

" 'We think the true doctrine is correctly stated by Mr. Dillon at section 96: "The principle is a plain one, that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others.'" 123 Cal. at pages 194, 195 [55 P. 769].

"And furthermore, if it is contended that the

implied direction given to the claimant herein was not, in effect, as the facts seem to indicate, a mere attempted delegation of authority, but was a direct employment of the fair association corporation to itself do the work, then, and in that event, it is evident that such act of implied direct employment failed absolutely to come within the rules laid down by the statute for the guidance and control of the board of supervisors in the letting of contracts or the making of purchases involving such a large sum as \$15,000, and pertaining to the kind and character of the permanent improvements assumed to have been contracted for herein.

[3] "Section 4036b and subdivision 33 of section 4041 of the Political Code are intended simply to give the board power to levy taxes for the purposes indicated therein, to wit: To advertise, exploit, and make known the resources of the county, etc., and to create a fund to be used for collecting, preparing, and maintaining an exhibit of the products and industries of this county at any domestic or foreign exposition for the purpose of encouraging immigration. But it is to subdivision 7 of section 4041 that we must look when we desire to ascertain the conditions and limitations under which the board of supervisors must act when they desire to exercise their powers in the way of making permanent improvements and refurbishing of the kind in the case at bar. By the Amendment of 1923, there was specially included in subdivision 7 matters pertaining to the rebuilding, furnishing, or refurbishing of 'exposition building or buildings for exhibiting and advertising farming, mining, manufacturing, live stock raising, and other resources of the county, stadium and such other public buildings as may be necessary to carry out the work of the county government, * * * and supplies for the proper maintenance of the same.' It therefore follows that the doing of the work by the supervisors for which compensation is sought herein could only be done under the restrictions touching plans, specifications, and bids laid down in subdivision 7.

"Likewise, as regards the acquiring of the personal property if it be assumed that the property was acquired directly from the claimant here, and not as the result of any delegation of authority to the claimant, then such acquisition should have been had through the purchasing agent designated by the Legislature in subdivision 21 of the act."

[4] In addition to the foregoing, we may add, quoting the language of the text-writer, in 18 Cal. Jur. p. 1002, § 273:

"It is generally recognized that ultra vires contracts of a municipal corporation are abso-

lutely void, and cannot be the subject of ratification or estoppel in pais. And the decided weight of authority is to the effect that when, by charter or statute, the mode in which contracts of a municipal corporation may be entered into is prescribed, and any other method is expressly or impliedly prohibited, no contract will be binding unless made in the specified mode; the mode in such cases constitutes the measure of the power."

The citations set forth as supporting this statement of the law are too copious to be here inserted. And further, upon the same subject, we may quote from 7 Cal. Jur. p. 512, § 86:

"Inasmuch as a county has power to make only such contracts as are expressly authorized or such as may be necessary to the exercise of its powers, it follows that any contract made in excess of this power is ultra vires and therefore void. * * * Also where duties are enjoined by law upon county officers specially designated for their discharge, the board of supervisors is entirely without authority to contract with private parties for their performance"—citing a number of authorities.

The entire transcript in this case shows that the board of supervisors delegated its authority to a private corporation, even if we assume that it had authority to expend the money in the first instance. In making this statement, we must disregard what we have heretofore said; that the transcript shows no compliance with the law relative to the raising of money for the purposes of holding a county fair. That boards of supervisors may not delegate the performance of acts involving an exercise of judgment or discretion, see, also, 15 Corpus Juris, 465; Mechem on Agency (2d Ed.) p. 84, par. 124.

We see no escape from the conclusion that the board of supervisors had no authority to delegate to the San Joaquin Fair Association, a private corporation, the performance of the acts which it did perform so as to render the county liable for any deficiency between the receipts and expenditures of such private concern in the handling of a county fair. Having no authority to make the delegation, the ratification is absolutely void.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; GLENN, Justice pro tem.

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BLACKWELL v. THOMASSON. (Civ. 4791.)

District Court of Appeal, Second District, Division 1, California. Aug. 8, 1927.

1. Evidence ⇨397(2)—Oral negotiations are merged in complete written contract, and it may not be varied by parol evidence.

Where a complete written contract is made, oral representations and negotiations are merged in the contract, and parol evidence is not permissible to vary its terms.

2. Evidence ⇨434(1)—Parol evidence is always admissible to prove fraud.

Fraud may always be proved by parol evidence.

3. Evidence ⇨434(11)—Fact that written automobile sales contract recited that it contained all conditions and representations held not to prevent purchaser from proving fraud by parol evidence.

The fact that an automobile sale was evidenced by a written contract reciting that all conditions and representations were embodied therein held not to prevent the purchaser from proving by parol evidence that the sale was induced by fraud in making false guaranty.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Suit by Jack Blackwell against D. H. Thomasson. Judgment for plaintiff, and defendant appeals. Affirmed.

Joseph P. Sproul and Sproul & Sproul, all of Los Angeles, for appellant.

James S. Jarrott and Jarrott & Jarrott, all of Los Angeles, for respondent.

McLUCAS, Justice pro tem. Plaintiff brought suit for the recovery of moneys paid under a sales contract for the purchase of an automobile. Defendant appeals from a judgment rendered for plaintiff in the sum of \$275.

Plaintiff testified: That he saw an advertisement of the defendant guaranteeing a new car for 90 days; that he called on the defendant and the automobile was shown to him by a salesman, who said to him: "We guarantee the car for 90 days; you have got the advertisement in your hands and we stand by our guaranty. We give you a written guaranty also with that." That he agreed to purchase the machine, and that when defendant presented the contract for signature he inquired about the guaranty. That defendant said the guaranty could not be included in the contracts because it would cost too much to discount them, but that if plaintiff would sign the contract that he would have the guaranty typewritten and mailed to plaintiff the next morning. That plaintiff never received the guaranty and defendant refused it. By leave of court, plaintiff was granted permission to amend his complaint,

alleging fraud. While there was a sharp conflict in the evidence yet there was evidence to support the finding of the court as follows:

"That as part of the consideration for said sale, the defendant guaranteed and represented that said car was new and in perfect condition, and that he, the said defendant, would keep the same in good condition and in good repair for a period of 90 days from and after June 11, 1921. That at said time defendant falsely and fraudulently represented to plaintiff that said guaranty would not be incorporated in the written agreement for the purchase of said car for the reason that defendant expected to sell said agreement, and if the same contained a written guaranty he would be unable to sell or discount the contract except at great loss, but that he would guarantee said automobile as hereinbefore set forth for the period of 90 days after said date and mail to plaintiff a written statement to that effect. That defendant made said representations, statements, and promises without any intention of performing the same, but solely for the purpose of inducing plaintiff to execute said contract for the purchase of said car and making the payments therein called for. That defendant failed to mail to plaintiff any guaranty in writing. That relying upon defendant's said representations, promises, and agreement, plaintiff paid to defendant the sum of \$375 on the purchase price of said automobile. That at all times thereafter while said automobile was in plaintiff's possession plaintiff operated the same in a prudent and careful manner and took good care of the same. That at the time said car was delivered to plaintiff it was not in perfect mechanical condition, and was unfit for practical use as an automobile. That on July 17, 1921, the said automobile was defective and became out of repair and could not be operated by reason of the following defects: The radiator leaked, the self-starter would not work, it was impossible to keep lights burning on said car—the electrical appliances on said car being defective and burnt out the lights—the valves were defective, and would stick so that said car could not be operated, and the clutch would not hold when going up grade."

The purchase agreement contained the following:

"It is agreed that this instrument contains the entire agreement between the contracting parties and that no statement, promises, or inducements made by any party hereto, or employee, agent, or salesman of either party hereto, which is not contained in this written contract shall be binding or valid; and this contract may not be enlarged, modified, or altered except by endorsement hereon, and signed by the party of the first part or his assigns and the party of the second part."

[1-3] Appellant relies upon the rule that a written agreement cannot be varied by an oral statement. As held in the cases cited by appellant, the general principle of law, well settled, is that where a complete written contract is made, oral representations or warranties and all oral negotiations are merged in the written contract, and the general rule

is that parol evidence is not admissible to vary its terms. But parol evidence is always admissible to prove fraud. The fact that the sale of the automobile is evidenced by a written contract which recites that all conditions and representations are embodied therein will not prevent the purchaser from proving by parol evidence that the sale was induced by fraud. *Mooney v. Cyriacks*, 185 Cal. 70, 81, 195 P. 192; *Whiting v. Squeglia*, 70 Cal. App. 108, 114, 232 P. 986; *Odson v. Swanson*, 70 Cal. App. 279, 233 P. 354; *California Credit & Collection Corp. v. Randall* (Cal. App.) 244 P. 958.

The judgment is ordered affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

85 Cal. App. 18

GUSTASON v. SPEAK. (Civ. 4858.)

District Court of Appeal, Second District, Division 1, California. Aug. 10, 1927.

1. New trial ⇨70—Trial court has power to grant new trial notwithstanding evidence might be sufficient to justify verdict for plaintiff.

That there was sufficient evidence to justify a verdict for plaintiff is not necessarily sufficient to deprive the court of power to grant defendant a new trial.

2. Malicious prosecution ⇨21(1)—One acting honestly on advice of attorney after disclosing all facts has "probable cause."

Where defendant in action for malicious prosecution shows that before commencing the prosecution he, in good faith, consulted an attorney of good standing and stated all the facts, and was advised that a prosecution would lie and acted honestly on that advice, this of itself constitutes "probable cause."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Probable Cause.]

3. Appeal and error ⇨977(3)—Order granting new trial will not be disturbed unless trial court abused discretion.

An order of the trial court granting a new trial should not be disturbed unless it is clearly manifest that there was an abuse of discretion.

4. New trial ⇨70—Granting defendant new trial in malicious prosecution held not abuse of discretion, in view of evidence.

Granting new trial on the ground that the evidence did not support the verdict for plaintiff in action for malicious prosecution held not an abuse of discretion, in view of the evidence.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action for malicious prosecution by David Gustason against A. J. Speak. Judgment for

plaintiff. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

William U. Handy, of Los Angeles, for appellant.

Willedd Andrews, of Los Angeles, for respondent.

CONREY, P. J. The plaintiff brought this action to recover damages for malicious prosecution of a criminal action against the plaintiff. In accordance with the verdict of a jury, judgment was entered for plaintiff in the sum of \$500. Thereafter the defendant moved for a new trial. The court granted said motion, and in its order specified that the motion was granted upon the ground that the evidence does not support the verdict. From said order plaintiff appeals.

The plaintiff as a physician had rendered professional services to the wife of respondent, A. J. Speak, and for those services had made a charge of \$200. Mr. Speak contended that the charge was excessive. After the disagreement had continued for some time, Speak sent to the plaintiff a check for \$125 with a notation thereon in the words "Payment in full to date." Thereafter the plaintiff pasted over the defendant's notation on the check a slip of paper on which he had written the following: "Applies on account statement rendered"—and stamped thereunder with a rubber stamp his own name and address. With the check in that condition he presented the same to the bank for payment. On being informed of these facts, Mr. Speak ordered payment stopped on the check. Thereafter Speak discussed this matter with his attorney, who advised him to see the district attorney. For the purpose of showing said check to the district attorney Speak obtained possession thereof from a justice court, where it had been filed in an action of Gustason to recover on his claim, and took it to the office of the district attorney, where he exhibited the check and made a statement of facts. According to his own testimony, Speak told the district attorney that there had been a dispute between him and the doctor, and that he had made his check a receipt to show that it cleared him of a \$200 charge "if this check came through so and so; but when it came through here is the condition it is in." Thereupon the district attorney prepared a complaint charging the defendant with forgery and told Speak to take the papers to the justice court. Speak complied with this instruction and made affidavit to the complaint. According to Speak's testimony, he believed that plaintiff "was guilty of some offense there."

The deputy district attorney who had the interview with Speak stated that he issued the complaint because he thought that the document as presented to him was a forgery. His testimony corroborated that of Mr. Speak

with reference to the interview and the appearance of the check, but denied that Speak had explained to him the circumstances under which the check was issued, or had stated that there had been any attempt to settle a disputed account. He said that he told Speak that "he thought it was a forgery." Prior to the commencement of this action the criminal complaint had been dismissed by the justice of the peace.

Appellant contends that the order granting a new trial should be reversed because there was sufficient evidence: (1) To justify the jury in finding that a crime had not been committed by the plaintiff; (2) to justify the jury in deciding that the defendants had not made a full, fair, and true statement of all material facts to the district attorney; (3) to justify the jury in finding that there was both malice and lack of probable cause.

[1] The fact that there was sufficient evidence legally to justify a verdict is not necessarily sufficient to deprive the court of power to grant a new trial; otherwise, the right to grant a new trial in substantially all cases of conflicting evidence would be destroyed. "The trial court in acting upon a motion for a new trial, particularly on the ground of insufficiency of the evidence to support the verdict or findings, has a wide discretion, and its action thereon, either for or against the motion, will not be disturbed on appeal unless it clearly appears to the appellate court that the discretion was abused. This proposition has been so often decided that it is unnecessary to cite authorities in support of it." *Estate of Wall*, 183 Cal. 431, 191 P. 687.

[2-4] Where a defendant in an action for malicious prosecution shows that before commencing the prosecution alleged to have been malicious, he has in good faith consulted an attorney at law of good standing, has stated to him all of the facts of the case, and has been thereupon advised by such attorney that a prosecution would lie, and such person has acted honestly upon that advice, this, of itself, constitutes probable cause. *Johnson v. Southern Pacific Co.*, 157 Cal. 333, 338, 107 P. 611. It is evident that in granting a new trial in the case at bar the trial court was of the opinion that according to the preponderance of the evidence the jury should have found that the defendant had made a full, fair, and true statement of all material facts to the district attorney before swearing to the complaint, and that upon the advice given to him by the district attorney in response to that statement the defendant, Speak, was justified in believing that there was probable cause for the prosecution. The judge before whom the case was tried having acted in accordance with his opinion in respect to this matter, his order granting a new trial should not be disturbed on this appeal unless it is clearly manifest that in the granting of the order upon the stated grounds there was an abuse of dis-

cretion. We think that there was no such abuse of discretion.

The order is affirmed.

We concur: HOUSER, J.; YORK, J.

84 Cal. App. 511

In re HOYLE. (Civ. 5835.)

District Court of Appeal, First District, Division 2, California. July 20, 1927.

1. Newspapers $\S$ 3(1)—Construction of statute defining newspaper must be reasonable considering object of providing means of displaying public notices (Pol. Code, $\S$ 4460, 4462, 4463; Civ. Code, $\S$ 3542).

In proceeding under Pol. Code, $\S$ 4462, the construction of Pol. Code, $\S$ 4460, 4463, which define a newspaper of general circulation, must be reasonable and must consider the object to be accomplished of providing efficient means for displaying public notices (Civ. Code, $\S$ 3542).

2. Newspapers $\S$ 3(3) — Newspaper held "printed and published" in same place notwithstanding use of boiler plate material produced elsewhere (Pol. Code, $\S$ 4460, 4462, 4463; Civ. Code, $\S$ 3542).

In proceeding under Pol. Code, $\S$ 4462, newspaper held one of general circulation under Pol. Code, $\S$ 4460, 4463, requiring that to be a newspaper of general circulation it must be both printed and published in the place where it seeks the patronage of public advertisements, notwithstanding that in making up the paper boiler plate material was used which was produced elsewhere (Civ. Code, $\S$ 3542).

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Printed and Published.]

3. Newspapers $\S$ 3(3)—Use of boiler plate held not within term "typesetting," as necessary part of mechanical process to be performed where newspaper is printed (Civ. Code, $\S$ 3542; Pol. Code, $\S$ 4460, 4463).

In view of Civ. Code, $\S$ 3542, requiring construction of statutes to be reasonable, use of boiler plate in making up newspaper held not included within term "typesetting" as a necessary part of mechanical process which Pol. Code, $\S$ 4460, 4463, requires to be performed where paper is printed and published.

In the matter of the application of John E. Hoyle to have the standing of the South San Francisco Journal and South San Francisco News as a newspaper of general circulation ascertained and established. From a decree establishing the newspaper as one of general circulation pursuant to Pol. Code, $\S$ 4462, an appeal was taken. Affirmed.

Ross & Ross, of Redwood City, for appellant.

Franklin Swart, of Redwood City, for respondent.

THOMPSON, Presiding Justice pro tem. This is an appeal from a decree adjudging "the South San Francisco Journal and South San Francisco News" to be a newspaper of general circulation pursuant to section 4462, Political Code.

Appellant contends that because a newspaper is made up in part of what is commonly termed "boiler plate" material, which is prepared elsewhere, the paper is not printed and published at South San Francisco, according to the definitions of the terms "printed" and "published" as provided by section 4463, Political Code.

The evidence is without substantial conflict. John E. Hoyle is the owner and publisher of the newspaper in question. For more than one year prior to the filing of the petition in this case that paper was printed, published, and issued from a fixed place of business located in South San Francisco; all of the local items of news and intelligence, as well as advertisements contained in the paper, were secured in that vicinity and printed with the object of serving the community; the mechanical part of producing the newspaper, including typesetting, editorial work, and impressing the type upon the paper, were all performed in that place; it possessed a bona fide paid subscription list in and about that city; and it was operated, issued, and circulated for the dissemination of news and intelligence of a general character. In the makeup of the paper, characteristic of the average rural press, the columns which were not required for paid advertisements or news items were filled with what is commonly called boiler plate. The evidence indicates that this stereotype matter sometimes occupied from 20 to 50 per cent. of the available space in the forms. The sole question involved in this appeal is whether a newspaper which uses in its makeup boiler plate material procured elsewhere than at the place where the paper is printed and published is qualified to enjoy the standing and privileges of a newspaper of general circulation, as provided by statute.

Section 4460 of the Political Code provides that:

"A newspaper of general circulation is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers, and which shall have been established, printed and published at regular intervals, in the state, county, city, city and county, or town, where such publication, notice by publication, or official advertising is given or made, for at least one year preceding the date of such publication, notice or advertisement. * * *

The terms "established," "printed," and "published," as they are used in the preceding section, have been defined by the Legislature in section 4463 of the Political Code. The word "printed" means that the mechanical

operation of producing the newspaper, including the typesetting and the impressing of the types upon the paper, or what is commonly known as the presswork, shall have been performed during the whole of the period of time prescribed by statute to qualify a paper as one of general circulation. The word "published" means that the newspaper must have been issued from the same place where it is printed. In order to qualify a newspaper as one of general circulation so as to entitle it to publish official notices and advertisements, it must be both printed and published in the city, town or county where it seeks the patronage of such public advertisements. Sections 4460, 4463, Pol. Code: Application of *Monrovia Evening Post*, 199 Cal. 263, 248 P. 1017.

[1] In determining whether a paper which makes use of boiler plate is qualified to enjoy the standing of a newspaper of general circulation, the language of the statute should be given a reasonable construction, keeping in mind the object sought to be accomplished by the Legislature, which was to provide for an efficient means of displaying public notices in order to reach the attention of interested parties in a particular community. In *re McDonald*, 187 Cal. 158, 201 P. 110; Application of *Monrovia Evening Post*, supra. In the case last cited it is said:

"The very purpose of requiring the publication of official notices is to inform the people concerning proceedings of a public nature for their general welfare. It appears reasonable to require such notices to be published in newspapers having a fixed and permanent domicile and a substantial circulation at the city or place where the inhabitants live who are most vitally interested in the transactions respecting which notices are required."

In this case the "*Monrovia Evening Post*" was held not to be a newspaper of general circulation in the city of *Monrovia* for the reason that all the mechanical portion of making up and issuing the paper, including stereotype plates, typesetting, and presswork, were performed in the printing shop of the "*Pasadena Evening Post*" at *Pasadena*, and not at *Monrovia*.

[2] Apparently the purpose of requiring a newspaper of general circulation to be both printed and published in the place where the public notices are to be made is to require such a paper to have a fixed and permanent abode. Evidently two things were considered as most important in determining the standing or permanency of a newspaper plant, namely, the location at which the mechanical part of the operation of making up the paper is performed; and, secondly, the process of issuing the paper, including the presswork, as well as the publication and circulation of the paper.

[3] In the exercise of a liberal construction of the statute it would seem unreasonable to

hold that the "mechanical work of producing a newspaper" is not performed at the place where the paper is issued, even though it has a fixed place of business where its presses, forms, type, stock and printing apparatus are kept and used, where its editorial and mechanical work is done, and where local news is gathered, advertisements secured, and the bulk of its subscription list exists, merely because a percentage of its forms are made up of stereotype plates which are prepared elsewhere. This construction of the statute would probably disqualify every newspaper in existence, including the average rural press, as well as the more pretentious city daily papers, for all newspapers resort to the use of boiler plate material and many of them profit by the use of the more modern matrix system as well as the telephoto process of making plates for use in their columns, most of which newspaper feature material is produced outside of the local printing shop, and is furnished to the trade by syndicates which specialize in the service. It would seem almost impossible to successfully operate a newspaper in this progressive age without the use of the modern stereotype material. The newspaper field is now favored with many able and instructive specialists in editorial work, and in every line of activity, including finance, commerce, trade and agriculture, whose articles are stereotyped, syndicated and sold to a wide circle of newspaper customers. The so-called "funny page" and the pictorial magazine department of the great daily papers, cartoons, cuts of individuals, historic, picturesque and tragic scenes of calamities, advertising plates of drugs, nostrums, books, magazines and business enterprises of every sort are stereotyped or matrix-plated and sold to the trade for convenient and profitable use. Certainly it cannot be reasonably said that the use of this modern method of disseminating news and intelligence disqualifies a paper from becoming a newspaper of general circulation. It is true that primarily in the process of producing much of this boiler plate material, the type is first set by means of a mechanical typesetting machine, from which the dies are made and the plates cast, after which, in the composite form of boiler plate, the material is sold to the trade. Boiler plate, as it is commonly used for newspaper purposes, may be considered in the nature of material or equipment by the aid of which a newspaper is made up and produced. We are of the opinion that the use of boiler plate in the process of making up a newspaper is not included within the term of "typesetting" as a necessary part of the mechanical process which the statute requires to be performed in the place where the paper is printed and published. To hold otherwise would do violence to the cardinal rules of construction.

(Civ. Code, § 3542; 23 Cal. Jur. 722, 725), and would destroy the statute.

The judgment is therefore affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

201 Cal. 715

W. H. MARSTON CO. v. CENTRAL ALASKA FISHERIES CO. (MUELLER, Intervener).
(S. F. 11497.)★

Supreme Court of California. July 30, 1927.

Rehearing Denied Aug. 29, 1927.

- 1. Guaranty** ⇐102—Where guarantor claimed that he personally discharged obligations, evidence that company of which he was president filed claim against coguarantor's estate held admissible.

In action by assignee of guarantor to recover from principal amount paid in discharge of principal's indebtedness, where guarantor claimed that he personally furnished money that discharged obligations, evidence that company of which he was president filed creditor's claim against coguarantor's estate held admissible.

- 2. Guaranty** ⇐100—If guarantor used money of another to pay guaranty obligation at principal's request, principal could not repudiate implied obligation to reimburse payor.

If guarantor used moneys in his possession and under his control belonging to company of which he was president with permission of latter to pay guaranty obligation, and payment was also made at request of principal and payee, principal could not repudiate its implied obligation to reimburse payor.

- 3. Principal and surety** ⇐185—Surety, upon performing obligation, has right to action in assumpsit upon implied promise of principal to make him whole.

Full payment and performance by surety extinguishes primary obligation, and new rights and liabilities then arise, upon part of principal to reimburse surety for moneys expended with legal interest, though not according to terms of primary obligation, and upon part of surety right of action in assumpsit upon implied promise of principal to make him whole.

- 4. Bills and notes** ⇐214—Assignment of right, title, and interest in claims against corporation held sufficient to transfer assignor's right of recovery on notes (Civ. Code, §§ 953, 954, 1044).

Assignment embracing all of assignor's right, title, and interest in his claims and demands against corporation, including his claim and demand on certain notes, held sufficiently specific to transfer assignor's right to recover on notes to assignee, in view of Civ. Code, §§ 953, 954, 1044, though no actual transfer of the notes was made.

- 5. Guaranty** ⇐102—Finding that company to whom guarantor assigned claim against principal paid indebtedness at guarantor's request was equivalent to finding that relationship of creditor and debtor existed.

Finding of court to effect that company to whom guarantor assigned claim against principal paid indebtedness of which latter was guarantor, at his special instance and request, was equivalent to finding that relationship of creditor and debtor was thereby created, from which an implied promise at once arose on part of guarantor to repay amount advanced by company to meet his obligation.

- 6. Corporations** ⇐506—Where corporation would have made no defense otherwise, permitting stockholder to intervene as party in interest held not error.

Where it was plain that unless stockholder intervened no defense whatever would have been made by defendant corporation or by any person in its behalf in action by guarantor to recover from corporation amount paid in discharge of its indebtedness, there was no error in allowing stockholder to intervene as party in interest.

- 7. Parties** ⇐48—Denying stockholder, intervener, right to continue as party after failure to sustain complaint in intervention held not error.

In action by assignee of guarantor to recover from principal amount paid in discharge of principal's indebtedness, where guarantor had been one of stockholders and officers of principal, denying intervener, a stockholder of defendant corporation, right to continue as party after failure of proof to sustain allegations of complaint in intervention charging collusion on part of plaintiff and directors of defendant corporation, held not error.

In Bank.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by the W. H. Marston Company against the Central Alaska Fisheries Company to recover as assignee of guarantor from principal amount paid in discharge of principal's indebtedness, in which Fred A. Mueller intervened. From the judgment, plaintiff appeals. Reversed.

Keyes & Erskine, of San Francisco, for appellant.

B. D. Marx Greene and William Kehoe, both of San Francisco, for respondents.

SEAWELL, J. By the complaint herein, which contains 26 causes of action, plaintiff alleged an indebtedness against defendant, Central Alaska Fisheries Company, a corporation, evidenced by several promissory notes made and executed by Central Alaska Fisheries Company to the First National Bank of Berkeley, reduced by a few payments made thereon to the sum of \$123,027.95, with interest, which indebtedness was assigned by W. H. Marston, as guarantor, to W. H. Marston Company. Said bank thereafter indorsed certain of said notes without recourse and contemporaneously therewith delivered the same to the Central National Bank of Oakland and the Crocker National Bank of San Francisco, respectively.

The trial court found that the only cause of action upon which plaintiff was entitled to recover against defendant, Central Alaska Fisheries Company, was the one which recited a transaction whereby W. H. Marston, on December 1, 1920, loaned said Central Alaska Fisheries Company the sum of \$5,000, as evidenced by the latter's promissory note to him,

which note was thereafter assigned to plaintiff. Judgment accordingly went for plaintiff for the sum of \$5,000 only, with interest. It is from that part of the judgment which limited the amount recoverable against said defendant to the note last above mentioned that the appeal was taken. Practically all of the indebtedness sued upon was evidenced by promissory notes made during the year 1921. A portion of said indebtedness had its inception in 1920, at a time when W. P. Springer was president and Peter A. Wagner, secretary-treasurer, and W. H. Marston, vice president, of Central Alaska Fisheries Company, and was carried into the transactions of 1921 in the form of renewal notes. Beginning with the year 1921, W. H. Marston became president, and his son, Otis Marston, secretary, of said company. W. H. Marston and his son Otis were also contemporaneously president and secretary, respectively, of the W. H. Marston Company, a corporation. All of the said promissory notes executed by Central Alaska Fisheries Company to the First National Bank of Berkeley were guaranteed by W. H. Marston either by indorsement upon said notes or by a written contract of continuing guaranty executed by him. In most instances both methods of guaranty were adopted.

By the first cause of action, it is alleged that at the special instance and request and for the use and benefit of the Central Alaska Fisheries Company, W. H. Marston paid to said First National Bank of Berkeley the sum of money herein sued upon and assigned to plaintiff his claim and demand thereto. By the second cause of action it is alleged that at the special instance and request and for the use and benefit of the Central Alaska Fisheries Company, W. H. Marston Company, at the special instance and request of W. H. Marston and in order to discharge the liability of the said W. H. Marston as a guarantor of the obligation of said Central Alaska Fisheries Company, paid to said First National Bank of Berkeley the amount named in the first cause of action; that after said W. H. Marston Company made said payment at the special instance and request of W. H. Marston, guarantor aforesaid, he likewise assigned and transferred to said W. H. Marston Company all his right, title, and interest in and to all claims and demands that he had against said Central Alaska Fisheries Company. The two allegations above specifically referred to, to wit, the satisfaction or payment of the Central Alaska Fisheries Company's indebtedness to the bank, first, by Marston, and, second, by the W. H. Marston Company at the former's request, in view of the court's findings, become important questions in determining the character of the transactions and the rights of Marston, especially with respect to his relations with the W. H. Marston Company.

[1] The W. H. Marston Company owned

considerable income-producing property, but had no bank account. It would seem that all of the income derived from its property was received by W. H. Marston and deposited to his account. The W. H. Marston Company borrowed upon its notes during the years 1920 and 1921 \$130,000. Of this sum it would seem that \$30,000 was furnished by the First National Bank of Berkeley, \$50,000 by the Central National Bank of Oakland and \$50,000 by the Crocker National Bank of San Francisco, and the whole amount was deposited with the First National Bank of Berkeley and placed in the account of W. H. Marston. He paid all the taxes assessed against the W. H. Marston Company's property and premiums on policies of insurance as they became due. When called upon to make good his guaranty of the Central Alaska Fisheries Company's notes he responded by checks against his personal account. It appears that upon the death of Peter A. Wagner, who was a coguarantor with Marston of the Central Alaska Fisheries Company's said indebtedness, W. H. Marston Company (and not W. H. Marston) filed, on December 7, 1921, a creditor's claim against the estate of Peter A. Wagner totaling \$83,000. The claim, which was filed more than three years before the commencement of the present action, was based upon six separate promissory notes executed during the months of October, November, and December, 1920, by said Central Alaska Fisheries Company to the First National Bank of Berkeley, the payment of which was jointly and severally guaranteed by said Peter A. Wagner, W. P. Springer, and W. H. Marston, all stockholders and officers of said Central Alaska Fisheries Company. The claimant, W. H. Marston Company, averred in its affidavit that it was the owner and holder of said notes, and that the affidavit was made by W. H. Marston, the president of said company, for and on its behalf. Said claim was allowed and approved for \$43,026.79. Appellant complains against the ruling of the court admitting this evidence, but we think it was clearly admissible as some evidence relevant to the present claim made by said W. H. Marston that he personally furnished the money that discharged the obligations owed by the Central Alaska Fisheries Company to the First National Bank of Berkeley on account of said promissory notes. This evidence and the further circumstances that all of the income from the W. H. Marston Company's property or business inured to the personal use and benefit of W. H. Marston, and the payment by him of all charges and expenses accruing against said company's property, would also tend to show that the W. H. Marston Company and W. H. Marston were for all practical purposes one entity. The learned trial court evidently took the view that the money paid by the personal checks of Marston on account of said Central Alaska Fisheries Company's indebtedness

were in fact moneys belonging to the W. H. Marston Company, and that said payments constituted a voluntary payment by said company and were made without a sufficient consideration to support them.

The court found as a fact that the Central Alaska Fisheries Company had not paid either to W. H. Marston or to the W. H. Marston Company any part of said sum of \$123,027.95 alleged by separate counts to be owing either to W. H. Marston or to the W. H. Marston Company, and it would follow therefrom that said obligation was never discharged by said Central Alaska Fisheries Company, but was actually paid at the latter's request to said payee from moneys which, according to the only evidence in the record on the question, belonged to either W. H. Marston or the W. H. Marston Company. There is no evidence in the record that would justify the inference that moneys paid to discharge the Central Alaska Fisheries Company on its guaranteed notes were moneys belonging to said company.

It was also specifically found that W. H. Marston, at the various times alleged, assigned and transferred to the W. H. Marston Company all his right, title, and interest in and to his claims against the Central Alaska Fisheries Company, including his claim and demand on each of said several promissory notes, but it was further found not true that said W. H. Marston Company thereby became the owner and holder of any of said notes. Finding No. 46 is here pertinent. It follows:

"As to paragraph II of the twenty-fifth cause of action, the court finds:

"That it is true that on or about September 24, 1923, the said Central Alaska Fisheries acknowledged in writing to the said W. H. Marston Company that it was indebted to the said W. H. Marston Company as the assignee of said W. H. Marston in the sum of \$123,027.95, alleged to have been paid out by the said W. H. Marston at the special instance and request of said Central Alaska Fisheries Company as alleged in the second paragraph of the first cause of action of said amended complaint, with interest upon said sum from December 30, 1922. It is likewise true that the said Central Alaska Fisheries, on or about September 24, 1923, promised in a writing signed by the said Central Alaska Fisheries, to pay to the said W. H. Marston Company as the assignee of said W. H. Marston the said sum of \$123,027.95, with interest thereon at the rate of 7 per cent. per annum from December 30, 1922; and it is likewise true that no part of said sum or the said interest has been paid by the said company; but the court finds that it is untrue that said W. H. Marston ever paid out any sums of money as alleged in the second paragraph of said first cause of action of said amended complaint, and therefore the said W. H. Marston had no claim against the said Central Alaska Fisheries Company, Inc., which he could assign to said W. H. Marston Company, and the promise made by said Central Alaska Fisheries, Inc., to pay said sums of money to said W. H. Marston Company as assignee of said W. H. Marston was

made without consideration, and attempted to acknowledge an indebtedness which did not exist."

[2] If it be true that W. H. Marston, as found by the court, never paid out any sums of money at the special instance and request of the Central Alaska Fisheries Company to the First National Bank of Berkeley for the use and benefit of said Central Alaska Fisheries Company, as alleged in paragraph II of the first cause of action, and that no obligation of any character was created in favor of the W. H. Marston Company by reason of the payments made by it to said bank at the special instance and request of W. H. Marston "in order to discharge the liability of the said W. H. Marston as a guarantor of the obligations of said corporation" (Central Alaska Fisheries Company), as alleged in paragraph II of the second cause of action and found by the court to be true, it would follow that the obligation of the Central Alaska Fisheries Company to pay its indebtedness would go wholly discharged. If as a matter of fact W. H. Marston used moneys in his possession and under his control which belonged to the W. H. Marston Company with the permission and consent of the latter to pay his guaranty obligation, and said payment was also made at the request of the Central Alaska Fisheries Company and the payee, that would constitute a transaction between Marston and said Marston Company about which the Central Alaska Fisheries Company would have no legal ground of complaint. Nor could it repudiate its implied obligation to reimburse the payor. *Wheeler v. Bull*, 131 Cal. 421, 425, 426, 63 P. 732. Such a transaction would constitute a loan as between W. H. Marston and W. H. Marston Company, or at least a payment of money by the W. H. Marston Company to the use of W. H. Marston, and in either event an implied obligation on the part of W. H. Marston to reimburse W. H. Marston Company would be created. The evidence is without contradiction to the effect that W. H. Marston paid the Central Alaska Fisheries Company's indebtedness from moneys deposited in his name and private account. All checks were so drawn and paid. It is very doubtful if there is any satisfactory evidence in the record that would justify a holding that the particular moneys used by W. H. Marston to pay said indebtedness were not his own. Surely there is no evidence tending to prove that he was not fully authorized to use said moneys deposited in his name for purposes and in ways that would indicate a proprietary right in him. No question of fraud or misappropriation on the part of W. H. Marston is claimed or suggested by respondent. *Yule v. Bishop*, 133 Cal. 574, 62 P. 68, 65 P. 1094, is relied upon by respondent as a case decisively against appellant's right of recovery. We do not so regard it. That was

an action to enforce the statutory liability of stockholders for a debt of the corporation. One Mrs. Blair, the indorser of said note, being called upon by the payee, but without being requested by said corporation to do so, paid the note in suit and took from the bank an assignment of said note "and all its rights and interests thereto and all moneys due or to grow due thereon and all rights of action which said bank had or held" against said corporation payor, "and against the stockholders of said corporation created or existing in favor of said bank by reason of said loan." In turn Mrs. Blair assigned and transferred the note and all rights and interests therein and all moneys to become due thereon to one Black, who brought an action against said corporation and recovered a judgment against it for the amount paid by her to the bank. Black and Mrs. Blair executed and delivered to Yule an assignment of all their right, title and interest in and to the judgment, to the note, and to any and all rights of action against the stockholders of said corporation payor, created or existing by reason of the loan made by said payee bank. Yule sued to enforce the statutory liability of the stockholders. Issue being joined, the court found as a matter of fact that with the note the bank's right of action against the stockholders had been assigned to Mrs. Blair. That finding was not assailed. The finding that was challenged by the plaintiff in his motion for a new trial and the one which received the particular consideration of the court upon appeal, dealt with the effect of the written assignment of Blair of the judgment and promissory note to Yule, whereby the court found that neither Black nor Mrs. Blair had assigned to plaintiff (Yule) any rights of action against the stockholders of the corporation upon account of the debt. The order appealed from was reversed with leave to either party to amend their pleadings if they should be so advised.

[3] The doctrine reannounced in the above-cited case as the law of this state is "that full payment and performance by the surety extinguishes the primary obligation; that new rights and liabilities then arise—upon the part of the principal, to reimburse the surety for the moneys expended, with legal interest, though not according to the terms of the primary obligation; and upon the part of the surety, the right to an action in assumpsit upon the implied promise of the principal to make him whole. * * * Redington v. Cornwell, 90 Cal. 49, 27 P. 40, is distinguished from the Yule Case by pointing out as the distinguishing features that the latter case was not a case of the payment of a debt by a surety, but the payment of a debt of a corporation by one of its stockholders, who asked to be subrogated to the rights of the original holder of the debt to enforce the stockholder's liability. In such a case, it

is pointed out, a stockholder, not being a mere volunteer, by virtue of his relations to the corporation, has a right to take up the corporation's note and to hold it and the debt represented by it and enforce contribution amongst his fellow stockholders. Although Redington paid the indebtedness of the corporation of which he was a stockholder, it was held that the debt was not extinguished, while it is said in the Yule Case, supra, that payment on the part of the surety extinguishes the debt. The doctrine of assumpsit upon the implied promise of the principal to make the surety whole is, however, approved. In the instant case, although the pleadings are not framed on this theory, Marston was nevertheless not only a guarantor but a stockholder of the Central Alaska Fisheries Company.

[4] The assignment made by W. H. Marston to the W. H. Marston Company of his claim or right to reimbursement from the Central Alaska Fisheries Company was sufficiently specific to transfer his right to recover to another. "A thing in action is a right to recover money or other personal property by a judicial proceeding." Section 953, Civ. Code. "A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. * * *" Section 954, Civ. Code. "Property of any kind may be transferred, except as otherwise provided by this article." Section 1044, Civ. Code. No exception exists against the assignment of the right of reimbursement arising upon the implied promise of a principal to make his surety whole.

No transfer of the notes paid by the checks of W. H. Marston to the First National Bank of Berkeley on account of his guaranty obligations was made by said bank either to Marston or to the W. H. Marston Company. The assignment made by Marston to the W. H. Marston Company embraced all his "right, title, and interest in and to his claims and demands against the said Central Alaska Fisheries Company, including his claim and demand" on the several notes. As above noted no actual transfer of the notes was made, and that portion of each assignment made by W. H. Marston to the W. H. Marston Company, which concludes with the words "including his [Marston's] claim and demand on said note [giving date] to the W. H. Marston Company, * * *" was an attempt to transfer in addition to the rights and claims of action that had sprung into existence upon the extinguishing of the old liability all other possible rights and claims or demands that may have existed by reason of the original transactions. This is not strictly an action to recover upon extinguished obligations, but an action in assumpsit brought by the assignee of a guarantor for the amount paid out by the latter and founded upon new rights and liabilities

which sprang up upon the extinguishment of the primary obligation by its performance by the guarantor—a right that has never been controverted and is expressly recognized in *Yule v. Bishop*, supra. The vital question presented by *Yule v. Bishop*, supra, a case involving the liability of stockholders, had to do with an action brought upon an assigned note which the indorser was compelled to pay. That action was brought to enforce all the rights and interest which the assignee indorser had in said note at the time the assignment was made, which was subsequent to its extinguishment by payment, and therefore there was nothing but a performed obligation assigned by the transaction.

We do not deem it necessary in the view that we take of matters presented to discuss the several equitable remedies open to a guarantor upon payment of his principal's debt. Nor do we deem it necessary to decide whether or not the rule announced in *Yule v. Bishop*, supra, to the effect that where a debt is extinguished by the surety's payment the debtor's liability thereby comes to an end, and neither the doctrine of equitable assignment nor of subrogation can transfer it as a live, subsisting obligation, has been abrogated by the negotiable instruments provisions of the Civil Code (sections 3201, 3202 et seq., adopted in 1917).

[5] We are of the opinion that the finding of the court to the effect that the W. H. Marston Company paid the indebtedness of which W. H. Marston was the guarantor, at his special instance and request, in the circumstances of the case, was equivalent to a finding that the relationship of creditor and debtor was thereby created, from which an implied promise at once arose on the part of W. H. Marston to repay the amount advanced by said company to meet his obligation. The evidence, however, without contradiction, shows that W. H. Marston drew the checks against his personal account that discharged the indebtedness owing by the Central Alaska Fisheries Company to said bank. If, on the other hand, Marston paid said indebtedness in his personal capacity, as he claims to have done, the assignment being sufficient would in either event entitle the plaintiff to a judgment for the full amount sued upon.

[6, 7] We think there is no merit in the claim that the court committed error in allowing a stockholder of defendant, Central Alaska Fisheries Company, to intervene as a party in interest. It is plain that unless he intervened no defense whatever would have been made by the corporation defendant or by any person on its behalf. Neither was it error to deny the intervener the right to continue as a party after a failure of proof to sustain certain allegations of the

complaint in intervention charging collusion on the part of plaintiff and the directors of defendant corporation. This was a matter largely in the discretion of the trial court, and its discretion seems to have been wisely exercised in view of the importance of the issues involved in the action.

The portion of the judgment appealed from is reversed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; LANGDON, J.; CURTIS, J.

WASTE, C. J. The petition that this court direct judgment to be entered for the appellant in accordance with its decision in the above entitled cause is denied.

202 Cal. 18

FITZGERALD et al. v. BADARACCO et al.
(S. F. 12647.)

Supreme Court of California. Aug. 23, 1927.

Mandamus ☞113—Writ of mandate directing municipal tax levy sufficient to pay certain salaries was denied, since direction would nullify charter's tax limit provisions.

Where, under municipal charter, board of supervisors was to prepare the annual budget and tax levy, but board of public works was to fix compensation of its own employees, latter board's power held so limited as to be subject to control of supervisors, hence petition for writ of mandate directing supervisors to levy tax sufficient to pay salaries fixed by board of public works was denied; otherwise charter's tax limit provision would be a nullity.

Preston J., dissenting.

In Bank.

Application by W. J. Fitzgerald and others for a writ of mandate compelling John B. Badaracco and others, as the municipal Board of Supervisors, to levy certain taxes. Writ denied.

Maurice T. Dooling, Jr., and F. A. Devlin, both of San Francisco, for petitioners.

John J. O'Toole, City Atty., of San Francisco, for respondents.

RICHARDS, J. The petitioners, consisting of a considerable number of the employees of the department of public works of the city and county of San Francisco, have applied for a writ of mandate whereby they seek to have this court direct the board of supervisors of said city and county and the members thereof to adopt a tax rate and levy a tax for the fiscal year ending June 30, 1928, sufficient to pay the said petitioners certain amounts in the way of added compensation fixed by said board of public works by a resolution thereof adopted May 18, 1927, for the services performed and to be performed by said petitioners as the employees of said board during said fiscal year. The petition herein discloses that on the 6th day of June, 1927, the said board of supervisors, purport-

ing to act pursuant to the provisions of section 3, c. 1, art. 3, of the charter of said municipality, adopted a certain ordinance providing for the sums, respectively, to be allowed to the various departments, officers, boards, and commissions thereof for said fiscal year, and making a budget of the same; that in so doing the said board made a budget of the amount estimated to be required to pay the expenses of conducting the public business of said department of public works for said fiscal year, including and itemizing the amounts to be paid by said board for the salaries and wages of its employees; that in so doing said board of supervisors failed to allow and provide for the amount required by said board of public works to pay the said added compensation of its employees, and that pursuant to said budget the said board of supervisors is about to levy the annual taxes to be imposed upon the inhabitants and properties within said city during said fiscal year; and that in so doing the board will not, unless so directed by this court, embrace in the tax levy a sum sufficient to meet and pay the said added compensation so provided and fixed for its said employees by the said board of public works. Wherefore, the petitioners apply for this writ. The return which the respondents have made to this writ is in the form of a demurrer to its sufficiency, and the questions presented thereby relate to the power with which said board of public works is invested under the terms of said charter with relation to fixing the compensation of the employees of said board, and to the limitations, if any, upon such power embraced in the other provisions of said charter. By the terms of section 3, c. 1, art. 6, of said charter, it is provided that:

"The board [of public works] may employ such clerks, superintendents, inspectors, engineers, surveyors, deputies, architects, and workmen as shall be necessary to a proper discharge of their duties under this article, and fix their compensation, but no compensation to any of said persons shall be greater than is paid in similar employment."

It is the contention of the petitioners that under the foregoing provision of the charter the board of public works is invested with plenary power to fix the compensation of those of its employees who are referred to therein, and that when said board has acted in the matter of fixing the compensation of its employees the amounts thus fixed are not subject to control or diminution through the action of any other department of said municipality, but must be provided for in the annual tax levy thereof. It is made to appear, however, by the terms of section 3, c. 1, art. 3, as the same read prior to the adoption of certain amendments thereto in the year 1924, that the board of supervisors of said municipality were charged with the duty of preparing and adopting an annual budget, which, when so prepared and adopted,

should furnish the basis of the tax levy to be later made by said board. Said section read as follows:

"The supervisors shall meet annually between the 1st Monday of May and the 1st Monday of June, and by a vote of a majority of all the members thereof make a budget of the amounts estimated to be required to pay the expenses of conducting the public business of the city and county for the next ensuing fiscal year. The budget shall be prepared in such detail as to the aggregate sum and the items thereof allowed to each department, office, board, or commission, as the supervisors shall deem advisable."

It is also to be noted that by the provisions of sections 11, 12, and 13 of chapter 1 of article 3 of said charter it is provided that the tax levy to be made by the board of supervisors of said municipality "shall not exceed the rate of \$1 on each \$100 valuation of the property assessed." Certain exceptions to this limit of taxation are provided for in the sections of said article above referred to, but these do not affect the questions before us. It is the contention of the respondents herein that under the provisions of section 3, c. 1, art. 3, of said charter, relating to the annual budget and under the provisions of sections 11, 12, and 13 of said charter, relating to the limit of taxation, the power of the board of public works to fix the compensation of its employees is so limited as to be subject to the control of the board of supervisors in the fixation of the budget and in the levy of taxes conformably thereto, and that said board of public works in the exercise of its aforesaid power may not provide for the payment of the compensation of its employees in an amount exceeding the sums allowed to it by the board of supervisors in its said budget and provided for in the tax levy to be made conformably therewith. We are of the opinion that the contention of the respondents in the foregoing regard must be sustained, and that to hold otherwise would be not only to nullify in a large measure the provisions of the charter with relation to the preparation of the annual budget by the board of supervisors, but would also be to place it within the power of the board of public works and certain other departments of the city government to provide for expenditures within their several departments in excess of the tax limit provided for in the foregoing provisions of said charter and in so doing to be and act beyond the control of the legislative body of said city, whose duty it is to keep the expenditures of its government within such limit of taxation. It has been brought to our attention that in the year 1924 two certain charter amendments were proposed and adopted by the electors of said municipality relating to the duties imposed upon the board of supervisors in the matter of the preparation of the annual budget, and also in the matter of the classification of the wages and salaries of the officers and employees of said municipality to

be accomplished by the adoption of certain ordinances of the board of supervisors to be passed in accordance therewith, but that such classification has not as yet been made or said ordinances adopted by said board. By the terms of the latter of these amendments it is provided that:

"Pending the adoption by the supervisors of classification and compensation schedules as herein provided, the existing salaries and compensations and charter salary and wage-fixing powers shall remain in force and effect."

Whatever may be the interpretation and effect of the foregoing amendments to the charter, or either of them, when put in operation, we are not called upon here to consider for the reason that we are of the opinion that prior to the adoption of said amendments the power of the board of public works in the matter of the fixation of the compensation of its employees was subject to the limitation imposed by the budget provisions and taxing limit of said charter as it existed prior to the aforesaid amendments thereof.

The application for the writ is denied.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

I dissent: PRESTON, J.

202 Cal. 1

BRIARE v. MATHEWS et al. (Sac. 3811.)

Supreme Court of California. Aug. 15, 1927.

1. Municipal corporations $\S$ 184(2)—Rule of council prescribing qualifications of police appointees held not binding because limiting council's charter power over police department.

Where city charter gave council general authority to organize and maintain police department, council's rule placing age limit upon police appointees held not binding upon it, since such body could not limit the power conferred upon it by charter.

2. Municipal corporations $\S$ 186(1)—Salary of police appointee over age limit could not be recovered in taxpayer's suit as paid in violation of rule.

Under charter giving city council authority to organize and maintain the police department, the council may make rules but is not bound by them, hence in taxpayer's suit salary paid police appointee over rule age limit cannot be recovered on ground that it was paid in violation of rule.

3. Municipal corporations $\S$ 186(1)—Police-man's salary payments held illegal and recoverable, where he accepted position within year after term as councilman at which compensation was increased.

By virtue of charter provision that no councilman should, within one year after his term, hold an office, the compensation of which had been increased during his term, policeman's ap-

pointment held illegal and salary paid him recoverable in taxpayer's suit, he having resigned as councilman and immediately become policeman, although police salaries had been increased during his term as councilman.

4. Municipal corporations $\S$ 1000(3)—Taxpayer's demand that city institute proceedings to recover salaries illegally paid should be made upon council, not city attorney.

Under charter investing city council with control of all city litigation, taxpayer's demand, precedent to his suit, that city bring action for recovery of salaries illegally paid city employees should have been made upon the council, and not upon the city attorney.

5. Municipal corporations $\S$ 1000(3)—Taxpayer's demand upon council to institute proceedings held not prerequisite, where useless.

Where one not qualified was appointed to police force, in taxpayer's suit to recover salary paid him, demand upon council to institute recovery proceedings held not prerequisite to taxpayer's suit; facts showing demand would have been unavailing.

6. Action $\S$ 48(1)—Taxpayer's suit to recover salaries paid two members of police force held improper joinder of causes, hence demurrable.

In taxpayer's suit to recover salaries illegally paid two members of police force, causes of action held improperly joined, hence special demurrer should have been sustained.

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Frank D. Briare against D. J. Mathews and others. Judgment for plaintiff, and defendants appeal. Reversed with directions.

Warren H. Atherton and A. P. Hayne, both of Stockton, for appellants.

Vincent W. Hallinan, of San Francisco, for respondent.

CURTIS, J. This action was instituted by a citizen and taxpayer of the city of Stockton against the city auditor and his surety, the city treasurer and his surety, C. O. Smith, Madeline Fotheringham and her husband, John Doe Fotheringham, to recover certain amounts of money which said officers had paid to the said C. O. Smith and Madeline Fotheringham, respectively, as salaries during the time said Smith and Fotheringham were serving as members of the police force of said city of Stockton. It was alleged, and the court found, that the appointment of each of said persons was illegal, and that all money paid them as salaries was illegally paid, and directed that the same be repaid into the city treasury of said city. The ground upon which Smith's appointment and tenure of office was found to be invalid was that just prior to his appointment he was a member of the city council of said city, and while a

member thereof said city council voted to increase the compensation of the members of the police force of said city, and, furthermore, that Smith was over the age of 35 years at the time of his appointment. The ground upon which Fotheringham's appointment was held to be invalid was that at the time of her appointment she was over the age of 35 years and had not at the time of her appointment been a resident of said city for the period of 2 years immediately prior thereto. From the judgment in favor of plaintiff, the defendants have appealed.

During all the times herein mentioned the city of Stockton has been governed by a freeholders' charter. It provides for what is commonly known as a commission form of municipal government. The city council consists of the mayor and four councilmen. One of said councilmen is designated and acts as commissioner of finance and is ex officio treasurer of said city; one is designated and acts as commissioner of audit and is ex officio auditor of said city; one is designated and acts as commissioner of public health and safety and one as commissioner of public works. The council by section 72 subdivision 5, of the charter, is given power "To organize and maintain police and fire departments." Section 48 of the charter provides that no member of the council shall be elected or appointed to any office, the compensation of which is increased by the council while he was a member thereof, until 1 year after the expiration of the term for which he was elected. By ordinance the council adopted certain rules and regulations for the government of the police department of said city. Rule 2 of said rules and regulations provided that:

"The police force is under the general control and direction of the commissioner of public health and safety, who has authority to appoint the chief of police and all members of the police department, subject to the provisions of the city charter and the approval of the city council."

By rule 30 it is provided that patrolmen shall be appointed by the commissioner of public health and safety and approved by the council.

"They are required to be between the ages of 25 and 35 years and not less than 5 feet 9 inches in height, sound of body and mind, of good moral character, and residents of the city of Stockton for a period of not less than 2 years."

It was plaintiff's contention at the trial, and the court evidently agreed with him, that the appointment of Smith was in violation of section 48 of the charter and of rule 30 of said rules and regulations adopted by the council, and that the appointment of Fotheringham was in violation of said rule 30.

We will first consider the validity of the appointment of Mrs. Fotheringham. It will be noted that it is not claimed that her

appointment violated any provision of the charter. The only respect in which it is contended it is illegal is that she failed to meet the requirements of rule 30 as to her age and residence, rule 30 having been adopted by ordinance passed by said council. The question therefore is presented as to the binding effect of this ordinance upon the council and the commissioner of public health and safety. But as the charter gives to the council the power to organize and maintain the police departments, and the only authority under which the commissioner of public health and safety acts in reference to this department is derived from the ordinance, and, furthermore, as the power is reserved in said ordinance to the council to approve appointments to the police department made by said commissioner, the real question presented is the binding effect of said ordinance upon said council. Can the council by ordinance limit the power over the police department, given it in the charter, to such an extent that an appointment legal by the terms of the charter is rendered invalid and void by its failure to comply with the standards fixed by the ordinance? Somewhat of a similar question was before this court in the case of *Higgins v. Cole*, 100 Cal. 260, 34 P. 678. The board of trustees of the city of Fresno had appointed a chief of the fire department of said city. The city was then acting under the Municipal Corporation Act of 1883, p. 93, under which the board of trustees was given full authority over the fire department. At the time of the appointment of said fire chief there was an ordinance of said city, in effect, providing that the chief of the fire department should hold office for the term of 1 year or until his successor was appointed and qualified. Some 3 months after the appointment of said chief of the fire department, the board of trustees passed a resolution declaring the position vacant and appointing another person to fill the same. It was claimed by the first appointee that the term of his office had been fixed at 1 year by the ordinance, and that the board of trustees was without power to declare the office vacant and appoint his successor until the expiration of said year. This court, on page 264 of the opinion (34 P. 680), said:

"The ordinance, in effect, provided that the chief should be appointed to hold office for one year, or until his successor should be appointed and qualified. This, as we understand it, must be construed as declaring only that the term of office shall continue until a successor is elected and qualified, and not necessarily for a full year. And under the statute providing that the trustees may 'appoint and remove such policemen and other subordinate officers as they may deem proper,' it would seem that they had no power to limit their right of removal. * * *

"As the term of office of the chief of the fire department was not fixed by the constitution nor declared by law, it must be held that appellant's term continued only during the pleasure

of the appointing power, and that he was rightfully removed."

In *Thompson v. Board of Trustees of City of Alameda*, 144 Cal. 281, 77 P. 951, the facts show that the board of trustees of the city of Alameda adopted an ordinance providing that whenever a petition signed by a certain per cent. of the voters of said city asked for the submission to the voters of said city of any proposition of local interest, the board of trustees should submit said proposition to said voters at the next general or municipal election to be held therein; that such a petition had been filed with said board of trustees and said board had refused to call said election, but was proceeding to act upon the matters set forth in said proposition without submitting the same to the vote of the people and before the next general or special election to be held in said city. It was the plaintiff's contention in said action that the board by said ordinance had suspended its legislative and discretionary powers to act upon the matter set forth in said petition until the next election to be held in said city, and he asked for a mandate directed to said board that it desist and refrain from acting upon said matter and comply with said ordinance. In denying relief to the plaintiff, this court, on page 282 of the opinion (77 P. 951), said:

"The position of the appellant is that the ordinance is mandatory, and that compliance with its provisions by the board of trustees is 'a condition precedent to their acting legislatively, in awarding or refusing franchises to railroad corporations.' But if this be the case, the effect of the ordinance would be in this and other cases where petitions may be filed, to suspend the legislative and discretionary powers of the board. The period of suspension, it is contended by respondents with apparent justice, would in all cases be until the next general or municipal election—that is to say, for a period that might be 2 years, and in the present case in fact is over a year. This, indeed, is contested by the appellant's counsel, who claims that the ordinance provides for special elections when deemed by the board desirable. But we deem it immaterial whether the longer or the shorter period be taken. In either case it is obvious that it was beyond the powers of the board by ordinance or otherwise to divest itself and succeeding boards, for a longer or a shorter period, of powers vested in it by the general law for the benefit of its constituents. For this would be to repeal pro tanto the general law. * * *

"But we do not think it necessary to give to the ordinance such a construction. The words 'the board of trustees shall submit to said voters,' etc., are not necessarily to be construed as mandatory (Bouvier's Law Dictionary, 'shall'; [Cairo & F.] Railroad Co. v. Hecht, 95 U. S. 170 [24 L. Ed. 423]); and in the present case there is no reason to suppose that they were so intended. It is more reasonable to suppose that the ordinance was intended as a mere rule of procedure for the guidance of the board, and as such to be observed or disregarded by the

board in its discretion, as circumstances might require."

In addition to these expressions from our own court, we find the following statement from 28 Cyc. 412:

"To be eligible to office, one must possess such qualifications as may be prescribed by the constitutional and statutory provisions. No qualifications, however, other than those imposed by the Constitution or statute are necessary. Qualifications in addition to those imposed by charter cannot be imposed by ordinance."

[1] It seems clear from the foregoing authorities that the city council was without authority to limit by ordinance the power conferred upon it by the charter. It is conceded that except for said ordinance the appointment of Mrs. Fotheringham was legal and valid, or at least there was no evidence that she did not possess all the qualifications as required by the charter and general laws. It must be held, therefore, that her appointment was legal, it having been approved by the city council, which body was by the charter invested with complete authority over the police department.

[2] It is not to be inferred from what we have said that the council may not make reasonable rules and regulations for the government of the police department. Undoubtedly it may. But these rules are simply for the convenience of the council and to enable it to better direct the affairs of said department. They cannot be considered mandatory to the extent of divesting the council of any right or power conferred upon it either by the charter or by statutory or constitutional enactment. This disposes of the judgment in so far as it directs the repayment to the city of Stockton of the money paid to Mrs. Fotheringham. It also disposes of the contention that Smith's appointment was invalid by reason of his being over the age of 35 years at the time of his appointment. It in no way affects the finding, and the judgment based thereon, that Smith's appointment was illegal for the reason that he was a member of the city council at the time the compensation of the members of the police department was increased.

[3] By express provisions of the charter he was ineligible to appointment to any office, the compensation of which was thus increased, until 1 year after the expiration of the term for which he had been elected. The evidence shows, and the court found, that he resigned from the council and was immediately appointed to the police force. His appointment was therefore, illegal, and gave him no right to receive any salary for his services rendered thereunder.

It is contended further by appellants that plaintiff cannot maintain this action for the reason that the complaint fails to show that he made any demand upon the city council to

institute proceedings to recover the money thus illegally paid before the commencement of this action. It is alleged in the complaint that such a demand was made upon the city attorney, and that this official refused to comply therewith.

[4] While the charter and an ordinance of said city authorize the city attorney to bring and prosecute all actions on behalf of said city, the charter invests the city council with control of all litigation of the city. Under these provisions of the charter we would question the power of the city attorney to institute litigation of this character without the sanction and direction of the council. By giving the council control of all litigation the charter has authorized it to determine what litigation shall be commenced as well as to how it shall be prosecuted thereafter. After the council has once determined that an action on behalf of the city shall be instituted, the charter then makes it the duty of the city attorney "to bring and prosecute" said action on behalf of the city, subject to the control thereof given by the charter to the city council. The demand, therefore, to institute this action on behalf of said city should have been made on the city council instead of on the city attorney.

[5] A demand, however, in our opinion, in this case was not necessary. We think the facts alleged in the complaint sufficiently show that such a demand would have been useless, and when it appears from the complaint that a demand would have been unavailing, it is not required. *Mock v. City of Santa Rosa*, 126 Cal. 330, 58 P. 826; *Osburn v. Stone*, 170 Cal. 480, 150 P. 367.

Appellants have argued that the evidence was insufficient to support the finding that the officers, the auditor and the treasurer, audited and paid the claims with knowledge of their illegal nature, and with knowledge that the persons to whom the same were paid were not legally entitled to payment thereof. While this argument might have some force when directed on behalf of the salary paid to Mrs. Fotheringham (which we have held to be legal for other reasons), it is entirely without weight in so far as the same affects the payment of the claims made to Smith. Both the auditor and the treasurer, as we have already seen, were members of the city council and must have had knowledge that the salaries of the police force were increased while Smith was a member of the council, and that immediately thereupon Smith resigned from the council and was appointed to a position in the police department. The contention, that the acts of the council in determining that Smith and Mrs. Fotheringham possessed the necessary qualifications as to age and residence cannot be legally attacked, need not be passed upon, as in our opinion the lack of these qualifications,

which had been created only by ordinance, would not and did not render their appointment illegal.

[6] The complaint in this action contained two causes of action separately stated—one relating to the payments made to Smith, and the other relating to the payments made to Mrs. Fotheringham. Defendants demurred to the complaint on the ground that two causes were improperly united in this action. These demurrers were overruled. The precise question was before the District Court of Appeal in the case of *Hansen v. Carr*, 73 Cal. App. 511, 516, 238 P. 1048, and the court held that the demurrer was properly sustained. We are convinced that the case was correctly decided, and, following it, we must hold that the court erred in overruling the special demurrers to the complaint in this action.

For the reasons given herein the judgment is reversed, with directions to the trial court to sustain defendants' special demurrers with permission to plaintiff to amend his complaint as he may be advised.

We concur: LANGDON, J.; SEAWELL, J.; SHENK, J.; PRESTON, J.; RICHARDS, J.

202 Cal. 10

UNITED STATES ex rel. HOLLINGS-
WORTH, Dist. Atty., v. BERG et al. ★
(L. A. 9992.)

Supreme Court of California. Aug. 16, 1927.

Rehearing Denied Sept. 14, 1927.

1. Appeal and error ⇐458(1)—"Supersedeas" issues only when in court's judgment it is necessary to protect rights of parties on appeal.

"Supersedeas" does not issue as of right, but only when in court's judgment it is necessary to protect rights of parties on appeal.

2. Constitutional law ⇐56—Supreme Court cannot by legislative enactment be deprived of constitutional power to issue supersedeas.

Supreme Court's power, under Constitution, to issue writ of supersedeas whenever necessary to protect rights of parties pending appeal cannot be abrogated by legislative enactment.

3. Appeal and error ⇐1—Matter of appeal is statutory, and Legislature may impose any condition or restriction on granting stay of execution pending appeal.

Matter of appeal is purely one of statutory regulation, and Legislature may impose any condition or restriction on granting of stay of execution pending appeal.

4. Appeal and error ⇐458(1)—Stopping of illegal sale of intoxicating liquor on filing of complaint held not cause for granting supersedeas to stay execution of closing order pending appeal (Wright Act; Code Civ. Proc. § 949, as amended by St. 1921, p. 95; Volstead Act [27 USCA]).

Fact that sale of intoxicating liquor in building was stopped on filing complaint, under

Wright Act (St. 1921, p. 79), incorporating in law of state Volstead Act (27 USCA [U. S. Comp. St. § 10138¼ et seq.]), or abatement of liquor nuisance does not require issuance of supersedeas to prevent enforcement of closing order pending appeal, in view of Code Civ. Proc. § 949, as amended by St. 1921, p. 95.

5. Intoxicating liquors — 259—Procedure in intoxicating liquor cases in state courts, whether in name of United States or of people of state of California, must be based on state laws (Wright Act; Volstead Act [27 USCA]).

Wright Act (St. 1921, p. 79), incorporating Volstead Act (27 USCA [U. S. Comp. St. § 10138¼ et seq.]) in law of state, did not adopt procedure of latter act, and authority for procedure in action concerning intoxicating liquors in state courts must be found in state laws, whether proceeding is brought in name of United States or in name of people of California, as authorized by Volstead Act.

In Bank.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Proceeding by the United States, on the relation of James C. Hollingsworth, District Attorney of the County of Ventura, against Gus A. Berg and others, to abate a liquor nuisance and to close certain premises. From a judgment closing a certain hotel, the named defendant and others appeal, and apply for supersedeas. Supersedeas denied.

Sheridan, Drapeau, Orr & Gardner, of Ventura, for appellants.

James C. Hollingsworth, Dist. Atty., of Ventura, for respondent.

WASTE, C. J. Certain of the defendants in this proceeding have appealed from the judgment of the superior court closing the Ventura Hotel, in the city of Ventura, for four months, under the provisions of the National Prohibition Act (27 USCA; U. S. Comp. St. § 10138¼ et seq.). Section 949 of the Code of Civil Procedure, providing for the stay of proceedings in the court below upon the judgment or order appealed from, as amended, declares that the perfecting of an appeal by the giving of an undertaking or making a deposit does not operate, as in ordinary cases, to stay proceedings, where the judgment adjudges a building or place to be a nuisance and, as a part of the judgment, orders and directs the closing of the building or place against its use for any purpose for any period of time. Stats. 1921, p. 95. A stay having been granted by the trial court for only a short time, the appellants have applied to this court for a writ of supersedeas staying the execution of the judgment pending the determination of the appeal. The respondent submits the matter on a general demurrer to the petition.

From the allegations of the petition it appears that the building ordered closed by the

judgment of the lower court is the largest and most prominent hotel in the city of Ventura. It was opened for business on the 30th day of May, 1926, and, from the findings and from the oral statement made by the trial judge at the time of the rendition of the judgment, we may conclude that the management at all times consistently disregarded the provisions of the Prohibition Act. The complaint was filed January 7, 1927, and the court found that on certain dates during December, and for a long time prior thereto during the year 1926 and thereafter, the parties conducting and owning the hotel kept and sold, and were, at the time the abatement proceedings were instituted, keeping and selling, intoxicating liquors on the premises. In a brief review of the evidence, prior to pronouncing the judgment declaring the hotel a nuisance and ordering it closed for a time, the trial court said that the place had "had a bad reputation with relation to the sale of intoxicating liquor from May until December, and" that, "if as much interest had been taken in that hotel before this action was brought as there was after it was brought, there would not have been any necessity for the action at all, because any one who lives in this community can appreciate what the general reputation of that hotel was. So far as the * * * court is concerned, it feels that those who were in it were very lax indeed in their duties as landlords, or as those interested in the building." The court further stated that it had been fully determined to close the hotel for the period of time prescribed by law, but, "as there appeared to have been an honest endeavor to comply with the law since the institution of the abatement proceedings," it would order the premises closed for a shorter period of time.

[1] Because of the fact, alleged in the petition, and commented upon by the trial court, supra, that, coincident with the filing of the complaint, a complete change of management was made, since which time there have been no violations of the Prohibition Act in connection with the maintenance of the hotel, it is argued that it is not necessary that the place be kept closed pending the appeal, the purpose of the abatement proceeding having been indirectly accomplished. The trial court, in possession of all the facts, used its discretion in fixing the time during which the hotel should be kept closed and in passing upon the application for a stay of execution. The question for this court to determine is whether, with essentially the same facts before it, it should, in the exercise of its appellate jurisdiction issue a writ of supersedeas, which does not issue of right but only when, in the judgment of the court, it is necessary to protect the rights of the parties on appeal.

[2, 3] While the Supreme Court has power under the Constitution to issue a writ of su-

persedeas whenever it is necessary for such purpose and cannot be deprived of that power by legislative enactment, the matter of appeal is purely one of statutory regulation, and the Legislature has authority to impose any condition or restriction on the granting of a stay of execution. *Foster v. Superior Court of City & County of San Francisco*, 115 Cal. 279, 47 P. 58; *Ex parte Queirolo*, 119 Cal. 635, 51 P. 956.

[4] In making the application for the writ of supersedeas, appellants are apparently anticipating the main contention they will advance in support of their appeal from the judgment. They contend that the abatement provision of the Volstead Act (incorporated in the law of this state by adoption of the Wright Act) is valid only in so far as it tends to abate a nuisance, and that, if it be construed as warranting punishment or forfeiture of property as a penalty, it is open to grave constitutional objections, citing *Schlieder v. United States* (C. C. A.) 11 F.(2d) 345, 348; *United States v. Chesebrough Mfg. Co.* (D. C.) 11 F.(2d) 537; *United States v. Pepe* (C. C. A.) 12 F.(2d) 985; *Key v. State ex rel. Hodge*, 101 Okl. 211, 224 P. 549. The point they seek to make is that, as the nuisance caused by the sale of intoxicating liquor in the hotel has already been abated, the court is deprived of jurisdiction to enter a decree of abatement. While some of the federal courts other than the Supreme Court of the United States, in the cases cited by petitioners, supra, lend color to the contention, they appear to have placed too little emphasis upon the fact that the proceeding for the abatement of a nuisance under the prohibition law is more than a mere equitable proceeding in the ordinary sense. It is a most important phase of the enforcement of the prohibition law, made so by the act itself. 41 U. S. Stats. at Large, 305. In this case, the proceeding was instituted against the keeper of the hotel and the corporation owning the building in which the hotel was conducted. The individual and the corporation appear to have been essentially identical. The judgment runs against both. There does not appear to have been any effort to correct the evil until some one was spurred into action by a report of the Ventura county grand jury. It is alleged that Berg, the hotelman, no longer owns any stock in the holding company, and that another is managing the hotel, and that the present owners and management were innocent of any infraction of the law. While the hotel premises are not being used as a place where intoxicating liq-

uor is now sold, these facts were presented to and considered by the trial court. The petition does not disclose whether or not petitioners were willing, or offered, or were refused an opportunity to enter into an undertaking, as they might have done if the trial court deemed such procedure proper or safe, as a guaranty against further infraction of the law; but appellants appear to have stood on their plea of a lack of jurisdiction in the lower court to order the hotel closed. The opportunity was open to them under the act, and the giving of such an undertaking has been held to be an alternative to a judgment in abatement. Appellants now assert a willingness to give such undertaking, if a supersedeas be granted. We are of the view, however, that the situation should remain as it was determined by the action of the trial court.

[5] The state of California, in adopting the Wright Act (Stats. 1921, p. 79), did not adopt the procedural features of the Volstead Act. The authority for the procedure in such actions in our courts must be found in the laws of this state, whether the proceeding is brought in the name of the United States or in the name of people of the state of California, as authorized by the Volstead Act. *Carse v. Marsh*, 189 Cal. 743, 210 P. 257; *Ex parte Brambini*, 192 Cal. 19, 218 P. 569. Section 949 of the Code of Civil Procedure, supra, was amended for a purpose. In denying applications for writs of supersedeas pending appeals in other cases, the courts have held that the Legislature, by amending the section, has indicated as its opinion that there should be no stay of an action to abate a nuisance where the judgment orders the closing of the building for any period of time, and the court having jurisdiction of the appeal ought to be careful not to nullify the statute. *People v. Jackson*, 190 Cal. 257, 263, 212 P. 4; *People v. Piazza*, 59 Cal. App. 43, 45, 209 P. 1017.

In view of the declared policy of the people of California so plainly indicated by the amendment to the section, supra, and in the light of the allegations of the petition, we are of the view that we would not be justified in the issuance of the discretionary writ of supersedeas in this case. The application for such a writ is therefore denied.

We concur: CURTIS, J.; RICHARDS, J.; SEAWELL, J.

Justices PRESTON and LANGDON, being disqualified, do not participate in the foregoing opinion.

201 Cal. 643

BLAKE v. CITY OF EUREKA et al.
(S. F. 12240.)

Supreme Court of California. July 25, 1927.

1. Municipal corporations ☞323(3)—Complaint to enjoin street improvement alleging improvement was laid out in places on private property, but not indicating places, held demurrable (Street Improvement Act of 1911, as amended).

In an action to enjoin proceedings to pave and to otherwise improve streets, under the Street Improvement Act of 1911 (St. 1911, p. 730), as amended, on the ground that the improvement was laid out upon private lands in various places, complaint alleging that improvement was laid out on private lands at various places, but not alleging where those places were, held demurrable.

2. Municipal corporations ☞318—Property owners cannot restrain street improvement on grounds not set forth in protest filed with council (Street Improvement Act of 1911, as amended).

A property owner who has duly filed protest against street improvement under the Street Improvement Act of 1911 (St. 1911, p. 730), as amended, on designated grounds, and whose protest has been overruled, cannot maintain an action to restrain the improvement on grounds not set forth in his protest nor in any way base a complaint of the overruling of his protest upon grounds not set forth therein.

3. Municipal corporations ☞323(3)—Complaint to enjoin improvement alleging failure to hear evidence on objections, but not alleging offer or refusal to hear evidence, held insufficient (Street Improvement Act of 1911, as amended).

In an action to enjoin proceedings to pave and to otherwise improve streets, under the Street Improvement Act of 1911 (St. 1911, p. 730), as amended, complaint alleging that city council failed to hear evidence on objections to improvements, but not alleging that plaintiffs offered any evidence in support of their protests or that the city council refused to hear such evidence, held insufficient to state cause of action.

4. Appeal and error ☞917(2)—Where demurrer was sustained to complaint to enjoin street improvements failing to make necessary allegations, Supreme Court might assume that absence of allegations was urged at hearing on demurrer (Street Improvement Act of 1911, as amended).

In action to enjoin proceedings to pave and to otherwise improve streets, under Street Improvement Act of 1911 (St. 1911, p. 730), as amended, where the complaint alleged that the city council failed to hear evidence on objections, but did not make necessary allegations that plaintiffs offered evidence and that city council refused to hear it and trial court sustained demurrer to complaint, Supreme Court might assume that absence of necessary allegations was urged.

5. Appeal and error ☞917(1)—Where demurrer to complaint to enjoin street improvements was sustained with leave to amend and plaintiffs did not amend, Supreme Court might assume that they could not make necessary allegations (Street Improvement Act of 1911, as amended).

In action to enjoin paving and otherwise improving streets, under the Street Improvement Act of 1911 (St. 1911, p. 730), as amended, where the complaint failed to contain the necessary allegations that plaintiffs offered evidence and that the city council refused to hear it, and demurrer to the complaint was sustained with leave to amend, and plaintiffs failed to amend, the Supreme Court might assume that plaintiffs could not make the necessary allegations.

6. Municipal corporations ☞298—Burden was on persons objecting to street improvements before council to prove objections (Street Improvement Act of 1911, as amended).

Property owners objecting to paving and to otherwise improving streets, under Street Improvement Act of 1911 (St. 1911, p. 730), as amended, had the burden of establishing truth of their objections, and where they offered no evidence the city council might overrule them without hearing evidence thereon.

7. Municipal corporations ☞325—Overruling of objections to street improvement by council held not reviewable (Street Improvement Act of 1911, as amended).

Decision of city council overruling objections to paving and otherwise improving streets, under Street Improvement Act of 1911 (St. 1911, p. 730), as amended, that street was varying widths, that there were gulleys in it, that the land fronting it was sparsely settled, that buildings on either side would not exceed certain number, that market value of land in district would be depreciated, that improvement would cost at least specified sum, and that property owners could not pay this much held final and not reviewable.

8. Municipal corporations ☞450(4)—Council's decision fixing boundaries of assessment district for street improvements held final (Street Improvement Act of 1911, as amended).

In proceedings to pave and to otherwise improve streets, under Street Improvement Act of 1911 (St. 1911, p. 730), as amended, decision of city council fixing the northern boundary of the assessment district at approximately 120 feet north of the street being improved and the southern boundary 2,640 feet south of the street, held final and not reviewable.

9. Municipal corporations ☞450(4)—Presumption is that members of council fixing boundaries of assessment district were familiar with conditions and governed thereby (Street Improvement Act of 1911, as amended).

It must be presumed that members of the city council fixing the boundaries of an assessment district to pay for paving and other street improvements, under Street Improvement Act of 1911 (St. 1911, p. 730), as amended, were familiar with conditions prevailing in the pro-

posed district and that in fixing the boundaries they were governed thereby.

10. Municipal corporations $\S$ 280(1)—That council disregarded its rule not to improve street in absence of petition therefor held not to affect validity of proceedings (Street Improvement Act of 1911, as amended).

In proceedings to pave and to otherwise improve streets, under Street Improvement Act of 1911 (St. 1911, p. 730), as amended, that the city council disregarded rule promulgated by it, but unauthorized by statute, that it would not improve a street in absence of petition for the improvement by a majority of the property owners, *held* not to affect the validity of the proceedings, the rule being repealable at pleasure by inconsistent action.

11. Municipal corporations $\S$ 442—Council cannot agree that property be assessed for street improvements in proportion to benefits or bear specified per cent. of cost (Street Improvement Act of 1911, as amended).

City council has no authority to agree with property owners or other persons that property shall be assessed for street improvements, under Street Improvement Act of 1911 (St. 1911, p. 730), as amended, according to the benefit the property receives, or that it will bear only specified per cent. of the cost of the improvement.

12. Municipal corporations $\S$ 293(1)—Council's agreement that improvement assessment should not exceed 60 per cent. of cost held not to affect validity of resolution of intention (Street Improvement Act of 1911, as amended).

Agreement of city council, if made in accordance with petition, for paving and other street improvements, under Street Improvement Act of 1911 (St. 1911, p. 730), as amended, asking that the assessment of the property fronting on the street should not exceed 60 per cent. of the cost of the improvement, *held* not to invalidate the resolution of intention to construct the improvements, the agreement being void.

13. Evidence $\S$ 65—Petitioners for street improvements are presumed to know that law renders property liable for cost of improvement proportionately to benefit if assessment district is formed (Street Improvement Act of 1911, as amended).

Court will presume that petitioners for street improvements, under Street Improvement Act of 1911 (St. 1911, p. 730), as amended, know that their property will be liable for the cost of the improvement in proportion to the benefit received, in case an assessment district is formed, they being presumed to know the law.

14. Municipal corporations $\S$ 434(1)—That public lands within assessment district were exempted from liability held not to invalidate street improvement proceedings (Street Improvement Act of 1911, as amended; St. 1911, p. 740, $\S$ 20, subd. 8).

In proceedings to pave and to otherwise improve streets, under Street Improvement Act

of 1911 (St. 1911, p. 730), as amended, that the city council exempted public lands within assessment district from the payment of any part of the cost of improvement in pursuance of St. 1911, p. 740, $\S$ 20, subd. 8, *held* not to invalidate proceedings.

15. Municipal corporations $\S$ 79—City charter controls over conflicting statutes concerning improvements (Street Improvement Act of 1911, as amended).

Where the provision of the city charter conflicts with the statute dealing with improvement of the streets, such as the Street Improvement Act of 1911 (St. 1911, p. 730), as amended, the charter provisions are controlling; the matter being purely municipal affair.

16. Municipal corporations $\S$ 266—Street Improvement Act held applicable to city of Eureka (Street Improvement Act of 1911, as amended; Charter of City of Eureka, $\S\S$ 43, 191).

Street Improvement Act of 1911 (St. 1911, p. 730), as amended, *held* applicable to the city of Eureka under its charter (section 191), there being no general plan or scheme of street improvement in the charter, particularly section 43, similar to that provided by the Street Improvement Act of 1911.

17. Municipal corporations $\S$ 293(1)—Proceeding by city of Eureka, under Street Improvement Act, by resolution rather than ordinance held expressly authorized (Street Improvement Act of 1911, as amended, particularly $\S\S$ 3, 10, 18; Charter of City of Eureka, $\S$ 191).

Street Improvement Act of 1911 (St. 1911, p. 730), as amended, particularly section 3, providing for resolution of intention to construct street improvement, section 10, providing for resolution ordering work, and section 18, authorizing resolution directing that work be done under supervision of city engineer, and Charter of City of Eureka, $\S$ 191, providing for improvement proceedings under statutes, *held* to expressly authorize street improvements proceedings under Street Improvement Act of 1911 by resolution rather than by ordinance.

18. Municipal corporations $\S$ 79—City amending charter to come within constitutional provision held not subject to general laws concerning municipal affairs except as charter provides (Const. art. 11, $\S$ 6, as amended in 1914; St. 1917, p. 1743).

The city of Eureka *held* not subject to general laws in matters concerning its municipal affairs, except as its charter provides, having amended its charter so as to come within the provisions of Const. art. 11, $\S$ 6, as amended in 1914, and the amendment to the charter having been approved by St. 1917, p. 1743.

19. Municipal corporations $\S$ 488, 489(6)—Objections that assessment district did not include lots fronting on street held not open, where not presented to council (Street Improvement Act of 1911, as amended).

Where objection to Street Improvement Act of 1911 (St. 1911, p. 730), as amended, that the assessment district did not include certain

lots fronting on a street in which a sewer was to be laid in the course of the improvement, was not made by written protest to the city council, it might not be made to the Supreme Court.

20. Injunction ⇨ **22—Injunction to prevent council from considering bids for street improvements awarding contract held not to lie where these acts have been done (Street Improvement Act of 1911, as amended).**

Where the city council had already entertained bids for street improvements, under the Street Improvement Act of 1911 (St. 1911, p. 730), as amended, and had awarded contract therefor, injunction to prevent doing of these acts held not to lie.

21. Municipal corporations ⇨ **323(1)—Injunction against street improvement proceedings held not to lie where contract had been awarded and supervision vested in city engineer (Street Improvement Act of 1911, as amended).**

Where the city council had awarded contract for street improvement, under Street Improvement Act of 1911 (St. 1911, p. 730), as amended, and had directed the city engineer to supervise the work, leaving no authority over work in the city council except in a few unimportant respects, not made basis of complaint, held that injunction against city council to prevent further proceedings did not lie.

In Bank.

Appeal from Superior Court, Humboldt County; W. V. Tryon, Judge.

Action to enjoin proceedings to construct street improvements by W. W. Blake and others against the City of Eureka and others. From a judgment of dismissal, plaintiffs appeal. Affirmed.

J. F. Coonan and G. A. Webb, both of Eureka, for appellants.

J. W. Henderson, of San Jose, for respondents.

CURTIS, J. This action was instituted for the purpose of obtaining an injunction restraining the members of the city council of the city of Eureka from further proceeding under resolutions 199, 1591, and 1592, theretofore passed by said council, or from considering bids or awarding a contract for the construction of certain improvements of three streets of said city, mentioned and described in said resolutions. It is alleged in the complaint that the plaintiffs in said action are the owners of land within the assessment district proposed to be formed for the purposes of paying the costs of said improvements, and that all of said plaintiffs with the exception of William Kehoe are taxpayers and residents of said city. The defendants, so it is alleged in the complaint, are the city of Eureka, the members of the city council thereof, and the Mercer-Fraser Company, a corporation, a construction company, who made the lowest bid for the construction of said im-

provements and to whom said city council awarded the contract for the improvement of said streets. The complaint sets up seven causes of action, all separately stated. The court sustained a general demurrer to each cause of action. It also sustained special demurrers to the first and sixth causes of action. The demurrers to the first, second, and sixth causes of action were sustained with leave to amend and the others were sustained without leave to amend. The plaintiffs failed to amend their complaint or any of the causes of action thereof within the time allowed by the court, and judgment was entered dismissing said action. From this judgment the plaintiffs have appealed. The three resolutions above mentioned were passed and adopted by the city council in furtherance of proceedings taken by said council under the Street Improvement Act of 1911 (Stats. 1911, p. 730), and amendments thereto, to pave and otherwise improve three certain streets in said city of Eureka. Resolution 199 was the resolution of intention provided for by section 3 of said act. Resolution 1591 was the resolution ordering the work of said improvements to be done as provided for by section 10 of said act, and resolution 1592 was a resolution directing the work to be done under the direction of the city engineer and the assessment to be made by him as provided for by section 18 of said act.

[1] In passing upon the several demurrers filed herein it will be necessary to consider the points raised by the appellants somewhat in detail, and we will discuss them as they relate to the several causes of action in the order set forth in the complaint.

[2] *First Cause of Action.*—The ground of the special demurrer to the first cause of action was that the complaint alleged that the improvement mentioned in the resolution of intention in various places along Harris street (one of the streets to be improved) was laid out upon private lands, but that it could not be ascertained from said complaint where or in what places said improvement was to be made upon private property. The demurrer was sustained and 10 days given to amend. Plaintiffs failed to amend. There was no error in sustaining this demurrer. The only allegations in the first cause of action upon which an argument with any hope of success might be based in favor of plaintiffs' contention that said first cause of action states facts sufficient to constitute a cause of action are that the cost of the improvement provided for in said proceedings would be in excess of the reasonable value of the land in the assessment district, and that the city council failed to hear evidence on the objections to said improvement, made in numerous protests, signed by some 254 property owners within the assessment district. We think, however, that a consideration of these allega-

tions will show that their inclusion in the cause of action did not render the same invulnerable to a general demurrer.

We will first consider the allegation that the cost of the improvement exceeded the reasonable value of the land benefited by the improvement. Section 6 of the Improvement Act of 1911 provides that at any time prior to the hour set for the hearing of protests any property owner liable to assessment for said improvement may make written protest against the proposed work. Section 7 of the same act provides that if no protests or objections are presented to the clerk of the city council or when a protest is filed the city council shall have overruled the same "immediately thereupon the city council shall be deemed to have acquired jurisdiction to order the proposed improvements." It does not appear from the complaint that any objection as to this excessive cost of said improvement was ever made to the city council, and the copies of the protests annexed to the complaint do not contain any such objection or any one similar thereto. Can plaintiffs now, in an action to enjoin the city council from ordering the improvement raise an objection which was not made by them or any of them in their written protests presented to the city council? If they can, then why the provision of the statute providing for the filing of written protests by the property owner with the city council? If a property owner at any stage of the proceedings to construct an improvement under said statute may by an action in court enjoin further work thereon without first complying with the statute providing for the filing of written protest, then the statutory provision requiring such protest is ineffective for any purpose whatever and can be disregarded with impunity by any property owner. As already mentioned, section 7 of the act provides that if no protests are filed, or if those filed are denied, the council immediately will be deemed to have acquired jurisdiction to order the proposed improvement. It has been held by this court, in construing this statute, that:

"If it [the city council] has duly disposed of the protests then as to all the world it has the power to proceed." *Farley v. Reindollar*, 174 Cal. 703, 707, 165 P. 19, 21.

It is further held in that case that a property owner who had failed to protest cannot object to the disposition of protests to which he was not a party. We think it logically follows that a property owner who has duly filed a protest upon certain designated grounds, and whose protest has been denied, cannot thereafter, in a proceeding in court or otherwise, complain of the denial of his protest on other grounds than those set forth therein, nor can he upon grounds not stated in any protest maintain an action to restrain the work of said improvement. We think

this question has been definitely settled by the following decisions of this court: *Duncan v. Ramish*, 142 Cal. 686, 696, 76 P. 661; *United Real Estate, etc., Co. v. Barnes*, 159 Cal. 242, 244, 113 P. 167; *Cohen v. City of Alameda*, 183 Cal. 519, 191 P. 1110. In the case of *United Real Estate, etc., Co. v. Barnes*, supra, in construing a similar statute, this court said, page 244 (113 P. 168):

"No objections were made by the plaintiff, or by any other person, and after the time for the objections had expired the council ordered that the street be opened and appointed commissioners to assess the benefits and damages. The decision thus made by the council is conclusive upon the plaintiff. The case cannot be distinguished in this particular from *Duncan v. Ramish*, 142 Cal. 691 [76 P. 663], and the numerous cases there cited. In that case the court said with respect to a similar objection: 'It is enough for the local property owner that he has a right to be heard before the city council upon the question, by filing a petition of remonstrance in the proceeding prescribed by law, setting forth his reasons why the improvements should not be made. Upon this the council must decide the question, and its decision is final.' In the same case, speaking of an objection with respect to the size of an assessment district, it was further said: 'It must be held that the property owner, having this right, must avail himself of it, or be concluded by the decision of the council.' The 'right' here referred to was the right to make objections to the extent of the assessment district. This case, it is true, arose under the Vrooman Act [St. 1885, p. 147] in a proceeding for paving or macadamizing a street, and not under the Street Opening Act [St. 1889, p. 70]. But the legislative power of the state, exercised in both instances by the city council, is the same in one case as in the other, the provisions of the statute as to the proceedings in the council and the conclusive effect of its decisions are substantially the same and the same principles must apply."

We think the same reasoning applies to the construction of the Street Improvement Act of 1911, and that plaintiffs cannot raise any objection in this action which they could have raised before the city council at the time provided by section 6 of said act for the hearing of protests, and which they failed to make by means of written protests filed as provided in said act.

[3] The other objection to which we have already referred, made in support of appellants' contention that the court erred in sustaining the general demurrer to the first cause of action, is that the city council failed to hear evidence on objections to said improvement made in the written protests filed by interested property owners. There is no allegation that the city council refused to hear such evidence, nor is there any allegation that any of said protestants offered to produce any evidence before said city council in support of their protest and which said city council refused to hear. The copy of the

resolution overruling protests annexed to the complaint shows that:

"All protests or objections were read to the council, and all of said protests or objections having been heard and duly considered by the council, and the council being fully advised in the premises and being required to pass upon said protests, it is hereby resolved by the council of the city of Eureka that all of said protests and objections against said proposed work or improvement be and the same are hereby overruled and denied."

Plaintiffs do not allege that this resolution failed to set forth the true action of the council taken at its meeting when said protests were considered by it, except that said city council "did arbitrarily and willfully determine, as plaintiffs are informed and believe, that said protests represented less than one-half of the owners of the property to be assessed for said improvement, and did then and there by resolution No. 1590 (a copy of which is annexed, marked Exhibit D, and made a part hereof) overrule and deny said protests."

[4, 5] Aside from any binding effect this resolution may have upon plaintiffs by reason of the allegations of their complaint in reference thereto, we think that the failure of plaintiffs to allege that they offered any evidence in support of their protests and objections and their failure to also allege that the city council refused to hear such evidence renders the first cause of action deficient in a material respect. We may assume that this point was urged upon the trial court at the hearing of the demurrer. It will be noted that the order of the trial court overruling said demurrer gave to plaintiffs 10 days within which to amend their first cause of action, and that the plaintiffs failed to file any amendment or any amended complaint. We may further assume that, had plaintiffs been able to cure this defect in this cause of action by alleging that they had offered to produce evidence in support of their protests and objections and that the city council had refused to hear such evidence, they would have done so by filing an amendment to their complaint alleging these facts. Having failed to so amend their pleadings, we feel that we are justified in concluding that they were unable to supply the missing allegations.

[6, 7] The burden of proof was upon the protestants to prove the truth of their objections, and without such evidence upon their part the city council was under no obligation to hear evidence before denying the same. *Ahlman v. Barber Asphalt Pav. Co.*, 40 Cal. App. 395, 403, 181 P. 238; *Lambert v. Bates*, 137 Cal. 876, 70 P. 777. There were further objections to said improvement alleged in the first cause of action which were also properly made before the city council by means of written protests. These were to the effect that Harris street was of vary-

ing widths along its course; that there were a number of gulleys in said street; that the land fronting thereon was sparsely settled. and that the total number of buildings on either side thereof would not exceed 45; that the market value of the property in said district would be depreciated if said improvement is made; that the cost improvement would be at least \$218,184.47; and that this expenditure was more than the property owners could pay.

These protests were overruled by the city council and its decision thereon was final. "The theory upon which the district is established, upon which the cost of the work shall be apportioned, is that it will derive special benefits from the improvement. But some one must determine that question, and, as stated, the Legislature has seen fit to delegate such power to the city council. From this conclusion it follows that the allegations of the complaint, to the effect that plaintiffs' property will not be benefited by the proposed improvement, cannot be considered in aid of the statement of a cause of action, since as to such question no evidence in support thereof would be admissible upon the trial. *Cake v. City of Los Angeles*, 164 Cal. 705 (130 P. 723); *Duncan v. Ramish*, 142 Cal. 686 (76 P. 661)." *Beale v. City of Santa Barbara*, 32 Cal. App. 235, 242, 162 P. 657, 660; *Rutledge v. City of Eureka*, 195 Cal. 404, 426, 234 P. 82. The first cause of action makes certain allegations of the other causes of action a part of said first cause of action by reference to said allegations appearing in other causes of action of said complaint. These allegations, or such of them as we deem of sufficient importance to discuss, will be considered in our discussion of the separate causes of action of said complaint containing said allegations.

[8] *Second Cause of Action.*—The objection to said improvement set forth in this cause of action is that the city council in determining the boundaries of said assessment district fixed the north boundary thereof at approximately 120 feet north of Harris street and the south boundary line 2,640 feet south of said Harris street. This objection was set forth in the protests filed with the city council. The right to fix the boundaries of the assessment district by section 4 of the act of 1911 is vested in the city council, and we see no reason why the same rule should not apply to the action of the city council in fixing the extent and boundaries of the district as we have already seen applies to its action in deciding whether the property of any certain owner will be benefited by the improvement. In the case of *Beale v. Santa Barbara*, supra, the court said, page 242 (162 P. 660):

"The position of counsel for appellants, as announced at the hearing, was to the effect that whenever a city council declares its intention to make street improvements, and likewise its intention to establish an assessment district

upon which to apportion the cost of such improvement, any dissatisfied property owner therein, upon a claim that his property will not be benefited, may demand a hearing in court and thus obstruct the proposed improvement until a determination of such question by the court. As stated in *Paulson v. City of Portland*, 16 Or. 450 [19 P. 450, 1 L. R. A. 673], such a course would hardly be practicable, and would result in substituting in place of the judgment of the common council, who are selected on account of their supposed fitness for that duty, the opinion of a multitude of witnesses, many of whom would be personally interested in the controversy. Says Hamilton on Special Assessments, § 515: "The determination of the assessing board as to what property is benefited and the extent of such benefit, when made in accordance with statutory requirements, is conclusive, in the absence of fraud or mistake."

[9] There may have been good and sufficient reasons why the district was extended only 120 feet north of Harris street and was extended 2,640 feet south of said street. The relation of Harris street to the land situated on either side thereof may furnish a satisfactory and reasonable explanation for fixing the boundaries of the district so that the greater portion thereof would lie to the south of said street and a less portion to the north thereof. It must be presumed that the members of the city council were familiar with the conditions prevailing in the proposed assessment district and that in fixing its boundaries they were governed by such existing conditions. Some body or tribunal must determine the extent and limitations of the district, and, as we have already seen, the Legislature has provided that such power shall be exercised by the city council.

[10] *Third Cause of Action.*—The objection alleged in this cause of action as grounds for invalidating the proceedings taken by the city council to make said improvement may, for the sake of convenience, be divided into three classes:

First. Those allegations directed against the action of the city council to the effect that said city council had, prior to the adoption of said resolution of intention, promulgated a rule that it would not improve any street in said city unless petitions praying for said improvement were presented to it, signed by more than a majority of the property owners along said street or of the district to be affected thereby; that no petition had been presented for the improvement of the streets mentioned in said resolution of intention; and that, notwithstanding that no such petition had been presented to said city council, said city council passed said resolution of intention.

Second. Those allegations to the effect that an employee of the Mercer-Fraser Company circulated a petition for the construction of said work on Harris street in which petition there was contained the following

clause: "We also request the city council to create a district to be assessed for the cost and expense of the improvement according to the benefit derived, the assessment against the property fronting upon Harris street not to exceed 60 per cent. of the cost of the improvement;" that said petition was signed by property owners representing about 46 per cent. of the property fronting on Harris street and was presented to the said city council; that the city council "approved said petition and granted the petition of said property owners without change or qualification and thereupon ordered plans and specifications to be prepared for said work, and thereafter in pursuance of said agreement, passed said resolution of intention No. 199."

Third. Those allegations exempting public lands within said district from the payment of any part of the cost and expense of said improvement, as provided by subdivision 8 of section 20 of said Street Improvement Act.

As to the allegations in class 1, we think but little need be said. Any rule that the city council might promulgate adopting a policy regarding improvement of streets may be repealed at the pleasure of the council. This could be done directly by the city rescinding its action adopting the rule or indirectly by taking any action inconsistent with said rule. The city council is given the power to order the streets of the city improved whenever, in the opinion of the city council, "the public interest or convenience may require" (section 2, Street Improvement Act 1911), and any rule promulgated by it, which by its terms would trench upon this power would have no binding effect upon the council. The statute makes no provision for such a petition, nor does it authorize the council to promulgate any such rule.

[11] As to the allegations in class 2, it will be observed that the petition of the owners of property fronting on Harris street, and which it is alleged was approved by the city council, and upon which the resolution of intention was passed, requested the creation of an assessment district, and that the cost and expense of the improvement be assessed according to the benefits derived, the assessment to property on Harris street not to exceed 60 per cent. of the total cost of the improvement. The Improvement Act of 1911 provides two plans by which the cost of improvements incurred thereunder may be paid; one, by assessment against the property according to its frontage on the street improved, and the other by the creation of a district, and the property therein assessed according to the benefits received by each piece of property situated therein. Evidently the signers of said petition desired that the district plan be adopted by the city council in the proceeding which it was proposing to take for the improvement of Harris and other streets in

said city, and in the event this plan was adopted they requested that the property of said district be assessed to pay the cost and expense of said improvement according to the benefits derived. They also asked that the assessment against the property fronting upon Harris street should not exceed 60 per cent. of the cost of the improvement. Appellants insist that the city council in approving and granting said petition agreed that the cost of the entire improvement to the property owners on Harris street should not exceed 60 per cent. of the total cost of said improvement, and in pursuance of this agreement they passed the resolution of intention, being resolution No. 199. Appellants contend that this agreement on the part of the city council vitiated the resolution of intention and rendered all proceedings of the city council taken thereafter relative to the said improvement illegal and void. Referring to the copy of the resolution of intention attached to the complaint herein, we find it makes no reference to the petition filed by said property owners and contains no agreement or stipulation whatever relative to the amount or to the proportion of the cost and expense of said improvement which said property owners would be required to pay. It does not even provide that the cost of improvement shall be assessed against the property in the district in proportion to the estimated benefits to be received by each of the several lots or parcels therein situated. It does provide, however, for the formation of an assessment district and makes the expense of said improvement chargeable upon the property of said district, as provided in section 3 of said act. In all respects it complies with the requirements of said section 3 as to the matters and things which shall be contained in such a resolution of intention.

[12,13] The city council is without any authority at the time of the passage of the resolution of intention, or at any other time either before or after the passage of the resolution, to agree with any property owner or other person either that his property shall be assessed in proportion to the benefit it receives from the improvement, or that it will bear only 60 per cent. or any per cent. whatever of the cost of the improvement. The city council can determine that the cost of the improvement shall be chargeable against the property of a district, in which case it becomes the duty of the superintendent of streets, or city engineer, in the event that the last-named officer is designated by the city council, to make the assessment and determine the amount each property owner shall pay for said improvement. Any agreement or understanding between the city council and any property owner as to the cost of said improvement would be void and would be without binding effect either upon the city council or upon any official of said city charged with the duty of preparing said assessment. As-

suming, therefore, that the allegations of this cause of action in the complaint are to the effect that such an agreement was made by the city council when it approved and adopted said petition of the property owners, such an attempted agreement was beyond the power of the city council to enter into. It did not bind any of the parties thereto, and, in our opinion, it could not affect the validity of the action of the city council in adopting said resolution. The property owners presenting said petition are presumed to know the law and to know that their property would be liable for the cost of said improvement, in case an assessment district was formed, in proportion to the benefit received therefrom. There is no allegation that the city council acted fraudulently in the matter. On the other hand, the allegations of the complaint show that the petition of these property owners was presented, and whatever action thereon was taken by the city council was in open session of the council.

[14] The allegations in class 3 regarding the exemption of public property require but little consideration. They show that the city council acted in pursuance of the provisions of subdivision 8 of section 20 of the statute, and that its action in that regard was perfectly legal. In our opinion, the facts alleged in the third cause of action were not sufficient to constitute a cause of action and the order sustaining the general demurrer thereto was proper.

[15] *Fourth Cause of Action.*—The ground upon which it is sought to invalidate said proceedings in this cause of action by proper allegations set out therein is that the city council should have acted by ordinance, and not by resolution in the proceedings taken by it for the improvement of said streets and that having attempted to thus proceed by resolution and not by ordinance, such proceedings are without authority of law and are, therefore, illegal.

Section 43 of the charter of the city of Eureka provides that "the council shall have power to pass ordinances." Then follow 61 subdivisions of said section in which is enumerated every conceivable power or authority which the council might by any possibility be called upon to exercise. The first of said subdivisions is:

"To establish or alter the grades of, and to open, lay out, alter, extend, close, straighten, widen, or otherwise improve or regulate streets, alleys, lanes, and sidewalks upon the same; determine the width of sidewalks and streets, and the grade of the same, and to provide for acceptance of the streets when constructed and completed in accordance with such regulations as the council may adopt. Also to open, lay out, construct, alter, widen, extend, repair, and vacate walks, crosswalks, avenues, and thoroughfares in or over any plaza, park, or grounds belonging to or under the control of said city."

[16] It is appellants' contention that by this section of the city charter the city coun-

city could only enact a valid resolution of intention by the passage of an ordinance adopted with all the formalities required by said city charter for the adoption of ordinances of said city. It is conceded that the resolutions passed by the city council in the proceedings to improve said streets were not adopted as ordinances, nor were the charter provisions governing the adoption of ordinances complied with by said city council in the passage of said resolutions. The respondents concede that they proceeded solely under the provisions of the Street Improvement Act of 1911 and claim that they have complied with the terms of said statute in all respects and that the charter provision above referred to has no application to proceedings taken by the city council under the provisions of said improvement act. The charter of said city of Eureka contains no plan or scheme for the improvement of the streets of said city, unless it be held that subdivision 1 of section 43, above quoted, provides for such a plan or scheme. We think a mere reading of said subdivision would indicate that such was not the purpose of the framers of the charter in enacting said subdivision. On the other hand, we think it plainly appears therefrom that this provision of the charter was to govern said city council in its usual and ordinary care over the streets of said city and in the improvement thereof, but it does not purport to provide for a general scheme of improvement like that set forth in the Street Improvement Act of 1911 or in similar statutes which have been passed from time to time by our state Legislature. Section 191 of said charter provides that all improvements and proceedings not otherwise provided for in the charter shall be taken under and in pursuance of the provisions of the laws of the state applicable thereto in force at the time such improvements and proceedings are taken. Under this section of the charter the appellants concede that the city council might proceed under the Street Improvement Act of 1911 to construct a system of improvements such as are provided for in said act, but that where there is any conflict between said charter and said statute the provisions of the charter are paramount and control the proceedings to be taken by said city council. There can be no question that the improvement of the streets of the city is a municipal affair, and that where there is a conflict between the city charter and the general law in a merely municipal affair the provisions of the charter control. *Civic Center Ass'n v. Railroad Com.*, 175 Cal. 441, 166 P. 351; *City of Los Angeles v. Central Trust Co.*, 173 Cal. 323, 159 P. 1169. While subdivision 1 of section 43 of the charter of the city of Eureka, as already noted, authorizes the city council by ordinance to improve the streets of said city, it contains no provision

for a general plan or scheme of street improvement like or similar to that provided for in the Street Improvement Act of 1911.

[17] The Improvement Act of 1911 was, therefore, by said section 191 of the charter, made applicable to the city of Eureka. By its provisions the city council is expressly authorized to proceed in improving the streets of said city in accordance with the plan or scheme provided in said act, and if said act provides that action may be taken by the city council by resolution and not by ordinance, then said city council may proceed in the manner provided by said Improvement Act. Section 3 of this act provides for the resolution of intention, while section 10 of the act directs that the city council shall pass a resolution ordering the work done, and section 18 provides that the "city council by resolution adopted" may provide that the work shall be done under the direction of the city engineer. It will thus be seen that the three resolutions passed by the city council in the street improvement proceedings before us, and concerning which appellants complain, were expressly authorized by the Street Improvement Act of 1911, and as the act was made applicable to the city of Eureka by the express provisions of the charter of said city, the action of said council in proceeding by resolution and not by ordinance was in pursuance of the provisions of said charter as well as in accordance with the terms of said act. Such action, was, therefore, regular and legal.

[18] Appellants call attention to the fact that the city of Eureka has amended its charter and comes within the purview of section 6, art. 11, of the Constitution, as amended in 1914. This amendment to the city charter was approved by the Legislature in 1917 (Stats. 1917, p. 1743). Therefore appellants contend that in the manner of enacting ordinances or resolutions or in the manner of improving streets the council is dealing with municipal affairs and accordingly has the power to make and enforce any and all laws in respect to municipal affairs, subject only to restrictions and limitations of the charter, and, furthermore, that the city of Eureka is not subject to general laws in matters concerning municipal affairs. In the main these contentions of appellants must be conceded, and they are to a certain extent sustained by the following authorities cited by appellants: *Civic Center Ass'n v. Railroad Com.*, supra; *Morgan v. City of Los Angeles*, 182 Cal. 301, 187 P. 1050; *Heilbron v. Sumner*, 186 Cal. 648, 200 P. 409. The true rule as stated in these authorities is set forth in *Heilbron v. Sumner*, supra, page 650 (200 P. 410), as follows:

"As a result thereof [the amending of a city charter so as to come within the terms of the Constitution as amended in 1914] the city is not subject to general laws in matters concern-

ing municipal affairs except as the charter itself may provide."

We have already seen that the charter of the city of Eureka, by section 191 thereof, has expressly provided that the city of Eureka shall be subject to the general laws of the state applicable to the improvement proceedings in force at the time such improvement proceedings are taken and had. Except for this section of the charter appellants' position would be unassailable, but with this section an integral part of the organic law of the city, its provisions are controlling in the matters set forth therein and bring the city of Eureka within the exception mentioned in the above cases. This disposes of the only point made by appellants in support of the sufficiency of the allegations of the fourth cause of action of said complaint. The demurrer thereto was therefore properly sustained.

[19] *Fifth Cause of Action.*—The principal allegation of this cause of action is that the assessment district does not include lots adjacent to and fronting on a street in which a sewer provided for in the improvement proceedings is to be laid for a distance of 590 feet. This objection was not contained in a written protest filed with the city council at or before the meeting when the resolution of intention was passed and therefore cannot be now considered. Quoting again from Duncan v. Ramish, supra, the court says:

"It does not appear that any objection was made to the boundaries of the district, and hence it must be held that the decision of the council as to its extent was correct."

Furthermore, this same case lays down the rule, page 696 (76 P. 665), that:

"There is nothing in the law which requires the assessment district fixed by the council to include all the property fronting on the streets. The court cannot say that it might not be possible that some of the property fronting on the streets would not be benefited by the improvement."

This section of the sewer, 590 feet in length, may be merely an outfall sewer for the benefit and convenience of the property in the district and may not in any manner benefit the owners of adjoining land fronting on said street. It would therefore have been proper for the city council to have excluded the property fronting on the street in which said sewer was laid from the burden of paying for its cost of construction.

Sixth Cause of Action.—This cause of action, like the first cause of action, contains merely an allegation upon information and belief that there was included in the work provided for in the resolution of intention private property not deeded to the city nor dedicated to the public as a public street. A special demurrer, based upon the same ground as that set forth in the special de-

murrer to the first cause of action, was sustained by the trial court, and upon appellants' failure to amend within the time allowed by the court judgment was entered dismissing said cause of action. There was no error in this action of the court.

Seventh Cause of Action.—Appellants apparently have abandoned this cause of action as they make no reference to it in their brief. It consists principally of restatements of objections to said improvement set forth in the previous causes of action, and which have been already fully discussed by us in considering the sufficiency of the allegations of said several causes of action.

[20] There was also interposed and sustained by the court a general demurrer to the complaint as a whole. If neither one of the causes of action stated facts sufficient to constitute a cause of action, the complaint as a whole would, of course be subject to a general demurrer. But independent of the sufficiency of the several causes of action the complaint shows upon its face that the appellants are not entitled to the relief prayed for therein. As already stated in the opening of this opinion, the complaint shows that the city council had initiated proceedings to improve certain streets of the city of Eureka under the Street Improvement Act of 1911 and had passed the three resolutions numbered 199, 1591, and 1592. The last of these resolutions to be passed by the city council was the resolution numbered 1592, passed on the 6th day of April, 1926. The prayer of the complaint is for an injunction enjoining and restraining said defendants, as members of said city council, from doing or performing any acts in their official capacity as the council of Eureka, in further proceeding under said resolutions numbered 199, 1591, and 1592, or in considering bids or in awarding a contract for the construction of said improvement, and for general relief. But it is further alleged in said complaint that the city council on the 27th day of April, 1926, did by resolution, after opening sealed bids for said work, award the contract to do said work to the said defendant, Mercer-Fraser Company, for the price of \$218,184.47. In view of this allegation of the complaint, the respondents insist that the general demurrer to the complaint was properly sustained as, they contend, it appears from the face of the complaint that the principal if not all of the acts to be performed by said city council, and which it is sought by this action to enjoin and restrain, had prior to the filing of said complaint been performed by the said city council. It will be noted that plaintiffs ask in their complaint that the members of the city council be enjoined and restrained from doing any act under said resolutions "or in considering bids or awarding a contract for the construction" of said improvement, and for general relief. As the complaint shows

that the bids were considered and the contract awarded before the commencement of this action, no injunction will lie to prevent the city council from performing either of said acts. "An injunction lies only to prevent threatened injury and has no application to wrongs which have been completed." *Parkinson v. Bldg. Trades Council*, 154 Cal. 581, 602, 98 P. 1027, 1036, 21 L. R. A. (N. S.) 550. "The office of a writ of injunction, as its name imports, is peculiarly a preventive and not a remedial one; it is to restrain the wrongdoer, not to punish him after the wrong has been done or to compel him to undo it." *Stewart v. Superior Court*, 100 Cal. 543, 546, 35 P. 156, 158; *Hatch v. Raney*, 9 Cal. App. 716, 100 P. 886; *Delger v. Johnson*, 44 Cal. 182, 185.

[21] "The point principally urged by appellants is, that it was the duty of the board of trustees, in response to the notice given them by the property owners, to direct the street superintendent to let the contract to them. The work in question was being done under the Improvement Act of April 7, 1911 (Stats. 1911, p. 730). * * * When the board of trustees made its award, its power and duties in respect of letting the contract ceased. It then became the duty of the superintendent of streets either to cause the contract to be entered into by the original bidder or with the property owners should they elect to take over the work. The statute confers this power and duty upon him, acting, of course, in his official capacity, and it was not necessary for the board of trustees to take further action unless there was a failure on the part of the original bidder to enter into the contract, in which case the city council, under section 13, was directed to 'again advertise for proposals or bids.' The notice given by the property owners to the board of trustees conferred no rights upon them nor did it impose any duty upon the board of trustees." *Wentland v. Clark & Henery Const. Co.*, 37 Cal. App. 34, 37, 38, 173 P. 480, 481.

It is, therefore, apparent that no injunction will lie in this proceeding against the members of the city council to restrain them from doing that which the complaint shows upon its face they have already done. But the prayer of the complaint goes further, or at least attempts to do so, by asking that the city council be enjoined from taking any further proceedings under said resolutions and for general relief. Just what further proceedings said council threaten to take under

said resolutions the plaintiffs do not specify in their complaint, except that in the seventh cause of action they allege:

"That if not stayed by the process of this court, defendants, as the council of Eureka aforesaid, now threaten to, and unless restrained by the court will, proceed with the construction of said work and the creation of an assessment district therefor."

As to the creation of an assessment district the Street Improvement Act of 1911, section 4 thereof, provides that this may be done in the resolution of intention and the copy of this resolution passed by said city council, a copy of which is attached to plaintiffs' complaint, shows that said city council, in said resolution created said assessment district, defined its boundaries, and declared the properties within said boundaries to be benefited "by said work and improvements" and to be assessed to pay the cost and expense thereof. The assessment district had therefore been created prior to the commencement of this action. As to proceeding with the construction of said work there is little if anything that the city council has to do with the work of said improvement after the award of said contract. The improvement Act of 1911 provides that after the contract is awarded it then becomes the duty of the superintendent of streets to either cause said contract to be entered into by the original bidder or with the property owners, should they elect to take over the work. From there on the construction work of said improvement is under the exclusive direction and supervision of the superintendent of streets, or of the city engineer, in case the city council shall so provide, and in this proceeding the city council by said resolution No. 1592 has directed the work to be done under the supervision of the city engineer, and the city council is without authority over the same except in a few and unimportant respects, and it is not alleged that the city council is either acting or threatening to act in these respects, or in any of them. The general demurrer to the complaint was therefore well taken upon this ground, as well as upon the grounds first considered and discussed herein. For these reasons it appears that the judgment should be affirmed, and it is so ordered.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

201 Cal. 629

(258 P.)

MUNICIPAL IMPROVEMENT CO. v. THOMPSON et al. (S. F. 11788.)★

Supreme Court of California. July 23, 1927.

Rehearing Denied Aug. 22, 1927.

1. Time $\S$ 9(4)—Notice of road district improvement, posted September 25, held to allow 20-day period before hearing of objections, set for October 15 (Road District Improvement Act 1907, as amended).

Notice of road district improvement, posted on September 25, held to allow sufficient time before hearing on objections, set for October 15, under Road District Improvement Act of 1907 (St. 1907, p. 806), as amended, requiring lapse of 20 days since posting and first publication; Code Civ. Proc. $\S$ 12, being inapplicable, since statute requires that 20 days must elapse after the posting and before the date of hearing.

2. Time $\S$ 11—Fraction of day is deemed entire day for purposes of computing time.

Law takes no notice of fractions of day, and any fraction is deemed entire day for purpose of computing time, unless in particular case it is necessary to ascertain relative order of occurrences on same day.

3. Time $\S$ 8—Where reckoning of time is from doing of particular act, day upon which act is done should be counted.

Where reckoning of time is to be made from doing of particular act, day upon which act is done must be counted as one day, especially where intention to exclude such day does not appear.

4. Highways $\S$ 113(2)—Pre-existing indebtedness against land in road district, under improvement act, held to justify officer's refusal to execute contract for further improvements (Road District Improvement Act 1907, as amended by St. 1921, p. 326, $\S$ 22).

Existence of outstanding indebtedness against land in road district, under Road District Improvement Act of 1907 (St. 1907, p. 806), as amended by St. 1921, p. 326, $\S$ 22, describing form of bonds to be issued as one of series which constitute only indebtedness of district, held to justify refusal of chairman of board of county supervisors to execute contract for further improvements under same act, notwithstanding St. 1921, p. 325, $\S$ 20, which provides no bonds or assessment shall be held invalid for defects in proceedings.

5. Constitutional law $\S$ 290(1)—Highways $\S$ 122—Provision for levy of taxes to satisfy bonded indebtedness for road improvements in same manner as county taxes held not unconstitutional (Road District Improvement Act 1907, as amended by St. 1921, p. 329, $\S$ 26).

Road District Improvement Act 1907 (St. 1907, p. 806), as amended by St. 1921, p. 329, $\S$ 26, which provides for levying and collecting taxes to pay installments of principal and interest on bonded indebtedness for road improvements in same mode as ordinary county taxes, held not unconstitutional as denying property owner knowledge of amount of special assess-

ment tax, or because of fluctuations in assessed values, or possibility of inequality due to delinquent taxes.

6. Highways $\S$ 138—In absence of fraud, court will not determine effect of proposed paving improvement on abutting property, though cost is claimed excessive.

Where no fraud is alleged or proved in assessment proceedings for improvement of highway, court will not determine probable effect of paving on value of assessed property in determining validity of assessment, though cost is claimed to be excessive.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the Municipal Improvement Company against C. V. Thompson, Chairman of the Board of Supervisors of San Mateo County, and others. Judgment for plaintiff, and defendants appeal. Reversed.

Franklin Swart, of Redwood City, John D. Willard, of San Francisco, James T. O'Keefe, of Redwood City, J. E. McCurdy, of San Mateo, and J. W. Coleberd, of South San Francisco, for appellants.

Kirkbride & Gordon, of San Mateo, for respondent.

SHENK, J. This action was commenced in the superior court in and for the county of San Mateo to compel the chairman of the board of supervisors of said county to sign a contract awarded by said board to the plaintiff for the performance of certain street work in a proceeding had and taken under the Road District Improvement Act of 1907 (Stats. 1907, p. 806), as amended. From a judgment in favor of the plaintiff, the defendants have appealed. In their answer the defendants allege and now urge that the said proceedings are invalid for reasons which will be considered.

The resolution of intention was published on the 15th, 22d, and 29th days of September, 1923, and the "Notice of Road District Improvement" was posted on September 25. On October 15 the board of supervisors proceeded to hear such objections as were offered against the work, including those of the defendants other than the defendant chairman of said board, and on the same day the board adopted a resolution ordering the work to be done and fixing the time for the reception of bids on November 5. Notice to bidders was duly posted and published, the bids were received, opened, and examined, and on November 19, 1923, the board adopted a resolution awarding the contract to the plaintiff. Subsequently a form of contract was presented to the defendant chairman of said board for his signature. He refused to sign the contract on the ground that he had been advised by counsel for certain interested prop-

erty owners that the proceedings were irregular, and that he thought, in the interest of all concerned, the legality of the proceedings should be tested in court. This action was accordingly commenced to compel the execution of the contract.

[1] It is first contended that the board of supervisors was without jurisdiction to hear the objections to the work at the time the same were heard and disposed of by reason of an alleged insufficient notice of the passage of the resolution of intention. Section 4 of the act provides that printed copies of the resolution of intention headed "Notice of Road District Improvement" shall be "posted along the line of the work described in said resolution * * * and published. * * * Affidavits in proof of such publication and posting shall be filed with the clerk of the board of supervisors. When, before the day of the hearing specified in the resolution of intention, twenty days have elapsed since the posting and the first publication (they need not be simultaneous) of the resolution of intention, the board of supervisors shall have acquired power to proceed with such hearing and to take all other action in the proceeding as is in this act authorized."

[2, 3] We think the notice of hearing of objections was sufficient. Under well-recognized rules, either September 25, the date of the posting, should be included in the computation of the 20-day period, or, if that day be excluded, October 15 should be included. In either case, the period of 20 days elapsed between the posting of the notice and the hearing of the objections. Under the peculiar wording of the statute the question would not seem to be determinable by the rule laid down in section 12 of the Code of Civil Procedure, which is a re-enactment of section 307 of the original Practice Act (St. 1850, p. 455). If the statute had been made to read that the objections should be heard at least "twenty days after the posting of notices," section 12 of the Code of Civil Procedure would require that September 25 be excluded and October 15 be included and the 20-day period would intervene. But the statute requires that 20 days must elapse after the posting and before the day of hearing. Counsel for the defendants have misread the language of the statute in their argument wherein they urge that 20 days must elapse "after the day of posting." The statute reads "since the posting." The law takes no notice of fractions of a day. Any fraction of a day is deemed a day unless in a particular case it is necessary to ascertain the relative order of occurrences on the same day. It was early recognized as settled that:

"Where the reckoning is to be made from an 'act done' [here the posting of the notice on September 25], the day upon which it was done must, of necessity, be counted as one day, because if that day be excluded, then the count, instead of being from the act itself, is really

from the day following the doing of the act, which would be a subsequent point of time." *Price v. Whitman*, 8 Cal. 412, 416; *Iron Mountain Co. v. Haight*, 39 Cal. 540.

This is true especially when, as here, there is no indication that the day on which the act was done was intended to be excluded. *Derby v. City of Modesto*, 104 Cal. 515, 522, 38 P. 900; 24 Cal. Jur. 577 et seq. It may also be noted that the first publication of said notice was on the 15th day of September, 1923, a full month prior to the date set for the hearing of the objections. In any event, the notice was sufficient.

[4] In their first affirmative defense the defendants alleged, and the court found, that on the 11th day of September, 1923, which was the date of the passage of the ordinance of intention, there was an outstanding indebtedness against the land in this identical district of \$18,631.90, and that this indebtedness represented the balance unpaid and not yet due of a total indebtedness of \$37,263.81 incurred for public work performed in a prior proceeding taken under said Road District Improvement Act of 1907 pursuant to a resolution of intention adopted October 16, 1917. It is the contention of the defendants that the board of supervisors was without authority to commence another proceeding under said act when there was a pre-existing indebtedness on the land in the same district created under said act. The contention is based on the language of section 22 of the Act of 1907 as amended in 1921. In that section the form of the bonds to be issued to represent the cost of the improvement is prescribed. Included in the required form is the statement that:

"This bond * * * is one of a series of bonds of like date and effect * * * issued in behalf of road improvement district number * * * of said county, which constitute the only indebtedness of said district."

It is argued that by including the statement that the said bonds "constitute the only indebtedness of said district," the Legislature has in effect prohibited proceedings under the act and the issuance of further bonds thereunder unless it be true that said bonds "constitute the only indebtedness of the district." We are persuaded that there is much of substance in this contention. The form prescribed by section 12 of the act as originally adopted contained no such requirement. In 1915 the section was amended (Stats. 1915, p. 1397) so as to require that the board of supervisors include in the form of the bond a representation that said bonds "constitute the only indebtedness of the district." This section was again amended in 1919 (Stats. 1919, p. 516), and the same requirement was repeated. The statute was revised in 1921 (Stats. 1921, p. 311), and the identical language again employed. In this revision, however, the requirement as to the

form of the bond is incorporated in section 22 (Stats. 1921, p. 326). We are not at liberty to disregard the requirement of the statute. Its obvious purpose was to assure property owners in the district that improvement bonds of this sort would not be pyramided upon the district by similar, successive, and contemporaneous proceedings and was further to assure the contractor and all purchasers and holders of said bonds that said bonds, when issued, would constitute the only indebtedness of the district. This purpose may reasonably be deemed to result in making the bonds a more marketable and stable security as well as having an influence on the bids for the work favorable to the property owners. If bonds be issued to represent the cost of the improvement in the present proceeding and the bonds issued to pay for a former improvement be outstanding, unpaid, and not yet due, as in this case, the statement to be incorporated in the bonds about to be issued and required by the statute, to wit, that there is no other indebtedness of the district, would be false. The statute requires the board of supervisors to make that representation in the body of the bond, and under the law the chairman of the board of supervisors must sign the bonds. Every consideration in law and equity demands that when the required representation be made it be the truth of the matter. We are not now dealing with the effect of the language in section 20 of the act that:

"No bonds and assessment or tax thereafter [after the acceptance of the work] levied for the payment of the bonds to be issued for said work and expenses shall be held invalid by any court for any error, informality, omission or other defect in the proceedings where the resolution of intention has been actually published as in this act provided, before the said board shall have ordered the work to be done." Stats. 1921, p. 325.

We are dealing with a situation where no work has been done, and where it appears that the chairman of the board of supervisors has refused to sign the contract when it is made known to him that bonds must thereafter be signed by him to represent the cost of the work and that such bonds when so signed would contain a statement which to his knowledge would be false. In such case the so-called curative clause has no application and the proceedings may be halted until such time as the statutory requirement has been complied with. If it be suggested that the proceedings should not be declared void in toto, but only an abatement ordered until such time as the present outstanding indebtedness of the improvement district be paid off, it is at once observable that such a construction of the statutory provision might result in grave injustice either to the contractor or to the property owners. If the contractor has made his bid and the contract has been awarded to him and several years be

required to elapse before he can proceed with the performance of his work, the cost of material and labor on which his bid was based may in the meantime have materially increased. On the other hand, if such cost units have materially decreased, the result would be that the property owners would be required to pay more for the work than would be just and proper at the time the work was done. Our conclusion is that it was the intention of the Legislature that improvement proceedings under the act of 1907 should not be instituted until all indebtedness outstanding against the district and incurred by reason of prior proceedings under said act has been fully paid. It was thus the duty of the board of supervisors under the law to refrain from piling one indebtedness of the district upon another of the same district, and the chairman of the board was justified in refusing to sign said contract. The plaintiff seeks to meet the present objection by urging that the installments of principal and interest on the bonds to be issued for the contemplated improvement and falling due before the retirement of the old bond issue may for aught that now appears be paid out of funds raised otherwise than by a special assessment tax on the lands in the district. But it does otherwise appear. Section 6 of the notice of award, attached as an exhibit to plaintiff's complaint, provides that a special fund for the payment of said bonds is to be raised by the levy of special assessment taxes upon all the lands in the district. It is further contended that if said bonds be issued they will, under the holdings in *Woodill & Hulse Electric Co. v. Young*, 180 Cal. 667, 182 P. 422, 5 A. L. R. 1296, and *Barber Asphalt Co. v. Armstrong*, 48 Cal. App. 70, 191 P. 954, be a superior lien and be in effect the only indebtedness of the district. The cases just referred to did not involve proceedings under the Road Improvement Act of 1907, but were concerned with proceedings under other street improvement acts where no such restriction is found. The plaintiff further relies on *San Francisco Paving Co. v. Egan*, 146 Cal. 635, 80 P. 1076, and *Flickinger v. Fay*, 119 Cal. 590, 51 P. 855. Those cases likewise are not in point for the reason that the proceedings involved therein were taken under street improvement acts which contained no restrictions such as found in the act of 1907.

[5] The defendants challenge the constitutionality of the act of 1907 under the state and federal Constitutions. Section 26 of the act (as amended by St. 1921, p. 329, § 26) provides that the tax to be levied to satisfy the bond obligation "shall be levied and collected in the same mode and manner and by the same officers as the ordinary county taxes, and all laws applicable to the levy, collection and enforcement of such county taxes, are hereby made applicable to said special taxes." By reason of this provision it is contended that

the property owner may not know of the amount of the special assessment tax to be paid by him until the final installment on said bonds is to be paid (1) because of the fluctuations in assessed values from year to year, and (2) because the tax on some of the lots in the district may become delinquent and some of the landowners be required to pay an undue proportion in order to make up a sufficient fund to pay said installments. It is accordingly urged that the land of one property owner in the district may thus be impressed with a tax not properly chargeable to it, but chargeable against the land of the delinquent owner. We deem it not essential to the validity of the statute that the property owner be advised in advance of the precise amount he will be required to pay each year as the special assessment tax is levied to satisfy the installments of principal and interest on the bonds as they become due. The law requires the board of supervisors to levy and collect sufficient funds for that purpose. This requirement is mandatory. When the contract is let, the property owner does know the amount of the cost of the work which will be represented by the principal of bonds to be issued. The defendants herein were so advised, it is assumed, for they are objecting to the contract price. The nature of the proceedings is such that precision as to the exact amount of future levies as against each lot is impossible by reason of fluctuations in assessed valuations from year to year and delinquencies in payment of the tax on the part of some landowners in the district. These facts are not alleged in the answer, but they may be assumed. It would not follow therefrom that the method of ad valorem assessment would be invalid. If the value of a particular lot increase, it is reasonable to assume that the benefit and burden would increase proportionately. If the value decrease, a lessening of the assessment would result. If some of the special assessment payments become delinquent from year to year, it would not follow that the lands of the delinquent owners would be relieved from paying the charge. It would be merely postponed. With the penalties and costs accruing to the bond fund, it is reasonable to assume that the burden is equalized during the period that the bonds are outstanding.

The act of 1907 has received consideration in numerous cases in this state. Its validity on numerous grounds of attack has been declared. *Thomas v. Pridham*, 171 Cal. 98, 153 P. 933; *Barber Asphalt Co. v. Bancroft*, 167 Cal. 185, 138 P. 742; *Dillingham v. Welch*, 179 Cal. 656, 178 P. 512; *Pierce v. County of Solano*, 62 Cal. App. 465, 217 P. 545; *Swall v. County of Los Angeles*, 42 Cal. App. 758, 184 P. 406; *Hunt v. Manning*, 24 Cal. App. 44, 140 P. 39; *McCray v. Manning*, 22 Cal. App. 25, 133 P. 17. The ad valorem method of assessment has been upheld. *Los Angeles County Flood Control District v. Hamilton*,

177 Cal. 119, 169 P. 1028; *Thomas v. Pridham*, supra; *Swall v. County of Los Angeles*, supra. The method providing for the apportionment of the assessment on the lots in the district has been held to be a proper subject-matter of legislative discretion. *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Hendrick v. Crowley*, 31 Cal. 471, 474; *Mahoney v. Braverman*, 54 Cal. 565, 568; *Clute v. Turner*, 157 Cal. 73, 81, 106 P. 240; *Thomas v. Pridham*, supra; *Swall v. County of Los Angeles*, supra. The defendants rely largely on *Norwood v. Baker*, 172 U. S. 269, 19 S. Ct. 187, 43 L. Ed. 443, and *Spring Street Co. v. City of Los Angeles*, 170 Cal. 24, 148 P. 217, L. R. A. 1918E, 197. The effect of these decisions has been discussed and their application limited in *Thomas v. Pridham*, supra. See, also, *Duncan v. Ramish*, 142 Cal. 686, 691, 76 P. 661. We find nothing in those cases which brings the present case within the doctrine they declare. The defendants do not allege that no benefits will accrue to their lands. The court found that benefits would accrue, and expressions of the Supreme Court of the United States following the *Norwood* Case, especially those found in the case of *Kansas City Ry. v. Road District*, 266 U. S. 379, 45 S. Ct. 136, 69 L. Ed. 335, are to the effect that it is only when the legislative determination as to benefits is palpably arbitrary and therefore a plain abuse of power can it be said that it offends the due-process clause of the Fourteenth Amendment. See *Lent v. Tillson*, 72 Cal. 404, 14 P. 71.

[6] Finally, it is contended by the defendants that the evidence shows that the cost of the proposed work is grossly excessive when compared with the value of the lots in the district. The engineer of the proposed work testified that the original cost of the work would be in the proportion of \$566.92 for each 50-foot lot in the district and the total amount to be represented by the principal and interest on the bonds to be issued to represent the cost of the work would total \$226,295.37. The average assessed value of the lots in the district is \$150. The fair average market value of the lots in the district appears to be from \$500 to \$600. There are 384 50-foot lots in the district. It thus appears that the contract price is approximately equivalent to the market value of the lots in the district. As stated by the judge at the conclusion of the trial, the case presents a most unfortunate situation. There was evidence that the type of pavement provided for in the specifications is too costly for a district embracing property of such valuation. It may be that by reason of the improvement the values will be more than doubled in consequence of the pavement. Such may not be the case. These are not matters for our determination on this record. No fraud is alleged or proved. It is claimed that the bids were advertised for and the contract was awarded at a time when prices were at their peak. In a new proceed-

ing, if one be commenced, either less costly pavement may be specified or more advantageous prices may be received. These are questions to be determined by the board of supervisors in the exercise of their sound discretion. For the reason only that said board was not authorized to institute and carry to completion the proceedings in question in the face of said prior and outstanding indebtedness of the district, the judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

201 Cal. 726

WILLARD et al. v. GLENN-COLUSA IRR. DIST. et al. (Sac. 3674.)★

Supreme Court of California. Aug. 4, 1927.

Rehearing Denied Sept. 1, 1927.

1. Trial $\S$ 396(2)—Court's finding wholly without issues made by pleadings had no place in action, and could not be considered (Irrigation District Act as amended).

Where plaintiffs alleged that rules of board of directors of irrigation district organized under Irrigation District Act (St. 1897, p. 254, as amended) were discriminatory, but failed to allege that defendants operating under rules discriminated against plaintiffs, finding that certain acts of defendants were discriminatory, unfair, and inequitable, was wholly without issues made by pleadings, and had no place in action, and could not be considered on appeal.

2. Appeal and error $\S$ 878(1)—Plaintiffs, not appealing from judgment, could not complain of its effect as to them.

Where plaintiffs had not appealed from judgment, they were not in position to complain of its effect as to them.

3. Waters and water courses $\S$ 216—Irrigation District Act held not unconstitutional, because entire burden of maintaining irrigation system would be cast on landowners using water (Irrigation District Act, $\S$ 55, as amended by St. 1911, p. 516, $\S$ 11; Const. art. 11, $\S$ 13).

Irrigation District Act, $\S$ 55, as amended by St. 1911, p. 516, $\S$ 11, providing for collection of tolls or rates for use of water by landowners, enacted under authority of Const. art. 11, $\S$ 13, providing that Legislature has power to provide for regulation of affairs of irrigation districts, held not unconstitutional on ground that, if state board attempted to exercise limits of power, entire burden of maintaining and operating system would be cast on landowners using water.

4. Constitutional law $\S$ 48—Statute acquiesced in and acted on for long period should not be declared illegal, except after convincing demonstration of invalidity.

Statute which has been acquiesced in and acted on for a long period of time should not be lightly set aside or declared illegal, except after most clear and convincing demonstration of its invalidity.

5. Waters and water courses $\S$ 257(1)—Rules providing for ascending scale of rates for water used by landowners held not invalid (Irrigation District Act, as amended).

Rules of board of directors of irrigation district organized under Irrigation District Act (St. 1897, p. 254, as amended), providing for ascending or increasing scale of rates for water used by landowners, held not unreasonable or unwarranted, even though there was ample water in district to meet all requirements of users in district.

6. Waters and water courses $\S$ 257(1)—Rule requiring payment in advance of tolls for water used by landowners held not illegal (Irrigation District Act, $\S$ 39f, as added by St. 1917, p. 768, $\S$ 33).

Rule of board of directors of irrigation district, requiring payment in advance of tolls for water used by landowners under authority of Irrigation District Act, $\S$ 39f, as added by St. 1917, p. 768, $\S$ 33, held not illegal.

7. Waters and water courses $\S$ 257(1)—Irrigation District Act does not limit amount to be raised by tolls, but merely limits assessments (Irrigation District Act, $\S$ 39, as amended by St. 1917, p. 765, $\S$ 27).

Irrigation District Act, $\S$ 39, as amended by St. 1917, p. 765, $\S$ 27, limiting annual assessment to 2 per cent. of aggregate value of lands within irrigation district, does not limit aggregate amount to be raised by annual assessment, and also by means of tolls, but merely limits amount of annual assessment.

8. Waters and water courses $\S$ 257(1)—Irrigation district directors' determination that drainage machinery and construction of ditches should be paid from operation account was controlling on courts.

Determination of board of directors of irrigation district that drainage machinery and construction of drainage ditches to protect lands of district from seepage water should be paid from operation and maintenance account, where trial court found that it was necessary expense, was controlling on courts, and funds raised by tolls could be used to pay for same.

9. Waters and water courses $\S$ 257(1)—Finding of character of plaintiffs' lands assessed for water held not finding that particular part of lands was not loose or porous (Irrigation District Act as amended).

In action to have declared invalid certain assessments by irrigation district organized under Irrigation District Act (St. 1897, p. 254, as amended) against plaintiffs' lands for water, in which plaintiffs claimed that board discriminated in metering part of lands of district and not others, finding "it is not true that all lands of plaintiffs are loose and porous" was not finding that any particular part of plaintiffs' lands were not loose or porous.

10. Waters and water courses $\S$ 257(1)—Findings held not to show that irrigation district director's action in metering water was discriminatory (Irrigation District Act as amended).

Findings from which it could be reasonably inferred that plaintiff's lands, being loose and

porous, were metered, but other rice lands known as typical rice lands, which required less water than loose and porous lands, were not metered, did not justify conclusion that action of board of directors of irrigation district organized under Irrigation District Act (St. 1897, p. 254, as amended) in metering part of lands and not others was either discriminatory or inequitable.

11. Judgment ⇨256(1)—Where there was no finding on certain evidence, judgment could not be held to have been based thereon.

In action to have declared invalid certain assessments for water to extent that they included tolls, where there was evidence that in some instances board metered plaintiffs' lands only after protests had been filed by adjacent landowners against growing of rice in vicinity, but court made no finding on such evidence, judgment could not be held to have been based thereon.

12. Waters and water courses ⇨257(1)—Where complaint contained no averment that plaintiffs paid any excess tolls for water, judgment providing for repayment thereby must be reversed.

In action to have declared invalid assessments for water against plaintiffs' lands to extent that assessments included charges other than regular annual assessment, where complaint contained no averment that plaintiff had paid any of excess tolls, and there was no finding that such payment had been made, judgment providing for repayment to plaintiffs of several amounts paid by them respectively on account of excess tolls must be reversed.

In Bank.

Appeal from Superior Court, Glenn County; E. P. McDaniel, Judge.

Action by E. E. Willard and others against the Glenn-Colusa Irrigation District and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Hankins & Hankins, of San Francisco, for appellants.

A. L. Cowell, of Stockton, amicus curiæ.

Arthur C. Huston, of Woodland, and W. T. Belleu, of Willows, for respondents.

CURTIS, J. This action was instituted by certain landowners of the defendant irrigation district against the Glenn-Colusa irrigation district and its board of directors to have declared invalid certain assessments against the lands of plaintiffs to the extent that said assessments include any tolls or charges other than the regular annual assessment and to enjoin the enforcement of said assessment until said reductions are made. The complaint alleged the incorporation of the district, the names of the directors, the ownership of certain lands therein by the plaintiffs, and the use on said lands by plaintiffs of water during the assessment year 1922 for the purpose of irrigating said lands, and raising crops thereon, and that at all times during

said year there was available to said district sufficient water for the irrigation for any purpose of the whole of the lands comprised in said district. Plaintiffs then allege in their said complaint that under the pretended authority of the California Irrigation District Act the board of directors of said district in March, 1922, adopted certain rules and regulations, among which were rules 6, 6 A, and 6 B, which are as follows:

"Rule 6. Measurements and Rates.—The district shall be entitled to place meters or other measuring devices and turnouts in such of the ditches, canals, and laterals as they may consider necessary or proper, or may compute the amount of water delivered by reading the electric meters of the water user where water is taken from the canal by electrically operated pumps. Such meters or measuring devices may be used for the whole or any part of the irrigation season or for the whole or any part of a lateral system, and the metered charges based upon the average seasonal use of water as shown by said meters or measuring devices for the period of their installation.

"Rule 6 A. Normal Quantities and Rates.—Water for the irrigation of general crops and orchards will be charged for at the rate of 75 cents per acre, for the use of an average of not to exceed two acre feet per acre irrigated.

"Water for the irrigation of pasture land or for the sprouting of water grass, or for other purposes where but one irrigation for the season is required, will be charged for at the rate of 50 cents per acre for the use of not to exceed one acre foot per acre irrigated. If more than one second foot of water is required for such purposes, the charge shall be the same as for general crops. Delivery of water for these purposes will only be made when water is available.

"Water for the irrigation of rice will be charged for at the rate of \$4.00 per acre, for an average of not to exceed six acre feet per acre irrigated.

"Rule 6 B. Excess Quantities and Rates.—"Whenever the average use of water for either rice or general crops exceeds said normal quantities as specified in rule 6 A, such additional water as may be supplied will be charged for as follows:

"First acre foot in excess of normal, \$.6666 per acre foot.

"Second acre foot in excess of normal, \$1.00 per acre foot.

"Third acre foot in excess of normal, \$1.75 per acre foot.

"Fourth acre foot in excess of normal, \$2.50 per acre foot.

"Fifth acre foot in excess of normal, \$3.25 per acre foot.

"All over five acre feet in excess of normal, \$4 per acre foot."

Then are set forth in the complaint allegations 8 to 14, as follows:

"VIII. That said rule 6 is without the authority of the defendants and unlawful, in that it purports to create discriminatory methods of ascertaining the quantity of water distributed by said district to different tracts of land comprised in said district.

"IX. That said rule 6 A is without the au-

thority of the defendants and unlawful, in that it purports to create discriminatory charges for water distributed by said district.

"X. That rule 6 B is without the authority of the defendants and unlawful, in that it purports to create discriminatory charges for water distributed by the district.

"XI. That said rules 6, 6 A, and 6 B are arbitrary and inequitable, in that they create discriminations and preferences between the land-owners in said district.

"XII. That said rules 6 A and 6 B are respectively without the authority of the defendants and unlawful, in that the tolls and charges therein provided for are not required for any of the purposes for which tolls and charges are authorized to be made under the provisions of section 55 of said act, or otherwise howsoever.

"XIII. That said rules 6 A and 6 B are without the authority of the defendants and are unlawful, in that they are not charged to and collectable from all persons using the canal of said district for irrigation and other purposes, but are confined to persons using water for the purposes referred to in said rules 6 A and 6 B.

"XIV. That said rules 6 A and 6 B are without the authority of the defendants and are unlawful, in that they are not intended for any purpose of the district, but are intended solely to prevent the raising of rice on lands within said district."

It is then alleged that, acting under the pretended authority of these rules, defendants have caused the quantity of water used by plaintiffs to be ascertained by meter and have for said assessment year charged the plaintiffs with water according to tolls and charges provided for and set forth in rules 6 A and 6 B, and that on October 28, 1922, defendants caused the same to become a part of the assessment against plaintiffs' said lands for said assessment year; that said assessment is unlawful and invalid to the extent of the amount added thereto as aforesaid, and that plaintiffs have at all times been able, willing, and ready to pay the whole of any assessment, toll, or charge lawfully chargeable against them or against their lands.

The defendants in their answer denied that there was available for said district at all times during said year sufficient water for the irrigation for any purpose of the whole of the lands comprised in said district. They then deny that any of the rules and regulations set forth in plaintiffs' complaint is unlawful or invalid and admit that under the authority of said rules and regulations they caused the quantity of water used by plaintiffs to be ascertained by meter and for said assessment year have charged the plaintiffs with water according to the tolls provided for in rules 6 A and 6 B and that they caused the same to become a part of the assessment against plaintiffs' lands for said assessment year. As a further and separate answer the defendants allege that said district comprised an area of 103,000 acres of land, varying greatly in texture, character, presence of hardpan, and in other respects, and in partic-

ular in reference to the action of water thereon, the quantity of water necessary to raise crops thereon, and the loss of water by reason of seepage; that approximately 60,000 acres thereof are of such texture and character as to be what is called typical rice lands or lands upon which rice can be raised economically, profitably, and without unreasonable use or waste of water and without damage to surrounding land; that the balance of said lands of said district are of a loose and porous texture without hardpan and upon which rice cannot be raised except by the excessive use of water, and in which use the water is wasted, and damage to other lands occurs by reason of excessive seepage through said lands; that by reason of the difference in the use of water for general crops, rice raised on such typical rice lands and rice raised on the porous lands, it was necessary for the board of directors to make rules and regulations so as to provide for the use of water on all of said lands and to prevent damage to surrounding and adjacent lands through excessive seepage. The defendants then proceed to set forth the steps taken by the board of directors in the adoption of a set of by-laws, rules, and regulations, of which rules 6, 6 A and 6 B were and are a part; that plaintiffs had knowledge that said by-laws were being formulated; that copies thereof, after their adoption, were sent to the plaintiffs; that plaintiffs in compliance therewith made application for water to be used upon their respective lands during said assessment year and other facts which defendants claim estopped plaintiffs from objecting to said assessment against their said lands. The answer further alleged as separate defenses that plaintiffs' action was barred by the provisions of section 69 and also by the provisions of section 72 of the California Irrigation District Act (St. 1897, p. 254, as amended).

Upon the issues made by these pleadings the action went to trial and the trial court made findings and rendered judgment in favor of plaintiffs. The court found that at all times during said assessment year there was available to said district sufficient water for irrigation for all purposes of the whole of the lands of said district; that said lands consisted of 103,000 acres of land, each acre of which was entitled to its proportion of the amount of water distributed by said district for irrigation purposes based upon the ratio which the last assessment of the owners of said lands bears to the whole sum assessed upon the district; that rules 6, 6 A, and 6 B were without the authority of said board to adopt and were illegal in the respects specified in the complaint; that defendants have caused the quantity of water used by plaintiffs as found by the court to be ascertained by meter, and have for said assessment year charged the plaintiffs with said water according to the tolls and charges mentioned in rules

6 A and 6 B and have not caused the quantity of water used by other lands in said district for the growing of rice thereon or otherwise to be metered or otherwise ascertained; that the said actions of defendants are discriminatory, unfair, and unequal; that the assessment based upon said rules is unlawful and invalid to the extent thereto; that at a hearing of said board held on the 28th day of October, 1922, it was ordered that the unpaid balance of tolls and charges levied and charged for the use of water on the lands of plaintiffs should be added to and become a part of the assessment levied for the year 1922 upon such lands; that thereafter said amounts were purported to be duly ascertained and added to the said assessment, but the same were improperly and unlawfully added to said assessment and are not lawfully a part and portion thereof.

The court further found that approximately 60,000 acres in said district are of such texture and character as to be what is known as typical rice lands or lands upon which rice can be raised economically, profitably, and without unreasonable use or waste of water and without damage to surrounding lands; that the balance of the lands in said district are of a loose and porous texture without hardpan and upon which rice cannot be raised except by the use of large quantities of water, but it is not true that rice cannot be raised upon said last-mentioned land except by an excessive use of water, nor is it true that in using water for the cultivation of rice on said lands such water is necessarily wasted and damage to other lands occurs by reason of excessive seepage through the lands upon which the water is used; that by reason of the difference in the use of water for general crops, rice crops raised on said typical rice lands and rice raised on porous lands, it was necessary for the board of directors of said district to make rules and regulations so as to provide for the use of water on all of said lands and to prevent waste of water and to prevent damage to surrounding and adjacent lands through excessive seepage, but it is not true that said rules 6 A and 6 B in any way provide for the use of water on all of said porous lands or prevent waste of water or prevent damage to adjacent or surrounding lands through excessive seepage or otherwise. The court then proceeds to find, in accordance with the allegations of defendants' special defense, that the by-laws, rules, and regulations were adopted at meetings of the board of directors at which a large number of landowners of said district were present, but that all of plaintiffs were not present at said meetings; that thereafter copies of said by-laws were sent to each of the plaintiffs, but that it is not true that said plaintiffs had knowledge of said by-laws, rules, and regulations and of the rates fixed by said board of directors at all times mentioned in the complaint.

It then finds that the plaintiffs were not estopped from objecting to the said by-laws, rules, regulations, or rates, or from objecting to the assessment based thereon, and that plaintiffs' cause of action was not barred by the provisions of section 69 or the provisions of section 72 of the California Irrigation District Act. The court further finds:

"It is not true that all of the lands of the plaintiffs are loose and porous. It is not true that any of such lands in raising rice thereon require an excessive use of water. It is not true that said lands do not hold and retain such water, or that same seeps through such lands and thereby wastes such water, or damages surrounding or adjoining lands through any waste or excessive use of water. It is not true that plaintiffs wasted any water or that by reason of any wasteful use of water by plaintiffs said defendant district was required to make additional expenditures in pumping additional water, or in protecting its canals from breaks or overflow by reason of additional water carried therein for any purpose aforesaid. It is true, in protecting the lands of the district from a high water table and seepage water, said defendant was required to and did purchase drainage machinery and did construct drainage ditches at a great expense to said district, but it is not true that such high water table and seepage was caused solely by plaintiffs or persons using water for the cultivation of rice. It is true that a portion of the expense of said machinery and ditches was intended to be paid by or out of the additional income to be derived from the tolls collected for the use of said water on the lands of the plaintiffs. It is true that defendant district did purchase machinery and construct drainage ditches at a great expense, but no portion of such expense is payable by or out of any tolls or charges collected for the use of water."

Upon these findings the court rendered judgment in plaintiffs' favor:

"That the assessments referred to in the pleadings on file herein be and the same are hereby declared void and invalid to the extent of the amounts added thereto in respect of the excess tolls and charges mentioned in rule B referred to in said pleading, and that the said assessments be and the same are hereby reduced accordingly." (Rule B. referred to is evidently intended to mean rule 6 B mentioned in the pleadings. Said rule is also referred to in the findings as rule B.)

The court further decreed that said assessment created no lien on any property of the plaintiffs; that defendants and their agents and servants and all persons acting on behalf of them or any of them be restrained from enforcing said assessment until after reduction as aforesaid and that plaintiffs have and recover from defendant district all payments made by them or any of them in respect of any excess tolls and charges aforesaid and for plaintiffs' costs of suit.

Before proceeding to a discussion of the legal questions arising upon this appeal, it might be well for us to consider the nature of

the action as made by plaintiffs' complaint. In brief, the plaintiffs allege in their complaint that the defendants adopted rules 6, 6 A, and 6 B without any legal authority so to do, and accordingly said rules are illegal and void; that acting upon the pretended authority of said rules the defendants have metered plaintiff's lands and charged them rates or tolls for a portion of the water used thereon during the assessment year of 1922 and have added the amount of said tolls to plaintiffs' several assessments for said year and plaintiffs ask that the collection of said assessment be enjoined until the amount of said tolls are deducted therefrom. It will be noted that the only complaint plaintiffs make is that they were required to pay tolls or water rates for water used by them during said year instead of being furnished water for their said lands to be paid for by regular annual assessment. It will further be noted that plaintiffs do not complain of any discrimination against them in any manner whatever. There is no allegation in the complaint directly charging or from which it can be reasonably inferred that plaintiffs are treated any differently from other landowners of the district owning lands similarly to those of the plaintiffs or that they are charged any different or higher rates for the water used by them than the other landowners of the district are compelled to pay for a like amount of water used under the same conditions as plaintiffs have used the water for which they are charged. In other words, plaintiffs' sole contention, as made by their complaint, is that the district has no authority to charge tolls or rates for water used, but that the sole authority of the district to charge and collect for water used by the landowners is by an assessment against the property of said landowners situated in said district.

[1] By reference to the findings it will be seen that they are confined to the issues made by the pleadings in most instances, but not in all. In finding 12, for instance, it is found that defendants have caused plaintiffs' lands to be metered and have charged the plaintiffs according to tolls and charges mentioned in rules 6 A and 6 B and have not caused the quantity of water used by other lands in said district for the growing of rice or otherwise to be metered or otherwise ascertained; that said acts of defendants are discriminatory, unfair, and inequitable. This finding is wholly without the issues made by the pleadings and has no part or place in the action whatever, and cannot be considered herein. This must be so for the reason as we have already seen that the complaint contains no allegations that the defendants have discriminated against the plaintiffs by metering their lands and failing to meter lands of others similarly situated. It is true plaintiffs allege that said rules are discriminatory, and therefore ille-

gal, but they fail to allege that the defendants operating under said rules have in any way discriminated against said plaintiffs.

[2] It will be further noted that, while the court purports to find that rules 6, 6 A, and 6 B were without the authority of said board to adopt and were illegal in the respects specified in the complaint, the judgment decrees that the assessments are void and invalid only to the extent of the amounts added thereto in respect to the excess tolls and charges mentioned in rule B (6 B), and such judgment directs that the assessment be reduced accordingly. By the judgment, therefore, that portion of the assessment levied in pursuance of rules 6 and 6 A is not affected. It will be remembered that rule 6 provides for the metering of the lands of the district in whole or in part and that rule 6 A provides for the "normal rates" to be charged for the use of water under the meter system, while rule 6 B provides for the "excess rates" charged under said system. It is apparent, therefore, that the only part of said assessments invalidated by the judgment is that portion thereof which includes the "excess rates" charged plaintiffs. The judgment, therefore, tacitly sustains the right of the district to meter the lands thereof and to charge the "normal rates" provided in rule 6 A for the use of water thereon under the meter system. The plaintiffs have not appealed from said judgment, and therefore are not in a position to complain of its effect as to them. The defendants have appealed and the only question raised by their appeal is to that portion of said judgment which decrees that the assessments are "void and invalid to the extent of the amounts added thereto in respect of the excess tolls and charges mentioned in rule B" (6 B).

Respondents, however, have raised the question of the power of the board of directors of said district to meter the lands thereof and to charge either the normal or excess tolls or rates provided in said rules. This argument is probably made upon the theory that, if the board is without such authority, then all that part of the said assessment made up of charges for normal or excess rates is invalid and void, and, if the whole is invalid and void, then that portion in respect to excess rates is invalid and void. Appellants have met respondents' arguments practically under the same theory. The brief filed by the amicus curiæ is evidently filed upon the theory that the question of the power and authority of the irrigation district to levy and collect tolls is one and probably the most important question presented on this appeal. We will therefore consider this question as one properly within the scope of this appeal and will attempt to arrive at the correct determination thereof. It is appellants' contention that the board of directors of said district under the California Irrigation Dis-

trict Act was clearly within its power in adopting said by-laws, rules, and regulations in which rules 6, 6 A, and 6 B were a part thereof and that rules 6, 6 A, and 6 B are legal and valid. If the board of directors of said district has the authority and power to adopt these rules to govern the charges for the use of water in said district by the landowners therein, then there can be no doubt of the validity of the assessment complained of. On the other hand, if these rules are beyond the power of the directors of said district to enact, then all proceedings thereunder leading up to said assessment are illegal and void.

By the adoption of these rules the board of directors of the district has attempted to provide a complete plan or scheme for the distribution of the water of the district among the landowners therein and for the payment by said landowners for the use of said water in the manner provided in said rules. This plan contemplates first a basic charge estimated at 60 cents an acre to be raised by annual assessment to cover "bond principal and interest, together with the balance of maintenance charges." By this we understand the district raises by assessment an amount estimated at 60 cents per acre to cover the principal and interest on the bonded indebtedness and to meet the balance of maintenance charged after applying to maintenance the amount received as tolls or rates for water used. These rates or tolls are fixed as follows:

Normal Rates.

Water for pasture land where but one irrigation for the season is required, 50 cents per acre.

Water for general crops not to exceed two acre feet per acre, 75 cents per acre.

Water for irrigation of rice for an average of not to exceed six acre feet per acre irrigated, \$4 per acre.

Then follows the "excess rates" which provide for an ascending scale or charges increasing as the amount of water per acre increases, and, finally, the rules provide for the time when the tolls shall be paid. In this connection it might be stated that by this provision the tolls are made payable in installments, some of said installments being made payable and collected in advance.

Respondents contend in the first place that the board of directors of an irrigation district are without any authority whatever to impose tolls for the purpose of defraying the expense mentioned in section 55 (as amended by St. 1911, p. 516, § 11) of the California Irrigation District Act and that said section 55, in so far as it provides for the collection of tolls or rates for the use of water by the landowners, is unconstitutional. By section 13 of article 11 of the Constitution it is provided:

"That the Legislature shall have power to provide for the supervision, regulation and con-

duct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this state."

Under this section of the Constitution this court has held that:

"It is settled in this state that the Legislature has plenary power over districts organized for reclamation purposes." *Barber v. Gallo-way*, 195 Cal. 1, 6, 231 P. 34, 35.

In this same case this court, on page 16 (231 P. 39) of the decision, also said:

"Furthermore, article XI, section 13, of the California Constitution confers upon the Legislature a very broad power with respect to the supervision, regulation, and conduct of the affairs of districts of this character." (Irrigation districts.)

In pursuance of these broad and plenary powers invested in the Legislature by the Constitution, section 55 of the California Irrigation District Act was enacted, which is, in part, as follows:

"For the purpose of defraying the expenses of the organization of the district, and of the care, operation, management, repair, and improvement of such portions of such canal and works as are completed and in use, including salaries of officers and employees, and installments of rental or consideration accruing under any lease or contract as hereinabove in this section mentioned, the board may in lieu (either in part or in whole) of levying assessments as herein provided for, fix rates of toll and charges, for irrigation and other public uses declared by this act, and collect the same from all persons using said canal for irrigation and other purposes."

In support of their contention that this section is unconstitutional respondents do not rely on any decision of the courts of this state. They have, however, cited a number of authorities from other jurisdictions which they contend bear out their claim that said section is unconstitutional. These authorities at best are only indirectly in point and in none of them is discussed the question of the power of the Legislature to invest the board of directors of an irrigation district with authority to levy tolls or rates for the purpose of defraying the expense of the operation and maintenance of an irrigation system. Of the cases relied upon by respondent, those most nearly in point, are *Otis Orchards Co. v. Otis Orchards Irr. Dist.* No. 1, 124 Wash. 510, 215 P. 23; *Nampa & Meridian Irr. Dist. v. Bond* (D. C.) 283 F. 569, and *Colburn v. Wilson*, 24 Idaho, 94, 132 P. 579. These cases involve the right of an irrigation district to levy an assessment upon all the lands within the district to pay for the maintenance of the system. For instance, it was contended in the *Otis Case* that one who is not using any water upon his lands in said district was not liable for any assessment to

pay for the maintenance and upkeep of the system, and the court held:

"That the owner of irrigable land within a district must respond to the annual assessment for the operation and maintenance of the system, where the water is made available for his use, even though he does not use it."

The question of meeting this expense in whole or in part by means of tolls charged for the water used was not mentioned nor considered. Neither was it the subject directly or indirectly of the decision in either of the other two cases above referred to. We are of the opinion, therefore, that they are of slight, if any, value in determining the question of the validity of said section 55 which purports to confer such power upon the board of directors of an irrigation district. This question appears never to have been directly before the appellate courts of this state. Yet the authority of the district to levy tolls was discussed in at least two cases before this court and such authority, it seems, was not questioned on either of said occasions. These cases are *Danley v. Merced Irr. Dist.*, 66 Cal. App. 97, 110, 226 P. 847, 852, 854, and *Wores v. Imperial Irr. Dist.*, 193 Cal. 609, 632, 227 P. 181. In the first of these cases the court said:

"Section 55 of the California irrigation laws (Stats. 1911, p. 516, § 11) authorizes the board of directors of the irrigation districts, instead of levying assessments, to fix rates of toll charges for irrigation or other public uses declared by the act and collect the sum from all persons using the canal for irrigation or other purposes. As this is a legislative grant and a continuing power, we think the provisions of paragraph 8 purporting to waive the right to exact tolls without the power of the board of directors, and therefore void."

A hearing of that case in this court was denied. In the *Wores* Case this court, on page 632 (227 P. 189) said:

"This being so, the power of the board of directors to provide for the raising of such additional money for the needs of said district over and above that provided by the means of an assessment is to be found within the terms of section 55 of the General Irrigation Act, which provides that 'the board may in lieu (either in part or in whole) of levying assessments as herein provided for fix rates of tolls and charges for irrigation and other public uses declared by this act, and collect the same,' etc. The phrase in parentheses in the above quotation from said act plainly means that the board of directors may employ both methods of raising money for the purposes of the district as defined by law. In the fixation of tolls and charges for the use of its water by the various classes of users to whom it is to be supplied, the board of directors of the district is invested with a very large discretion by the general terms of the law giving that power, and which the courts ought not to interfere with in the absence of a clear showing of an abuse of that discretion. The remedy of the land owner or water user for the imposition of an un-

due burden by assessments or tolls or both is that of effecting a change in the directory of the district by the means provided in the acts relative to the selection of those who are from time to time intrusted with the conduct of the affairs of the district."

[3] It is true that in neither of these cases was the constitutionality of the statute raised. Nevertheless, in the face of these clear pronouncements of this court upon the power of the district to charge tolls, we would hesitate to declare the statute unconstitutional without clear and convincing reasons therefor are presented. The only reason advanced by respondents against the constitutionality of this section is that, should the board attempt to exercise the extreme limits of the power given it by said section and raise all the costs and expenses of operating and maintaining the system by tolls rather than by assessments, then the entire burden of maintaining and operating the system would be cast upon the landowners using the water, and the other landowners of said district would escape taxation entirely in so far as the same was levied for maintenance purposes. It is not claimed that the defendants have in the proceedings now under consideration attempted to resort to any such extreme measures. On the other hand, the rules and regulations provide for a basic charge of 60 cents per acre upon all lands of the district, a portion of which is applied towards the expense of maintaining and operating the system. But suppose that the board of directors had attempted to raise by means of tolls the total cost of operation and maintenance? Would it necessarily follow that their action was illegal, this authority having been conferred upon them by the Legislature under the broad powers given to the Legislature by the Constitution? The system of charging rates or tolls for the maintenance and operation of water systems is used almost entirely in municipalities owning their own systems, and quite often in such municipalities not only the cost and expense of operation and maintenance, but the amounts due upon principal and interest on the bonded indebtedness are raised by tolls and rates. As to the lands in an irrigation district, it might be that some of said lands receive no benefit whatever from the irrigation system. In such a case would there be anything inequitable if the Legislature should provide in such a case that such lands might be excluded from the cost of maintaining the irrigation system from which they received no benefit? Would the constitutional rights of the landowners who are receiving the entire benefit of said system be invaded by such a statute? We think not. It is not to be presumed that the board of directors of the district is going to act arbitrarily in exercising any power with which they are invested. If the board of directors should unlawfully discriminate

against any of the landowners in levying an assessment or should arbitrarily impose unjust tolls upon any of such landowners, the courts are open for the redress of any wrongs that may be suffered by said landowners from such arbitrary or illegal action by said directors. In our opinion there is but little that can be said against the reasonableness of the provisions of section 55 of the California Irrigation District Act, but much that can be said in favor of its provisions, especially when applied to a district situated as the Glenn-Colusa Irrigation District is situated. Evidently from the record before us the lands in said district vary greatly in their fertility, in their adaptation to different crops and in the amount of water required to produce crops thereon.

Respondents claim that the only fair and legal method of raising the necessary money with which to pay the cost and expense of maintaining the system is by an ad valorem tax upon all the lands within the district, in which event the water for irrigation purposes would be apportioned proportionately to each landowner upon the basis of the ratio which the last assessment of such owner for irrigation purposes within said district bears to the whole sum assessed upon the district. Section 18 (as amended by St. 1919, p. 661, § 3). Under the strictly assessment plan lands having high valuation and requiring only a small amount of water would, of course, pay a relatively large assessment, in which event the owner thereof would be entitled to receive a proportionate amount of water, possibly largely in excess of his needs. On the other hand, land of less value might require a large amount of water. Following the rule, however, as applied to the first piece of land, the amount of water this landowner would receive would be in proportion to the amount of assessment paid by him, based upon the value of his land. It would possibly transpire that he would be without sufficient water to meet the requirements of his land. It is true the first landowner with an excess amount of water may sell or assign his excess amount of water may sell or assign his excess water to his neighbor who is without sufficient water, but he is not obliged to sell it to any one. In case he should refuse to sell his excess water, the second landowner is without sufficient water to properly irrigate his land, while the excess water of the first landowner is permitted to run to waste. Such a situation is contrary to every principle of the law governing the use of water from the time when water was first applied for irrigation purposes in this state. It may be assumed, however, at least in most instances, that the landowner with an excess amount of water will be willing to sell the water which he will not require for his own land to the landowner whose supply is insufficient for his purposes. Yet it leaves the

second landowner in an unsettled and uncertain condition. He has no permanent supply of water adequate for his needs. He may be able one year to purchase sufficient water for his land and the next year he may not. He is always dependent upon his ability to go out to those who have excess water and acquire sufficient for his own needs. If he fails in this respect his crops are a failure. The water he is entitled to, therefore, is of little or no value to him. It is needless to say that such an uncertainty is not conducive to the operation of a successful farming venture. On the other hand, by giving to the board of directors the power to raise the whole or a part of the cost of maintenance by tolls as has been done by the enactment of said section 55, every landowner of the district is given an opportunity to the extent of the water supply of the district of securing a definite, certain, and adequate supply of water for his lands. It appears to us that such a statutory provision is not only within the power of the Legislature under the Constitution to enact, but that it affords an elastic system under which the affairs of the district may be operated to the end that the objects and purposes of the statute may be fully realized. We are, therefore, of the opinion that section 55 is not subject to the criticism that it is unconstitutional.

There is nothing new in the provisions of this act regarding the power of the directors to raise by these two methods the cost and expense of operating and maintaining the irrigation system of the district. A similar provision to that contained in the present act is to be found in the original Irrigation District Act, commonly known as the Wright Act, passed in 1887 (Stats. 1887, p. 29). In section 37 of this act will be found the following provision:

"For the purpose of defraying the expenses of the organization of the district, and of the care, operation, management, repair, and improvement of such portions of said canal and works as are completed in use, including salaries of officers and employees, the board may either fix rates of tolls and charges, and collect the same from all persons using said canal for irrigation and other purposes, or they may provide for the payment of said expenditures by a levy of assessments therefor, or by both said tolls and assessments. * * *

It has, so far as our information goes, remained an integral part of every irrigation act adopted in this state since the enactment of the original statute. It has been upon the statute books of this state for over 40 years. While its constitutionality has never been passed upon by this court, this question, so far as our knowledge goes, has never been raised. It is hardly possible that, in all the litigation that has been before the courts of this state regarding irrigation districts in their various ramifications, the validity of

this provision of the statute would not have been attacked had there been any question of its constitutionality. The fact that no proceeding prior to the present one has ever been brought before this or any of the appellate courts of this state in which the constitutionality of this provision of the statute has been questioned is most convincing proof that the profession as a whole has regarded its validity unassailable.

[4] It is unnecessary to call attention to the wide extent to which irrigation districts are now in use, as it is common knowledge that they are one of the principal agencies through which the waters of the state are conserved and made profitable for irrigation and domestic purposes. Many of these districts are no doubt providing for either the whole or a part of the cost of maintenance and operation by means of tolls as provided by this section of the act. To now hold that these districts are without power to fix rates of tolls and charges to meet either the whole or a part of the cost of operation and maintenance would no doubt cause the greatest confusion to exist in the business affairs of these districts and might possibly in some instances disrupt the districts themselves. A statute which has been acquiesced in and acted upon for so long a period of time should not be lightly set aside or declared illegal except after the most clear and convincing demonstration of its invalidity. No such a showing has been made in this case regarding those provisions of section 55 complained of. For this reason, as well as those already stated, we are not disposed to declare invalid any of the provisions of said section.

[5] This disposes of the question as to the power of the board of directors to adopt rules and regulations providing for the levying and collection of tolls to pay in whole or in part the cost of maintenance and operation of the system. Respondents further contend, however, that conceding this power to be in the board of directors, yet the rules so adopted and particularly certain portions of rules 6, 6 A, and 6 B are invalid for other reasons. The first contention made by respondents in this respect is that said rules are invalid in so far as they provide for an ascending or increasing scale of rates for water used. No authority is cited in support of this contention. The only argument advanced against such a rule is that the court found that there was ample water of the district available to meet all the requirements for the users of water in the district. Therefore, if the purpose of said rule was to discourage the excessive use of water or to prevent waste, respondents contend that under the finding just referred to such a rule was unnecessary and therefore invalid. We are not impressed with this argument. It is obvious that such a rule would tend to encourage the economical use of water by the landowners of the dis-

trict. The fact that there is ample water available for the needs of the district furnishes no excuse for the excessive use or waste of water, nor would that fact relieve the directors of the district of the duty to adopt all reasonable measures to prevent the excessive use and waste of water. Many of the government projects have adopted this method of fixing charges for the use of water under governmental control and we have not been cited to any instance in which it has been held to be illegal or an unreasonable requirement upon those to whom water is furnished. It has always been the policy of the law of this state to discourage an excessive use of water or a waste thereof by those entitled to its use. We are not prepared to say, therefore, that this provision of the rule is unreasonable or is an unwarranted exercise of power on the part of the directors.

[6] It is next objected that the rule requiring the payment of tolls in advance is illegal. By reference to rule 6 B it will be seen that the rates or tolls charged for water used during the year are payable in installments over a period of time from May 1st to August 15th of each year and that for any water used after said last-named date the charges therefor are made payable on the 15th day of each month thereafter. The authority to make such a rule is admittedly given to the board of directors by section 39f of the act (as added by St. 1917, p. 768, § 33). We have carefully read and reread respondents' argument in support of their contention that this section of the act is invalid, but we must admit our inability to agree with it or to give it the force and effect claimed for it by respondents. It appears to us that this contention of respondents is without any merit whatever.

[7] The claim is further made that the assessment is illegal, in that it exceeds the limit fixed by section 39 of the act (as amended by St. 1917, p. 765, § 27). This section provides that the board of directors may levy an annual assessment not exceeding 2 per cent. of the aggregate value of the lands within the district according to the last duly equalized assessment roll thereof for any of the purposes of said act. The amount of the assessment levied by the directors for the assessment year 1922 was 1.1 per cent. upon the assessed value of said lands. Respondents claim that there is evidence that the amount raised by the district by means of tolls and the annual assessment exceeds this 2 per cent. limit provided for by the act, and it is respondents' contention that this shows a violation of the provisions of section 39 and renders the assessment invalid. The act in plain terms provides that these expenses and charges may be raised by tolls or by an annual assessment or by both tolls and an annual assessment. It then provides that the limit of the annual assessment shall be 2 per cent. up-

on the assessed value of the property in the district. Had the Legislature intended to limit the aggregate amount to be raised by these two methods to the 2 per cent. mentioned in the section, it would have been a simple matter to have so provided. As the limitation applies simply to the amount of taxes to be raised by the annual assessment, there is no authority to extend it to include additional amounts of money raised by other methods.

[8] It is further contended by respondents that, assuming that rules 6, 6 A and 6 B are valid, yet the board of directors had no authority to use the money raised thereby to pay in whole or in part for a drainage system constructed in said district. The trial court found that, in order to protect the lands of said district from seepage water, the district was required to and did purchase drainage machinery and did construct drainage ditches at great expense and that a portion of the expense of said machinery and ditches was intended to be paid out of the additional income to be derived from tolls collected from the use of water on the lands of plaintiffs. It is respondents' claim that the cost of installing said machinery and constructing said ditches should be paid entirely from the construction fund of the district and that such charges cannot be construed as part of the cost of maintenance and operation of said district. The trial court took the same view of the law and accordingly held that no part of said expense could be lawfully charged to operation or maintenance or paid from funds raised by tolls or water rates. In this we think the court erred. This identical question was before the courts of the United States in the case of *Nampa & Meridian Irr. Dist. v. Bond*, 268 U. S. 50, 53, 45 S. Ct. 383, 384 (69 L. Ed. 843). In that case the court said:

"Expenditures necessary to construct an irrigation system and put it in condition to furnish and properly to distribute a supply of water are chargeable to construction; but when the irrigation system is completed, expenditures made to maintain it as an efficient going concern and to operate it effectively to the end for which it was designed are, at least generally, maintenance and operating expenses. The expenditure in question was not for extensions to new lands or for changes in or additions to the system made necessary by faulty original construction in violation of contractual or statutory obligations (*Twin Falls Co. v. Caldwell* [C. C. A.] 272 F. 356, 369; [*Id.*] 268 U. S. 85 [45 S. Ct. 22, 69 L. Ed. 178]), but was for the purpose of overcoming injurious consequences arising from the normal and ordinary operation of the completed plant which, so far as appears, was itself well constructed. The fact that the need of drainage for the district lands, already existing or foreseen, had been supplied and the cost thereof charged to all the water users as a part of the original construction, by no means compels the conclusion that an expenditure of the same character, the necessity for which

subsequently developed as an incident of operation, is not a proper operating charge."

Prior to the decision of this case it had been before the United States Circuit Court (288 F. 541), and on this occasion the court said:

"In other words, the expense of preventing injury by seepage resulting from operation is a proper operation charge, or, at least, the determination of the Secretary of the Interior to that effect is controlling upon the courts."

As the court found that this was a necessary expense and the board determined that it should be paid from the operation and maintenance account, we feel in the language of the Circuit Court of Appeals that such determination is controlling upon the courts.

[9, 10] The next contention of appellants is that the action of the board of directors of the district under said rules was discriminatory and inequitable. In this regard respondents claim that the board had no authority to meter a part of the lands of the district and not others. This court apparently has held to the contrary. *Sheward v. Citizens' Water Co.*, 90 Cal. 635, 641, 27 P. 439; *Waterworks v. San Francisco*, 82 Cal. 286, 22 P. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116. But there is no finding to the effect that the board of directors has metered certain lands and refused to meter others of the same character. The court found, as we have before stated, that there were two kinds of rice lands in the district, one known as typical rice lands upon which rice could be raised profitably without an excessive amount of water and the other whose soil was of a loose, porous texture without hardpan and upon which rice could not be raised except by the use of large quantities of water. The court found that, while the board of directors had caused respondents' lands to be metered, it had not caused "the quantity of water used upon other lands in said district for the growing thereon of rice, or otherwise, to be metered or otherwise ascertained." As to respondents' lands the court found:

"It is not true that all of the lands of plaintiffs are loose and porous."

This is not a finding that any particular part of plaintiffs' lands is not loose or porous. In so far as this finding attempts to define the character of plaintiffs' lands, practically all of said lands may be loose and porous. Taking these two findings together it may be reasonably inferred therefrom that respondents' lands, being loose and porous, were metered, but the other rice lands, those known as typical rice lands which required a less amount of water than loose and porous lands, were not metered. It is obvious, therefore, from the findings that the court found no facts which would justify the conclusion that the action of the board of directors in the

respect just considered under said rules was either discriminatory or inequitable. In this connection we might consider the claims of respondents that the evidence shows that lands were metered by the board only when and after protests had been filed with the board against the supplying of water there-to for the purpose of growing rice upon said lands. It appears that in many parts of said district there was opposition to the growing of rice for the reason that its cultivation required a large amount of water to be brought and kept standing upon the lands used for that purpose. The seepage of water from these lands tended to damage adjacent and surrounding lands and for that reason the owners of these adjacent lands would protest against the growing of rice in the vicinity of their own lands.

[11] While there is evidence in support of the claim of respondents that in a number of instances the board metered lands only after such protests had been filed by adjacent land-owners, yet the court failed to make any finding predicated thereon. Just what effect this evidence had upon the court we are left to conjecture, but evidently it did not impress the court as of sufficient importance to warrant a finding based upon it. It may be, as there were allegations in the complaint directed against the board of directors in this respect, that the trial court was of the opinion that it would not be warranted in finding a fact which was not responsive to the pleadings. As there was no such finding, the judgment of the court cannot be held to have been based thereon, and therefore the mere presence of this evidence in the record cannot have any controlling effect upon the final determination of this action. The objection that the board of directors had no authority to add the amount of the unpaid tolls to the regular assessment and make them a part of the annual assessment for the year is answered by the terms of section 39f of the act, which expressly authorizes such action to be taken by the board.

[12] This disposes of all the important questions raised against the validity of said assessments. It follows from what we have said that the evidence is insufficient to support the findings upon which rests the judgment decreeing that said assessments are invalid to the extent of the excess tolls charged under said rule 6 B. The judgment should be reversed for this reason. It should also be reversed for the further reason that it provides for the repayment to respondents of the several amounts paid by them respectively on account of said excess tolls. The complaint contains no averment that the respondents, or any of them, had paid any of said excess tolls or any part thereof, and there is no finding that any such payment had been made. This part of the judgment,

therefore, even should it be assumed that such tolls are invalid, would not be justified by the pleadings nor supported by the findings.

For the reasons hereinbefore given, the judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

85 Cal. App. 87

MERKLE v. MERKLE et al. (BIERWAGEN et al., Interveners). (Civ. 3288.)★

District Court of Appeal, Third District, California. Aug. 13, 1927.

Hearing Denied by Supreme Court Oct. 10, 1927.

1. Wills ☞114—Document signed and acknowledged, but without attesting witnesses, held ineffective as will (Civ. Code, §§ 1276, 1277, 1288).

Document signed by testatrix, although her signature was acknowledged before notary public, in view of lack of attesting witnesses, was not valid as will, under Civ. Code, §§ 1276, 1277, 1288.

2. Reformation of Instruments ☞45(4)—In action to reform deed, evidence held to support finding that deceased agreed to give her daughter and daughter's husband land for support.

In action to reform deed to land, given for support of grantor, evidence held to support finding that deceased mother had agreed to give plaintiff and her husband land for support.

3. Specific performance ☞85—Oral agreement to give land, supported by adequate consideration, held specifically enforceable, even if deed were fatally defective (Civ. Code, § 3391).

Even if deed from mother to daughter and her husband for support were fatally defective, oral agreement to give land, supported by consideration adequate, within Civ. Code, § 3391, would be enforceable in equity.

4. Reformation of Instruments ☞17(1)—Mutual mistake or mistake which one party knew and other knew or suspected should not be required as prerequisite to reforming written instrument, unless manifest justice requires (Civ. Code, § 3399).

Civ. Code, § 3399, relating to reformation of written contract for mistake, should not be so strictly construed as to require mutual mistake or mistake of one party which other at time knew or suspected, unless manifest justice of case so requires.

5. Reformation of Instruments ☞19(2)—Mistake in description of land in deed for support, never seen or read by one grantee until after death of grantor, held "mutual," justifying reformation; "mutual mistake" (Civ. Code, § 1577, subd. 2, and § 3399).

Where daughter, who, with husband, was granted land by her mother for support, was not present at execution of deed and never saw

or read it until after death of mother, mistake in description of land was "mutual mistake," within Civ. Code, § 1577, subd. 2, and section 3399, warranting reformation of deed, although complaint and court's finding stated mistake was that of deceased, in view of amended complaint and other findings setting forth facts culminating in making of deed showing mistake was mutual.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mutual Mistake.]

6. Reformation of instruments ⚡36(1)—Complaint for reformation of deed for mistake in description of land held sufficient on general demurrer (Civ. Code, § 3399).

In daughter's action to reform deed given for support of mother, amended complaint alleging mistake held to state facts sufficient as against general demurrer incorporated in answer, under Civ. Code, § 3399.

7. Judgment ⚡256(2)—Special findings by court held to support judgment reforming deed given for support (Civ. Code, § 1577, subd. 2, and § 3399).

In daughter's action to reform deed given by mother for support, facts found by court substantially in language of complaint held to support judgment reforming deed on theory of mutual mistake in description of land, within Civ. Code, § 1577, subd. 2, and section 3399.

8. Deeds ⚡56(2)—Delivery depends on intent.

Question whether deed has been delivered is one of intention.

9. Deeds ⚡58(1)—Putting deed in hands of third party instructed to deliver it, even after grantor's death, in absence of showing of his intention to recall it, is good "delivery."

Putting deed in third party's hands with instructions to deliver it, even if it is delivered after grantor's death, in absence of indication of intention of grantor to recall it, is good "delivery"; determining fact being grantor's intention.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deliver—Delivery.]

10. Deeds ⚡208(5)—Evidence that mother gave deed for support to daughter with instruction to deliver it to grantee after grantor's death held to show delivery.

In daughter's action to reform description of land in deed for support of mother, evidence that mother gave deed to another daughter with instructions to deliver it after mother's death to plaintiff, grantee therein, held to show delivery of deed.

11. Reformation of instruments ⚡44—In action to reform deed, parol testimony is admissible to complete description of land (Civ. Code, §§ 3399, 3401).

In action to reform deed for lack of complete description of land, admitting parol testimony to supply deficiency in description held proper, in view of Civ. Code, §§ 3399, 3401.

12. Frauds, statute of ⚡142—Equity courts will reform both executed and executory contracts regardless of statute of frauds.

That equity courts will reform both executed and executory contracts irrespective of statute of frauds is thoroughly established.

13. Reformation of instruments ⚡45(5)—Reforming error in description of land in deed for support held proper, under evidence (Civ. Code, §§ 3399, 3401).

Under Civ. Code, §§ 3399, 3401, which merely follow equitable doctrine of reformation of instruments, where description of land in deed for support was partly correct but township and range were omitted and its location as in certain park was erroneous, in view of evidence clearly showing grantor intended property in dispute to be described in deed and attempted in good faith to do so but was defeated by carelessness of scrivener, reforming deed according to parol evidence was proper, especially in view of fact that valuable and adequate consideration was given.

14. Appeal and error ⚡110, 782—Order denying motion for new trial is not appealable.

Order denying motion for new trial is not appealable, and appeal therefrom may be dismissed.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by Minnie Merkle against Carl F. Merkle and another, executors of the estate of Elizabeth Bierwagen, deceased, to reform a deed, in which Michael Bierwagen and others intervened. From a judgment for plaintiff and orders denying the interveners' motions for a new trial and to vacate the judgment, they appeal. Appeal from the order denying a new trial dismissed. Judgment and order denying the motion to vacate it affirmed.

Hennessy & Kelly, of Grass Valley, for appellants.

Lee Gebhart, of Sacramento, and Nilon & Nilon, of Grass Valley, for respondent.

HART, J. The plaintiff brought this action to secure a decree reforming and correcting a certain deed, purporting to convey to her certain real property situated in the county of Nevada. Elizabeth Bierwagen, the owner and purported grantor of said property, was the mother of the plaintiff.

The amended complaint (verified) alleges that on or about the 8th day of January, 1923, the said Elizabeth Bierwagen died in the county of Nevada, and that Carl F. Merkle and Christian Bierwagen "have been, and they are now, the duly appointed, qualified and acting executors of the last will and testament of said decedent"; that in the year 1911, Elizabeth Bierwagen, deceased (to be hereinafter referred to as "deceased") entered into an agreement with plaintiff, whereby she promised and agreed that if plaintiff

and her husband, Carl F. Merkle (one of the defendants herein), would care for the real property then owned by deceased, and care for, nurse, and protect her (deceased) during the remainder of her lifetime, the latter would convey to plaintiff herein the real property hereinafter described, which said real property was then owned by said deceased. The complaint proceeds:

"That subsequently, and on or about the — day of December, 1915, the said Elizabeth Bierwagen, deceased, further agreed to and with this plaintiff that if she, the said plaintiff, and Carl F. Merkle, her husband, one of the defendants herein, in consideration for what work, labor, and services they had theretofore performed for the said decedent in caring for her real property, and in the caring for said decedent personally, and in addition thereto, that if they would use, lay out, and expend money sufficient to repair the dwelling house upon said premises, and would care for and protect the said decedent during the remainder of her lifetime, that she, the said decedent, would then and there convey to said plaintiff, Minnie Merkle, all of the said real property by deed.

"That the said plaintiff herein, in pursuance of said agreement above set forth, did during the years 1915 and 1916, pay, use, lay out, and expend a large sum of money, to wit, more than \$2,000 of moneys belonging to this plaintiff and Carl F. Merkle, her husband, one of the defendants herein, in rebuilding, repairing, and putting in proper condition the said dwelling house upon said premises, and did care for, assist, and protect the said decedent during the remainder of her lifetime.

"That on the 7th day of February, 1916, the said decedent made and executed a certain deed, of which the following is a copy:

"This indenture, made this twenty-second day of December, A. D. 1915,

"Between Mrs. Elizabeth Bierwagen, Chicago Park, Nevada county, California, the party of the first part, and Mrs. Minnie Merkle, Chicago Park, Nevada county, California, the party of the second part;

"Witnesseth: That the said party of the first part, for and in consideration of the sum of ten 00/100 dollars, in gold coin of the United States of America, to me in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to her heirs and assigns forever, all those certain lots, pieces or parcels of land situate, lying and being in the county of Nevada, state of California, and bounded and particularly described as follows, to wit: southeast one fourth ($\frac{1}{4}$) of the southeast one fourth ($\frac{1}{4}$) of the northeast one fourth ($\frac{1}{4}$) and the northeast one fourth ($\frac{1}{4}$) of the northeast one fourth ($\frac{1}{4}$) of the southeast one fourth ($\frac{1}{4}$) situated in Chicago Park, Nevada county, California, containing twenty (20) acres.' * * *

Said deed was signed by the deceased and duly acknowledged and recorded in the office of the county recorder of Nevada county on the 25th day of December, 1923.

The amended complaint proceeds, paragraph 7:

"That at the time of the execution of said deed and the delivering of the same to the said Elizabeth Bierwagen, it was the intention and the purpose of Elizabeth Bierwagen to convey to this plaintiff the following described premises, to wit:

"Southeast one-fourth (S. E. $\frac{1}{4}$) of the southeast one fourth (S. E. $\frac{1}{4}$) of the northeast one fourth (N. E. $\frac{1}{4}$) and the northeast one fourth (N. E. $\frac{1}{4}$) of the northeast one fourth (N. E. $\frac{1}{4}$) of the southeast one fourth (S. E. $\frac{1}{4}$) of section sixteen (16) township fifteen (15) north, range nine (9) east, Mt. Diablo Base and Meridian, situated in Nevada county, state of California, containing twenty (20) acres.

"That it was the intention and purpose of said Elizabeth Bierwagen, deceased, to insert in said deed the description of said premises in this paragraph above described, and to insert the description as above set forth in said deed. The said description contained in said deed as actually executed does not express or incorporate the purpose and intention of the said grantor therein; that said grantor thought and believed when she executed said deed that the deed contained the description of the property in this paragraph described; that by a mistake on the part of said grantor the description contained in said deed actually executed does not set forth or describe the section, township, or range in which the said real property is situated, and also the said description, by a mistake on the part of said grantor, states that said property is in Chicago Park; that said property was, and is, not situated in Chicago Park; that the only real property owned by said grantor at the time said deed was executed was the real property in this paragraph described, and the said grantor intended to convey to plaintiff by said deed the said real property.

"That the said omission on the part of the grantor to insert the said section 16, township 15 north, range 9 east, Mt. Diablo Base and Meridian, in said deed above set forth was not discovered by this plaintiff until the — day of December, 1923.

"That this plaintiff has performed all of the obligations on her part to be performed, and has paid to said decedent for said premises the consideration expressed in said deed, and other considerations as well."

It was stipulated by the parties that the answer of the defendants (executors of the estate of deceased) to the original complaint might stand as the answer to the complaint as amended, and in said answer they allege:

"That the knowledge, information, and belief of defendants upon and as to the facts alleged in plaintiff's complaint are such as to preclude defendants from denying, under oath, the allegations of said complaint; allege that the defendants are unwilling to deny, either of their own knowledge or upon their information or belief, the allegations of plaintiff's complaint herein."

It was also stipulated that the complaint in intervention and the answer of interveners to the original complaint might stand in

the same relation to the amended complaint. The averments and denials are numerous, and we will therefore state in a general way what they contain. The following averments of the complaint are denied: That plaintiff executed the deed as originally framed, as shown by the complaint, or intended to execute the deed as reformed by the decree of the court; that deceased intended to convey the real property in question to the plaintiff and her husband; that deceased made the agreement with the plaintiff and her husband, as alleged in the complaint; that (upon information and belief) the discovery by plaintiff of the omission to describe the property correctly in the deed was not until December, 1923; that the deed was delivered to plaintiff; and that the plaintiff and her husband paid or performed the consideration for said deed, as averred in the complaint. It is alleged that deceased, at her death, left no surviving husband, but that there survived her, upon the happening of that event, ten children, the plaintiff and the five interveners being of that number; that said interveners, ever since the death of deceased, have been and are the owners and entitled to the possession and are in the possession of an undivided five-elevenths interest in and to the property in controversy; that plaintiff has no estate, interest, right, or title whatever in and to said five-elevenths interest, part, or share in and to "all of said above-described property" (naming the real property in dispute); allege (upon information and belief) that the purported deed referred to in the complaint does not bear the signature of the deceased; that the "plaintiff claims and asserts an interest in, or the ownership of, the whole of said five-elevenths interest, adverse to said interveners," and that said claim is without right; that deceased "never conveyed the above-described property (meaning the real property in question), nor any part or portion thereof, to said plaintiff, nor to any other person," but up to the time of her death, was the owner, in possession, and entitled to the possession of all said property; that, on the 13th day of February, 1923, the superior court in and for the county of Nevada, in the matter of the estate of deceased, made an order admitting to probate a writing, dated June 1, 1917, purporting to be the last will and testament of the deceased, and appointed said defendants Carl F. Merkle and Christian Bierwagen executors of said purported will, and that they duly qualified as such executors and entered upon the discharge of the duties of their said office, and ever since have acted as such executors; that the real property involved herein "was not disposed of by said will"; that (lastly) "the complaint does not state facts sufficient to constitute a cause of action." The prayer of the complaint in intervention and answer to the amended complaint is that plaintiff be required to expose the nature of her claim, and that all adverse claims of

plaintiff and the interveners, and each of them, be determined by a decree of the court, and also that interveners be adjudged the owners of an undivided five-elevenths interest or estate in and to all the real property referred to in the complaint; that plaintiff has no interest of any kind whatever in said five-elevenths interest in said real property, and she, her agents, successors, and assigns be forever debarred from asserting or claiming any interest in or title to said undivided five-elevenths interest in said property, etc.

The trial of the cause was by the court sitting without a jury.

The findings are substantially in the language of the complaint, except as to the allegations of the complaint in intervention, which would, if found to be sustained by the proofs, entitle the interveners to a judgment establishing their asserted interest in the said property, which allegations the court found were untrue. Judgment passed for the plaintiff in accord with said findings, decreeing a revision of the deed in accord with the correct description of the property as given in the amended complaint.

The interveners moved for an order vacating the judgment on certain specified grounds, and also for a new trial. Both motions were denied, and the interveners appeal from the judgment and the orders denying said motions.

The assault upon the judgment presents the question whether the material findings do or do not derive sufficient support from the evidence to uphold them. This general proposition involves these questions, to wit: (1) Did the deceased make the agreement with the plaintiff and her husband, as said agreement is set forth in the complaint? (2) If so, did the plaintiff and her husband perform the agreement upon their part to be performed? (3) Did the deceased, in and when making the deed set out in the amended complaint, intend to describe therein and so convey to the plaintiff the real property, consisting of 20 acres, upon which she had for many years resided and was residing when said deed was prepared and signed by her, and which property is described in the seventh paragraph of the amended complaint? (4) Was there, legally, a delivery of the deed to the plaintiff? In addition to these propositions, there are some others involving an attack upon rulings by the court with respect to the admissibility of certain testimony.

The several points above stated are so far correlated that a statement of the facts of the series of transactions eventuating in the present litigation will, from the nature of the situation, embrace the particular facts by the light of which we are to be guided in the consideration and determination of each of said points.

It appears that the real property in controversy was acquired, with another and differ-

ent tract of land, by Ludwig Bierwagen, the husband of the deceased, on the 25th day of September, 1902, from one Mabel Briot; that the two tracts of land, each of which consisted of 20 acres, were conveyed by said Briot to said Ludwig by means of a single instrument or deed; that the husband of the deceased passed out of this life either on the 7th or the 8th of January, 1903; that his wife (the deceased) succeeded to the ownership of both tracts of 20 acres each, and during all her years, from the date of the acquisition of said property by her husband, resided on the 20 acres here in controversy. At the time of the death of her husband, the deceased was about 69 years of age. In the early part of April, 1904, the plaintiff, who was a daughter of the deceased, and Carl F. Merkle intermarried. From the 4th day of April, 1904 (as will be noted, subsequent to the death of the deceased's husband), up to the date of the death of deceased, the plaintiff and her husband resided with deceased on the premises and in the house involved in this litigation. Merkle assisted in taking care of the place—attending to the cows and looking after and caring for such fruit crops as were produced on the premises—and the plaintiff assisted in the housework. Merkle had entire charge of the work on the premises from 1904 until and including the year 1909. From the last-named year, Christian Bierwagen, a son of the deceased and a brother of the plaintiff, had charge and took care of the premises and continued in that capacity until the year 1911. Merkle, however, continuing to reside at the home of deceased and assisting Christian in such work or labor as was required to be done on the premises. This situation continued until the year 1911. In the meantime the health of the deceased began to fail. In fact (Merkle testified, as did his wife and other members of the family), the deceased was ill much of the time from and after the time the Merkles went to the premises to reside with the former. By the year 1911, the deceased had become so enfeebled, physically, by reason of illness and her venerable years, that she became incapacitated for the performance of any kind of labor. In the year just mentioned, the deceased, realizing that her physical condition was such that she could not take care of herself or her property, proposed to her son, Christian, that if he would assume and discharge that responsibility during the remainder of her life she would give the property to him (Christian), the transfer to take effect upon her death. This proposition, which was made in the presence and hearing of plaintiff, her husband, and Miss Elizabeth Bierwagen, daughter of the deceased, Christian declined to accept, saying that, while he could take proper care of the ranch, he, being a single man (meaning that he was unmarried), was himself incapable of giving his mother the personal care and at-

tention which her physical condition and advanced age required. Thereupon the deceased made a like proposition to the plaintiff—that is, that if plaintiff and her husband would remain at her house and take care of her and attend to the affairs of the ranch during the remainder of her life, she (deceased) would give the ranch and her home to plaintiff, the latter, however, upon receiving the property upon the deceased's death to pay to the latter's son, Christian, and her daughter, Elizabeth, the sum of \$1,500 each. After some reflection, the plaintiff and her husband accepted the proposition, and from that time until the passing of the deceased, the Merkles continuously remained on the ranch of the deceased, the husband, as above stated, giving his entire time and attention to the work required to be done on the premises, and the plaintiff attending to the domestic affairs of the home and the personal needs of her mother.

[1] It appears that, on the 5th day of June, 1911, the deceased attempted to execute a last will and testament, whereby she sought to make a testamentary disposition of her estate. This document or paper was signed by her, and following her subscription thereto was her acknowledgment before a notary public that she executed the same. There were no attesting witnesses to the instrument, a formality essential to the validity of every last will, except an olographic and a nuncupative will. Civ. Code, §§ 1276, 1277, 1288. Furthermore, the property was not correctly described therein. By this purported will the deceased undertook to devise to plaintiff the real property in dispute with the proviso that the plaintiff should pay to her son, Christian, and her daughter, Elizabeth, the sum of \$1,500 each.

It further appears that the house situated on the real property in question, and which had been occupied as a residence by deceased from the time her husband acquired the property until her death, and in which plaintiff and her husband, with the deceased, resided under the agreement referred to, was an old structure—in fact, an old building at the time of the purchase of the premises by the husband of the deceased—and had, by the winter of 1914 and 1915, become so dilapidated that it was necessary to repair it to make it a suitable or a reasonably comfortable place in which to live. During the winter mentioned—whether the latter part of December, 1914, or the first part of January, 1915, is not definitely shown—a portion of the roof of the house was blown off by the wind. This circumstance brought up a conversation at that time between the deceased and the plaintiff and her husband with regard to the matter of repairing the house, and thereby putting it in a condition for comfortable use as a dwelling house. In that conversation the deceased declared to the plaintiff

and her husband that "she had no money on land and would spend no money any more to rebuild, because," testified plaintiff's husband, "she didn't know how long she would have the use of it, and after her demise the property would belong to us anyway, so we should fix it to suit ourselves and pay the expenses." Deceased, either on the occasion of which we are now speaking or a short time thereafter, stated that, if the Merkles made the repairs which were necessary to put the house in proper condition, she would give them a deed to the premises "for security's sake, in case something should turn up that there would be disharmony or trouble with the will, so we would have the deed anyway, and be safe for the money that we have invested in it." (Carl Merkle's testimony.) The Merkles agreed to repair the house and did do so at an expense to themselves of approximately \$3,000.

In the latter part of the year 1915—in the fall of that year (thought the witness, Miss Elizabeth Bierwagen)—the deceased said to Miss Elizabeth and Carl Merkle that she (deceased) desired to make a deed conveying the real property in question to the plaintiff, and requested Carl to call at the office of C. H. Barker, a notary public at Grass Valley, in Nevada county, and instruct him to prepare such deed. Within a few days thereafter Carl called at Barker's office and informed the latter of the wishes of the deceased regarding the preparation of a deed to the property in dispute. Barker called for a description of the property to be inserted in the deed. Carl did not have the description with him, but stated that he would furnish the same later. A few days subsequently, Miss Elizabeth, at the request of the deceased brought to the latter the Briot deed conveying to Ludwig Bierwagen the two 20-acre tracts, and, after examining said deed and comparing the description contained therein of the 20-acre tract in dispute with her tax receipts, deceased requested her daughter to mark in brackets with a pencil in the Briot deed the 20 acres described in the seventh paragraph of the amended complaint (the real property which is the subject of this controversy), and then take the Briot deed as so marked to Barker and state to him that it was her wish that he prepare a deed in accord with the description in the Briot deed as indicated by the pencil marks, so that the deed, as so prepared, would, upon its being executed by her, convey to plaintiff the real property in dispute. A few days before Christmas of the year 1915, Miss Elizabeth, following the instructions of her mother in that particular, took the Briot deed to Barker, and, handing it to him, called his attention to the marked description in said deed and "told him," so she testified, "that that part in brackets (made by pencil, as explained) was the property that she (the deceased) wanted

to deed to Mrs. Merkle. Barker said he would attend to it. * * * He (Barker) brought the deed he prepared out to the house some time in February, 1916. * * * He said to my mother that he had brought the deed which mother asked him to make for her to sign. I interpreted to my mother what Barker said to her (the deceased being a German by birth and unable intelligibly to speak or understand the English language). I saw my mother sign this paper" (referring to the deed which the witness inspected while testifying). Miss Bierwagen testified that Barker, as a notary, took her mother's acknowledgment of the deed. The deceased later delivered the deed into the possession of her daughter, Elizabeth, and instructed her to hold possession of it until after her (deceased's) death, and then deliver it to plaintiff. Miss Elizabeth thereupon took the deed to the Nevada County Bank, where she and Carl Merkle jointly rented and maintained a safe deposit box, and deposited the deed in said box. In this immediate connection it may be stated that Miss Elizabeth testified that the deceased never had a key or any access to the deposit box in which the deed was placed. In fact, that witness testified that her mother had not for many years been at the bank where said safe deposit box was maintained by herself and Carl Merkle; that she and said Merkle shared the expense of maintaining said box; and that she paid her share out of her own money.

On June 1, 1917, the deceased made and executed (at least attempted to do so) a new will. This instrument changed, and consequently in that particular was different from, the will of 1911 with respect to certain bequests and also as to the disposition of the residue of the estate after the payment of the bequests as so changed. It contained, however, the same provision by which the deceased attempted to dispose of the real property in dispute as was contained in the will of June 5, 1911, to wit: That the said real property should go to the plaintiff, but she to pay to Christian and Miss Elizabeth Bierwagen \$1,500 each. In said will Christian Bierwagen and Carl F. Merkle were nominated and appointed the executors thereof. The instrument was signed by Christian Bierwagen and Carl F. Merkle as witnesses, and acknowledged by the deceased before a notary public. (This will, for reasons not necessary to state herein, is of doubtful validity.) Besides, having been copied, except as to the bequests mentioned, from the will of 1911, the description of the property therein was incorrect. Said will was by the deceased delivered into the possession of Miss Elizabeth, with the request by deceased that she keep possession of it until after the latter's death. Within a brief time thereafter, Miss Elizabeth deposited the will in the safe deposit box above referred to, where it remained with other papers, including the deed

of deceased attempting to grant the real property in question here to the plaintiff, until the death of the deceased in January, 1923. About a week after the death of deceased, Elizabeth Bierwagen took the said deed and the purported will of June 1, 1917, to the law office of Messrs. Nilon & Nilon, in Grass Valley, and turned the documents over to that firm of lawyers with instructions to inaugurate and pursue to a final conclusion such legal proceedings as said lawyers might conceive to be necessary to carry out the intention of the deceased with respect thereto, if legally it could be done. Examining the documents, the lawyers advised that the deed as it then stood was fatally defective, in that it did not contain a sufficient or complete description of the real property that it appeared to have been the intention of the deceased to convey to plaintiff, and that it was doubtful whether the will of 1917 involved a valid testamentary disposal of the estate of the deceased. It was, however, suggested that the deed should nevertheless be delivered by Miss Elizabeth to the plaintiff, named therein as the grantee. The plaintiff was thereupon sent for, and, upon appearing in the office of the lawyers named, Miss Elizabeth gave the plaintiff possession of the deed by a manual delivery thereof to her (plaintiff). The plaintiff, after reading the deed, handed it to a member of said law firm with the request that he (the lawyer) cause it to be recorded in the office of the county recorder of said county. The deed was accordingly recorded on the 29th day of December, 1923.

On the 17th day of January, 1923, a petition was filed in the superior court, in and for the county of Nevada, by Christian Bierwagen and Carl F. Merkle, executors therein named, for the probate of the will of the deceased, dated and purporting to be executed on the 1st day of June, 1917. On the 13th day of February, 1923, an order was made by said court admitting said will to probate, and thereupon letters testamentary were issued to said Bierwagen and Merkle.

The above statement of the facts is taken from the testimony of Carl F. Merkle and Miss Elizabeth Bierwagen. The testimony of those witnesses was corroborated by C. H. Barker, the notary public, the plaintiff, and Christian Bierwagen upon the several material matters coming to their knowledge, respectively.

Barker testified to the fact of the preparation of the deed by his stenographer. He stated that Miss Elizabeth Bierwagen brought to him the Briot deed, called his attention to the fact that the description of the land which was to be conveyed by the deed he was to prepare was contained in the Briot deed within brackets made with pencil; that he later dictated the description to his stenographer, but inadvertently omitted to insert in the description the township within which

the fractional sections are situated, and also the range; that the error in placing the property in "Chicago Park" was solely due to his own carelessness. (This latter error in the deed may perhaps be accounted for by the fact that the land in dispute was situated near a tract of land known as and commonly called "Chicago Park.") All the witnesses, when testifying, referred to said real property as being at "Chicago Park.") Barker further testified that he personally took the deed to the home of the deceased; that the contents of the instrument were translated to deceased by her daughter, Elizabeth, before she (deceased) signed it; that he saw deceased subscribe her name to the deed; and that he took her acknowledgment.

The plaintiff testified to the fact of the making of the agreement and the terms thereof; that the real property which the deceased agreed to give to her upon the death of the former was the real property involved herein and described in the seventh paragraph of the amended complaint; that she and her husband repaired (in fact, practically rebuilt) the house on the premises, as stated by her husband in his testimony, at an expense of approximately \$3,000; that both continuously resided on said premises, performing the services which they, respectively, agreed to perform from the year 1911 until the death of her mother; that neither she nor her husband (and the last-named likewise testified) ever received from the deceased any remuneration whatsoever for their said services, except the consideration for which they agreed to live with and take care of the deceased and the premises in question. She testified that she was not present when her mother signed and purported to acknowledge the execution of the deed, and never saw the deed or read the contents thereof until after her mother's death, when it was delivered to her in the law office of Nilon & Nilon by Miss Elizabeth Bierwagen, but that she understood, and in fact knew, from the agreement referred to and conversations with the deceased it was the intention of her mother to convey to her (plaintiff) the property upon which they resided from 1911 until the death of the deceased, and which is described in the seventh paragraph of the amended complaint. Plaintiff further testified that prior to the time that the deed prepared by Barker was signed by the deceased she heard the latter say to her daughter, Elizabeth, that she (deceased) "wanted her (Elizabeth) to see Barker and have him make a deed conveying the real property in dispute to her (plaintiff). It is not necessary to refer to the testimony of Christian Bierwagen further than to say that it supports in all vital respects the testimony given by the plaintiff Carl Merkle and Miss Elizabeth Bierwagen.

There is in the record testimony to the effect that, when the purported deed was executed by the deceased, she owned no real

property in Nevada county other than that described in the seventh paragraph of the amended complaint. Mrs. Catherine Tucker, a professional searcher of records at Nevada City, county seat of Nevada county, testified that she had searched the public records of said county, and from such investigation found that at no time in the year 1915 was there any other real property on record in the name of the deceased than the 20-acre tract and improvements involved in the present controversy.

It is perfectly plain from the foregoing statement of the testimony presented by the plaintiff that the trial court, believing said testimony, was warranted in finding, as in effect it did find, these facts: (1) That the deceased made the agreement with the plaintiff and the latter's husband which is set forth in the amended complaint. (2) That the plaintiff and her husband performed the services for which deceased agreed to convey or transfer the said real property to plaintiff. (3) That, in pursuance of her purpose to perform, on her part, said agreement, she intended and attempted to convey to the plaintiff, by means of the deed set out in the amended complaint, the real property described in the seventh paragraph of said pleading. (4) That, when she signed the deed prepared by Barker, she believed and understood that the instrument contained a correct description of the real property involved in this dispute, and that the instrument as signed by her would convey and transfer to plaintiff said real property. (5) That the plaintiff believed and understood that, by the deed, the deceased intended to convey said property to her, and believed that the same would be and was correctly described in said instrument. (6) That the deceased delivered the deed to her daughter, Elizabeth, with instructions to hold it until after her (deceased's) death and then deliver the instrument to the plaintiff, and that said Elizabeth did, after her mother's death, hand the same to plaintiff.

[2, 3] As stated, the finding that the agreement by and between the deceased on the one hand, and the plaintiff and the latter's husband on the other, as alleged in the complaint, is abundantly supported by the evidence. Indeed, the intervener made no substantial showing contradictory of the testimony disclosing the making of the agreement. The deed in question constituted the mere conduit through or by means of which the deceased attempted, inter vivos, to perform her part of the agreement, and even if it were necessary to hold that the said deed was for any sufficient reason fatally defective—if, for instance, in fact or in law there had been no delivery—still the agreement, as alleged, proved, and found, being supported by an adequate consideration (Civ. Code, § 3391), would be enforceable in equity and the plaintiff thus vested with title to said real property, notwithstanding that it rests in parol

(Pomeroy on Specific Performance, p. 268; McCabe v. Healy, 138 Cal. 81, 70 P. 1008; Stewart v. Smith, 6 Cal. App. 152, 91 P. 667; Barry v. Beamer, 8 Cal. App. 200, 96 P. 373). We are, however, not concerned here with or about the proposition last suggested. As seen, the relief which the plaintiff seeks by her action is a reformation of the deed in question so that it will express the intention or purpose of the deceased in executing that instrument. And, since as shown above, it is established by the well-buttressed findings of the trial court that the agreement referred to was made as alleged in the amended complaint, and that the deceased endeavored, in consonance with said agreement, to convey to plaintiff the real property set out in said complaint, there are left for consideration but two propositions, to wit: (1) Whether the mistake or error involved in the failure to insert in said deed a complete or proper description of the property thereby attempted to be conveyed was a "mutual mistake of the parties," in the sense contemplated by section 3399 of the Civil Code. (2) Whether there was a valid delivery of the deed to the plaintiff, the named grantee.

[4] The section of the Code just named reads:

"When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

Given a strict or literal construction and application, it would perhaps be necessary to hold that, within the meaning of the above section, the "mistake" which it is the purpose of this action to correct by a revision of the deed was neither a mutual mistake nor "a mistake of one party, which the other at the time knew or suspected," for it is obvious that the plaintiff, not being present when the deed was executed by the deceased, and never having seen or read the deed until after the death of her mother, was without opportunity to hear and know, and was, therefore, without reason to suspect, that the instrument did not contain a correct description of the property which it was the intention of both parties thereby to convey. The section, however, has never been subjected to so strict a construction, and, since the remedy it affords in the cases to which it was and is designed to apply is of an equitable nature, or peculiarly conversant with the practice of courts of equity, it should never be so construed and applied unless the manifest justice of the case imperatively requires it.

[5] We think that the circumstances of the instant case, as disclosed by the evidence, justify the conclusion that, within the mean-

ing and intent of section 3399 of the Civil Code, the mistake was mutual, or the mistake of both the deceased and the plaintiff. A mistake of fact consists, among other things, in a "belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed." Civ. Code, § 1577, subd. 2. It is undoubtedly true that the plaintiff, although not present when the deceased signed and acknowledged the deed, and never saw or read it until after the death of the deceased, knew that the latter intended to make the instrument, knew that it had been made and consequently of its existence, and knew, from her conversations with deceased, the verbal agreement referred to and the wills she attempted to execute, that the deceased intended by the deed to convey the real property in dispute to her (plaintiff). The evidence clearly shows that the deceased up to the time of her death, and that plaintiff up to the time that the instrument was delivered to her, believed that the deed contained a correct description of and conveyed to plaintiff the real property described in the seventh paragraph of the amended complaint.

The case of *Cleghorn v. Zumwalt*, 83 Cal. 155, 23 P. 294, involved an action to reform a deed by which a larger interest in the land would be conveyed than the owner supposed she owned therein. An agreement previously made by and between the parties for the sale and purchase of the land called for the transfer of the owner's entire interest in a larger tract of land, which the latter believed consisted of only a one-fifth interest therein, whereas, as the owner discovered after the deed was executed and delivered to the grantee and the latter had paid the consideration for the transfer, she owned, without knowing it at the times of the agreement and the grant, and therefore, unintentionally had conveyed to the grantee, by the general description of the land contained in the deed, a three-fifths instead of a one-fifth interest in the larger tract. The trial court refused to decree a revision of the deed, "not on the ground," as the court in that case states it, "that it would be inequitable, or would not make the deed conform to the purchase as actually made, but on the technical ground that at the time of the actual execution and delivery of the deed there was not a mutual mistake of fact as to what it conveyed." Reversing the case and referring to the position of the trial court as just indicated, the court said:

"In this we think the court erred. There is no doubt whatever that at the time the minds of the parties met and the bargain was actually made, the mistake was mutual. Both then understood and believed that what the one was selling and the other was buying was the undivided one-fifth, and the price was fixed on that basis. The execution and delivery of the deed

afterward was but the carrying into effect of the agreement already made. The mistake relates to the time of the agreement, not merely to the time of the carrying of the agreement into effect. But even if it be held that the cause of action must relate solely to the condition and understanding of the parties at the time of the execution and delivery of the deed, the case is one which comes within the provisions of section 3399 of the Civil Code, and entitled the plaintiff to the relief demanded."

See, also, 22 Cal. Juris, page 718 et seq., and cases cited in the footnotes.

It is true in this case that the amended complaint did not expressly allege, nor did the court likewise find, that the fact that the deed did not fully or completely describe the property was due to the mutual mistake of the plaintiff and the deceased. On the contrary, both the allegations of said complaint and the court's finding in this respect are that the mistake was that of the deceased. The amended complaint and the findings, however, set forth and find the facts of the several transactions (including the making of the verbal agreement between the deceased and the plaintiff) culminating in the making of the deed, and from that statement and those findings of the facts the necessary implication is that the mistake was mutual as between the parties. In other words, from the facts stated in the complaint and as found by the court is plainly deducible the fact that the deceased mistakenly believed when she signed the deed, that she was thereby conveying to plaintiff the real property described in the seventh paragraph of the complaint; and from the facts so stated and as found by the court is likewise deducible the fact that the plaintiff, as to said deed, erroneously believed the same thing. Indeed, in the very nature of the situation as disclosed by the facts stated in the complaint and as found by the court, relative to the several transactions leading to the making of the deed, neither the plaintiff nor the deceased could have entertained any other supposition or belief as to the purpose and the intended effect of the deed as executed by the deceased.

[6, 7] The amended complaint, as to the matter of the mutuality of the mistake, stated facts sufficient to withstand the force of the general demurrer, which, as seen, was incorporated in the answer, and the facts found by the court are sufficient to support the judgment upon the theory that the failure fully or properly to describe in the deed the property thereby intended to be conveyed involved a mutual mistake as between the parties, within the intent or contemplation of section 3399 of the Civil Code. This construction of the complaint and the findings is peculiarly proper under the circumstances of this case, for, as seen, in point of fact, the defective description of the property was due to the carelessness of the scrivener who drafted the

instrument, the deceased's actual mistake (which in the very logic of the situation also became that of plaintiff) being, as has been declared, in assuming and believing that he (the scrivener) had prepared the deed in accord with deceased's instructions as communicated to him through her daughter, Elizabeth, as to the description of the property which she thereby intended to convey to plaintiff.

[8, 9] The point that there was not a legal delivery of the deed to the plaintiff (the grantee) derives no support from the record. The question whether a deed has been delivered is one of intention; and this question is always one of peculiar importance where, as here, the deed is given by the grantor into the possession of a third party with unconditional instructions to deliver it to the grantee at some future time. The rule is thus stated in *Crozer v. White*, 9 Cal. App. 612, 621, 100 P. 130, 134:

"We think that it is well settled in this state that where a grantor has placed the deed in the hands of a third party, with instructions to deliver it to the grantee, even where the same is to be delivered after the death of the grantor, if there be nothing to indicate an intention on the part of the grantor to recall the same, such deed has then passed beyond the control of the grantor for all time. Manifestly, the question must be determined by the grantor's intention in the matter, and is one of fact to be solved by the light of all the circumstances surrounding the transaction. *Bury v. Young*, 98 Cal. 451 [33 P. 338, 35 Am. St. Rep. 186]; *Whittenbrock v. Cass*, 110 Cal. 1 [42 P. 300]."

[10] There is not a particle of evidence in the present case tending to show that, when she committed the deed to the custody of her daughter, Elizabeth, with instructions that she (the daughter) should hold it until after her (deceased's) death and upon the happening of that event to deliver it to the plaintiff, the deceased did not then and there intend to part with all control or dominion over said deed. To the contrary, all the circumstances show that her intention was to make the transfer of the property to plaintiff by said deed absolute. The deceased, when giving the deed into the possession of her daughter, with the instructions as explained, said nothing or used no language or made no expression indicating, or which could be construed as, an intention on her part to qualify such delivery or that the delivery was to be contingent upon the happening of some condition. Nor did she at the time say anything which could even be construed or understood as the manifestation of an intention in her not to part with all control and dominion over the deed and the property. To the contrary, the evidence shows, as the court found, that her intention was to make the conveyance absolute or unconditional. The testimony of Miss Elizabeth Bierwagen (uncontradicted as to this matter)

is to the effect that the deceased handed the instrument to her (Elizabeth) with instructions that it be retained by her until her (deceased's) death, and that thereupon she (Elizabeth) should deliver it to the plaintiff; that neither then nor thereafter did deceased make any other statement or declaration regarding the delivery of the deed, nor did she ever after its delivery ask for or recall or have possession of the deed. *Hayden v. Collins*, 1 Cal. App. 259, 263, 264, 81 P. 1120, cited by appellant. As has been before stated, it is clear from the verbal agreement (proved to the satisfaction of the trial court by the testimony of several witnesses), the conversations between deceased and others relating to said agreement, and the attempted testamentary devise of the property to plaintiff on two previous and different occasions that the deceased, in pursuance of her previous agreement to transfer the property to plaintiff, intended by the deed to make an absolute or unconditional conveyance of the property to plaintiff; that, in other words, it was her intention that the deed should become effective upon her delivery of the instrument to her daughter with the instructions above indicated; that, in brief, she intended, when she delivered the deed to her daughter, a present transfer of the property.

The cases cited by counsel for appellants to support their claim upon the question of delivery present situations, as to the facts, materially different from that presented here.

In *Nelson v. Thomas*, 36 Cal. App. 433, 172 P. 398, it is merely held that the evidence was sufficient to sustain the finding that the deed therein involved was never delivered.

In *Jeffers v. Hulén*, 52 Cal. App. 590, 199 P. 350, it is held in an action to quiet title and involving the question of the legal effect of an instrument in the form of a grant, bargain, and sale deed, that the evidence was sufficient to support the finding that the instrument was intended to operate as a mortgage and not as an absolute conveyance of the property therein described. In that case it is properly held that the statement of the grantor accompanying the delivery of a deed that the grantee was to have the property described in the instrument, "if anything happens to the grantor," "indicates that a present transfer of travel was not intended, but rather a testamentary disposition of the property."

In *Stone v. Daily*, 181 Cal. 571, 185 P. 665, the wife executed a deed conveying her separate real property to her husband, and deposited the instrument, inclosed in an envelope, with a bank. On the envelope the grantor and her husband, the grantee, signed written instructions to the bank to the effect that the latter should keep the deed "so long as we may live"; that during such time the bank was not to deliver the deed to "either of us nor to any other person, * * *; upon

the death of either of us to deliver the same to the survivor on demand." Thus it will be seen, as Justice Olney stated in the opinion, the grantee was to receive title to the property only upon the condition that he survived the grantee, but that the deed was to be returned to her if her husband predeceased her. It is obvious that in that case there was no intention in the grantor when she deposited the deed with the bank to effect "a present transfer" of the property to her husband. The vesting of title in him was made contingent upon the condition that the wife (grantor) predeceased him.

It is obvious that the above cases are not in point here. The other cases cited by appellant on the question of delivery are no less inapplicable here.

Upon the question whether the mistake in the description of the property was mutual as between the parties, the cases called to our attention by appellants are different in material respects from the instant case. We will not review them herein.

[11, 12] The contention, that, the deed in question being invalid because the real property purported thereby to be conveyed was not completely described therein, it was improper to admit parol testimony to supply the deficiency of the instrument in that particular, is untenable. One of the thoroughly established rules in equity is that said courts will reform contracts, both executed and executory, irrespective of the statute of frauds. "In other words, the statute does not prevent a court from reforming the written evidence of a contract within the statute, by enlarging or restricting the terms or the subject-matter of the contract, so as to make it express the real agreement whenever it is clearly shown that, by reason of fraud or mistake, either the terms or the subject-matter of the contract, as it was intended and understood by the parties to it, is not embraced in the writing. * * * A contract required by the statute to be in writing cannot, of course, be enforced, until it is in writing; * * * but the statute does not interfere with the power of a court of equity to reform deeds or other instruments in which the parties intended to comply with the statute, but were prevented by fraud, accident, or mistake." *Williams v. Hamilton*, 65 Am. St. Rep. 501. See, also, 2 Pomeroy's Eq. Juris. (2d Ed.) §§ 845, 862, and 866; *House v. McMullen*, 9 Cal. App. 664, 100 P. 344; *Mitchell v. Whitford*, 49 Cal. App. 46, 192 P. 457; Civ. Code, § 3401.

[13] There are innumerable cases in which

reformation of deeds has been allowed to correct a misdescription therein of the property intended to be conveyed, whereby (in some such instances) property has been included in or excluded from the grant or conveyance contrary to the intention of the parties. And generally, in such cases, it is impossible to establish the fact of the wrong description or the fact that the description does not correspond with the intention of the parties as to the particular land to be conveyed without a resort to parol evidence. Indeed, the practice in courts of equity with reference to the revision of written agreements, as is true of sections 3399 and 3401 of the Civil Code, which merely follow the equitable doctrine of reformation long existent prior to the adoption of said sections, presupposes the necessity for invoking the aid of parol evidence to support the plea for such relief, and this upon the equitable consideration that, while equity courts fully recognize the validity and efficacy of statutes of frauds, they will not permit such statutes to stand as a shield to wrongs which it is their specific purpose to prevent. In the present instance, however, it is claimed, as we have seen, that the case here is not one of mere misdescription of specific real property, but one where there is no particular real property at all described in the deed, that for that reason the instrument is invalid, and that the insertion therein of a description of the property in dispute through or by means of the remedy of revision, as provided by section 3399 of the Civil Code, would amount to the making of a deed when none as to said or any property had ever existed. But it is perfectly clear that the deceased intended to cause to be described in the deed the property in dispute, and that there was an attempt in good faith to do so, but that such attempt, through the carelessness of the scrivener who prepared the document, was abortive. The description was partially correct, and the incompleteness of the description and the erroneous location of the property within the boundaries of "Chicago Park" constituted it a misdescription.

It must be borne in mind that the deed does not involve a voluntary transfer of the property, but is supported not only by a valuable, but, according to the evidence, an adequate consideration.

[14] The order denying a motion for a new trial is not appealable. The appeal from said order is therefore dismissed. The judgment and the order denying the motion to vacate the judgment are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

85 Cal. App. 63

COCKE et ux. v. MacLEOD. (Civ. 5648.)

District Court of Appeal, Second District, Division 1, California. Aug. 12, 1927.

1. Reference $\Rightarrow$ 49—Power of referee appointed by "interlocutory judgment" held not to cease because judge appointing him retired (Code Civ. Proc. § 184).

Powers of referee held not to terminate on the retirement of the judge appointing him by decree providing that defendant held title to west half of property in trust for plaintiff, that referee should fix boundary between west half of property and east half thereof, that on referee's report court would enter a further and additional decree confirming or modifying the report and in accordance therewith enter judgment in favor of defendants "for a sum equal to —," and that the second decree should provide for payment thereof prior to vesting of title, especially under Code Civ. Proc. § 184, though decree was "interlocutory judgment," appointment not being personal to the judge making it, but by the court itself.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interlocutory Decree or Judgment.]

2. Courts $\Rightarrow$ 50—Authority of court over action in which receiver or referee has been appointed is undisturbed by transfer from one department to another.

Transfer from one department of the court to another of an action, in which a receiver or referee has been appointed, does not disturb the authority of the court over the action.

Application by Robert Virgil Cocke and wife for a writ of prohibition to be directed to A. D. MacLeod, as referee, to restrain him from proceeding with the hearing in an action to establish a trust in real property. Alternative writ discharged.

Fredericks & Hanna and Lyon, Fleming & Robbins, all of Los Angeles, for petitioners.

Seth B. Smith and William & Guy Lewis, all of Los Angeles, for respondent.

HOUSER, J. [1] In this proceeding petitioners pray that respondent, as referee appointed by a judge of the superior court, be permanently restrained and prohibited from proceeding with the hearing in an action pending in said superior court, in which action respondent was appointed referee.

The facts appear to be that in a suit brought for the purpose of having a trust declared in favor of the plaintiff as to a one-half interest in and to certain real property described in the complaint, the court made findings of fact and drew conclusions of law therefrom and thereupon rendered judgment to the effect that the plaintiff was the owner of the west one-half of said property, subject to a lien and the payment thereof by plaintiff of one-half of a certain mortgage thereon; that defendant held the record title to the said one-half of said property in trust for the plaintiff;

"that the defendant, Robert Virgil Cocke, account to the plaintiff, Joseph Richard Cocke, for the income, rents, and profits of the said west one-half (W. $\frac{1}{2}$) of the said real estate, belonging to Joseph Richard Cocke, from and after the 1st day of January, 1924, and also the one-half of the interest, amortization payments, and taxes paid by said Robert Virgil Cocke, accruing and paid since the 25th day of January, 1921; and that the defendant, Robert Virgil Cocke, pay to the plaintiff, Joseph Richard Cocke, the excess, if any, of the aforesaid income, rents, and profits, over and above the amount of the aforesaid interest, amortization payments, and taxes paid by him, and in the event of the aforesaid payments for interest, amortization, and taxes exceed the aforesaid income, rents, and profits, the plaintiff, Joseph Richard Cocke, pay to the defendant, Robert Virgil Cocke, the amount of such excess."

The judgment also provided that:

"A. D. MacLeod is hereby appointed as referee to take evidence and find and determine said amounts, and the difference between them, and to report such findings to the court."

Of the conclusions of law which were drawn from the findings, and upon which conclusions, with others, the judgment is based, the following are deemed material to the question here involved, to wit:

"That a decree should be entered herein providing that A. D. MacLeod be appointed referee herein to fix and determine the boundary line separating the westerly one-half from the easterly one-half of said property. * * *

"That said decree should further provide that said referee shall report his findings to this court, and that this court shall thereupon enter a further and additional decree confirming or modifying the report of said referee, and, in accordance with said report as modified or confirmed, enter judgment in favor of defendants against the plaintiff for a sum equal to —."

"That said second decree shall provide that all sums found to be due therein to the defendants from the plaintiff shall be paid prior to the vesting of the title. * * *"

After the judgment was rendered, but before any action had been taken by the referee, the judge who rendered the judgment retired from office as judge of the superior court, since which retirement he has been neither appointed nor elected to such position.

In such circumstances, it is contended by petitioners that the judgment which was rendered was interlocutory only, and that because of the fact that the judge who rendered such judgment no longer holds a judicial position on the bench of the superior court, such court is without jurisdiction to render a final judgment founded upon the interlocutory judgment, and consequently that the referee appointed by the court is also without jurisdiction in the premises.

In the case of Connolly v. Ashworth, 98

Cal. 205, 38 P. 60, where the authorities are cited, it is held that when the term of office of a judge expired before a decision in an action pending before him had been filed, his successor was without jurisdiction to render judgment on the decision which had been signed by the former occupant of the office prior to his retirement. To the same effect is *Broder v. Conklin*, 98 Cal. 360, 33 P. 211, in which it is also held that (syllabus):

"In an action to declare the defendant guilty of fraud in the matter of an insolvent's estate, and that he holds certain property in trust for the benefit of the plaintiffs, and for an accounting of the moneys received by him under the trust, a finding by the court 'that the plaintiffs herein are entitled to judgment,' but leaving the principles of the accounting to be determined and other matters to be adjudicated, is not a sufficient determination of the cause to authorize the entry of judgment thereon by the clerk."

The case of *Clement v. Duncan*, 191 Cal. 209, 215 P. 1025, was one for the dissolution of a partnership. The trial court caused an "interlocutory decree" to be entered which dissolved the partnership, ordered an accounting between the partners and appointed an expert accountant to examine into and "report on all the affairs of the said copartnership, and to return the same to the court."

The court said:

"The interlocutory decree 'was based upon findings which determined none of the questions at issue except the fact of partnership and the existence of mutual and undetermined claims and demands, and upon a conclusion of law which declared no more than that an accounting was necessary. The decree, declared by the court itself to be "an interlocutory decree," appointed a referee to state an account, the settlement of which was essential to the fixing of the relative rights of the parties in the partnership property. Under all the authorities such a decree is not final.' *Doudell v. Shoo*, 159 Cal. 448, 453, 114 P. 579, 581, and cases therein cited. See, also, *Gray v. Palmer*, 9 Cal. 636, and *Gianelli v. Brisco* [*Briscoe*], 40 Cal. App. 532, 181 P. 105."

In the case of *Pomper v. Superior Court of State of California in and for Los Angeles County*, 191 Cal. 494, 216 P. 577, it appeared that the lower court had rendered an "interlocutory judgment and decree" by which title to real property was quieted in one of the parties to the action, but reserved for future determination by the court the question of the amount of the rents, issues, and profits to be paid by the respective defendants to the plaintiff therein. The court said:

"While it is true that the so-called interlocutory judgment purported to settle the basic issue involved in the case, it expressly left for future determination the rights of the parties with relation to the rents, issues, and profits, which was one of the issues raised by the complaint, as the plaintiff prayed for judgment for the value thereof.

"The general rule is that where a decree is

made fixing the liability and rights of the parties which refers the case to a master or subordinate tribunal for a judicial purpose, such, for instance, as the statement of an account, upon which a further decree is to be entered, the decree is not final. 2 Cal. Jur. §§ 19, 20, p. 142; *California Nat. Bank v. Stateler*, 171 U. S. 447, 19 S. Ct. 6, 43 L. Ed. 233, see, also, *Rose's U. S. Notes*; *Clement v. Duncan*, ante [191 Cal.] p. 209 (215 P. 1025); *Doudell v. Shoo*, 159 Cal. 448, 453 (114 P. 579)."

Although the ruling and general trend of the opinion in the case of *Zappettini v. Buckles*, 167 Cal. 27, 138 P. 696, would appear to be not entirely consistent with the decision as hereinbefore indicated in the two cases to which reference has been had herein, in view of the facts in the instant case as disclosed by the conclusions of law therein, it was intended that the referee was to be charged with the duty of fixing and determining the boundary which would show the dividing line between the properties of the respective parties to the litigation; that upon the report of the referee being filed the court would render an additional decree confirming or modifying such "report" and thereupon enter judgment "in favor of defendants against the plaintiff for a sum equal to —"; and that said second decree should provide that said sum should be paid by plaintiff to defendants "prior to the vesting of title"—together with the additional fact that by the interlocutory judgment which was actually rendered in the action the referee was authorized to take evidence and find and determine the state of the accounts existing between plaintiff and the defendants—we are constrained to hold, in accordance with the principle announced in *Pomper v. Superior Court of State of California in and for Los Angeles County*, 191 Cal. 494, 216 P. 577, that the judgment which was rendered was interlocutory only.

[2] Such conclusion, however, is not necessarily decisive of the question of the power of the referee to act under his order of appointment. It is clear that the order is not one merely personal to the judicial officer of the court, but is an order by the court itself and as such unaffected by the retirement of the judge who made it. Were it otherwise, no judge, other than the one making the appointment of a receiver or a referee, even in a condemnation proceeding, would be authorized to receive and act upon the report of such appointee; and a similar situation might result in an action, arising from the death or retirement of a judge who theretofore had made an order appointing a notary public or commissioner to take a deposition. In the county of Los Angeles, as well as in other counties of this state having several judges of the superior court, where for the expedition of the business of the court, cases may be and frequently are transferred from one busy department thereof to another department temporarily open for the transaction of business,

it may and does often happen that an action therein pending in which a receiver or a referee theretofore has been appointed is transferred from one department of the court to another department thereof. In such circumstances, so far as concerns the judge presiding over the department from which such cause has been transferred, he occupies a position similar to that occupied by the judge in the instant case, in that he is no longer connected with the cause. The authority of the court, however, is undisturbed by such circumstances. *Cudd v. Williams*, 39 S. C. 452, 18 S. E. 3; *Pratt v. Timmerman*, 69 S. C. 186, 48 S. E. 255. No authority has been presented which would indicate that after such transfer, because a judge other than the one making the appointment of a receiver or a referee would have charge of the proceedings in the action, the order of appointment would become a nullity and such appointee unauthorized to proceed with his duties.

Section 184 of the Code of Civil Procedure is as follows:

"No proceeding in any court of justice, in an action or special proceeding pending therein, shall be affected by a vacancy in the office of all or any of the judges thereof."

Aside from lack of authority to the effect that, because of the retirement of the judge who made the order of appointment of the referee in the instant case, the powers of such referee ceased, the statutory authority to which reference has been had is broad enough in its scope to cover the situation here presented.

It is therefore ordered that the alternative writ issued herein be and it is discharged.

We concur: CONREY, P. J.; YORK, J.

85 Cal. App. 134

VANDERBILT MINING CO. et al. v. INDUSTRIAL ACC. COMMISSION et al. ★
(Civ. 5876.)

District Court of Appeal, First District, Division 1, California. August 16, 1927.

Hearing Denied by Supreme Court Oct. 13, 1927.

1. Master and servant §419—Commission awarding permanent disability compensation for Charcot knee could award additional compensation for subsequent amputation because of Charcot knee (Workmen's Compensation Act, § 20d).

Notwithstanding that Industrial Accident Commission had awarded permanent disability compensation to employee for injury which, due to pre-existing syphilitic condition, resulted in Charcot knee, commission held to have jurisdiction to subsequently award additional compensation, for subsequent amputation because of Charcot knee, under Workmen's Compensation Act, § 20d (St. 1917, p. 831, as amended), providing that the commission shall have continuing jurisdiction over its awards and may alter or amend any award upon good cause appearing

therefor, such power including right to increase compensation awarded.

2. Master and servant §419—Where award granted antisiphilitic treatment and operation which was refused, subsequent award for permanent disability held not to terminate liability for treatment.

Where original award to employee sustaining injury resulting, because of pre-existing syphilitic condition, in Charcot knee required employer to furnish antisiphilitic treatment and an operation, and the employee refused the operation and was found justified in refusing, subsequent award for permanent disability held not to terminate liability for medical treatment; antisiphilitic treatment not being part of treatment for operation and not subsequently passed on.

Proceeding under the Compensation Act by John A. McFarlane, employee, against the Vanderbilt Mining Company, employer, and the Columbia Casualty Company, insurer. To review an award of the Industrial Accident Commission awarding compensation, the employer and insurer bring certiorari, making the Industrial Accident Commission and the employee respondents. Award affirmed.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

TYLER, P. J. [1] Certiorari to review an award of the Industrial Accident Commission. It is alleged therein, in substance, that on January 30, 1924, respondent John A. McFarlane filed an application for adjustment of claim under the Compensation Act (St. 1917, p. 831, as amended), in which it was alleged that he sustained an injury by slipping on a timber while working for Vanderbilt Mining Company at Ivanpah, Cal., on September 26, 1923, causing abrasion of his right shin and a strain of the right knee. That evidence taken upon the hearing showed that McFarlane had worked for several days following this injury, and that he had been treated for superficial injury of the leg by a Dr. Brook, of Las Vegas, Nev., but after about two weeks' time he went to Bakersfield and placed himself under the care of doctors of that city. That shortly after the 1st day of January following, the insurance carrier had him removed to Los Angeles, where a complete examination was made by specialists on behalf of the company, and also by a referee doctor appointed by the Industrial Accident Commission; that the medical evidence showed that McFarlane was suffering from a Charcot joint of the knee caused by syphilis; that a Charcot joint is one evidence of the disease known as "tabes dorsalis," often referred to as "locomotor ataxia." Thereafter findings and award were issued April 12, 1924, by

which it was determined that McFarlane had scraped the inner aspect of his right leg from the knee to the ankle, approximately precipitating a previous diseased condition resulting in a Charcot knee. As a result of this injury, the commission found that disability had continued from October 5, 1923, to and including February 6, 1924, which on maximum earnings amounted to \$348.16 compensation; that it was necessary to do a fixation operation of the right knee joint, together with antisyphilitic treatment. It was further found that the proper apportionment between the disease and injury was to award applicant certain medical and surgical care without compensation from and after February 6, 1924, as said injury might result in permanent disability which in such event would be rated subsequently upon request and the filing of medical reports. This award became final. Thereafter McFarlane refused to accept the operation on his knee, and the commission found the refusal justified. McFarlane then filed a request for a permanent injury rating. The commission filed its decision upon this petition September 3, 1924, in which it held the condition to be permanent, consisting of what is technically known as "Charcot knee," and it further found that the proportion of permanent disability attributable to the injury, and not to the pre-existing disease, had been fully compensated by the compensation awarded for the temporary disability in the previous award. On September 22, 1924, McFarlane filed a petition for rehearing in which he set forth, among other things, that he had paid out over \$770 for medical expense while in Bakersfield, prior to the first hearing, and he asked that the commission grant him a further award in reimbursement for such expense. On October 17, 1924, this petition came on for a rehearing and was denied.

Following this decision McFarlane then petitioned for a writ of review in the District Court of Appeal, Second Appellate District, Division 2, which petition was denied on December 9, 1924. Thereafter, on April 22, 1926, some 16 months later, McFarlane filed a petition for further compensation based on new and further disability, and also for an allowance for medical bills, said petition setting forth that on September 26, 1925, it had become necessary for him to have his leg amputated because of the Charcot knee. Applicant asked for a further allowance of compensation on account of the loss of his leg and for the medical, surgical, and hospital expense incurred in connection therewith, and the sum of \$933.85 to cover medical expenses that were incurred previous to the first hearing, a part of which had, it is claimed, been the subject of the petition for writ of review which had been denied. Petitioners herein answered said application and set up that the said matter had become res-

judicata, and that the denial of the writ of review established the previous decisions of the commission as the law of the case. Thereafter on July 21, 1926, the commission entered its decision on applicant's petition for further compensation in which it determined that (1) the order and decision of September 3, 1924, was a final decision upon the claim for disability compensation and therefore the applicant was entitled to no further compensation for permanent disability; (2) that McFarlane was entitled under the award of April 12, 1924, to certain medical and surgical treatment and such treatment had not been furnished by petitioners herein; and (3) that as the applicant's claim for such medical treatment had not been acted on in the denial of the petition for rehearing on September 22, 1924, the case should be set down for further hearing as to such medical expense. Thereafter McFarlane filed a petition for rehearing on July 9, 1926, claiming that the amputation of the leg was a new and further disability, and the commission granted the petition and subsequently on April 2, 1927, rendered two decisions. Under the first, medical expense incurred prior to the first hearing was disallowed, but an award was made for antisyphilitic treatment subsequent to the first hearing, and prior to the amputation of the leg, in the amount of \$187.50, for which an award was made. Under the second, it was found that the employee was entitled to a new and further disability by reason of the amputation of the leg above the knee, which was rated at 73 $\frac{3}{4}$ per cent., amounting to \$20.83 a week for 240 weeks and thereafter \$4.41 a week for life, but as said disability was caused in part by pre-existing disease and in part by injury, that the proportion of said disability attributable to the injury was 25 per cent. which reduced the amount to \$5.21 for 240 weeks, and thereafter \$1.10 a week for life. It also found the reasonable medical expense to be \$141.10 for the cost of amputation, one-quarter of which is \$35.28, and award was made accordingly. Petitioners aver in support of the present application that the commission in entering its decision of April 2, 1927, acted without and in excess of its powers; that the findings and award are not sustained by the evidence and the findings do not sustain the awards; and, further, that they are unreasonable. It is also claimed that the award of September 3, 1924, was a complete decision of the case as it disposed of all issues up to that date, which included antisyphilitic treatment, and the fact that the knee should not be operated on, that the condition of Charcot knee is a diseased condition and the award contemplated that the disease might become worse and might necessitate an operation to amputate it, in accordance with the course of such disease; that there was no rating of the amount of permanent disability, but the find-

ings were general that the full disability of the employment for precipitating an impending Charcot knee had been fully compensated, and the final order that applicant take nothing further was a complete disposition of that issue; that a denial of the writ of review to the District Court of Appeal confirmed this, and that, therefore, the commission could not reopen the case and give further relief for the same condition of Charcot knee existing 18 months later. It is further claimed that the antisiphilitic medical treatment was part and parcel of the treatment for the operation ordered, which had never been accepted, and that, therefore, the commission was without jurisdiction to entertain the claim of further disability or medical treatment due to the syphilitic condition after the findings and awards of April 12, 1924, and September 3, 1924, which fixed the total liability for these claims and which had become final. In support of the claim that the disability benefits had become final, petitioners argue that the fact that the Charcot knee condition necessitated an amputation after the original awards had been made could in no manner affect their liability, as such operation was rendered necessary as the proximate result of the disease known as "Charcot knee," and not as a new development of the injury. We cannot subscribe to this contention. The medical evidence showed that the disease known as "Charcot knee" is developed by a traumatic injury such as the employee suffered, where a pre-existing syphilitic condition exists. In accordance with this evidence the commission in the original award of April 12, 1924, found that the injury suffered by McFarlane proximately precipitated the pre-existing diseased condition resulting in a Charcot knee. By this award it was definitely established that the injury complained of was temporary in character and consisted of a Charcot knee, which was due to both injury and pre-existing quiescent syphilis. The award made upon the petition for a permanent disability rating filed September 3, 1924, was to the same effect. At the time of the filing of this last final award the employee had not suffered an amputation of his leg. It cannot be successfully argued that this loss did not constitute "new facts" such as would confer jurisdiction upon the commission under section 20d of the Compensation Act to amend its

prior awards. A different and more complete permanent disability resulted from the operation than that determined by the award of September 3, 1924. The nature of this new disability was a progression of the permanent character of such condition which was originally caused or contributed to by both disease and injury. Under these circumstances, the commission was justified in entertaining and granting a petition for rehearing upon applicant's request for further compensation and in the making of its award of April 2, 1927, as above recited. The extent and apportionment thereof was fixed and established by the commission under a schedule adopted by the commission pursuant to statute. It was a determination of a fact within its jurisdiction.

[2] Equally without merit is the further contention that the award of September 3, 1924, terminated all liability for medical treatment under the award of April 12, 1924. This original award ordered petitioner to furnish a surgical operation, together with antisiphilitic treatment as suggested by Dr. Jones in a report filed with the commission. The treatment was a thing separate and apart from the operation provided for. The subsequent decision on petition for permanent disability did not deal with this question, but the decision upon applicant's petition for further compensation filed April 23, 1926, and decided June 21 following, expressly recites that this matter was not passed upon, and it orders that the cause be set for further hearing on the claim for medical expense under the provisions of the findings and award filed April 12, 1924. The supplemental award of April 2, 1927, for the first time determined the amount to be allowed for treatment. The applicant was entitled to medical aid for the disease from which he was suffering by reason of the fact that the injury he received produced in part a condition requiring medical treatment. The award of April 12, 1924, so determined and it has long since become final. The amount to which he was entitled was passed upon for the first time in the supplemental award of April 2, 1927, and the amount so found to be due finds support in the evidence.

The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

85 Cal. App. 15

DONAHUE v. CONLEY. (Civ. 4605.)

District Court of Appeal, Second District, Division 1, California. Aug. 10, 1927.

1. Bankruptcy $\S$ 426(2)—Where defendant gave cash and note for sum embezzled, then gave new note for unpaid portion of old, original fraud precluded bankruptcy from discharging note.

Where defendant gave cash and note for sum embezzled and later gave a new note for unpaid portion of old, debt on new note held debt for money embezzled, hence not discharged by bankruptcy because of original fraud.

2. Appeal and error $\S$ 656(3)—In suit upon note, record justified appellate court's amending findings of fact of lower court, in view of statute (Code Civ. Proc. $\S$ 956a, as added by St. 1927, c. 352).

In suit upon a note where bankruptcy was in issue, record held to justify appellate court in amending findings of fact of lower court pursuant to Code Civ. Proc. $\S$ 956a, as added by St. 1927, c. 352, relative to courts of appeal altering findings of fact.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Ada Donahue against John J. Conley. Judgment for defendant on his plea of discharge of liability under the federal Bankruptcy Act, and plaintiff appeals. Finding of facts amended, judgment reversed, and cause remanded, with directions.

Waldo & Hinds, of Pasadena, for appellant.

David S. McCann, of San Diego, for respondent.

YORK, J. All of the objections raised to the findings of fact and conclusions of law herein are predicated upon the proposition that the indebtedness of the defendant to plaintiff was an indebtedness as set forth in the amended complaint, to wit, moneys embezzled by the defendant which had been entrusted to the defendant for the purpose of purchasing second mortgages. The defendant, according to the evidence and the amended pleadings, appropriated to his own use a sum aggregating about \$5,000, and thereafter gave a note for part thereof and the balance in cash. Upon paying up the most of the original note, the balance of this original note was paid by a note, which last-mentioned note is the note upon which the original complaint herein was solely based. After the adjudication in bankruptcy of the defendant, the plaintiff secured leave at the time of trial to file an amended complaint which set up the alleged embezzlement, and which the plaintiff now contends on this appeal is such an obligation as comes within the exception stated in the discharge in bankruptcy secured by the defendant herein, "excepting such debts as are by law excepted

from the operation of a discharge in bankruptcy." The trial court had before it not only the evidence set forth in the supplement to the brief herein, but also the original complaint and the answer thereto and certain portions of the proceedings in the bankruptcy court, including the discharge and the claim filed in the bankruptcy court by the plaintiff herein. The findings herein must have been predicated upon the belief of the trial court that the indebtedness sued on was the balance due on a note given for an unpaid balance of a prior note, and that therefore the allegations of the amended complaint as to fraud, embezzlement, and misappropriation were matters that could not be considered by the court in rendering its judgment.

[1] A fraud was involved in the original liability, to wit, the embezzlement of the funds of plaintiff entrusted to defendant, and the intervening note transactions we hold do not change the fact that the suit is still for a part of the money so obtained. This being so, the debt comes within the exception stated in the discharge in bankruptcy. Even if the money were stolen without ever being entrusted to defendant, the liability would still be one not wiped out by such discharge in bankruptcy. *McIntyre v. Kavanaugh*, 242 U. S. 138, 141, 37 S. Ct. 38, 61 L. Ed. 205, 207.

As the judgment must be reversed, we should consider whether or not we are authorized to order the entry of a new and different judgment. By an act of the Legislature, which became effective July 29, 1927 (Stats. 1927, c. 352), there was added to the Code of Civil Procedure a new section, numbered 956a. It is there provided that on appeal in nonjury cases, the Supreme Court or District Court of Appeal may make findings of fact contrary to, or in addition to, those made by the trial court. Provision is made for the making of such findings on the evidence in the record, or on that evidence and such additional evidence as the court of appellate jurisdiction may take, pursuant to rules to be prescribed therefor.

[2] It may be said that section 956a will not become entirely self-operative in cases where additional evidence must be taken until appropriate rules therefor shall have been adopted. *Capron v. Van Horn*, 74 Cal. Dec. 44. See, however, Code of Civil Procedure, $\S$ 187; *Roche v. Superior Court of San Diego County*, 30 Cal. App. 255, 260, 157 P. 830. In this connection, it should be noted that while said section provides that the rules shall be made by the Supreme Court, the Constitution declares that rules of practice and procedure shall be made by the Judicial Council. But in the present action, all necessary amendments to the findings are amply justified by the record, including the evidence now before us.

Therefore, it is ordered that the findings of

fact in this action be, and they hereby are, amended as follows: (1) By striking from finding 4 the words "in payment of his said indebtedness." (2) By striking from finding 5 the words "as payment." (3) By amending finding 9 to read as follows: "That the liability of defendant to plaintiff was created by defendant's fraud, embezzlement, misappropriation, and defalcation, while acting in a fiduciary capacity." (4) By striking out finding 10. (5) By striking out from finding 12 the word "not."

Upon the findings of fact as thus amended, the judgment is reversed, and it is ordered that the cause be remanded to the superior court with the direction that judgment be entered in favor of the plaintiff and against the defendant in the sum of \$1,629.24, with interest thereon from the 29th day of April, 1918, at the rate of 4½ per cent. per annum, together with costs.

We concur: CONREY, P. J.; HOUSER, J.

85 Cal. App. 21

PENDELL v. VESPER et al. (Civ. 4639.)

District Court of Appeal, Second District, Division 1, California. Aug. 10, 1927.

1. Executors and administrators §314(3)—Where devisee's interest in specific land is assigned and portion reassigned, executor selling land in administration need not account to last assignee (Code Civ. Proc. § 1678).

Where an interest in specific real property of a decedent's estate is assigned, and reassigned in portions, and an executor sells the real property under an order of the court in due course of administration, he is not required to account for the money received from the sale other than in his account as executor rendered to the court, no accounting to the last assignee being necessary, notwithstanding Code Civ. Proc. § 1678.

2. Executors and administrators §367—Property is presumably sold by executor to pay expenses, debts, or specific cash legacies.

The presumption is that property sold by an executor is sold for the purpose of paying the costs and expenses of administration, or the debts of the estate, or specific cash legacies.

3. Executors and administrators §314(3)—Statute providing for distribution to assignees applies only where no question arises respecting conveyance (Code Civ. Proc. § 1678).

Code Civ. Proc. § 1678, providing that if some of the original heirs, legatees, or devisees have conveyed their shares in the estate of a decedent to other persons, then such shares must be assigned to persons holding the same, applies only where no question arises on the distribution as to the conveyance having been made.

4. Wills §744—Where land is not specifically devised, rents or proceeds of sale by executor are assignable only as cash remaining after payment of expenses.

Where property is not specifically devised, rents received by the executor therefrom or the proceeds of the sale of the property in due course of the administration, under the authority of the court, can be assigned only as a residuary portion of the cash remaining in the hands of the executor at the close of the estate after paying all costs and expenses of administration.

5. Wills §744—Complaint alleging devisee's assignment of interest in land and reassignment of portion to plaintiff, and seeking accounting from executor who sold land, held insufficient to establish an interest in estate where not alleging payment of administrative expenses (Code Civ. Proc. § 1678).

Complaint alleging that interest in estate was devised to designated person, but not alleging that it was specific devise, and alleging devisee's assignment of interest in specific real property and reassignment of a portion of this interest to plaintiff, held insufficient to establish an interest in the estate, where failing to allege that the debts and charges and costs of administration had been paid, the rents or proceeds being assignable only as portion of the cash remaining at the closing of the estate after the payment of the expenses, notwithstanding Code Civ. Proc. § 1678.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action to establish interest in an estate, brought by G. Roy Pendell against A. E. Vesper and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

G. Roy Pendell, of Los Angeles, in pro. per. Merriam, Rinehart & Merriam, of Pasadena, for respondent Rezin Thompson.

Grant Jackson, of Los Angeles, for respondent Vesper.

YORK, J. This is an appeal by plaintiff from an order dismissing plaintiff's action, which action was dismissed by the trial court on the ground that the complaint did not state facts sufficient to constitute a cause of action.

The claim of the appellant in this action appears to be that notwithstanding the decree of distribution which was entered in the matter of the estate of John H. Thompson, deceased, and which decree contains no reservation whatever in favor of the appellant, the appellant is entitled to recover from the defendant Thompson, personally and as executor, some portion of the estate by this action which was filed by him more than two months after the decree of distribution had become final. Appellant claims a right in the estate of John H. Thompson, deceased, by reason of an assignment made to plaintiff, by the defendant Vesper, of a one-fourth of the interest assigned to said Vesper by the defendant Martha Carroll. Under the terms

of the will, the defendant Carroll was to receive two-thirteenths interest in the estate, and the defendant Martha Carroll, during the course of the administration, assigned to the defendant Vesper *her interest in two certain parcels of real property*, presumably property of the estate, and the assignment by defendant Vesper to plaintiff was an assignment only of a one-fourth portion of such interest thus assigned to him by defendant Carroll in said two parcels of real estate. By final decree of distribution of the estate, rendered after said two parcels had been sold under order of court, two-thirteenths interest of the entire estate of John H. Thompson, deceased, was distributed to the defendant Carroll, and the relief asked against the defendant Thompson is "that the said Rezin Thompson be directed and ordered to pay to this plaintiff, under said assignments, the sum of \$410.92, and that plaintiff have judgment against the said Rezin Thompson, both as executor of said estate and as an individual, for said sum of \$410.92; that plaintiff have judgment against defendants for costs of suit, and for such other and further relief as may seem meet and proper to the court." It is alleged in the complaint that the said two parcels of real estate which were specifically described in said conveyance and said complaint were sold during the course of probate for certain amounts, and that rentals had been received by said executor as such executor from the real estate prior to such sale. It is also alleged that the defendant Thompson had knowledge of such assignments, but nevertheless petitioned and caused the court to make its order distributing to Martha Carroll the two-thirteenths interest previously assigned by her to Vesper, as aforesaid. It is also alleged that a portion of the funds derived from the sales of said lands and the rents derived from said lands prior to such sales and represented by the interest therein assigned by Martha Carroll has been paid to Vesper, and that portion of said funds amounting to \$1,186.80 still remains in the hands of the defendant Rezin Thompson—probably meaning as such executor. Plaintiff also alleged that he is the owner of a one-fourth interest in said funds and the money so held by said executor by reason of the conveyance to him hereinbefore set out, but that defendant has failed and refused to pay any part thereof to plaintiff. Plaintiff also attempts to set up sufficient facts to justify an accounting to ascertain what plaintiff's alleged one-fourth interest in the interest of said Vesper would amount to.

[1] The order of the trial court may have been predicated upon several different grounds, but sufficient to say that where an interest in specific real property of a decedent's estate is assigned and reassigned in portions only, and where in due course of administration the real property is by order of court sold, an executor is not required by any provision of law pointed out to us by

appellant to account for what he may do with said money so received from such sale, other than his account as executor rendered to the court.

[2, 3] Presumably, property when sold by an executor is sold for the purpose of paying costs and expenses of administration, or debts of the estate, or to pay specific cash legacies. It was held in *Howe's Estate*, 161 Cal. 152, 118 P. 515, that section 1678 of the Code of Civil Procedure, as to partition or distribution to assignee of devisees, only applies where no question arises on the distribution as to such conveyance having been made. "Where its validity or effect is an issue upon the distribution, the determination of that question is not a matter within the probate jurisdiction of the court." If the rule contended for by appellant is correct, we can readily see that it could be made impossible for an executor to ever close his estate. If an assignment of an interest in specific property which has to be sold to pay the costs and expenses of administration is assigned and reassigned, time without number, it could readily be made impossible for any executor in the ordinary course of business to ever complete his trusteeship.

[4] We find no authority for the assignment of the moneys received from the sale of property by an executor in due course of administration where the real estate has not been specifically given under the will to any particular person, except only such interest as assignee may have in the cash on hand. In the case at bar, the complaint alleges that the estate consisted in part of the real estate hereinbefore mentioned, and that, under the terms and provisions of the last will and testament so admitted to probate, the defendant Martha Carroll acquired an interest in said estate, which said interest included a two-thirteenths undivided interest in and to said two pieces of real estate. There is nothing set forth in the pleading that would authorize us to conclude that the will specifically devised said or any portion of said real estate to the said Martha Carroll, and it is not clear from the appellant's brief in what way or in what manner he claims that the amount that the executor would receive from the sale of the property in the due course of administration of said estate could be kept in a separate fund by itself and be subject to a special assignment as set forth in his complaint, to wit, an assignment of a portion of an assigned interest. The complaint even claims the rentals from the property received by the executor, while no authority is set up in the appellant's brief to show how or why he would be entitled to any part or portion of the rents so received by the executor.

[5] Presumably, the executor during his administration would be paying the taxes and expenses of maintaining the property, and it would require some definite authority for us to hold that the rents received by the executor, or the amounts received by him for

the sale of the property in due course of administration under the authority of the court, could be assigned or transferred from one person to another other than as a residuary portion or balance of cash on hand in the hands of the executor at the close of said estate after paying all costs and expenses of such administration. The complaint is silent as to whether the debts and charges and costs of administration have been paid. It fails to state facts sufficient to entitle the appellant to the relief demanded in his complaint.

The judgment of the trial court is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

85 Cal. App. 55

GASTER v. HINKLEY. (Civ. 5834.)

District Court of Appeal, First District, Division 2, California. Aug. 12, 1927.

1. New trial ⚡140(3)—Evidence of defendant's remarks at time of automobile accident contrary to his testimony held competent for court to consider on plaintiff's motion for new trial.

Evidence of defendant's remarks at the time of an automobile accident, which was directly contrary to the testimony which he gave at the trial, held competent for the trial court to consider on plaintiff's motion for a new trial.

2. Appeal and error ⚡994(2), 1002—Appellate court does not determine conflicts in evidence nor pass on credibility of witnesses.

The appellate court does not pretend to determine which version of conflicting stories is correct, or pass on the credibility of witnesses.

3. New trial ⚡157—On motion for new trial, court may consider conflict in evidence.

Where there was a sharp conflict in the evidence with respect to material facts, it may be considered by the trial court on a motion for new trial.

4. Appeal and error ⚡977(3)—Whether trial court abused discretion in granting new trial should be determined from consideration of entire record.

In passing on the question of whether the trial court abused its discretion in granting plaintiff's motion for a new trial, the appellate court should consider the entire state of the record.

5. Appeal and error ⚡989—On appeal from order granting new trial, appellate court passes only on whether there is substantial evidence supporting trial court's conclusions.

On appeal from an order granting a new trial, the appellate court does not pass on the weight of evidence, but determines only whether there is substantial evidence supporting the trial court's conclusions.

6. New trial ⚡6—Granting new trial is largely discretionary with trial court.

The granting of a new trial rests largely in the discretion of the trial court.

7. New trial ⚡72—Where evidence preponderates against verdict, trial judge should set it aside.

If the weight of the evidence preponderates against the verdict, it is the duty of the trial judge to set it aside.

8. Appeal and error ⚡979(2)—Unless trial judge abuses discretion, order granting new trial on conflicting evidence will not be disturbed.

If the evidence is conflicting, and it does not appear that the trial court abused its discretion in granting a new trial, the order will not be disturbed on appeal.

9. Municipal corporations ⚡706(3)—Automobile driver has burden of proving pedestrian's contributory negligence.

The burden of proving plaintiff's contributory negligence, in pedestrian's action for injuries from being struck by automobile, rests on the defendant.

10. Municipal corporations ⚡706(8)—Instruction that plaintiff must have been without contributory negligence which might "in any wise" have contributed to automobile accident held erroneous.

In pedestrian's action to recover for injuries from automobile accident, instruction that, before the plaintiff could recover, it must be shown that plaintiff was without contributory negligence which might "in any wise" have contributed to the accident held erroneous, since it fell far short of the rule that, to defeat recovery, the contributory negligence must directly and proximately contribute to the injuries sustained.

11. Municipal corporations ⚡705(10)—Plaintiff's contributory negligence must be proximate cause of injuries from automobile accident to defeat recovery.

In an action for injuries sustained from being struck by automobile, plaintiff's contributory negligence must directly and proximately contribute to injuries sustained to defeat recovery.

12. Trial ⚡295(1)—Instructions must be construed together.

All the instructions must be read together and construed as a whole.

13. Trial ⚡296(1)—Where necessary element omitted from one instruction is supplied in others, the error is harmless.

The omission of a necessary element from one instruction is not reversible error, provided it is supplied in other instructions.

14. Trial ⚡296(1)—Incorrect statement of law as to material issue will not be cured by correct statement in another instruction, where error might have been prejudicial.

An incorrect statement of the law as to a material issue which appears to have been prejudicial will not be cured by a correct statement

of the law in another instruction, since it cannot be determined which statement controlled the jury.

15. Negligence ⚡82—“Contributory negligence” is act of plaintiff amounting to want of ordinary care co-operating with defendant’s negligence to proximately cause injury.

“Contributory negligence” is such act or omission by plaintiff amounting to a want of ordinary care as, concurring or co-operating with the negligent act of a defendant, was the proximate cause of the injury complained of.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contributory Negligence.]

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Anna Gaster against A. B. Hinkley. Verdict for defendant. From an order granting a new trial, defendant appeals. Affirmed.

Pierce & Carlson, of Richmond, and Donahue, Hynes & Hamlin, of Oakland, for appellant.

Daniel A. Ryan, of San Francisco, for respondent.

THOMPSON, Presiding Justice pro tem. This is an appeal from an order granting a new trial after a verdict had been secured in favor of the defendant.

On the motion for a new trial the respondent contended that certain instructions which were given at the request of the appellant were erroneous and therefore warranted the granting of a new trial; but the chief question involved on this appeal is whether in view of the evidence the trial judge abused his discretion in granting the new trial.

On November 8, 1923, at about 8 o’clock p. m., the defendant was driving his Essex coupé automobile from Richmond toward Oakland along San Pablo avenue. It was a rainy night. There was a double line of street car tracks along this avenue. Seated upon defendant’s right on the front seat was his friend Shroeder. Defendant’s wife and Mrs. Shroeder occupied the rear seat. All agreed they were traveling about 15 miles an hour, with the machine running over the westerly rail of the street car track.

The plaintiff, who is an elderly lady, had been shopping at a grocery store on the westerly side of San Pablo avenue at its intersection with Thirtieth street. With a number of small parcels under her left arm she went to the crossing where she stopped at the westerly street line for a few moments waiting for the traffic to pass. Southerly from the intersection of these streets, some 50 feet distant, was an excavation in the easterly portion of the street, 18 or 20 feet from the easterly curb. This hole was about four feet square and was inclosed with a fence. A pile

of dirt 5 feet in depth lay upon the pavement about the hole. This mound of dirt extended to within 3 or 4 feet of the easterly rail and so far toward the east as to leave scant room for a vehicle to pass between it and the easterly curb. Lighted lanterns were placed as a warning upon this obstruction.

After the traffic had passed, the plaintiff crossed to the center of the street and stood between the two tracks, where she waited a moment for the passing of an automobile on the easterly side, which was going toward Richmond. She then looked northerly, and before continuing on her way she turned again and looked southerly toward Oakland. At this instant another car came from the south and in passing the dump of dirt in the street it suddenly swerved toward her. She stepped back to avoid this car and was instantly struck by the left fender of defendant’s car, which was traveling southerly near the center of the street. The plaintiff was hurled to the pavement and sustained severe injuries consisting of a fractured left leg, three broken ribs, an injured spine, and numerous bruises and contusions about the body. She was taken by the defendant to an emergency hospital and remained under a doctor’s care for several months.

The defendant’s story of the affair was substantially corroborated by all of the occupants of his car. No other witness observed the immediate accident. The defendant testified that he and his wife had driven to Richmond for their friends, Mr. and Mrs. Shroeder, and that they were returning to Oakland along San Pablo avenue about 8 o’clock p. m.; that it was raining lightly and the pavement was wet, but that his view of the street was not obscured. He said that they were traveling 15 miles an hour “astride of the western rail,” and testified:

That “as we neared the intersection of Thirtieth street I noticed a woman standing * * * between the two rails. * * * When I first saw the woman she was between 30 and 40 feet from me. Shortly after that a car coming from Oakland in this vicinity suddenly swerved to the left. * * * Immediately upon the swerving of this car, the woman stepped backward, and before I could turn my car to the right, she had come in contact with the left * * * bumper or fender, and fell to * * * the street.”

He then testified that he stopped the car within 15 or 20 feet, and returning took the injured lady to the hospital for treatment.

In spite of the fact that the defendant saw the plaintiff standing in the center of the street dangerously near the exact line in which he was traveling and 30 or 40 feet ahead of him, he neither sounded his horn as a warning, nor changed his course, although the street was unobstructed upon his right. In this regard the following testimony was adduced:

"Q. Why didn't you turn your car to the right when you were 30 feet away? A. The lady had crossed my path. I had a well-defined path astride the rail. She was facing the other way, and had apparently crossed my path and was going on. I saw no reason why I should swerve my car. * * *

"Q. Why did you not blow your horn? A. * * * I partly thought it would confuse the lady, and I saw no reason for blowing my horn. * * *

"Q. How far away from the lady were you when you swerved to the right? A. The lady had either come in contact with my car, or I was so close to her that I could not. * * * I attempted to swerve it, but I did not succeed before she came in contact with the car."

[1] It will be observed that the defendant testified that he was traveling only 15 miles per hour, and that he plainly saw the plaintiff standing between the tracks 30 or 40 feet ahead of his car. For the purpose of impeachment he was asked if he did not tell a police inspector by the name of Powers, at the hospital the night of the accident, that he was running 20 miles an hour at the time of the accident and that he did not see the plaintiff until he struck her. He emphatically denied talking with the inspector or telling him either that he was traveling 20 miles an hour, or that he did not see the plaintiff until he struck her. The inspector, Powers, was then called, and testified positively that he did talk with the defendant at the time and place mentioned, and that the defendant then told him he was traveling 20 miles an hour and did not see the lady until he struck her. This was a flat contradiction upon material testimony and was competent for the trial court to consider upon a motion for a new trial.

One witness for plaintiff testified that immediately prior to the accident the defendant was running 25 or 30 miles an hour. Several witnesses testified that the plaintiff was picked up seventy-five or eighty feet southerly of the point where she was struck. This was not only in conflict with defendant's evidence but furnishes some proof which tends to show that he was driving at an unlawful rate of speed.

Much of the trial was devoted to an attempt to prove that the plaintiff sustained serious and permanent injuries as a result of the accident, while, upon the contrary, the defendant made a strenuous effort to refute this showing. To this end much time was consumed in examining physicians as expert witnesses. For the purpose of thus contradicting plaintiff, Dr. Irwin was called by the defendant. He had examined the plaintiff at his office three or four weeks prior to the trial, and testified to facts generally discrediting plaintiff's claim that she was seriously and permanently injured. He testified that she told him she had come alone to his office; that he did not see her son at his office; that she then walked without the aid of a cane, and with approximately 50 per

cent. more ease and apparent comfort than she appeared to exhibit in her effort to walk before the jury during the trial. The plain inference which was conveyed by this evidence on the part of the doctor was that the plaintiff was feigning more serious results from the accident than she really suffered, although he denied this inference. Nevertheless, it is apparent that his evidence would have a potent influence to prejudice the jury against the plaintiff, provided his testimony was given full credit. Undoubtedly it would create the impression that she was fraudulently trying to deceive the jury and would therefore be likely to result in their discrediting and rejecting her testimony. Both the plaintiff and her son contradicted the doctor, saying that they went together to his office; that the son personally entered the presence of the doctor on that occasion; and that the plaintiff did not tell him she had come alone to his office.

[2, 3] This court does not pretend to pass upon the credibility of witnesses, nor to determine which version of the story was correct. There was, however, a sharp conflict with respect to material facts which it was competent for the trial court to consider upon a motion for new trial.

[4] In passing upon the question of whether there was an abuse of discretion on the part of the trial judge in granting the motion for a new trial, the entire state of the record should be considered, including the effort to impeach both the defendant and the doctor. If this evidence, taken as a whole, was favorable to plaintiff, or was such as to cause reasonable and unbiased minds to arrive at contrary conclusions as to the merits of the cause, then the discretion of the trial judge in granting the new trial will not be disturbed. *Merralls v. Southern Pacific Co.*, 182 Cal. 19, 22, 186 P. 778.

[5, 6] While the evidence on the part of plaintiff furnished little proof of negligence on the part of the defendant, yet the defendant's own testimony supplied proof of conduct dangerously close to what might amount to a lack of ordinary care and prudence. On appeal from an order granting a new trial, the appellate court is not called upon to pass on the weight of evidence, but to determine only whether there is substantial evidence in the record supporting the conclusions of the trial court in granting the new trial. The granting of a new trial rests largely in the discretion of the trial court. 2 Cal. Jur. 905, § 533; *Quinn v. Kenyon*, 22 Cal. 82.

[7, 8] If the weight of the evidence preponderates against the verdict, it is the duty of the trial judge to set it aside. *Gordon v. Roberts*, 162 Cal. 506, 509, 123 P. 288; *Warner v. Thomas Parisian Dyeing & Cleaning Works*, 105 Cal. 409, 38 P. 960. If the evidence is conflicting, and it does not appear that the trial judge abused his discretion in granting a new trial, his order will

not be disturbed on appeal. *Butler v. Miller*, 69 Cal. App. 586, 231 P. 1007.

[9-11] The following instruction was given at the request of the defendant:

"Before the plaintiff can recover in this action, it must appear to your satisfaction that the defendant was guilty of some act of negligence which directly contributed to the accident. It must also appear to your satisfaction that the plaintiff was without fault or negligence on her part *which might in any wise have contributed to the accident.*"

[12-14] Standing alone, this instruction was erroneous. The burden of proving the contributory negligence of the plaintiff rested upon the defendant. Not only must it appear that plaintiff was guilty of a lack of ordinary care for her own safety under the circumstances of the case, but also that this negligence contributed directly and proximately to the injuries which she sustained. *Gett v. Pacific Gas & Electric Co.*, 192 Cal. 621, 631, 221 P. 376; 19 Cal. Jur. 649. To instruct the jury that it was only necessary that plaintiff's negligence should contribute "in any wise" to the injuries which she sustained falls far short of the well-established rule that it must *directly* and *proximately* contribute to the injuries sustained. However, the jury was elsewhere fully and correctly instructed as to all the necessary elements constituting contributory negligence. All of the instructions must be read together, and construed as a whole. 24 Cal. Jur. 857, § 113. The omission of a necessary element from one instruction is not reversible error, provided it is supplied in other instructions. But an incorrect declaration of the law as to a material issue, which appears to have been prejudicial, will not be cured by a correct statement of the law in another instruction for the reason that it is impossible to determine which controlled the jury. 2 Cal. Jur. 1027, § 611; *Cooper v. Spring Valley Water Co.*, 16 Cal. App. 17, 25, 116 P. 298; *Brown v. McAllister*, 39 Cal. 573; *Sappenfeld v. Main St. & A. P. R. Co.*, 91 Cal. 48, 59, 27 P. 590. In *Chidester v. Consolidated People's Ditch Co.*, 53 Cal. 56, an instruction was held to be erroneous which declared that the defendant was liable for damages "resulting either directly or remotely from the negligence of the defendant," and was not cured by the subsequent giving of another instruction correctly stating that he was liable only for such negligence as *proximately* caused the damage, for the reason that it was "impossible to determine on which of these (instructions) the jury acted."

[15] In the instant case the following instructions which were given correctly stated the law on that subject:

(a) "Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care as, concurring or co-operating with the negligent act of a defend-

ant, was the proximate cause of the injury complained of;" and (b) "if the plaintiff was herself negligent and her negligence proximately contributed to her injuries, then she cannot recover. * * *

Since the record in this case will not warrant an interference with the discretion exercised by the trial court in granting a new trial, because of the serious conflict of material evidence, it becomes unnecessary to determine whether the giving of the erroneous instruction above quoted was prejudicial error.

For the foregoing reasons, the order granting a new trial is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

84 Cal. App. 577

CENTRAL PAC. RY. CO. v. COSTA et al.
Board of Sup'rs. (Civ. 3243.)

District Court of Appeal, Third District, California. July 26, 1927.

1. Counties $\Leftrightarrow$ —"Counties" are governmental agencies, powers and functions of which have direct and exclusive reference to general policy of state.

"Counties," as political entities or subdivisions of state, are governmental agencies, all powers and functions of which have direct and exclusive reference to general policy of state, and are but branch of general administration of that policy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, County.]

2. Constitutional law $\Leftrightarrow$ 63(2)—State may, except where people have not restricted such power, delegate to counties functions belonging to it and take back functions delegated.

State may, through Legislature and in exercise of sovereign power and will, in all cases where people themselves have not restricted or qualified such exercise of that power, apportion and delegate to counties any of functions belonging to it, and may take back and itself resume exercise of certain functions which it had delegated.

3. Constitutional law $\Leftrightarrow$ 284(1)—Statute providing for cancellation of assessments where property is taxed by two counties without regard to location of property is not unconstitutional as depriving county in which property is situated of property without due process of law (Pol. Code, § 3804b).

Pol. Code, § 3804b, providing in effect that, where real property has been assessed by two or more counties for same year and owner has paid one assessment, assessments by other counties should be canceled, regardless of whether property is situated in that county or not, held not unconstitutional as depriving county in which property is situated of property without due process of law, since state in dealing with matters appertaining to administration of governmental affairs of counties deals with itself.

4. Statutes $\S$ 245—Taxation $\S$ 480—Proceeding to obtain relief from double taxation by different counties must substantially follow statute, but statute should be liberally construed (Pol. Code, $\S$ 3804b).

Proceeding, under Pol. Code, $\S$ 3804b, to obtain relief from double taxation by different counties must substantially follow statute, but reasonable liberality in construction of statute establishing such proceeding should be rule to end that owner of property subject to taxation may not be compelled to pay more than is justly due from him to government.

5. Statutes $\S$ 245—In construing tax statute, obvious intention and meaning of Legislature should be given effect where language permits it.

In construction of statutes relating to taxes, obvious intention and meaning of Legislature should be given effect where language will permit it, rather than adhere too strictly to letter, and any leaning in case should be in direction of presumption that everything is expressed in tax laws which was intended to be expressed.

6. Limitation of actions $\S$ 1—Object of statutes of limitations is to suppress fraudulent and stale claims from springing up at great distances of time.

Statutes of limitations are statutes of repose, object of which is to suppress fraudulent and stale claims from springing up at great distances of time and surprising parties or their representatives when all proper vouchers and evidences are lost, or facts have become obscure from lapse of time or defective memory or death or removal of witnesses.

7. Limitation of actions $\S$ 12(2)—Taxation $\S$ 480—Proceeding to compel county to cancel assessment on property assessed by another county, nearly 6 years after statute providing relief from such double taxation took effect, held not barred by statute or laches (Code Civ. Proc. $\S$ 343, and $\S$ 338, subd. 1; Pol. Code, $\S$ 3804b).

Where petitioner filed petition with board of supervisors of county to have assessment and certificates of sale of lands and deeds to state of property, also assessed by another county to which petitioner had paid taxes, canceled, and board refused to cancel, as provided by Pol. Code, $\S$ 3804b, mandamus proceeding to compel board to cancel assessment and deeds nearly 6 years after section 3804b took effect, though assessments were made long before, held not barred by statutes of limitations, under Code Civ. Proc. $\S$ 343, and section 338, subd. 1, or by laches.

8. Equity $\S$ 67—Laches is analogous to statute of limitations as applicable to actions at law.

Laches is an equitable defense and is analogous to statute of limitations as applicable to actions at law.

9. Equity $\S$ 72(1)—Party pleading "laches" must show that he has or will suffer substantial prejudice by long delay in bringing action.

One of essentials of defense of "laches" is that party pleading it must show that he has

suffered, or will suffer substantial prejudice by long delay in bringing action or suit.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Laches.]

10. Taxation $\S$ 497—Petitioner held entitled to writ compelling county to cancel assessment on property taxed by another county and tax deeds to state (Pol. Code, $\S$ 3804b).

Where lands were assessed in Nevada county and petitioner paid taxes, and lands were assessed for same year in Sierra county, and on default of owner to pay taxes lands were sold to state by Sierra county, and petitioner in due legal time presented with tax receipts from Nevada county petition to board of supervisors of Sierra county, praying cancellation of assessments as provided by Pol. Code, $\S$ 3804b, and board refused to grant application for cancellation of assessments and certificates of sale, petitioner held entitled to writ of mandate to compel cancellation.

Appeal from Superior Court, Sierra County; W. I. Redding, Judge.

Mandamus proceeding by the Central Pacific Railway Company against August Costa and others, as members of and constituting the Board of Supervisors of Sierra County, to compel the cancellation of certain assessments of taxes upon real property and certificates of sale of said lands and any deeds to the state. From a judgment denying the relief, petitioner appeals. Reversed with directions.

H. W. Hobbs, of San Francisco, for appellant.

Henry B. Neville, of Downieville, for respondents.

HART, J. The petitioner Railway Company petitioned the court below for an alternative writ of mandate to compel the respondents, as members of and constituting the board of supervisors of the county of Sierra, to enter upon the minutes of said board an order directing the auditor of said county to cancel certain assessments of taxes levied upon certain real property of petitioner, and further, to cancel the certificates of sale of said lands and "any deeds to the state executed in pursuance of said sale," or to show cause why they have not done so upon applications theretofore made by petitioner to the respondents for such cancellation.

The sales of the real property described in this proceeding were to the state (Pol. Code, $\S$ 3771) for delinquent taxes assessed thereon by the county of Sierra for the years 1899, 1902, 1903, 1904, and 1908.

The trial judge set forth the reasons for the denial of the relief prayed for by petitioner in a written opinion, which was filed by him, and which opinion is printed in the transcript. A statement of the case and the issues submitted by the pleadings (the peti-

tion and the answer or return) is correctly set forth in said opinion as follows:

"This is an application for writ of mandate commanding the board of supervisors of Sierra county to enter an order upon the minutes of said board directing the auditor of said county to cancel certain purported double assessments of the property of petitioner.

"It is alleged by petitioner that, at all times mentioned in the petition, it was the owner of certain tracts of land described by legal subdivisions; that for the fiscal year commencing July 1, 1899, the county of Nevada, acting by and through its duly constituted officers, assessed for state, county, and school purposes certain tracts of said lands of petitioner; that petitioner has paid all of the taxes levied and assessed thereon by the county of Nevada; that for said fiscal year commencing July 1, 1899, the county of Sierra, acting by and through its duly constituted officers, assessed for state, county, and school purposes the same tracts of said lands of petitioner; and that petitioner failed to pay said taxes so assessed by the said county of Sierra, and said lands were sold to the state of California on July 2, 1900.

"The petition contains similar allegations regarding various tracts of the said lands of petitioner, which were assessed by Nevada county for the fiscal years commencing July 1, 1902, 1903, 1904, and 1908 and by the county of Sierra for the same years; and it is alleged that petitioner has paid all of the taxes levied upon said lands by the county of Nevada for each and all of said years, but failed to pay the taxes levied by Sierra county for any of said years, and that the lands so assessed by Sierra county have been sold to the state.

"It is further alleged that on or about the 2d day of July, 1923, petitioner filed with respondents, as members of and constituting the board of supervisors of the county of Sierra, its application in writing that said board of supervisors make and enter upon its minutes orders directing the auditor to cancel said assessments, so made by the county of Sierra, by entries on the margin of the assessment book and also upon the delinquent list, should such assessments be carried therein, and directing the recorder to cancel the certificates of sale and deeds to the state; that with each of said applications, petitioner presented to and filed with respondents a certificate signed by the auditor of Nevada county, stating that the lands described in said applications had been assessed for taxes for the fiscal years in question, and that all of said taxes had been paid, as required by section 3804b of the Political Code.

"And it is finally alleged that respondents have wholly refused and neglected and do continue to refuse and neglect to make and enter in their minutes the orders so applied for, and that said tax sales appear to be valid on their face and constitute clouds upon the title of petitioner to said lands, and that petitioner has no other plain, speedy, or adequate remedy in the ordinary course of law.

"In their answer to the petition, respondents 'admit each, every, and all of the averments of the petition of petitioner in its petition set forth.'

"The respondents aver in their answer that during all the times mentioned in the petition,

prior to the 1st day of March, 1909 the lands described in the petition and the whole thereof were situated within the exterior boundaries of Sierra county and at all such times were a portion of the territory of said county; that the taxes levied upon said lands of petitioner by the county of Sierra, as stated and set forth in said petition, became, were and still are the property of and are now due and payable to the county of Sierra and the state of California as the interest of each appears. It is further averred that petitioner has been guilty of laches and unreasonable delay in making its applications to have said assessments canceled, and that by reason of said laches respondents and their predecessors in office have been and are deprived of the opportunity and right to litigate and have determined the claims of said county of Sierra relative to said assessments and the taxes accruing therefrom.

"Respondents also plead, in their answer, the defense that the cause of action set forth in petitioner's petition is barred by subdivision 1 of section 338 of the Code of Civil Procedure and by section 343 of the same Code.

"Petitioner's applications for orders canceling said assessments and its petition in this proceeding are based upon that portion of section 3804b of the Political Code, reading as follows:

"Where real property has heretofore been assessed by the assessors of two or more counties for the same year and the owner thereof has paid all of the taxes on one of such assessments, upon proof of the payment of such taxes on one of such assessments for any year, by the production of a tax receipt or certificate of the auditor of the county in which such payment has been made, the board of supervisors of any other county claiming the right to assess and tax such real property, shall thereupon enter an order upon its minutes directing the auditor to cancel such double assessment of such property by an entry on the margin of the assessment book, as also upon the delinquent list, should double assessment be carried therein. If the property assessed under such double assessment has been sold to the state and a certificate of sale or deed therefor has been issued to the state, the order of the board shall further direct the recorder to cancel such erroneous certificate and deed so issued except where the state has disposed of the property thereby conveyed.'

"Said section was added to the Political Code in 1917 and took effect July 27th of that year, but petitioner did not apply to respondents for the cancellation of said assessments until nearly 6 years thereafter, to wit, on July 2, 1923.

"Petitioner contends, however, that its cause of action—its right to commence and prosecute this proceeding—did not accrue until it had applied to the respondents for the orders of cancellation of the assessments in question, and, therefore, that it has not been guilty of laches, and that the statute of limitations had not run against it at the time of the institution of his proceeding."

The petition does not state, either directly or indirectly, that the lands involved herein are not situated within the boundaries of Sierra county. On the other hand, as will be observed from that part of the trial judge's opinion herein above presented, the answer or return alleges that said lands and all and

every part thereof are and were, at the times of the assessment and sale thereof to the state, on account of delinquency on the part of the owner in the payment of the taxes thereon for the years stated in the petition, situated within the boundaries of the said county. No evidence was received at the hearing of the proceeding, hence the judgment is founded upon the facts as they were stated in and admitted by the pleadings (the petition and the answer or return thereto) and is in effect a judgment on the pleadings. The court, nevertheless, specifically found that all of the material allegations of the petition are true, but concluded, as a matter of law, that:

"The petitioner is not entitled to a writ of mandate as prayed in the petition because its right is barred by the statute of limitations, and also by laches, and that respondents are entitled to a judgment dismissing the proceeding and awarding them costs."

The petitioner appeals from the judgment.

For the purpose of this decision, it is to be accepted as a fact in this case that said lands are and were at all times referred to in the petition situated within the boundaries of Sierra county. It is further to be accepted as established facts in this case that said lands, in the years named in the petition, were assessed and taxes thereon levied for county purposes by the county of Nevada, and that the petitioner paid to Nevada county the taxes so assessed and levied by said county for the years referred to.

While it is true, as is stated in that part of the opinion of the trial judge hereinabove reproduced, that the respondents, in addition to setting up the defense of laches and the bar of the statute of limitations against the right of the petitioner to maintain the proceeding inaugurated by its petition herein, also have expressly set up in their answer the plea, or more accurately speaking, have expressly interposed the proposition, as in impeachment of the right claimed by the petitioner to the relief it seeks to obtain by this proceeding, that those provisions of section 3804b of the Political Code, according to which the petitioner has proceeded herein, would, if given application in harmony with the prayer of the petition, have the effect of depriving the county of Sierra of a property right, to wit, the taxes assessed or levied on said lands, without due process of law. The court, however, in deciding the case, ignored the last-stated proposition, and the district attorney, in his brief filed herein, has not referred thereto, from which it may be assumed that he has abandoned or surrendered the point. For this reason, further notice herein of the point could be waived, a rule which the courts of appeal are strongly inclined to follow unless, perhaps, the point presents a proposition of law peculiarly vital to the decision and which, upon its face, is plainly subject to debatable considerations.

But, since said section is a comparatively new legislative enactment and authorizes a proceeding for the relief of a property owner from the effect of a double tax on his property, and, furthermore since, so far as we are advised to the contrary, the appeal courts of this state have thus far not been afforded an occasion for considering the section or inquiring into the question (if it be a question) whether it is consistent with the constitutional authority of the Legislature to enact or pass such a measure into law, it is deemed not improper to give to the legislation involved in the act, with respect to the question whether its enactment constituted a competent exercise of legislative power, some consideration herein.

It will readily be noted, upon reading section 3804b of the Political Code, that said section requires the board of supervisors of a county in any case to which its provisions and obvious purpose are appropriate, and where application is made by the owner of real property to such board for relief under and in pursuance of the provisions thereof, to direct a cancellation of the assessment levied, regardless of whether such property is or is not situated in the county wherein such application is made. In other words, as the statute reads, the situs of the real property is an immaterial consideration, and, therefore, upon the filing of the application for the cancellation of the assessment by the owner with the required proof that he has paid to another county taxes on the same property for the same year, upon an assessment thereof by such other county, there is no alternative left to the board of supervisors of the county in which such application and proof have been made but to order the auditor of such county to cancel the assessment on such property. It is upon this proposition that the respondents contended in the court below that section 3804b of the Political Code, as so applied, and as it was obviously intended to be applied, will operate to deprive Sierra county of its just taxes on the lands involved without due process of law.

Obviously the act, in its nature and purpose, is remedial. It gives to the owner of real property, circumstanced with reference to the assessment of such property for revenue raising purposes as the act contemplates, a remedy whereby he may, by a summary proceeding before the supervisors (and not before the courts), relieve himself from an unequal and unjust tax burden. And the legislation involved in the act is consistent with and in furtherance of the ends of the positive policy of the state to discountenance and disallow any act or course of official conduct on the part of the state or its agents charged with the administration of the fiscal or revenue system of the state which would result in or lead to the imposition upon real property owners of a tax burden amounting to double taxation.

It is no doubt true that, prior to the enactment of section 3804b of the Political Code, there were available to the owners of real property a number of different remedies, the election of which was or is governable by the circumstances peculiar to the particular case, whereby such property owners were or are enabled to relieve themselves from the illegal burden of double taxation brought about by such conditions as furnished the legislative motive for the enactment into law the provisions contained in said section. These remedies, though, when resorted to or invoked, pertain or are solely appropriate to judicial proceedings, and, when thus called into action, are usually attended by the expense, the inconvenience, and the delay in securing the final judicial adjudications of the questions involved incidental to the litigation of contested questions of property rights before the courts. Instances of double taxation due to disputed county boundary lines are not wanting. The present case, as we may infer from the briefs, furnishes such an instance. See *County of Sierra v. County of Nevada*, 155 Cal. 1, 99 P. 371. Other such cases, as we know as a matter of common knowledge, have arisen in the history of California, in which the excess tax following from the assessment of the same lands for the same years by two different counties, each county proceeding upon the assumption that such lands were situated within its exterior boundaries, thereby imposing upon the lands an illegal tax burden, and in which the amount involved was so small as to make it not worth the time, trouble, and expense to litigate and so secure an adjustment or adjudication of the matter in an appropriate proceeding by the courts. But, in such instances, if one of the assessments be not nullified, or if both assessments be enforced, the state would receive and retain a larger amount of taxes upon such lands than it would be entitled to, and at the same time the state itself would be forced or involuntarily driven into the position of impinging upon its own policy of equality, or as near equality as is reasonably practicable in the distribution of the burdens of government among property owners within its borders. Such a situation, it may be repeated, might have occurred, and in all probability has occurred, in some cases, prior to the enactment by the Legislature of 1917 of section 3804b, providing a summary and simple and inexpensive and convenient remedy for relief in instances such as we have before us now. Furthermore, since, as we have seen, said section (where there have arisen the circumstances which call for its actual application) plainly contemplates that it is the imperative duty of the board of supervisors to which application for relief under the section is made in the manner required thereby to direct the auditor to cancel the assessment, etc., without regard to whether the lands affected are or are not situated within the

county in which such application is filed, the remedy thus provided can be no less efficacious in the matter of safeguarding the rights of all the parties than would be any remedy which may be afforded for securing the identical relief through the courts. Conceivably, by the foregoing considerations the Legislature of 1917 was moved to enact said section, and so make it one of the constituents of the fiscal system of the state.

[1, 2] The discussion thus far has proceeded upon the assumption that the fiscal affairs of counties are nothing less than the fiscal affairs of the state itself. This assumption, however, is more than a mere assumption or supposition. It is a postulate to which assent must without qualification yield; for, as has often been reiterated by the cases, these propositions may be set down as fundamental, or at least so thoroughly established as to be entirely removed from the field of speculation or the realms of legitimate controversy:

"(1) That counties, as political entities or subdivisions of the state, are governmental agencies, all the powers and functions of which have a *direct* and *exclusive* reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy. 1 Dillon on Municipal Corporations. (5th Ed.) § 35; *County of Sacramento v. Chambers*, 33 Cal. App. 142, 146, 164 P. 613; *County of San Mateo v. Coburn*, 130 Cal. 636, 63 P. 78, 621; *Reclamation Dist. No. 1500 v. Superior Court*, 171 Cal. 672, 679, 154 P. 845; *Dillwood v. Riecks*, 42 Cal. App. 602, 607, 184 P. 35. (2) That, as a corollary of the foregoing proposition, 'the state may, through its Legislature, and in the exercise of its sovereign power and will, in all cases where the people themselves have not restricted or qualified such exercise of that power, apportion and delegate to the counties any of the functions which belong to it,' and, 'on the other hand, the state may take back and itself resume the exercise of certain functions which it had delegated to those local agencies.' *County of Sacramento v. Chambers*, 33 Cal. App. 149, 164 P. 616."

See *Reclamation District v. Superior Court*, 171 Cal. 672, 679, 680, 154 P. 845; *Watson v. Greely*, 67 Cal. App. 328, 337, 227 P. 664.

The case of *Reclamation District v. Superior Court*, supra, is illuminating upon the subject in hand, and thus it speaks in the language of Mr. Justice Sloss:

"The public building, roads, and bridges of a county are not the private property of the county in such sense as to authorize the county to object to the taking or damaging thereof by the state for public purposes. The counties are governmental agencies of the state (*County of San Mateo v. Coburn*, 130 Cal. 631, 63 P. 78, 621), and the property intrusted to their governmental management is public property. The proprietary interest in all such property belongs to the public, and if there be a legal title in the county, it is a title held in trust for the whole public (*Board of Education v. Martin*, 92 Cal. 209, 28 P. 799; *People v. Holladay*, 93 Cal. 241, 29 P. 54, 27 Am. St. Rep. 186; *Heffner v. Cass & Morgan*

Counties, 193 Ill. 439, 62 N. E. 201, 58 L. R. A. 353. In the absence of constitutional restrictions, the Legislature has full control of the property held by the counties as agencies of the state, and may dispose of that property without the consent of the county or without compensating it. *City of Edwardsville v. County of Madison*, 251 Ill. 265, 96 N. E. 238, 37 L. R. A. (N. S.) 101. Upon analogous principles, it has been established by a long line of decisions, in this state as well as elsewhere, that, except as restrained by constitutional limitations, the Legislature may alter the boundaries and extent of counties at will, may consolidate two or more into one, or divide and create new counties out of the territory of counties already existent. 'Upon the creation of a new county out of the territory of another, the Legislature, in the absence of constitutional restrictions, may make such provision with reference to the public property and debts, or their division, as to it may seem just. * * *' *Los Angeles County v. Orange County*, 97 Cal. 329, 32 P. 316; *Orange County v. Los Angeles County*, 114 Cal. 390, 46 P. 173; *Tulare County v. Kings County*, 117 Cal. 195, 49 P. 8; *Colusa County v. Glenn County*, 124 Cal. 498, 57 P. 477; *Riverside County v. San Bernardino County*, 134 Cal. 517, 66 P. 788; *Laramie County v. Albany County*, 92 U. S. 307, 23 L. Ed. 552."

See, also, cases cited in footnotes following section 1 of article 13 of the Constitution, p. 704 et seq., of Treadwell's fifth edition of the state's organic law.

It is thus readily to be seen that, when the state, through its Legislature, deals with the governmental affairs of counties, it deals with itself. As would be so in the case of principal and agent, as that relation is understood in the law governing contracts between private parties, the state may at any time, except in those instances in which the people themselves have in their Constitution interdicted legislative interference, confer upon or withdraw from the counties such of its sovereign powers as it may deem essential to the proper or convenient administration of its sovereign authority and duties. In line with this firmly established principle, the people have by their Constitution conferred upon the Legislature unlimited power in matters of taxation, except as restricted by the Constitution.

"This is one of the attributes of sovereignty which the people have placed in its [the Legislature's] hands; and they have intrusted its exercise to its discretion, either in the manner or to the extent to which it is to be applied. * * * For the purpose of apportioning this benefit, the Legislature may determine in advance what property will be benefited, by designating the district within which it is to be collected, as well as the property upon which it is to be imposed, or it may appoint a commission or delegate to a subordinate agency the power to ascertain the extent of this benefit. It may itself declare that the entire state is benefited, and authorize the burden to be borne by a public tax, or it may declare that all or a portion

of the property within a limited region is benefited, either according to its value or in proportion to its actual benefit, to be specifically ascertained by actual determination of officers appointed therefor." In *re Madera Irr. Dist.*, 92 Cal. 296, 324, 325, 28 P. 272, 279 (14 L. R. A. 755, 27 Am. St. Rep. 106); Const. art. 13, § 1.

[3] It is hardly necessary to say, in view of the principles above considered, and which are so well established as of the essence of our governmental polity that the doctrine of "due process of law" can have no application to any case growing out of section 3804b of the Political Code. As stated, the state, in dealing with matters appertaining to the administration of the governmental affairs of counties, deals with itself. As also in effect stated, the dominant thought at the bottom of section 3804b is to insure owners of property situated within the state unmolested enjoyment of their constitutional right to be protected against double taxation, and, as the state, in said section, seeks merely but justly to correct its own wrongs or those of its agents committed while engaged in fixing the tax burdens which must in particular years be borne by such property owners, the mode thus devised itself squares sufficiently with the juridical concept of the doctrine of "due process," etc., assuming, and only assuming, that that doctrine has any application to such proceedings as are authorized by the act in question.

We now come to the consideration of the proposition upon which the trial court planted its decision, to wit, that the proceeding in mandate instituted by the petitioner was barred by the statute of limitations and also by laches. Neither in its findings nor its conclusion of law does the court specifically declare by what particular provisions of the statute of limitations this action or proceeding in mandamus is barred. It will be noted, though, that the answer sets up section 338, subd. 1, and section 343 of the Code of Civil Procedure, as in bar of the several causes of actions set forth in the petition, and the discussion of the points thus made by respondents by the court in its written opinion indicates that it was upon section 338 that the court below based its conclusion that the several causes of action pleaded in the petition were barred.

Section 338, subd. 1, of the Code of Civil Procedure, declares that "an action upon a liability created by statute, other than a penalty or forfeiture," shall be commenced within three years (after the cause of action shall have accrued—see section 312 of said Code).

Section 343 provides:

"An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

Respondents, in their brief, as did the trial court in its written opinion, proceeding upon

the hypothesis that the relief herein demanded "is based upon a liability created by statute," contend, as the court held, contrary to the position of petitioner that its right to commence this proceeding did not arise until the demand for the cancellation of the assessments was made to the board of supervisors, that, as to the present proceeding, the statute of limitations began to run from the time of the operative effect of section 3804b of the Political Code. In other words, the theory of the decision below is that petitioner's right to the relief herein sought accrued on the 27th day of July, 1917—the effective date of section 3804b of the Political Code—and that, while the petitioner was required to file its demand and proof of payment of taxes on the lands in question for the years designated in the petition with the board of supervisors before it would be entitled to the writ herein sought, such filing was "merely a step in the enforcement of petitioner's remedy," which became available to it immediately upon the going into effect of said section, and should have been invoked within the period of time prescribed by the statute of limitations appropriate to such a case as this. This conclusion, it is asserted, is supported by the following cases: *Harby v. Board of Education*, 2 Cal. App. 418, 83 P. 1081; *People v. Cal. Safe Deposit & Trust Co.*, 41 Cal. App. 727, 731, 183 P. 289; *Barnes v. Glide*, 117 Cal. 1, 8, 48 P. 804, 59 Am. St. Rep. 153; *County of San Luis Obispo v. Gage et al.*, 139 Cal. 398, 404, 73 P. 174; *Wittman v. Board of Police Commissioners*, 19 Cal. App. 229, 231, 232, 125 P. 265; *Jones v. Board of Police Commissioners*, 141 Cal. 96, 97, 74 P. 696.

In *Harby v. Board of Education* a writ of mandate was petitioned for, and directed to, the board of education of the city of San Francisco, to compel said board to restore petitioner to the position of vice principal of a grammar school of said city, from which position she had, over 3 years previous to the application for the writ, been removed by said board. A demurrer to the petition upon the general ground and on the further ground that the proceeding was barred by section 338, subd. 1, of the Code of Civil Procedure, was sustained. On appeal, the judgment was sustained upon the ground that the action was barred by the provisions of said section 338, subd. 1. The wrong, if any, committed against the petitioner in that case was in the act of removal by the board of education, and, thereupon, and immediately, there accrued to her as against the board a right of action to have the wrong, if any, redressed, or to have restored any right of which thus she had been deprived. No demand upon the board of education to restore her to the position was required to entitle her to appeal to the courts for relief. The same is true (and, in line with the *Harby* Case, the Supreme Court so held) in the

cases of *Wittman v. Board of Police Commissioners* and *Jones v. Police Commissioners*. In those cases the petitioners were by the commissioners removed from membership of the police department of the city of San Francisco, in the first-named case the chief of police and in the last-named, a patrolman. In each of those cases, a period of over 3 years elapsed between the date of the act of removal and the date upon which the petitioner applied for a writ of mandate to compel the board of police commissioners to restore the applicant for the writ to the position in the department from which he had been ousted. As stated, in each case, the Supreme Court, on appeal, properly held that the statute had run against the right of the petitioner to maintain the action. Obviously, those cases are no different from the ordinary cases in which the gist of the action is in some specific wrongful act, as for instance, where a contract has been breached or a tort committed, immediately upon the breach of the contract or the commission of the tortious act, a right of action accrues to the injured party against the wrongdoer.

The other cases cited by respondents and hereinabove named disclose a situation somewhat different from that of the three cases just briefly examined. In some of those cases a preliminary step by way of a demand upon some administrative or other body or tribunal to perform an act falling within the scope of the official duties thereof was required to be taken as a condition precedent to the right of the interested party to maintain an action against said body or tribunal to compel it to do or perform the act. One of said cases may be specially noticed herein as precisely illustrative of the position of respondents. In *Barnes v. Glide*, supra, the following language from *Prescott v. Gonser*, 34 Iowa, 179, is quoted and by that case approved:

"That the action of mandamus cannot be maintained until there has been a refusal to perform the official duty sought to be enforced is true, but to hold that a plaintiff who has a right to demand performance at any time may delay such demand indefinitely would enable him to defeat the object and purpose of the statute. It is certainly not the policy of the law to permit a party against whom the statute runs to defeat its operation by neglecting to do an act which devolves upon him in order to perfect his remedy against another. If this were so, a party would have it in his own power to defeat the purpose of the statute in all cases of this character. He could neglect to claim that to which he is entitled for even 50 years unaffected by the statute of limitations, thereby rendering it a dead letter."

The case of *People v. Cal. Safe Dep. & Trust Co.*, particularly stressed here by respondents, involved a proceeding commenced on December 7, 1907, in the name of the people of the state of California on the complaint of the state bank commissioners, under

the provisions of the Bank Act (St. 1903, p. 365, as amended St. 1905, p. 304), for the purpose of securing the appointment of a receiver for the liquidation of the affairs of the said Safe Deposit & Trust Company. A receiver was appointed by the court, and on July 28, 1917, while the proceeding was still pending, one Smith applied for and was granted leave by the court to file a petition in intervention to obtain judgment against the Trust Company for a large sum of money alleged to be due him upon certain contracts executed by the bank prior to the commencement of the proceeding. A demurrer was filed interposing, among others, the objection that the right to litigate the claim set up in the complaint in intervention was barred by section 337, subd. 1, of the Code of Civil Procedure. The petitioner in intervention contended that the running of the statute was suspended by reason of the receivership proceeding, and that the statute did not run for the reason that his proceeding in intervention "could have been maintained only by leave of the court first had and obtained"; that the running of the statute, therefore, began with the making of the order granting him leave to intervene. The trial court sustained the demurrer on the ground that the intervention or any right of petitioner to maintain an action for the enforcement of the indebtedness of the bank to him was barred by the section of the Code named in the demurrer. The case being appealed, the appellate court affirmed the judgment, holding and declaring (as it could not logically otherwise be held) that petitioner's cause of action accrued to him prior to the application for leave to intervene—that "the statute commences to run from the time when the wrong complained of was done, and not from the time of obtaining leave to sue."

It is not necessary to refer specifically herein to the other cases cited by respondents upon the question in hand. We are satisfied that none of them is to be accepted as the criterion for the determination of that question in the instant case. They have application to the case at bar so far only as they hold that the statute appropriate to the particular case begins to run, as a general rule, from the date of the refusal by public officers to perform the act required of them as such officers by law. But the problem here is to be solved, not by analogy, but upon the solution of the question whether the Legislature intended that a taxpayer seeking relief under section 3804b should be limited as to the time within which to proceed, except the limitation which may be implied from the provision in the section that the application must be made before the lands affected are sold by the state.

We have seen that the established policy of the state is to make the burden of supporting the government as nearly equal as is possible (Const., art. 13, § 1), and that, in con-

sequence of that policy, the design of the state, as evidenced by its revenue system, is to afford an owner of property upon which a double assessment has been levied for the same year and the same purpose—that is, for the support of the same government—legal means for securing relief from such double taxation in any case where it might occur. The section of the Political Code in question was, as is obvious, designed to afford a mode for such relief in a particular situation. When the state, through its Legislature, provides a scheme or procedure for the relief of property owners in such instances, it does not intend that the aggrieved property owner, when he finds it necessary to invoke the remedy for such relief thus provided for, shall be unreasonably hampered by the interposition of objections which are founded upon ultratechnical considerations.

[4] A proceeding established for the purpose of affording such relief must, of course, be substantially followed as the Legislature has created it. On the other hand, reasonable liberality in the construction of the statute establishing such proceeding should be the rule, to the end that the owner of property subject to taxation may not be compelled to pay more than is justly due from him to the government. And that it has ever been a matter of serious concern to the lawmaking department of the government that no person or set of persons should be discriminated against, either purposely or innocently, by the public officers charged with the levying and the collection of taxes for public purposes, is clearly evidenced by the numerous provisions of our revenue laws giving the taxpayer reasonable opportunity for preventing, as far as may be, the imposition upon him of a tax burden unequal and unjust, when compared to the like burden likewise imposed upon others, and also for preventing the sacrifice of his property for inconsiderable sums falling due as the result of delinquency in the payment of the tax imposed upon his property for the general purposes of the government. For instance, the board of supervisors of each county is required to meet at a stated time for a stated period in every year, to sit as a board of equalization for the purpose of hearing any complaints which may be made by taxpayers regarding the assessment of their property, and thus review, and correct, where inequality in the levy has been shown, the assessment as made and returned by the assessor. Again, even after real property has, by operation of law, been sold to the state by reason of delinquency upon the part of the owner in the payment of the tax assessed thereon, such owner, or any party in interest, is allowed 5 years from the date of such sale within which to redeem the property. Pol. Code, §§ 3780 and 3817. And so running all through our system of revenue

laws are provisions clearly indicating that it is the policy of the state not only to apply, in distributing among property owners the burdens of taxation, the element of equality, as far as such equality may be practicable in the contrivement of a scheme for supplying the government with the requisite revenue which is always beset by great and sometimes insurmountable difficulties, but also to give to a delinquent taxpayer every reasonable opportunity, compatible with the just rights of the state in the premises, to redeem his property before it is finally sold by the state, perhaps, in some instances, far below its actual value. All these matters are mentioned for the purpose of showing that it was the design of the Legislature, in framing and enacting the state's revenue laws, to present a system which would fully conserve the just rights of the state in the matter of the collection of public revenues and at the same time afford like protection to taxpayers against oppressive exactions when required to respond to their duty to the government in that particular; that, to accomplish that important purpose, it was, and at all times is, the intention of the Legislature to establish, in substantially complete detail, the various steps to be taken, or the proceedings and the procedure to be followed, and not to leave any essential matter in connection therewith to inference or conjecture, or to be worked out by analogy, unless, in the latter case, the principle invoked is so near applicable to the instant situation as to justify adopting it where otherwise either the rights of the state or those of the taxpayers may be forfeited or lost.

[5] Of course, it is a settled rule in the construction of statutes relating to taxes, or which are designed for the raising of revenue for the support of the government, that the obvious intention and meaning of the Legislature should be given effect where the language will permit it, rather than to adhere too strictly to the letter, but, as is well said by Judge Cooley, in his work on Taxation (3d Ed.) pp. 363, 364:

"If there should be any leaning in such cases it would seem that it should be in the direction of the presumption that everything is expressed in the tax laws which was intended to be expressed. The laws are framed by the government for its own needs, and, if imperfections are found to exist, the Legislature, in the language of Mr. Dwaris, 'is at hand to explain its own meaning, and to express more clearly what has been obscurely expressed.' But there can be no propriety in construing such a law either with exceptional strictness amounting to hostility, or with exceptional favor beyond that accorded to other general laws. It is as unreasonable to sound a charge upon it as an enemy to individual and popular rights, as it is to seek for sophisticated reasons for grasping and holding by its authority every subject of taxation which the drag-net of the official force has brought within its supposed compass. The construction, without bias or prejudice, should seek the real intent of

the law; and if the leaning is to strictness, it is only because it is fairly and justly presumable that the Legislature, which was unrestrained in its authority over the subject, has so shaped the law as, without ambiguity or doubt, to bring within it everything it was meant should be embraced."

[6, 7] It is not and will not be claimed, nor do the cases cited by respondents so hold, that the statute of limitations, as a part of our system of procedural law governing the trial and the disposition of actions and proceedings in courts of justice, has any application to proceedings of which boards of supervisors or other governing or administrative boards have cognizance by virtue of the laws creating them and fixing their duties and powers. Section 3804b does not itself fix any period of time within which the owner of real property doubly assessed for the same year and for the same purpose may proceed under its provisions, save and except that, as before pointed out, he must make his application and proof before the state has sold such property. Keeping in mind the animating principle of statutes limiting the period of time within which actions at law must be brought to save the right sought in such actions to be judicially asserted, it is difficult to reconcile the omission by the Legislature to provide specifically in section 3804b or in some other section of the general revenue laws a time limit within which a taxpayer may apply to the board of supervisors for the cancellation of the assessment of his real property upon which the taxes on an assessment levied on the same property for the same year and purpose have previously been paid, upon any other theory than that the state lawmaking body intended, *ex industria*, not to place any limitation upon the taxpayer in that respect other than the limitation to be implied from the provision contained in the section that he must apply to the board of supervisors for the relief afforded thereby before the property involved is sold by the state. The basic principle of statutes of limitations is that they are statutes of repose, "the object of which is to suppress fraudulent and stale claims from springing up at great distances of time and surprising the parties or their representatives when all proper vouchers and evidences are lost or the facts have become obscure from the lapse of time or the defective memory or death or removal of witnesses." 37 C. J. pp. 684-686. In the instant case, the tests appropriately admitting of a provision limiting the taxpayer to a specified period of time within which to initiate proceedings to secure the relief provided by section 3804b are wholly wanting. All the essential facts forming the foundation for the relief authorized by the section are permanent public records. No question of "obscurity of the facts" through the erosive influence of time or of death or removal of witnesses or of the

treachery of human memory, can arise or enter into the proceeding. The facts may be shown as easily, readily, and accurately 20 years or more after the assessment and the sale have been made as they can be a month thereafter. This consideration is singularly significant when looking for the reason or reasons why the Legislature omitted to fix in the statute a time limit within which property owners aggrieved, as the section contemplates, should proceed to secure the relief afforded thereby. Besides all this, the prime desideratum, so far as the state is concerned in the matter of taxation, is to secure the payment of the taxes which constitute the revenue necessary for the support of its government, and, furthermore, as pointed out above, to enable the delinquent taxpayer to secure a return to him of his property.

[8, 9] The foregoing applies with equal cogency to the proposition, accepted by the trial court, that the right to have the assessments involved herein canceled is barred by laches. This is an equitable defense and is analogous to the statute of limitations as applicable to actions at law (and also under our present system—the reformed procedure—by virtue of statutory provisions applicable to suits in equity). But one of the essentials of the defense of laches is that the party pleading it must show that he has suffered or will suffer substantial prejudice by the long delay in bringing the action or suit. It is perfectly clear from what has already been said that no prejudice to the state can follow from the act of canceling an assessment which will result in imposing upon the owner of real property a double tax upon the same property for the same year and the same purpose. In fact, the fact itself of the enactment of section 3804b is a direct recognition by the state itself of the proposition that, rather than resulting in prejudice to it, the enforcement of the remedy thus afforded to property owners under the circumstances contemplated by the section will promote the ends of simple justice both to the state and such owners.

In addition to the considerations to which the discussion has thus far been confined, it may be suggested that, in the last analysis, the remedy provided by said section involves, in effect, nothing less than a summary mode for quieting the title or to remove a cloud from the title to the lands concerned. Indeed, it would seem to be logical to hold that, since it is plainly the intent of the section that the duty of the supervisors is to order the cancellation of an assessment subsisting upon real property which would, if enforced, have the effect of subjecting such property to double taxation for the same year and purpose, regardless of whether such property is or is not situated in the county in which such assessment has been levied, the owner of such land could maintain an action,

at any time before a sale of such property is made by the state, to quiet the title thereto or to remove therefrom the cloud upon such title occasioned by such assessment, and, in such case, secure the relief so sought without being required, as a prerequisite thereto, as equity would under certain circumstances so require in cases of the same technical character, to pay the taxes embarrassing the title. But however that all may be, we are firmly persuaded that, for the reasons hereinabove set forth, the judgment is erroneous and must therefore be reversed.

[10] The court below, as has been shown, expressly found that all the facts stated in the petition for the writ herein sought were and are true. It therefore follows that the found and established facts in the case are: That the lands were assessed by the county of Sierra for county purposes and for the years designated in the petition and in due time on the default of the owner to pay the taxes on said assessments were sold to the state by said county; that the same lands were, for the same years and for the same purpose, assessed in the county of Nevada; that the petitioner paid to the last-named county all the taxes called for by the assessments levied by it for said years; that petitioner in due legal time presented, with the tax receipts from the proper officer of Nevada county showing the payment of said taxes, its petition to the board of supervisors of Sierra county, praying for the cancellation of said assessments so levied by said county and of the certificates of sale of said property to the state; and that said board of supervisors refused to grant said application.

Accordingly, the judgment appealed from herein is reversed, and the court below is directed to enter upon the facts stated in the petition and upon its findings its judgment granting the writ of mandate as prayed for in the petitioner's petition.

We concur: FINCH, P. J.; PLUMMER, J.

84 Cal. App. 743

COCHRAN v. BROWN et al. (Civ. 5820.)★

District Court of Appeal, First District, Division 2, California. Aug. 6, 1927.

Hearing Denied by Supreme Court Oct. 3, 1927.

1. Street railroads §81(5)—Street car, driven rapidly towards crossing at night without lights and other warning, is negligently operated.

A motorman operating a street car and approaching a street crossing must exercise the degree of care which a reasonable person would exercise under similar circumstances, and a street car traveling rapidly towards a public crossing in the dark of the night without lights or other warning of approach is not operated with such care.

2. Trial ⇐296(3)—Instruction that motorman of street car approaching crossing must give reasonable warning held not prejudicial in view of instructions requiring finding of negligence.

In an action for personal injuries sustained by occupant of automobile when it was struck by electric interurban car at crossing in city, instruction that motorman was bound, when approaching a public crossing, to give reasonable warning to travelers as by blowing whistle or ringing a bell, or if operated at night by having a suitable light on the front part of the car, held not prejudicial, in view of other instructions requiring the jury to find negligence before finding verdict for plaintiff and defining negligence.

3. Street railroads ⇐117(29)—Occupant of automobile, struck by street car at crossing at night, held not guilty of contributory negligence as matter of law.

In an action for personal injuries sustained when an automobile, on which side curtains were fastened to keep out the rain, was struck at a public crossing in the city on a dark night by an electric interurban car, occupant of automobile held not guilty of contributory negligence as a matter of law.

4. Parties ⇐96(5)—Defendant waived objection that it was made party by amended complaint after demurrer to original complaint without leave, where it proceeded to trial without objection (Code Civ. Proc. § 473).

Defendant's objection that it was made a party by an amended complaint after demurrer to the original complaint was filed, and this without leave of court, as required by Code Civ. Proc. § 473, held to have been waived, where defendant had demurred to the amended complaint, answered, and proceeded to trial without raising the objection.

5. Appeal and error ⇐1004(1)—Damages ⇐96—Amount of damages for injuries is for jury; verdict is not reviewable in absence of passion or prejudice.

The question of what is a reasonable amount of damages for personal injuries is one for the jury and will not be controlled by the appellate court unless the record shows that the verdict was the result of passion or prejudice.

6. Damages ⇐130(1)—\$3,000 for cut over eye and fracture of rib held not excessive.

\$3,000 for cut over eye and fracture of one rib, confining plaintiff to hospital for not over 6 weeks and entailing medical expense of not over \$202.05, held not excessive.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action for personal injuries by Francis J. Cochran against E. N. Brown, the United Railroads of San Francisco, and the Market Street Railway Company. From a judgment in favor of defendant Brown and against the other defendants, the latter appeal. Affirmed.

Wm. M. Abbott and K. W. Cannon, both of San Francisco, and Ross & Ross, of Redwood City, for appellants.

Joseph J. Bullock, of Redwood City, for respondent.

NOURSE, J. Plaintiff sued the defendant Brown and the two defendant railroad corporations for personal injuries suffered in a collision between an interurban car operated by the corporations and an automobile operated by the defendant Brown, and in which the plaintiff was riding as Brown's guest at the time of the collision. The cause was tried before the court sitting with a jury and resulted in a verdict in favor of the plaintiff in the sum of \$5,000 against the two railroad corporations, and in a verdict absolving defendant Brown from liability. While the motion of the railroad corporations for a new trial was pending, the trial court reduced the judgment to \$3,000, and upon plaintiff's waiver of the excess over that amount the motion for a new trial was denied. From this modified judgment the railroad corporations have appealed upon a bill of exceptions.

The collision occurred at about midnight on December 17, 1922, while the plaintiff, riding with the defendant Brown in the latter's automobile, was attempting to cross Ellsworth avenue, in the city of San Mateo, at the intersection of Tilton avenue. At that time, and for a long time prior thereto, the defendant corporations were operating an interurban electric car line over Ellsworth avenue, running from San Mateo to San Francisco. As plaintiff and his companion were crossing the track at this intersection, an electric car struck the right rear wheel of their automobile and carried it across the intersection, causing personal injuries to the plaintiff, which are the subject of this suit. At the time it was raining heavily and Brown had isinglass curtains on the right side of his car where the plaintiff sat. When the electric car turned into Ellsworth avenue, about a block distant from the point of the accident, the trolley became disconnected, causing the lights to go out on the car. The trolley was replaced, but as the car proceeded along Ellsworth avenue towards Tilton the same thing occurred again. Both the plaintiff and defendant Brown testified that they looked to their right before proceeding across Ellsworth avenue, and that they did not see the car approaching. It was the theory of the plaintiff and the defendant Brown throughout the trial that they were run down by the electric car, which was proceeding immediately before the accident in total darkness; that the isinglass in the curtains on their automobile had been recently cleaned and afforded a good vision which would have enabled either of them to have seen the car if it had approached with the lights burning;

and that the sole proximate cause of the accident was the negligence of the defendant corporations in operating the car across the street intersection without lights or without other suitable warning. We should not be understood as implying that the evidence was not in conflict, but there was substantial and competent evidence tending to support every element of the theory upon which the plaintiff relied, and this evidence fully supported the verdict of the jury.

Criticism is made of the instruction given by the trial judge to the jury, which reads:

"I further instruct you that it was the duty of the motorman in charge of the car of the defendant, when approaching a public crossing, to give notice of the approach by a reasonable warning, as by blowing a whistle or ringing a bell or by such other device as might be sufficient to give timely warning to travelers of the approach of the car, and if operated at night, by having a headlight or other suitable light on the front part of said car, so as to afford time for such travelers to stop in a place of safety."

The instruction is not one which can be approved generally, but we think that the objection to it goes more to the verbiage than to the substance. What the trial court apparently intended to advise the jury was that it was the duty of the corporations to operate the car with ordinary care and precaution for the purpose of avoiding others using the public streets, and that in the exercise of this ordinary care a reasonable person would give some warning in approaching a street intersection in the dark of the night in order to afford others time to stop in a place of safety. We do not understand the instruction to mean that any statute or ordinance applicable to the case required the operator of the electric car to blow a whistle or display a headlight, but we do understand it to mean that reasonable prudence would dictate that some suitable warning should be given when approaching a public crossing.

[1] "Such timely warning of the approach of a street car must be given as to enable others to avoid any danger from it, and the nonperformance of such duty in approaching such street crossing intended to be crossed is evidence of negligence." 25 R. C. L. § 107. "Because of the greater speed with which the vehicles of a street railway move, and the little noise attending their progress, it is negligence to propel cars through public streets after dark, unless they are provided with lights sufficient to notify travelers on the street of their coming, and to put such travelers on their guard against collision." *Idem*. The cases cited by the text emphasize the fact that the degree of care required to be exercised by the motorman is only that which a reasonable person would exercise under similar circumstances, and that from all the experiences of mankind an electric car traveling rapidly over a public street in the dark of the night, without lights and

without other warning of its approach, is not being operated in the manner in which a reasonable and prudent person would operate it under those circumstances. As said in *Shea v. P. & B. V. R. R. Co.*, 44 Cal. 414, 427:

"The degree of prudence required of a party is dependent on the nature of the agency employed, as well as the time, place, and circumstances of its employment. In running a car loaded with earth on a down grade, in the night, with few lights in the immediate vicinity, a reasonable person would exercise a greater degree of care than he would in running a car where it would more readily be controlled, and in the daytime; and such prudence would not, in any respect, fall short of a reasonable prudence. It would be such prudence as a reasonable man would, under such circumstances employ, in order to avoid accidents and injuries to the persons and property of others."

[2] Taking the instruction with those later given, to the effect that the question whether the electric car was operated with ordinary care under the circumstances, was one for the jury, that negligence is the omission to do something which an ordinarily prudent person would have done under the circumstances, and that in any event the jury could not find a verdict against the railroad corporation unless they found the motorman was guilty of some negligence or carelessness in the operation of the car and that such negligence could not be presumed from anything which was before the jury, we are satisfied that the instruction complained of was not prejudicial.

[3] It is argued on the part of the appellants that the respondent was guilty of contributory negligence as a matter of law because he knew that the appellants were in the habit of operating their electric cars upon that street, and that his vision was obscured by the rain-covered isinglass curtain. *Finkle v. Tait*, 55 Cal. App. 425, 203 P. 1031, is cited in support of this theory, but the case is not in point because both the respondent and his companion testified that the isinglass curtain did not obscure their vision, that they looked to the right before approaching the car track, and that if the car had been carrying a light they would have been able to see it through the curtain. The jury was fully instructed upon the issue of contributory negligence. The evidence upon that issue was in some conflict, and it was its province to resolve that conflict. Their is nothing in the case which, under any conceivable theory, would support a conclusion that the respondent was guilty of contributory negligence as a matter of law.

[4] It is argued that the case was not at issue because the respondent had filed an amended complaint bringing in the Market Street Railway Company as a party defendant after a demurrer had been filed to the original complaint, and that this was done without first having obtained leave of court

as required by section 473, Code of Civil Procedure. The amended complaint was served on the two defendants included in the original complaint and upon the Market Street Railway Company on October 20, 1923, and on the same day the railway corporations filed their joint demurrer to the amended complaint, which was overruled January 3, 1924. Thereafter the same defendants filed their joint answer to this amended complaint, but have not at any time prior to filing their brief on this appeal raised the point that the Market Street Railway Company was not properly joined as a party defendant. In demurring to and answering the amended complaint and in proceeding with the trial without objection this defendant must be deemed to have waived any irregularity in the manner in which it was made a party defendant.

[5, 6] Finally, it is argued that the verdict is excessive because it was shown that the respondent has suffered no permanent injuries from the accident; that he merely suffered a cut over one of his eyes and the fracture of one of his ribs, all of which confined him to a hospital for not over 6 weeks, and entailed a total expense for medical treatment of not more than \$202.05. The question of what was a reasonable amount of damages to be allowed was one to be determined by the jury and cannot be controlled by the appellate court unless it appears from the record that it was the result of passion or prejudice. Appellants do not argue that such is the case here, but it is their contention that, because the respondent was a cripple from an accident received a number of years prior to this accident, the amount of the verdict in this case was the result of sympathy on the part of the jury for respondent's general condition. The difficulty of appellants' argument is that it is a theory which cannot be proved, and there is, therefore, nothing in the record which would justify this court in disturbing the verdict as modified by the trial judge.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

85 Cal. App. 180

HUME v. LINDHOLM. (Civ. 4816.)

District Court of Appeal, Second District, Division 1, California. Aug. 13, 1927.

1. Appeal and error $\S$ 607(1)—Request for transcript more than 10 days after actual notice of entry of judgment was not made in time (Code Civ. Proc. § 953a).

Request for transcript, having been made more than 10 days after actual notice of entry

of judgment, though within 10 days from time of service of notice, was not made within statutory time, under Code Civ. Proc. § 953a, and transcript could not be considered as part of record on which to consider appeal from judgment.

2. Appeal and error $\S$ 607(1)—Where transcript of testimony taken on trial was not requested in time, but transcript of testimony on motion to set aside judgment was, appeal from order denying motion to vacate could be considered (Code Civ. Proc. § 953a).

Where request for transcript of testimony taken on trial was not made within 10 days of actual notice of entry of judgment, as required by Code Civ. Proc. § 953a, but request for transcript of testimony on motion to set aside judgment was made within proper time and two certified transcripts were furnished on denial of motion to vacate, one by judge trying case and the other by judge denying motion, appellate court could consider appeal from order denying motion to vacate judgment.

3. Judgment $\S$ 270—Findings of fact and conclusions of law did not constitute "judgment" (Code Civ. Proc. § 664).

Under Code Civ. Proc. § 664, providing that in no case is a judgment effectual for any purpose until it has been entered, findings of fact and conclusions of law did not constitute "judgment."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judgment (In Law).]

4. Trial $\S$ 400(1)—Legal conclusions before entry of judgment remain subject to change by court.

Legal conclusions before entry of judgment remain subject to change by trial court on its own motion.

5. Judgment $\S$ 272—Statute requiring entry of judgment immediately upon filing of decision is directory only, and judgment can be entered thereafter (Code Civ. Proc. § 664).

Although Code Civ. Proc. § 664, required entry of judgment immediately upon filing of findings of fact and conclusions of law, statute is directory only and judgment could be entered thereafter.

6. Trial $\S$ 400(2)—Court could amend legal conclusion that plaintiff was entitled to judgment on condition that he deliver deeds within 20 days, by extending time for surrendering deed, without notice to defendant.

Court could modify legal conclusion that plaintiff was entitled to judgment for certain sum upon condition that plaintiff surrender certain deed within 20 days, so as to permit delivery of deed for cancellation more than year later, without notice to defendant.

7. Trial $\S$ 400(2)—Findings of fact cannot be changed in material manner without notice.

Findings of fact cannot be changed in material manner without notice.

8. Estoppel ¶63—Where legal conclusion stated that plaintiff was entitled to judgment on condition that he surrender deed within 20 days, plaintiff, retaining deed for over year during which property was sold for taxes, was not estopped from having legal conclusions modified as to time of surrendering deed.

Where court found that defendant was indebted to plaintiff in sum of \$800.40 and that plaintiff had not accepted deed in payment thereof and owned no right, title, or interest in or to property and ordered defendant's title to property described in deed quieted, and legal conclusion stated that plaintiff was entitled to judgment for \$800.40 on condition that plaintiff surrender deed within 20 days, plaintiff, retaining deed for 1 year and 7 months during which time property was sold for taxes, was not estopped from having legal conclusions modified as to time of delivering up deed for cancellation.

9. Appeal and error ¶901—One appealing has duty to inform appellate court of errors affecting judgment.

One appealing from judgment has duty to inform appellate court of any errors affecting judgment.

Appeal from Superior Court, Los Angeles County; W. P. Cary, Judge.

Action by Leeanna M. Hume against Albert L. Lindholm for the money due upon a contract. From the judgment, and from an order denying his motion to set aside the judgment, defendant appeals. Affirmed.

Luter, Barry & Kinder, of Los Angeles, for appellant.

Nolan, Rohe & Freston and Ralph E. Lewis, all of Los Angeles, for respondent.

YORK, J. The defendant has appealed from the judgment rendered against him and from an order denying his motion to set aside the judgment. Because of another appeal by plaintiff, it may avoid confusion if we refer to the parties to this appeal as plaintiff and defendant.

The action is for money due on contract. A decision was announced by the trial court in favor of plaintiff on submission of the case on May 23, 1922, and plaintiff's attorneys were directed to prepare findings. The decision announced from the bench was "in favor of plaintiff and against the defendant for the sum claimed." The sum claimed was \$800.40, with interest at 7 per cent. per annum from July 30, 1921.

But the findings of fact and conclusions of law were not filed until August 16, 1922. Those findings declared, among other things, that under the terms of a certain contract between plaintiff and defendant, the defendant promised to pay plaintiff \$800.40, with interest at 7 per cent. per annum from July 30, 1921; that the defendant in attempting to liquidate his said indebtedness to plaintiff delivered to her a grant deed dated August

11, 1921, purporting to convey to her certain described real estate; that plaintiff never accepted said deed "nor recorded same, but still has possession thereof"; that no part of said \$800.40 has been paid or any interest thereon.

As conclusions of law the court found that plaintiff was entitled to judgment against the defendant for the sum of \$800.40, together with interest thereon at the rate of 7 per cent. per annum from July 30, 1921, "upon condition that plaintiff surrender and deliver up to the clerk of this court for cancellation the deed hereinabove described within 20 days from the date hereof; that defendant is entitled to judgment against plaintiff; that plaintiff has no right, title, or interest in or to the real property described in said deed."

On the 26th day of March, 1924, a judgment was entered on said findings and legal conclusions in accordance therewith, except that said judgment was "upon condition that plaintiff surrender and deliver up to the clerk of this court for cancellation upon the filing of this judgment a certain grant deed dated August 11, 1921, wherein defendant is named as grantor and plaintiff as grantee, and that the said finding of fact and conclusion of law imposing the condition that said deed above mentioned be delivered within 20 days from the date of said findings, be and the same is hereby amended so as to permit the delivery of said deed to the clerk * * * for cancellation upon the filing of the judgment." The judgment quiets defendant's title to the land described in the deed as provided in said conclusions of law originally filed. The deed was filed with the clerk in accordance with said judgment. The defendant on May 2, 1924, served and filed a notice of motion to set aside said judgment on the ground that said deed was not delivered to the clerk of said superior court within the said period of 20 days and not until March 24, 1924; that defendant was not given any notice of said amendment of said findings of fact and conclusions of law and of the signing of said judgment until April 29, 1924; that subsequent to the expiration of 20 days after March 21, 1922, said property had been sold for taxes and said property had greatly depreciated in value; that interest had accrued on said sum of \$800.40; that plaintiff by not depositing said deed with the clerk for cancellation within the time specified in said findings and legal conclusions made on August 16, 1922, became estopped to have said findings and conclusions amended; also, that plaintiff by not filing said deed with the clerk had elected to accept the same in satisfaction of said claim.

The motion to set aside the judgment was denied on May 14, 1924. On May 24, 1924, defendant served and filed a notice of appeal

to this court from said judgment and from the order denying defendant's motion to set aside said judgment. On the same day the defendant requested of the clerk of the superior court a transcript of the testimony offered or taken on said trial and on said motion to set aside the judgment. The transcripts were prepared and certified.

Plaintiff contends that said transcript on said appeal from the judgment and from said order, not having been requested within 10 days of the defendant's notice of entry of judgment should not be considered on the appeal from the judgment. Defendant shows that the transcript was requested within 10 days from the time when plaintiff served notice of entry of judgment, and contends that the service *only* of that notice fixed the time from which the 10 days provided in section 953a, Code of Civil Procedure, commenced to run.

[1] The affidavit of defendant filed on May 2, 1924, in support of his motion to vacate the judgment shows that he had at that time actual notice of the entry of the judgment. Defendant's request for a transcript having been made more than 10 days after said actual notice, we hold that the request for the reporter's transcript was not made within the statutory time as to the judgment, and therefore cannot be considered as a part of the record on which to consider said appeal from the judgment. *Spear v. Monroe*, 181 Cal. 728, 186 P. 149; *Brown v. Superior Court of Los Angeles County*, 175 Cal. 141, 165 P. 429.

[2] But on the denial of the motion to vacate the judgment there are two certified transcripts, one by the judge who tried the case and the other by another judge who denied the motion. We have before us a sufficient record for the consideration of the appeal from the order denying the motion to vacate the judgment. Defendant's appeal from that order is based principally upon his contention that the trial court had no right to modify the legal conclusion wherein a condition was imposed that plaintiff should surrender said deed for cancellation within 20 days from the filing of the findings of fact and conclusions of law, without notice to defendant.

[3, 4] The findings of fact and conclusions of law did not constitute a judgment. "In no case is a judgment effectual for any purpose" until it has been entered. Section 664, Code Civ. Proc. Legal conclusions, before the entry of a judgment, remain subject to change by the trial court. It is within the power of the court of its own motion to change them. Should a judge conclude before the entry of a judgment that the conclusions of law are erroneous, it is not only his right, but his duty in the proper administration of justice to change them to conform to the law in accordance with the facts found. 14 Cal. Jur., p. 938; Consolidated

Constr. Co. v. Pacific Electric R. Co., 184 Cal. 244, 249, 193 P. 238.

[5] While the entry of the judgment should have been made immediately upon the filing of the findings of fact and conclusions of law (section 664, Code Civ. Proc.), that law is directory only, and the judgment can be entered thereafter. Although neglect to enter judgments should not be encouraged, the court does not lose jurisdiction to order a judgment entered long after that time as was done in this case. Furthermore, the findings determined that the deed had not been recorded and was not accepted by plaintiff, and that the plaintiff had no interest in the land described therein.

[6, 7] The contention of appellant that the court erred in modifying its legal conclusions as to the time of required surrender of the deed without notice to him cannot be sustained. Under such circumstances, the court has the inherent right to correct those legal conclusions. The case of *Wunderlin v. Cadoogan*, 75 Cal. 617, 17 P. 713, cited by appellant, is not in point. It is true that findings of fact cannot be changed in a material manner without notice. The case of *Crim v. Kessing*, 89 Cal. 478, 26 P. 1074, 23 Am. St. 491, is more nearly in point. In that case, although the findings of fact and conclusions of law are referred to as a "decision" and a "judgment," it is not held that they were conclusive on the inherent powers of the court until the entry of the judgment. Indeed, this position is made clear by the Supreme Court in the statement on page 486 of the opinion in that case, wherein the court says:

"All courts of record have the inherent power to correct their records so that they shall conform to the actual facts, and speak the truth of the case; and such correction may be made at any time, either upon the motion of the court itself, or at the instance of any party interested."

In that the case, the judgment entered required the sale of mortgaged property although not provided for in the findings. *Condee v. Burton*, 62 Cal. 1.

Here no findings of fact were changed. Indeed, no change was made in the legal conclusions touching the merits of the action. The surrender of the deed was required and was made. The plaintiff had judgment for \$800.40, and defendant had a judgment quieting his title to the land, and it is apparent from the testimony he could have had the deed at any time on requesting it from Mr. Nolan, plaintiff's attorney.

[8] The further point made by appellant that by respondent retaining said deed for 1 year and 7 months and apparently accepting the same, and permitting said property to be sold for taxes, that respondent was therefore estopped from having any modification from the legal conclusions is inconsistent with the facts. The court found that defend-

ant was indebted to plaintiff in the sum of \$800.40, and that plaintiff had not accepted said deed and owned no right, title, or interest in or to the property therein described, and ordered defendant's title to the property described in the deed quieted. It was therefore the duty of defendant, and not plaintiff, to pay the taxes, and he is blaming her for his own neglect.

The case of *Wunderlin v. Cadogan*, 75 Cal. 617, 17 P. 713, cited by appellant in support of his contention that the findings cannot be changed without notice to him, is not in point. In that case the change was one of findings of fact and not to supply an omission in the findings first filed, or change the direction for judgment, but was to substitute one set of findings for another.

[9] Although defendant asks for a reversal of the judgment in his closing brief, there has been no argument in support of that appeal. Inasmuch as it was his duty to inform this court of any errors affecting the judgment, if there were any, and he has not done so, the judgment is affirmed. Also, for the reasons herein set forth, the order denying the motion to set aside the judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

85 Cal. App. 86

HUME v. LINDHOLM. (Civ. 4947.)

District Court of Appeal, Second District, Division 1, California. Aug. 13, 1927.

1. Appeal and error $\S$ 873(1)—Jurisdiction of court to make order certifying transcript can be passed on on appeal from judgment.

Jurisdiction of court to make order certifying, approving, and settling reporter's transcript on appeal can be passed on, if there be sufficient record of proceedings, on appeal from judgment.

2. Appeal and error $\S$ 117—No appeal lies from order allowing or refusing certification of transcript.

No appeal lies from an order allowing or refusing certification of reporter's transcript on appeal.

Appeal from Superior Court, Los Angeles County; W. P. Cary, Judge.

Action by Leeanna M. Hume against Albert L. Lindholm. Defendant appealed from the judgment and from an order certifying, approving, and settling reporter's transcript on appeal, plaintiff appeals. Appeal dismissed.

Nolan, Rohe & Freston and Ralph E. Lewis, all of Los Angeles, for appellant.

Luter, Barry & Kinder, of Los Angeles, for respondent.

YORK, J. This is an appeal from an order "certifying, approving, and settling the re-

porter's transcript on appeal." Defendant has appealed from the judgment, and plaintiff has appealed from the said certification of the transcript on defendant's appeal.

[1, 2] The jurisdiction of the court to make the certificate can be passed on (if there be a sufficient record of the proceedings) upon defendant's appeal from the judgment. *Kaltschmidt v. Weber*, 136 Cal. 675, 69 P. 497. No appeal lies from an order allowing or refusing such certificate. *Henry v. Merguire*, 106 Cal. 142, 39 P. 599; *Lake v. Harris*, 198 Cal. 85, 89, 243 P. 417.

The appeal is dismissed.

We concur: CONREY, P. J.; HOUSER, J.

85 Cal. App. 69

CHAPMAN v. PACIFIC ELECTRIC RY. CO. (Civ. 5065).★

District Court of Appeal, Second District, Division 1, California. Aug. 12, 1927.

Hearing Denied by Supreme Court Oct. 10, 1927.

1. Street railroads $\S$ 81(5)—Street car operator owes duty of using usual precautionary warnings.

The operator of a street car owes the public the duty of using all precautionary warnings usual and in common use in operating the car.

2. Street railroads $\S$ 117(10)—Whether motorman gave warning signal and whether street car was lighted held for jury.

In an action by plaintiff who was injured while riding in automobile by collision with street car, whether the motorman gave a warning signal and whether the car was sufficiently lighted held questions for jury.

3. Trial $\S$ 252(1)—Instruction based on fact not supported by evidence held erroneous, though stating law accurately.

Where the court instructed the jury that in case certain facts existed the verdict should be for the defendant and there was no evidence whatever of such facts, the instruction was held erroneous, though it stated the law correctly.

4. Negligence $\S$ 93(1)—Evidence that plaintiff, injured when automobile collided with street car, was guest of driver held not to justify instruction on contributory negligence.

In action for injuries resulting from collision between automobile and street car, evidence that the plaintiff was the guest of the automobile driver held not to justify any instruction as to contributory negligence, there being no other evidence tending to show that plaintiff's actions contributed to cause the collision.

5. Appeal and error $\S$ 1064(1)—Court's statement in instructions that amount plaintiff claimed for damages from injury by street car was absurd held possibly prejudicial.

In action by person injured while riding in automobile which collided with street car, court's statement in instructions that the amount plaintiff claimed for damages was ab-

surd held possibly prejudicial, since the court thereby inferentially accused her of making false claim for damages.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Dorothy Chapman against the Pacific Electric Railway Company. Judgment for defendant, and plaintiff appeals. Reversed.

Arnold Praeger and William A. Sumner, both of Los Angeles, for appellant.

Frank Karr, R. C. Gortner, E. E. Morris, and C. W. Cornell, all of Los Angeles, for respondent.

YORK, J. This is an appeal by plaintiff from a judgment for defendant on a verdict of a jury. The action is for damages for the alleged negligence of defendant in operating a street railroad car, resulting in an accident causing plaintiff's injuries. The accident occurred about 9 o'clock at night on November 12, 1922, on Colorado street, in the city of Pasadena. The plaintiff was riding in an automobile driven by John L. Ramsey. She was his guest. He was driving his car westerly on said street and up an incline of about 8 or 9 per cent. Defendant's car was coming down this street in an easterly direction when the street car and automobile came together in a head-on collision, demolishing and setting fire to the automobile in which plaintiff was riding, severely injuring her, and causing the death of said Ramsey. The plaintiff alleged said accident to have been caused by the defendant's neglect in negligently propelling said street car at a dangerous rate of speed and in not maintaining a sufficient headlight on said street car, and alleges that the car did not "signal any alarm or bell," and that, although the motorman of defendant's car saw said automobile when it was about 300 feet from his car, he left his position at the controller of said car without shutting off the power or applying the brakes or "sounding any bell, signal, or alarm." Other acts of negligence of defendant were also alleged. The defendant denies all of plaintiff's allegations of neglect and alleges that the accident was caused by the neglect of plaintiff, and that plaintiff and the driver of the said automobile were at the time of the accident engaged in a joint and common enterprise, and that neither of them exercised ordinary care and both of them so negligently "rode and drove the said automobile as to bring the same into collision with defendant's car and contributed to said injury and damage." The plaintiff in one part of her complaint alleges:

"That while the automobile in which said plaintiff was then and there riding, as aforesaid, and said street car were approaching each other approximately 300 feet apart, the driver of said automobile, said Ramsey, was attempting to pass and go around another automobile

which was proceeding in the same direction * * * along said Colorado street, and that the said two automobiles were then and there abreast of each other; that while attempting to pass said automobile, the left-hand wheels of said automobile in which plaintiff was then and there riding were between the rails of defendant's street car track; that instead of permitting said Ramsey to pass and go around him, the driver of said automobile, who was unknown to plaintiff, speeded up his automobile and would not permit said Ramsey to pass him; that there was not sufficient room for said Ramsey to drive his said automobile between defendant's street car and the other automobile which he was attempting to pass. That by so speeding up, the driver of said automobile caused said Ramsey's automobile to be boxed in, and caught in a trap, and placed in a position of danger of collision with said street car."

Then follows an allegation that defendant's motorman saw the automobile in which plaintiff was riding in such position of danger while said automobile and said street car were 300 feet apart, and then follow allegations of alleged neglect of the motorman to ring any bell or give any warning or shut off his power or apply his brakes "at once," by deserting his post and leaving no person in control.

The race of the two automobiles seems to have been an admitted fact, and plaintiff seems to allege the above facts as showing that defendant had a last clear chance to avoid the accident. The allegation, however, does not correspond with plaintiff's testimony, which was more favorable to her than the allegations of her complaint. During the argument of counsel for defendant, said counsel commenced to reply to the contention of plaintiff's counsel that no bell was rung, and plaintiff gave no warning of the approach of his car, when the court interrupted him and said:

"Mr. Gortner, you need not say anything about a bell not being rung. It doesn't make any difference whether it was rung or not. The car was lighted, and the headlight was burning so that anybody who had eyes and was looking could have seen it, and I am going to hold that there was no duty on the motorman to ring his bell. The only question to be considered was whether the motorman was negligent in leaving his post, and you can confine your argument to that point."

[1] The court was speaking of issues made by the pleadings and in support of evidence which had been introduced and upon which counsel for plaintiff had argued to the jury contending that the facts plaintiff had alleged in regard to the warning and lights had been proved. Whether the facts had been proved or not, it was not for the court at that stage of the trial to decide. Plaintiff had testified that it seemed to her that the street car did not have a light on it; that she saw no light, although looking ahead; that she heard no bell, whistle, or gong—she was

not directing the driver of the automobile in which she was riding and it was not going over 20 or 22 miles per hour—that she did not see the street car at all until it suddenly loomed up. Defendant had contended that plaintiff was negligent while riding in the automobile and thereby contributed proximately to the accident; that she and the driver were engaged in a joint enterprise; and that both plaintiff and the driver by their alleged negligence contributed directly and proximately to the accident. Yet the court stated before the jury that the only question to be considered was whether the motorman was negligent in leaving his post. The operation of a street car in a public street, especially where there is a traffic congestion, is in itself a source of danger to those occupying the street, and the operator owes to the public the duty to use all precautionary warnings usual and in common use with such operations.

[2] Without considering the evidence in conflict with plaintiff's testimony, the jury could have found that no bell was being rung by defendant, and that there was no light on the defendant's car, and that the plaintiff did not see the defendant's car until the collision was inevitable. From the evidence, the jury could have found that the motorman saw the car in which plaintiff was riding when it was at least 300 feet away and approaching on the street car track. Adding to this testimony the physical fact of the collision and plaintiff's injuries, if this were the *only* evidence, the jury could have found for plaintiff, and hence the action of the court in confining the consideration of the jury to the question as to whether the motorman was negligent in leaving his post, and deciding that the car was lighted up, and that the headlight was burning, and that it was immaterial whether the bell was rung, was an invasion of the province of the jury and was error. If the car was not lighted and had no headlight, or one so dim as not to be effective, then the fact of whether a bell was ringing was material and should have been submitted to the jury. However, from the fact that the court instructed the jury on the question of plaintiff's contributory negligence, it seems that the court did not intend to pass on the question of contributory negligence in said statement confining the argument relating to defendant's negligence to the alleged neglect of the motorman in leaving his post. Although plaintiff's testimony was in conflict with that of witnesses produced by her, the jury had the right to believe her testimony to be true. We hold that the court erred in its instructions on the question of defendant's neglect, in confining their consideration to the action of the motorman in leaving his post. Under the circumstances of the case, the jury should

have been permitted to consider whether the car was lighted, the condition of the headlight, and whether the bell was ringing or gong sounding.

The jury were instructed that if plaintiff was guilty of a want of ordinary care, no matter how slight that want of ordinary care was, if it proximately contributed to her injury, they could not find a verdict for her. Yet there was no evidence of want of care on her part. The court did, however, instruct the jury:

"The negligence of the driver of the automobile in which plaintiff was riding, if there was any, was not imputable to her."

This was in accordance with *Dale v. Denver City Tramway Co.* (C. C. A.) 173 F. 787, 19 Ann. Cas. 1223; *Dyer v. Erie Railway Co.*, 71 N. Y. 228; *Noakes v. New York Cent. & H. R. R. Co.*, 195 N. Y. 543, 82 N. E. 1126.

[3, 4] The court instructed the jury that:

"If she acquiesced in and knowingly and willingly took part in an effort to race with another automobile and thereby contributed directly or proximately to the happening of said accident and collision in any degree, then your verdict should be for the defendant."

There was no evidence on which such a finding could have been made. An instruction on facts supported by no evidence is often misleading to the jury and prejudicial to one or more parties to the action. Although it stated the law accurately, it should not have been given, because there was no evidence on which to base it. Appellant and respondent were not engaged in a joint enterprise. There was no community of interest in the object or purpose of the driver of the automobile, and appellant was not charged with any duty of directing the driver. In fact, it is common knowledge that the interference of a passenger with a driver of an automobile is generally an element of danger rather than safety. The evidence in this case did not justify any instruction as to contributory negligence as against appellant. *Curran v. Earle C. Anthony, Inc.*, (Cal. App.) 247 P. 236; *Thompson v. Collins et al.*, 139 Wash. 401, 247 P. 458.

[5] The statement by the court in its instructions that the amount claimed by plaintiff was absurd was possibly prejudicial in that the court thereby inferentially accused her of making a false claim for damages, and such a statement thereof in itself may or may not be sufficient ground for reversal.

After careful examination of the entire case, including all of the evidence introduced, we believe that the party appealing sustained and suffered substantial injury by reason of the errors hereinbefore referred to.

The judgment is therefore reversed.

We concur: CONREY, P. J.; HOUSER, J.

202 Cal. 36

HAND et al. v. CLEESE et al. (Sac. 3793.)★
 Supreme Court of California. Aug. 29, 1927.

Rehearing Denied Sept. 26, 1927.

1. Waters and water courses ⇨152(8)—Evidence that claimants' ditch carried three to five inches of water held to support judgment giving them three inches of water.

In contest concerning water rights, testimony of two witnesses that certain claimants' ditch carried from three to five inches of water held to support judgment giving them three inches of water, based on more than five years' appropriation.

2. Waters and water courses ⇨158(2)—Construction of contract, giving each of rival claimants to water half of supply to which they were entitled, held proper.

In action to enjoin interference with water rights, where plaintiff's predecessor who had appropriated all water in canyon had agreed to give defendant's predecessor free use of water from ditch for purposes of irrigation and agriculture only, in view of fact that plaintiff's predecessor repaired ditch and did not abandon water rights, and other facts and circumstances, judgment construing agreement to award each of rival claimants half of water in ditch remaining after allotment to third party, who had rights through prior appropriation, was proper.

3. Waters and water courses ⇨152(2)—Plaintiffs' changing route of water supply held not to affect rights thereto.

In action to enjoin diversion of water, fact that plaintiffs, more than five years before commencing action, had diverted water through natural depression instead of through ditch built by their predecessor in interest did not affect their rights, in view of fact that such change injured no one.

4. Waters and water courses ⇨158(3)—Failure to repair ditch held not to cause forfeiture of right to water.

Failure of parties to repair water ditch pursuant to contract by their predecessor in title would merely give rise to action to recover one-half amount expended for repairs and would not cause forfeiture of water rights, since forfeitures are not favored.

5. Appeal and error ⇨1061(2)—On submitting findings before date for hearing of motion to dismiss for want of prosecution, failure to hear and pass on such motion held not prejudicial.

Where court continued defendant's motion to dismiss case for want of prosecution until certain date unless findings were submitted in meantime, and findings were submitted and signed before such date, failure to hear and pass on motion to dismiss was not prejudicial to defendant.

In Bank.

Appeal from Superior Court, El Dorado County; W. A. Anderson, Judge.

Action by Charles E. Hand and another against John P. Cleese and others to enjoin the diversion of water. From a judgment settling the water rights, the named defendant appeals. Affirmed.

E. Fitzgerald, of Placerville, and Edward F. Treadwell, of San Francisco, for appellant.

H. E. Dillinger, of Placerville, for respondents Gasparini.

Abe Darlington and Henry S. Lyon, both of Placerville, and Chas. A. Swisler, of Sacramento, for respondents Hand and Celio.

LANGDON, J. Plaintiffs brought this action to enjoin the defendants from diverting the waters of a stream known as "Johnson's north canyon," and from interfering in any way with the flow of said waters to plaintiffs' lands through ditches thereon. Plaintiffs' land does not border on the stream, and their rights have been acquired by appropriation. From the judgment of the trial court to the effect that plaintiffs and defendant Cleese are the owners as tenants in common of a specified amount of water of said stream, and that plaintiffs are entitled to use one-half thereof on their lands, and that defendants Gasparini are the owners of and entitled to use on their land a small quantity of the water of this stream, defendant Cleese has appealed.

There is no serious dispute about the correctness of the findings of fact, and they find support in a voluminous record of the proceedings at the trial. These findings disclose the following facts:

That at the time of the commencement of this action the plaintiffs were, and ever since have been, and for many years prior thereto they and their grantors and predecessors in interest had been continuously the owners of and in possession of certain lands, particularly described in the complaint and in the findings, which were located in county of El Dorado, state of California, and known as the "Johnson ranch," and on which they raise hay and other crops.

At the time of the commencement of this action the defendant John P. Cleese was the owner, in possession of and entitled to the possession of, and for many years prior thereto he and his predecessors and grantors had been the owners of, in possession and entitled to the possession, of certain lands situated in the county of El Dorado, state of California, adjoining the lands of plaintiffs.

The defendants Guiseppe Gasparini and Amelia Gasparini were at the time of the commencement of this action, and for many years last past have been, the owners of certain land situated in said county of El Dorado, together with a certain private ditch leading from Johnson's north canyon.

Since prior to the year 1864 there has been a certain water ditch, known as and called

"Johnson's ditch," commencing in a certain canyon, known as Johnson's north canyon, in the southeast quarter of section 36, township 11 north, range 11 east, Mount Diablo base and meridian, in said El Dorado county, and running thence to and through and over a portion of the lands of the defendant John P. Cleese and thence to the lands of the plaintiffs, which said ditch has been used at all times since its construction, and since prior to the year 1864, and is now used to divert and convey a portion of the waters flowing in said Johnson's north canyon, said canyon at all of said times having therein and flowing at the head of said ditch a stream of natural water varying in quantity according to the season of the year from twelve inches, miners' measurement, during the summer and fall to a greater quantity at other seasons of the year. Said ditch was constructed prior to the year 1864 by one J. C. Johnson, who then lived on the lands known as the "Johnson ranch" and said ditch was thereafter used by him to convey, and he did thereby actually appropriate and convey, the waters of said Johnson's north canyon to and on the said Johnson ranch, where the said water was used by him for irrigating and domestic purposes from the time said ditch was constructed until he moved away from said lands about the year 1874.

Said water was also used on said Johnson ranch, through and by means of said ditch, for mining purposes by the said J. C. Johnson and by his grantee, A. J. Blakeley, who also used said water on said Johnson ranch for irrigating purposes from the time he acquired said ranch and ditch by deed from said Johnson and wife on June 23, 1874, until the time of his death October 12, 1916. And each year since the death of said A. J. Blakeley, his successors in interest, including the plaintiffs in this action, in said Johnson ranch and ditch have, until prevented from so doing by defendant Cleese in July, 1920, used a portion of the waters of Johnson's north canyon, through and by means of said ditch, for irrigating crops growing in said Johnson ranch.

This Johnson ditch, before reaching said Johnson ranch, crossed over and through certain land known as the "Maxwell ranch," which is now owned by the defendant Cleese, and which adjoins the said Johnson ranch.

For many years prior to the commencement of this action, the defendant Cleese and his predecessors in interest in said Maxwell ranch used a portion of the water of said Johnson ditch for irrigating purposes on the Maxwell ranch, but until the month of July, 1920, such use of said water by the defendant Cleese and his predecessors in interest in said Maxwell ranch was by permission and with the consent of the said J. C. Johnson and his successors in interest, including the plaintiffs herein.

On the 11th day of January, 1864, the said J. C. Johnson, who then occupied, claimed, and owned the said Johnson ranch, and who is the predecessor in interest of the plaintiffs herein, and one Michael Maxwell, who then occupied the said Maxwell ranch and who was the predecessor in interest of said defendant Cleese, entered into and executed an agreement in writing, as follows:

"J. C. Johnson & M. Maxwell. Agreement.

"Memorandum of an agreement made this 11th day of January, A. D. 1864, between John C. Johnson and Michael Maxwell, both of the county of El Dorado and state of California, witnesseth that whereas said Johnson and Maxwell are owners and occupants of adjoining farms in John Canyons in said county, and said Johnson being desirous to reopen and construct his water ditch, a part of the upper portion of which runs through the premises of said Maxwell, in consideration of the premises said Maxwell hereby grants to said Johnson the right of way over his said premises to reopen and construct anew and keep in repair said ditch, and to assist in the construction and keeping in repair the same so far as the same shall extend on the premises of said Maxwell, and said Johnson in consideration of the premises hereby agrees that within a reasonable time he will reconstruct and thereafter keep in repair said ditch by the assistance of said Maxwell as to the extent as aforesaid, and to allow said Maxwell to the extent of his said premises the free use of water from said ditch for purposes of irrigation and agriculture only, and said Johnson further agrees in consideration as aforesaid that he will not sell or permit to be used any water for mining purposes to be used upon the land or premises of said Maxwell.

"J. C. Johnson. [L. S.]

his
"Michael X Maxwell. [L. S.]"
mark

"State of California, County of El Dorado--ss:

"On this 11th day of January, A. D. 1864, before me John Bush, a justice of the peace in and for said county, personally appeared John C. Johnson and Michael Maxwell, personally known to me to be the persons described in and who executed the foregoing instrument as parties thereto, and who each for himself acknowledged to me that he executed the same freely and voluntarily, for the uses and purposes therein specified. Given under my hand this 11th day of January, 1864.

"John Bush, Justice of the Peace."

The foregoing agreement after being executed, was recorded in the office of the county recorder of the county of El Dorado, state of California, on the 11th day of January, 1864.

In the month of July, 1920, the defendant Cleese, by opening the said ditch on his said lands at a point therein above the lands of the plaintiffs, diverted the waters of said ditch therefrom and prevented any of said waters from flowing to the said lands of plaintiffs and prevented plaintiffs from having or using any of said water on their lands, and since said time said defendant has repeat-

ed said acts and prevented plaintiffs from having or using any of said water on their said lands, and in July, 1920, defendant Cleese refused, and still refuses, to allow plaintiffs to take or to have or use on their lands any of the waters diverted by means of and flowing in said ditch and denies plaintiffs' right to take or have or use any of said waters.

Defendant Cleese intends to and, unless restrained, will continue to use all the water of said canyon, and will prevent any portion of said water from flowing through said ditch to plaintiffs' land, and will prevent plaintiffs from taking or having or using any of said water on their said land.

Prior to the said month of July, 1920, there was no dispute between the defendant Cleese or his predecessors in interest and the plaintiffs or their predecessors in interest concerning the ownership or right to the use of any of said water, nor, prior to said last-named time, did the defendant Cleese or his predecessors in interest prevent, interfere with, or obstruct the taking or use of any of said water by the plaintiffs and their predecessors in interest or dispute their right to take or use said water. The acts of the defendant Cleese in refusing to allow plaintiffs the use of said water, if continued, will cause great and irreparable injury to the plaintiffs.

For more than five years before the commencement of this action the said water flowing in said ditch had not been conveyed to plaintiffs' said land through the said ditch, but at a point on the lands of defendant Cleese near the boundary between his lands and the said lands of plaintiffs the portion of said water used by plaintiffs and their predecessors was diverted from said ditch and was thereafter by them conveyed on to the lands of plaintiffs down, along, and through a natural depression in the land, and thence by means thereof onto the lands of plaintiffs where the same was used for irrigation purposes by the plaintiffs and their predecessors in interest.

Prior to the month of July, 1920, no objection was ever made by defendant Cleese or his predecessors in interest to the aforesaid change in the manner of conveying said water to the lands of plaintiffs, nor to the taking and conveying of said water from said ditch in the manner above described.

The trial court further found that the defendant Cleese was not, and has not been, for more than five years prior to the commencement of this action, or at all, and is not now the owner in possession and entitled to the possession, enjoyment, or use of all of the waters of said stream known as Johnson's north canyon, and that said defendant Cleese has not, during all or any of said time or at all, continuously, uninterruptedly, peaceably, openly, notoriously under a claim of right, adversely to said plaintiffs and to all the world, taken and diverted all of the waters of the said canyon through the ditch described

in the complaint and carried the same to his land where the same was used by him for irrigating his said lands and for other useful and beneficial purposes. And said Cleese is not now the owner of the right to take, divert, appropriate, and use all of the water of said stream.

The stream or water course known as Johnson's north canyon has, for time immemorial, existed and flowed by, through, over, and upon a portion of the land of defendant Cleese, and said land has at all times been and is now riparian to said stream. Said Johnson ditch was constructed by the said J. C. Johnson, plaintiffs' predecessor in interest, as the waters of said canyon to the extent of more than one hundred inches, measured under a four-inch pressure, were actually appropriated by the said Johnson by means of said ditch prior to the year 1864, and at the time of said appropriation the land now owned by defendant Cleese was public land of the United States and unpatented. Ever since the 11th day of January, 1864, and until the month of July, 1920, the defendant Cleese and his predecessors in interest have recognized and acquiesced in the said appropriation of said water of said canyon by means of said ditch and the right of the plaintiffs and their predecessors in interest to take and use the said water.

The plaintiffs and their predecessors in interest did not at any time abandon the said Johnson ditch or their right to the water of said Johnson's north canyon, nor did they, until prevented from using water by the defendant Cleese in July, 1920, cease or discontinue the diversion of said water by means of said ditch or the use of said water for beneficial purposes on the lands of plaintiffs.

The capacity of said ditch as constructed by the said Johnson was in excess of one hundred inches of water, measured under a four-inch pressure. The capacity of said ditch at the present time is sixty-three inches of water, measured as aforesaid.

The trial court further found that the plaintiffs and the defendant Cleese own and are entitled to divert and use sixty-three inches, measured under a four-inch pressure, of the water in said Johnson's north canyon, flowing therein at the head or intake of said Johnson ditch, the plaintiffs owning and being entitled to one-half of said water, and the defendant Cleese owning and being entitled to the other one-half thereof, and they, the said plaintiffs and said defendant Cleese, are entitled to use said Johnson ditch for the purpose of diverting and conveying the said water for use by them on their said lands.

The defendants Gasparini are and they and their predecessors in interest for more than five years last past before the commencement of this action, and during all the times mentioned in the complaint, have been continuously, adversely, openly and notoriously the

owners of and entitled to three miners' inches continuous flow of the waters flowing in said Johnson's north canyon at the head or intake of their said ditch, and said defendants have for many years, and for more than five years last past, diverted said water through said private ditch and put said water to beneficial use on their said land for mining and for irrigating gardens and other crops thereon. That the amount of water required and used for irrigation by said defendants Gasparini was and is three inches.

[1, 2] The facts herein stated, as found by the court, leave no doubt as to the propriety of the judgment rendered. The trial court recognized the difficulty of determining the exact amount of water to be allowed to defendants Gasparini—a difficulty that arises in most cases of this character—but the court decided the question upon the testimony of two witnesses to the effect that the ditch carried from three to five inches of water to the premises of Gasparini.

As pointed out by the trial court, the ditch which carries the water from the canyon had become known by Johnson's name, and the canyon itself had taken this designation through his work in it constructing the original ditch. Later, when the ditch required considerable repairs and when the predecessors of defendant Cleese had acquired the land from the government, Johnson entered into the agreement set out herein. It is artificially drawn, which gives appellant some ground for argument as to its meaning, but the ditch is referred to as "Johnson's ditch" and as "his" (Johnson's) ditch, and it seems entirely clear from the whole instrument that at that time the right of Johnson as an appropriator of the water was recognized and acquiesced in by the predecessors in interest of Cleese. The circumstances surrounding the making of the agreement in question, and the needs and uses to which the water was being applied at that time, make it apparent that Johnson did not intend to contract to repair the ditch and then deprive himself of the use of the water upon his land.

Appellant contends that the record shows that Johnson abandoned the water which he had acquired by appropriation. While there is testimony upon which to base this contention, there is also evidence in the record which supports the findings of the court to the effect that plaintiffs and their predecessors in interest did not at any time abandon their right to the water of said Johnson's north canyon, nor did they, until prevented from using the water by the defendant Cleese in July, 1920, cease or discontinue the use of said water for beneficial purposes on the lands of plaintiffs.

[3] The court also found, as hereinbefore set out, that for more than five years before the commencement of this action the water had not been diverted to plaintiffs' land by

means of the Johnson ditch, but had been carried to said lands over a natural depression. Plaintiffs had the right to change this means of diversion of the waters to which they were entitled, since said change injured no one. These findings regarding the continued beneficial use of plaintiffs make it unnecessary to pass upon the position taken by the trial court that the parties were tenants in common of the ditch and water by virtue of the agreement hereinbefore set forth. Such a relationship would not be essential to plaintiffs' recovery herein unless it were also true that they had abandoned the water, in which case the possession and use of one tenant in common would be the possession and use of the other (*Unger v. Moon-ey*, 63 Cal. 586, 49 Am. Rep. 100), unless the tenant out of possession was informed that his cotenant was holding adversely.

The uncertainty of the agreement between the parties presented difficulties to the trial court in the division of the water, and these difficulties were recognized by the court. While the agreement granted to Maxwell "the free use of water from said ditch for the purposes of irrigation and agriculture only," it is perfectly clear from the terms of the agreement and from the surrounding facts and circumstances that Johnson intended to retain the use of a considerable portion of the water for himself for mining and domestic purposes, and he had the right to fully protect himself in these matters, for he had appropriated all the water. The trial court, considering all these facts and circumstances, concluded that the intention was to divide the water equally. This seems a fair construction of the instrument—in fact, a liberal one in favor of appellant—and in the absence of exact information on the question the court could do no better than to follow the maxim that equality is equity.

[4] It is also contended by appellant that, since by the agreement set forth herein the parties were to share the expense of repairing and renewing the ditch from time to time, the plaintiffs have lost their rights to the water by their failure to perform their obligation in this respect. Upon this question we are in accord with the trial court that such failure to repair would merely give rise to a suit to recover one-half of the amount expended by defendants in repairs. Equity abhors a forfeiture and, in the absence of a positive rule of law attaching such a penalty in a case like the present, the courts will not enforce so drastic a remedy. In the case of *Smith v. Stearns Ranchos Co.*, 132 Cal. 178, 64 P. 261, 716, the court refused to forfeit the right of a water user because he failed to pay the expense of maintaining and repairing the canal through which the water was to be conveyed and compelled the company to sue for the amount due for repairs, etc.

[5] One more point is made by appellant, predicated upon the failure of the plaintiffs to prepare findings after the court had decided this case on December 15, 1923. On September 6, 1924, defendant Cleese moved to dismiss the action for want of prosecution. The court did not hear this motion, and appellant contends this was an abuse of discretion. It appears that the court continued the motion until October 16, unless findings were submitted in the meantime, and they were submitted and signed before that date. It appeared, therefore, that at the time to which the motion was continued the findings had been signed and filed, and no reason for the granting of the motion existed. No prejudice resulted to defendant, therefore, by the failure to hear and pass upon such motion.

We find no error in the record. On the contrary, the findings follow closely the evidence in the case, and it would seem that the judgment clearly follows the findings made.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

202 Cal. 15

CHARLES L. DONOHUE CO. v. SUPERIOR COURT OF GLENN COUNTY et al.★
(Sac. 4029.)

Supreme Court of California. Aug. 20, 1927.

Rehearing Denied Sept. 19, 1927.

1. Mandamus ⇨168(4)—Evidence that attorney signing stipulation extending time for trying case represented defendant held to justify refusal to dismiss action for delay (Code Civ. Proc. § 583).

On application for mandamus to compel dismissal of action to foreclose mortgage for failure to bring case to trial within 5 years after defendant corporation filed answer, under Code Civ. Proc. § 583, evidence that attorney signing letters constituting stipulation for extension of time for bringing case to trial was acting for corporation, and that attorney who filed answer for corporation was present when cause, pursuant to stipulation, was reset for trial beyond expiration of 5-year period, *held* to show good cause for refusal to dismiss action.

2. Mandamus ⇨43—Mandamus requiring dismissal of action can be granted only on entire absence of showing of good cause for refusal.

Only when there is entire absence of showing constituting good cause for denying motion to dismiss action may mandamus to compel dismissal be properly issued.

In Bank.

Original application by the Charles L. Donohue Company for a writ of mandate to be directed to the Superior Court of the County of Glenn, Claude F. Purkitt, Judge. Writ denied.

W. T. Belieu, of Willows, and Frederick Olds, of San Francisco, for petitioner.

George R. Freeman, of Willows, for respondents.

SHENK, J. [1] This is an application for a writ of mandate to compel the respondent superior court and the judge thereof to dismiss an action pending in said court for the foreclosure of a mortgage on real estate and entitled Frank Freeman v. Charles L. Donohue, Charles L. Donohue Company, a Corporation, et al. The Charles L. Donohue Company, the petitioner herein, presented a motion in the trial court to dismiss the action under section 583 of the Code of Civil Procedure, on the ground that the action had not been brought to trial within 5 years after the said company had filed its answer and that it had not stipulated in writing that the time might be extended. After quite an extended hearing of the motion the court found and determined that a written stipulation had been entered into between the parties concerned in this proceeding extending the time beyond the 5-year period.

A transcript of the evidence taken on the hearing of the motion is before us and is relied on by both the petitioner and respondents. From this record it appears that a disputed question of fact arose before the trial court as to whether a written stipulation had been entered into as required by the statute. The statements in writing which the respondents contend amount to a written stipulation were embodied in numerous letters exchanged between the attorney for the plaintiff in said action and an attorney who for some years prior to the motion to dismiss and long before the expiration of the 5-year period had charge of the legal affairs of the Donohue interests, including those of the Donohue Company. This correspondence need not be set out in detail. It is sufficient to say that the letters exchanged between the two attorneys were abundantly sufficient in themselves, as determined by the trial court, to constitute a written stipulation extending the statutory time. But petitioner contends that the letters transmitted to plaintiff's attorney by the attorney representing the interests of the Donohue Company were not signed by the attorney who filed the answer on behalf of said company. The evidence shows that the attorney who entered into the written stipulation for the extension of time not only represented to the attorney for the plaintiff for a long period of time, but also stated in open court, in the presence of the respondent judge and in the presence and hearing of the officers actively in charge of the affairs of the Donohue Company, that he was acting in all matters in which the Donohue Company was interested. This attorney also stated to the

respondent judge in chambers that he was so acting. The attorney who filed the answer for the Donohoe Company was present in court when the cause was, pursuant to said stipulation, reset for trial beyond the expiration of the 5-year period.

[2] Under the evidence the trial court was justified in concluding that the petitioner and the attorney who filed its answer so assented to and sanctioned the said stipulation in open court as to render it in effect their own stipulation. Such being the case, the respondents have shown good cause why the motion to dismiss the action was denied. It is only when there is an entire absence of any showing constituting good cause presented in the superior court upon the hearing of the motion to dismiss that a writ of mandate to compel the dismissal of the action may properly issue. *Matter of Ford*, 160 Cal. 334, 349, 116 P. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267; *Candeias v. Superior Court of Merced County*, 49 Cal. App. 580, 193 P. 957; *Chrisman v. Superior Court in and for Fresno County*, 63 Cal. App. 477, 219 P. 85; 16 Cal. Jur. p. 819 et seq. In view of the written stipulation found by the court to have been made and assented to by the parties, it becomes unnecessary to discuss the other points urged by the respondents.

The peremptory writ is denied.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

202 Cal. 47

SCOTT et al. v. FRUIT GROWERS' SUPPLY CO. (Sac. 3895.)

Supreme Court of California. Aug. 29, 1927.

1. Waters and water courses ⇨107(3)—Evidence held to show spring was tributary of creek, hence riparian defendant could not so divert waters from spring as to deprive creek riparian owners of water rights.

Evidence held to show that a certain spring was a tributary of named creek, hence defendant could not so divert waters from the spring into his millpond as to deprive plaintiffs of their riparian rights in the creek waters.

2. Waters and water courses ⇨137—Riparian owner's frequent temporary diversion of water extending over prescriptive period gave him no prescriptive rights against other owners.

Riparian owner's frequent temporary diversion of water extending over prescriptive period gave him no prescriptive rights against other owners, since water always returned to land of other owners within a short time after use by diverter.

3. Waters and water courses ⇨105—Upper riparian owner was not entitled to divert creek's tributary waters to nonadjacent lands, his diversion right being no greater than other riparian owners'.

An upper riparian owner was not entitled to divert waters from a spring tributary to the creek to nonadjacent lands for irrigation purposes, his diversion right being no greater than that of other riparian owners.

4. Waters and water courses ⇨138—Upper riparian owner is presumed to be exercising only riparian rights, hence cannot secretly acquire prescriptive right against lower owners.

Upper riparian owner is presumed to be exercising only his riparian rights in the use of water, hence he can acquire no title by prescription unless it is brought home to the lower riparian proprietors that the upper proprietor asserts a right other than his riparian right.

5. Waters and water courses ⇨142—Upper riparian owner acquiring prescriptive right to use all water on certain land may not divert it to different lands to lower owner's injury (Civ. Code, § 1412).

An upper riparian owner who has acquired the prescriptive right to use all water on certain land does not, under Civ. Code, § 1412, thereby acquire the right to use the water on land other than that for which the prescriptive right was acquired, to the injury of other riparian owners.

6. Waters and water courses ⇨142—Prescriptive rights are stricti juris and should not be extended beyond the actual user.

Prescriptive rights are stricti juris and should not be extended beyond the actual user.

7. Waters and water courses ⇨128—Water Commission Act relative to 10 years' nonuser was not applicable in riparian owner's controversy, since yearly use for irrigation purposes was shown (Water Commission Act, § 11, as amended by St. 1919, p. 513).

In view of finding that the lower riparian owners had used stream's waters each year for irrigation purposes, the Water Commission Act, § 11, as amended by St. 1919, p. 513, relative to 10 years' nonuser, was not applicable in upper riparian owner's prescriptive claim.

8. Waters and water courses ⇨127—Argument of balance of convenience has no place in law governing riparian rights.

The argument that waters are of great value to the appropriators and of small value to other riparian owners has no place in the law governing riparian rights.

9. Waters and water courses ⇨145—Appropriator of water may not change point of diversion to injury of others, since he has only water's use, not its ownership.

An appropriator of water may not change the point of diversion so as to injure or deprive others of their water rights, since by the appropriation he has acquired only the use of the water, not its ownership.

10. Waters and water courses ⚓152(3)—**Injunction held proper remedy, where upper riparian owner was depriving lower owners of water's use.**

Where one riparian owner is depriving other owners of the use of stream's waters, latter are not restricted to damage action, but may proceed by injunction.

11. Waters and water courses ⚓152(3)—**Riparian proprietors may restrain taking of water to nonriparian land without showing damage.**

In an action by certain riparian owners or proprietors to restrain others from taking stream's waters to nonriparian lands, a showing of damages is not requisite.

In Bank.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by L. P. Scott and others against the Fruit Growers' Supply Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. E. Pardee, of Susanville, Farrand & Slosson, of Los Angeles, and Dozier, Kimball & Dozier, of San Francisco, for appellant.

N. J. Barry, Hardin Barry, and Barry & Barry, all of Susanville, for respondents.

LANGDON, J. This is an appeal from a judgment of the superior court of Lassen county, which enjoins defendant and appellant from conducting the water of Bagwell springs through a pipe line constructed by appellant in 1924 from Bagwell springs to its millpond on the south bank of the Susan river, in Lassen county, Cal. The geographical and topographical conditions involved in the controversy are best illustrated with a map and chart, but the findings of the trial court have described such conditions substantially as follows:

Susan river comes out of the mountains to the west of the town of Susanville and flows in an almost straight easterly direction. A short distance after the river comes out of the mountains it is joined on the north side by a tributary called Piute creek. Piute creek flows in a southeasterly direction and joins Susan river at an acute angle. Between the point where Piute creek comes out of the mountains and where it flows into Susan river there are certain ranches. The ranch closest to the mountains is the Cain ranch, owned by the appellant, and Piute creek flows across this ranch. Next below is the Long ranch, also owned by appellant, and Piute creek flows across this ranch. Next below the Long ranch are the lands of the plaintiffs Gehrig, Scott, Taylor, and Accomasso. Piute creek flows across all the lands of these last-named plaintiffs. The lands of the plaintiff Boggs are on the north of and border on Susan river just below the point where Piute creek flows

into Susan river. The Boggs lands have always been irrigated from the waters of Piute creek by a ditch connected with Piute creek before it reaches Susan river. On the south side of Susan river, a little below the point where Piute creek flows into Susan river, are the lands of the defendant upon which its mill and millpond are situated. The lands of the interveners lie below all the lands of plaintiffs and defendant, along Susan river. The Cain ranch, the Long ranch, and the ranches of plaintiffs, except plaintiff Boggs, are riparian to Piute creek and for many years have been irrigated by the water of said creek. The Long ranch lies in a basin, most of it north of Piute creek. Near the northern boundary of the Long ranch there is a spring of water known as the Bagwell spring, which flows 68 inches of water in all seasons of the year. This spring is considerably higher than Piute creek, and the waters thereof flow in an almost southerly direction in a well-defined channel between well-defined banks and into Piute creek, and this spring is therefore tributary to Piute creek. None of the waters of Bagwell springs ever have or can reach the Cain ranch, which is entirely dependent for water upon Piute creek proper before the confluence of Bagwell springs branch with Piute creek. After the 1st of July of each year, the waters of Bagwell springs constitute practically all the waters of Piute creek, the waters of Piute creek above that point being used on the Cain ranch.

Up to the month of July, 1924, the waters of Bagwell springs were used for the irrigation of the Long ranch and the ranches of the plaintiffs, and what was left over went into Susan river and went down to the interveners. The Long ranch and the plaintiffs' ranches were settled about 1860. The Longs connected the first ditch with the Bagwell springs branch. After the waters were taken out by the Longs and applied to the land there would be a space of from 24 to 48 hours when the plaintiffs would get no water. Some time during that time, however, the waters of the spring branch, after irrigating the Long ranch, would of their own accord return to the stream and thence flow down Piute creek, and Piute creek, where it flowed over the lands of the plaintiffs, would have the usual amount of water, and during all of those years the plaintiffs have used the waters of Piute creek for raising orchards and gardens and for domestic purposes. This condition continued until the month of July, 1924. Appellant's millpond is on the south side of Susan river, almost opposite the confluence of Piute creek with Susan river. There is a ditch leading from Susan river into the millpond. This ditch comes out of Susan river above the point where Piute creek flows into Susan river. It does not ap-

pear that the millpond of defendant ever had a drop of water from Piute creek prior to July, 1924. At that date the defendant and appellant, by means of a cement dam and pipe line, conveyed the water directly from Bagwell springs to its millpond on the south side of Susan river. This pipe line runs to the east of all the lands of plaintiffs outside the watershed, and never a drop of this water can return to Piute creek or to the lands of plaintiffs. This action was brought to enjoin this diversion.

[1] The record presents the initial question. Is Bagwell springs a tributary of Piute creek? The argument presented by respondents is predicated upon the theory that it is such a tributary, and the appellant challenges that position and the finding of the trial court in consonance therewith. The findings of the court with reference to the matter is:

"That there is a certain tributary of said Piute creek which arises in the south half of section 19, township 30 north, range 12 east, being what is known as and called Bagwell springs, the water of which stream flows in a general southeasterly direction in a well-defined channel between well-defined banks into said Piute creek at a point above all of the lands of plaintiffs and above the points of diversion of all the plaintiffs from time immemorial has so flowed."

This finding is supported by the testimony of the witnesses Long, Whalen, Jensen, Jenkins, Brockman, and several others, and it is idle for appellant to attack it because some conflict appears in the evidence offered at the trial.

The next question presented is as to whether the appellant may divert the waters from this tributary of Piute creek outside the watershed and into its mill pond, so as to deprive plaintiffs of their riparian rights in Piute creek.

[2] Appellant claims that it and its predecessors have openly, notoriously, and adversely used the water of Bagwell springs for the irrigation of the Long ranch, and that they have acquired the riparian rights of plaintiffs by prescription. The finding above quoted, to the effect that the water of the springs would always return to the creek after about 24 hours of use for irrigation on the Long ranch, and the testimony appearing in the record supporting such finding completely answer the position of appellant upon this question.

The attack upon the findings regarding the diversion of all the water of Bagwell springs by appellant by means of its pipe line, and the carrying of the same outside the watershed, is answered by the pleadings, the appellant admitting such diversion of all the waters of said springs to its millpond, but contending merely that such waters were not tributary to Piute creek.

[3-6] Two theories are advanced by appellant for a reversal of this judgment. The

contention is made that, as an upper riparian proprietor, it was entitled to divert the waters from the riparian land to the millpond. This position is clearly untenable. "A riparian proprietor on whose land a stream rises has no more right than other riparian proprietors." *Well, Water Rights*, § 294, p. 453; *Geddis v. Parrish*, 1 Wash. 587, 21 P. 314; *Neilson v. Spomer*, 46 Wash. 14, 89 P. 155. The other contention is that a right to the water of the spring has been acquired by appellant by prescription. This contention is answered by the evidence referred to herein and by the findings of the court based thereon to the effect that the appellant, in irrigating the Long ranch, merely diminished the waters of Piute creek for a period of from 24 to 48 hours, and thereafter the water returned to the creek for the use and benefit of the lower riparian owners. The presumption is that in the use of water an upper riparian proprietor is exercising his riparian rights, and no title by prescription can be given unless it is brought home to the lower riparian proprietors that the upper riparian proprietor asserts a right other than his riparian right. *Oliver v. Robnett*, 190 Cal. 51, 210 P. 408; *Peake v. Harris*, 48 Cal. App. 363, 192 P. 310; *Pabst v. Finmand*, 190 Cal. 124, 211 P. 11. It is also true that, even though the appellant had acquired a prescriptive right to irrigate the Long ranch with the entire flow of Bagwell springs, it would not have an incidental right to use the water on land other than that for which the prescriptive right was acquired (*Southern California Inv. Co. v. Wilshire*, 144 Cal. 69, 77 P. 767), where such diversion resulted in injury to others (*Civ. Code*, § 1412). Prescriptive rights are stricti juris and should not be extended beyond the actual user. *North Fork Water Co. v. Edwards*, 121 Cal. 662, 54 P. 69. Since the prescriptive right is limited by the extent of the use which conferred the title, the place of use cannot be changed, where to do so would interfere with the rights of others. *Southern Cal. Inv. Co. v. Wilshire*, 144 Cal. 68, 77 P. 767. In *Hargrave v. Cook*, 108 Cal. 80, 41 P. 18, 30 L. R. A. 390, it was said:

"Upon the question of the right of the owners of the Hargrave & Comfort ditch to extend it five or six hundred feet over the northwest quarter of section 20, now the land of Cook, the better to facilitate the obtaining of their water, we do not deem it proper, upon this appeal, to do more than point out that, while an appropriator of water upon government land retains his rights when the land passes into private ownership, by virtue of the confirmatory statutes of the United States * * * and, while in the exercise of these rights, he may change the point of diversion to another place upon the servient tenement, he is nevertheless limited in so doing to the exigencies of the situation, and has no right to make such change arbitrarily and at will. He may do so when under certain circumstances it is required to enable him to take the

amount of water to which he has ownership, and then only when 'others are not injured by the change.' Civ. Code, § 1412. His rights are the rights of the grantee of an easement, and extend, in the matter of changing the point of diversion, no further than the boundaries of the servient tenement, and even when entering upon this he is under obligation only to make reasonable changes with reasonable care, and also to repair, so far as possible, whatever damage his labors may have occasioned (Gale and Whately on Easements, 235); as to lands other than those subject to his easement, and as to other claimants and owners, he can make no change at all which injuriously affects them or their rights."

[7] It is contended by appellant that error was committed by the trial court in holding that plaintiffs' action was not barred by the provisions of the Water Commission Act of the state of California. The portion of said act relied upon is the following portion of section 11 thereof, as amended May 11, 1919 (Stats. of 1919, p. 513):

"If any portion of the waters of any stream shall not be put to a useful or beneficial purpose to or upon lands riparian to such stream for any continuous period of ten consecutive years after the passage of this act, such nonapplication shall be deemed to be conclusive presumption that the use of such portions of the waters of such stream is not needed upon said riparian lands for any useful or beneficial purpose."

Since the trial court found that within from 24 to 48 hours after the diversion of the water of the springs for use upon the Long ranch, said waters returned to the stream "and thus went on down Piute creek on said Long ranch, and thence through its natural course through the lands of the plaintiffs, and plaintiffs and their predecessors in interest have ever since about the same time, to wit, the year 1863, diverted and used the waters of said stream upon their said lands for the irrigation thereof and for domestic purposes," the above-quoted provision of the so-called Water Commission Act becomes immaterial.

[8] Appellant contends for a doctrine which has been designated "the balance of convenience," and urges that as its needs are very great for this water and its investment very large, those circumstances should weigh against the plaintiffs' rights, which have reference only to small pieces of land of comparatively little value. Such argument has no place in the law governing riparian rights. It was rejected in the case of *Miller & Lux v. Maderia Canal & Irrigation Co.*, 155 Cal. 59, 99 P. 502, wherein it was said:

"The argument that these waters are of great value for the purposes of storage by appropriators and of small value to the lower riparian

owners defeats itself. If the right sought to be taken be of small worth, the burden of paying for it will not be great. If, on the other hand, great benefits are conferred upon the riparian lands by the flow, there is all the more reason why these advantages should not without compensation be taken from the owners of these lands and transferred to others."

[9] Appellant also claims to be an appropriator of all the water of the springs. Apart from the fact that the appropriation, if such there was, was not made upon government land (*Cave v. Taylor*, 133 Cal. 566, 65 P. 1089; *Holmes v. Nay*, 186 Cal. 231, 199 P. 325; *San Joaquin & Kings River Canal & Irrigation Co. v. Worswick*, 187 Cal. 674, 203 P. 999), it is not the purpose of this action and it is not the effect of this judgment to deprive defendant and appellant of the use of the waters of the springs for irrigation of the Long ranch, but merely to enjoin it from diverting the waters from the watershed, and it is settled that even an appropriator of water may not change the point of diversion to the injury of others (*Kidd v. Laird*, 15 Cal. 163, 76 Am. Dec. 472; *Butte T. M. Co. v. Morgan*, 19 Cal. 609; *Ramell v. Irish*, 96 Cal. 214, 31 P. 41; *Hargrave v. Cook*, 108 Cal. 72, 41 P. 18, 30 L. R. A. 390). Furthermore, under the appropriation doctrine, one acquires only the use of the water, and not the ownership in the corpus thereof. *Ortman v. Dixon*, 13 Cal. 34; *McDonald v. Askew*, 29 Cal. 201; *Nevada County & Sacramento Coal Co. v. Kidd*, 37 Cal. 282; *Shenandoah Mining & Milling Co. v. Morgan*, 106 Cal. 409, 39 P. 802. The water flowing off the Long ranch after 24 hours' use was therefore subject to appropriation by lower proprietors, and they used it to irrigate their lands, as shown by the testimony and findings.

[10, 11] The only remaining point to be considered is the contention of appellant that injunction was not the proper remedy; that damages only should have been allowed, if any relief was granted to the plaintiffs; and that plaintiffs have not shown damage. The trial court found the plaintiffs had been substantially damaged by the diversion, and this finding is supported by testimony set out in respondents' brief and copied from the record. However, riparian proprietors may restrain the taking of water to nonriparian land without showing damage. *Fresno Canal & Irrigation Co. v. People's Ditch Co.*, 174 Cal. 446, 163 P. 497.

There are no other matters requiring discussion, and the judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

201 Cal. 754

WEBB v. VERCOE. (L. A. 8550.)

Supreme Court of California. Aug. 12, 1927.

Rehearing Denied Sept. 8, 1927.

1. Trusts $\S$ 110—Evidence held to sustain findings of fact establishing resulting trust in land sold on foreclosure to mortgagee.

Regardless of whether action is considered one to declare resulting trust or to redeem property from foreclosure sale after expiration of statutory period, evidence that mortgagee agreed to buy land on foreclosure and accept payment out of income of property held to sustain court's findings of fact and judgment establishing resulting trust in favor of plaintiff.

2. Judgment $\S$ 251(1)—Issues under pleadings and submitted to court held sufficient to warrant declaring resulting trust in land purchased by mortgagee on foreclosure or permitting redemption after expiration of statutory period (Code Civ. Proc. $\S$ 580).

Issues as framed by pleadings and submitted to court held sufficient, under Code Civ. Proc. $\S$ 580, to warrant either declaring resulting trust for mortgagee's repudiation of agreement to buy land on foreclosure and accept payment therefor out of income of property, or to warrant permitting redemption after expiration of statutory period.

3. Mortgages $\S$ 610—Trusts $\S$ 359(1)—Remedies by proceeding to declare resulting trust in property, purchased by mortgagee on foreclosure, and to redeem property after statutory period are practically same.

Remedies by proceeding against mortgagee purchasing on foreclosure to declare resulting trust and by proceeding to redeem from foreclosure after expiration of statutory period are practically same.

4. Trusts $\S$ 92½—Mortgagee's buying property on foreclosure with agreement to permit redemption by payment from income and repudiation of such contract creates resulting trust (Civ. Code, $\S$ 853).

Where mortgagee bought property at foreclosure sale with agreement to permit redemption therefor out of earnings of property and afterward repudiated such agreement, there was legal fraud giving rise to resulting trust, under Civ. Code, $\S$ 853, which need not be evidenced by writing.

5. Mortgages $\S$ 600(2)—In allowing redemption from mortgage foreclosure after statutory period, court may fix interest regardless of state (Code Civ. Proc. $\S$ 702).

Proceeding to redeem from mortgage foreclosure after statutory period is equitable one, and in decree therefor court may fix terms which it thinks proper and is not governed as to interest by Code Civ. Proc. $\S$ 702, fixing rate 1 per cent. per month in case of redemption of realty.

6. Mortgages $\S$ 591(1)—Trusts $\S$ 100—Equitable owner may sue to redeem after expiration of statutory period or claim resulting trust (Code Civ. Proc. $\S$ 701).

In view of Code Civ. Proc. $\S$ 701, giving judgment debtor right to redeem, equitable owner of property has right to insist on resulting

trust through legal fraud of mortgagee repudiating agreement to buy property on foreclosure and accept payment out of earnings therefrom, or may assert right to redeem after expiration of statutory period.

7. Trusts $\S$ 359(1)—Action to establish resulting trust in land purchased by mortgagee on foreclosure held not to involve rule pertaining to express trusts.

Action to establish resulting trust in land because of mortgagee's repudiation of agreement to buy land on foreclosure and let payment be made out of income thereof, even if regarded as action to redeem after expiration of statutory period, did not involve rule pertaining to express trusts.

8. Perpetuities $\S$ 4(15)—Action to establish resulting trust on mortgagee's repudiating agreement to buy on foreclosure held not to involve perpetuities.

Action to establish resulting trust because of mortgagee's repudiating agreement to buy land on foreclosure and accept payment out of income thereof, even if regarded as action to redeem after expiration of statutory period, held not to involve law against perpetuities.

9. Equity $\S$ 65(1)—Doctrine of clean hands held not involved in action to establish resulting trust for mortgagee's repudiating agreement to buy on foreclosure and accept payment from income.

Action to establish resulting trust in lands for mortgagee's repudiation of agreement to buy land on foreclosure and permit redemption thereof out of income of property, even if regarded as action to redeem after expiration of statutory period, held not to involve doctrine of clean hands.

In Bank.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Lillie T. Webb against Adele Vercoe, to establish a resulting trust. From a judgment for plaintiff, defendant appeals. Affirmed.

Rehearing denied. SHENK, J., votes for a rehearing.

Wm. Chambers, and Hunsaker, Britt & Cosgrove, all of Los Angeles, for appellant.

Jos. Musgrove and Carl B. Sturzenacker, both of Los Angeles, for respondent.

PRESTON, J. This is an appeal from a judgment in favor of plaintiff declaring a resulting trust in real property standing in the name of defendant.

By the amended complaint it is alleged that on November 3, 1917, and for a long time prior thereto, plaintiff was the owner and in possession of certain real property, "subject to a first mortgage in the principal sum of \$11,000, and to a second mortgage in favor of the defendant in the principal sum of \$5,000"; that on said date the owner of said first mortgage began an action to foreclose same; that defendant proposed to plaintiff, who was his sister and who was unable to pay said incum-

branches, that "said foreclosure suit be allowed to proceed to judgment, and that the property be sold * * * and that defendant would purchase the property for the benefit of plaintiff, and that the amount of said purchase price should be considered as a loan by the defendant to the plaintiff, and that plaintiff should remain in possession and the management of the said property, and should improve the same, and should receive from the income derived from the property a wage sufficient to enable her to live, and that the balance of the income, after payment of necessary expenses, should be turned over by the plaintiff to defendant, to be applied on account of the said loan, and that the defendant would, as soon as the amount of the said loan and interest at 7 per cent. per annum was paid by the plaintiff to the defendant, either from the proceeds of said property or otherwise, whether it took 5 or more years, convey the title of said property to the plaintiff, and that the defendant would hold the title to the said property in trust for the plaintiff, and as security for said loan, until such time as the said loan and interest were repaid, as hereinbefore alleged; that plaintiff having all confidence in the defendant, and relying upon the sisterly love and affection of the defendant, did accept the said proposal of defendant, and did permit the said foreclosure suit to proceed without making other effort to raise the money to redeem said property from such foreclosure."

By the answer this agreement was denied, but the court found its existence in practically the identical words of the complaint. The complaint also contained the allegation "that the legal title to said property on November 3, 1917, stood in the names of the plaintiff's three daughters, in trust for the benefit of plaintiff, who was the real owner thereof." This allegation, which was denied also, the court found to be true.

On stipulation of the parties the court appointed a referee to state the account between them, and his report was to the effect that the amount due defendant from plaintiff was the sum of \$27,801.25. Thereafter the court gave its judgment declaring that defendant held the title to said real property involved in trust for plaintiff, and that upon payment by plaintiff to defendant of said sum of \$27,801.25 within 90 days after entry of the judgment defendant should execute and deliver to plaintiff a good and sufficient deed of conveyance to said property free and clear of all incumbrances; that in case of her failure to do so, the clerk of the court be made a commissioner to execute such deed, the deed so executed by the clerk to operate as a transfer to plaintiff; that upon and after payment by plaintiff of said sum to defendant and a deed by said defendant or said clerk to plaintiff, defendant be restrained and enjoined from thereafter asserting any right, title, or interest in or to said property, and that plaintiff

be entitled to re-enter possession of the premises, and for costs of suit.

The facts show that on the 3d day of November, 1917, a suit to foreclose the first mortgage on said property was filed, and thereafter the defendant, who held the junior mortgage thereon, also began an action to foreclose it; that a combined decree of foreclosure and sale was made and a sale under said foreclosure occurred on the 24th day of March, 1919, at which time defendant became a purchaser for the purchase price of \$20,030.35; that thereafter and on the 25th day of May, 1920, defendant received a sheriff's deed to the property.

[1] At the outset it must be stated that defendant urges that the evidence does not furnish proper legal support for the findings of fact made by the court. It is unnecessary to dwell at length upon the evidence, but we will set forth the following quotations gleaned from various letters which passed between plaintiff and defendant during the years 1918, 1919, and 1920:

In a letter dated April 18, 1918, plaintiff wrote defendant, who was in Europe at the time, as follows:

"You take the ranch over in your name so that no one can touch it and let me manage it at no expense to you. Rendering you a complete statement & account of all moneys spent by me on it and money made from produce, hogs, rabbits, etc. Pay all the money I can make into your bank to your credit until I gradually reduce the mortgages. I just see my way clear to make good money this year on hogs. When one stops to consider, I have done very well to have held my own this long and not lost everything. At least I have a fine deep well pumping plant that cost \$3,000 practically all paid for, will have on May 11th, worth many thousands to that land. If Sentous forecloses, this fine property is sure to be lost as it is impossible to renew mortgages at this time. Much expense can be also saved by your taking up the mortgage right now. I pray and trust you will save the place to enjoy yourself some day as much as any one else."

To the above letter defendant replied:

"* * * Upon receipt of your letter I cabled Mr. Harris [attorney for defendant] as follows: 'Save property Deed to me, Mrs. Webb given management, Revert to her repayment debt. * * *' * * *"

Again she wrote plaintiff:

"I am glad to also hear that you are living out on the ranch and your account of the development of the trees, etc., also of local conditions, is most interesting."

Again:

"You are doing the only possible thing to bring you that success, and that is by living on the place and giving everything your personal attention and get out of debt as quickly as you can. That, I agree with you, is the best way to make money and gain success."

Again:

"I note all you say re your plans, etc., also hope for the discovery of oil. I pray with you—that all may come out happily in the end. * * * To save the ranch exhausts my resources—as you can imagine. * * *"

Again:

"Now please put all your energy and thought into making the ranch a success and at the same time provide a good and comfortable home for yourself and your daughters—until such time as you can buy it back."

Lastly, and after the property had been purchased, defendant wrote:

"If you read over my former letters you will see that I told you that you are to have every chance of redeeming your property upon payment of what I have spent in buying it in—which was to save it for you and your children, if possible. If years go by, it will be the same with the added interest—so I don't think you need worry yourself as to my intentions. My happiness will be to see you and your children in possession—free of debt."

The oral testimony given at the trial was also of such a character that the court, viewing the whole case, was well warranted in concluding that the written declarations of the defendant were to the effect that plaintiff need not attempt to redeem her property from the foreclosure sale, but could rely upon the defendant to furnish the money to purchase at such sale and to thereafter take a sheriff's deed, treating the transaction as a loan and holding the legal title as security for its repayment; this, too, upon the terms found by the court, to wit, interest at 7 per cent. per annum; and that plaintiff should have an indefinite time within which to repay defendant and secure thereby title to the property.

Counsel for respondent contends that the transaction between the parties forms an express trust, and that in the correspondence between them may be found the full requirements of the written declaration thereof required by the statute. He disclaims that it is an action to redeem from a mortgage foreclosure sale after the statutory limit for redemption upon a showing of grounds for equitable relief, and also disclaims that the transaction was one creating a resulting trust in real property.

[2, 3] Appellant, on the other hand, spends her efforts in attempting to show that the transaction was not one creating an express trust, and that the writings are insufficient to support such contention. We find it unnecessary to dwell upon this particular phase of the doctrine of trusts, for we have reached the conclusion that the transaction may be properly characterized both as conduct and statements, oral and written, out of which the law creates a resulting trust, and also as an agreement to permit plaintiff to redeem property from foreclosure sale after expiration of the statutory period therefor. Indeed, the

two remedies are practically the same. We regard the issues as framed by the pleadings and as submitted to the court on the trial to be amply sufficient, under section 580 of the Code of Civil Procedure, to warrant either or both of these conclusions. In *Bradley v. Bradley*, 185 Cal. 237, 240, 241, 131 P. 750, 751, it is said:

"It is a matter of indifference under this pleading whether it be said that plaintiff is seeking to enforce a voluntary trust which has been repudiated by the trustee or whether it is seeking to enforce an involuntary trust arising in law from that repudiation. In its creation the trust was voluntary, and however at variance it may be thought to be with the mandate of the statute as to the creation of trusts in land, it is of such character that equity will not permit the trustee to take advantage of the existing confidential relations in which the trust itself originated and by repudiating the trust obtain an unconscionable advantage over the confiding trustor and beneficiary. So numerous are cases upon this subject that it must suffice to refer to *Lauricella v. Lauricella*, 161 Cal. 61, 118 P. 430; *Cooney v. Glynn*, 157 Cal. 583, 108 P. 506; *Jones v. Jones*, 140 Cal. 587, 74 P. 143; *Kimball v. Tripp*, 136 Cal. 631, 69 P. 428."

[4] It is not controlling that respondent disclaims the transaction to be what we think it is, for we are taught that oftentimes the right hand may not "know what the left hand doeth." Testing the sufficiency of the transaction as one creating a resulting trust and, therefore, one which need not be in writing, we are able to appeal to a long line of decisions in this state to the effect that a transaction such as the one here under consideration will be properly denominated a loan by defendant to plaintiff, and a taking by defendant of the legal title to the property in controversy as security for repayment thereof, and the repudiation of this relation by the defendant a legal fraud giving rise to a resulting trust in the property. Civ. Code, § 583.

In the case of *Sandfoss v. Jones*, 35 Cal. 481, 487, a verbal agreement was made by two of several judgment creditors with an execution debtor to purchase all of the property involved at the sheriff's sale for the benefit of said execution debtor, and to advance their own money, if necessary for that purpose, and when they should have repaid themselves for said advances, with interest, out of the rents, issues, and profits derived from the property, to reconvey the portions unsold to the execution debtor. The court there said:

"It is well settled that where one purchases and pays for property with his own money, and takes the deed in the name of another, a trust by operation of law is raised, and the statute of frauds does not apply. * * *

"If, however, we consider the averments of the complaint in the light which is most favorable to the defendants, we have a verbal agreement on their part with an execution debtor,

whose land is about to be sold by the sheriff, to purchase it with their own funds, and hold it for his benefit. Such an agreement is equivalent to a loan of the money and a taking of the title as security for its repayment; or an agreement by one person to purchase land for the benefit of another, under circumstances which would amount to a fraud upon the latter, if the former was allowed to repudiate his promise, and, therefore not within the statute of frauds.

"In relation to such a contract the High Court of Errors and Appeals of the State of Mississippi said: 'It is not now an open question that when a party agrees before the sale to purchase property about to be sold under an execution against a party, and to give such party the benefit of the purchase, that the agreement is binding and will be enforced. The defendant, upon the faith of such an agreement, may have ceased his efforts to raise the money for the purpose of paying off the execution, and thus preventing a sale of his property. It will not do to say that the party promising was moved merely by friendly or benevolent considerations, and may, therefore, at his option, decline a compliance with his agreement. Such considerations constitute the foundation of almost every trust, and the trustee should be held to account as nearly as possible in the same spirit in which he originally contracted.'"

In the case of *Brown v. Spencer*, 163 Cal. 589, 593, 126 P. 493, 495, defendant loaned plaintiffs the amount necessary for them to complete the purchase of certain lands, the lands, however, being conveyed to her as security for the money so loaned, upon the understanding that she should hold same in trust for said plaintiffs until a reconveyance was demanded by them, or the land sold and the money repaid to her, plaintiffs at all times having possession of the property. The court said:

"The substance of the cause of action thus set forth is that the consideration for the transfer of the land was paid by Frank Spencer, John Spencer, and the plaintiffs, and the conveyance thereof was made to Eleanor Spencer. In such cases a trust is presumed to result in favor of the persons paying the consideration, and the grantee will be declared a trustee for them as to the land. Civ. Code, § 853. The loan of the money by Eleanor to the purchasers was, in legal effect, a transfer of the money to them. The consequence was that when the money was paid in settlement of the purchase price, it was their money, and not Eleanor's, that was so paid. The fact that it was paid directly to the vendors by her agent does not alter the legal effect of the transaction. The transfer being made to Eleanor, she became a trustee holding title to the land for the other interested parties. No writing was necessary to create a trust of this character. It is a trust which the law implies from the facts of the case and may be created without writing. The case falls exactly within the rule of the aforesaid section of the Civil Code. *Campbell v. Freeman*, 99 Cal. 546, 34 P. 113; *Hidden v. Jordan*, 21 Cal. 99; *Millard v. Hathaway*, 27 Cal. 139; *Sandfoss v. Jones*, 35 Cal. 486; *Waltton v. Karnes*, 67 Cal. 255, 7 P. 676; *Ward v.*

Matthews, 73 Cal. 16, 14 P. 604; *Hellman v. Messmer*, 75 Cal. 170, 16 P. 766; *Moultrie v. Wright*, 154 Cal. 523, 98 P. 257; *Title, etc. [Ins. & Trust] Co. v. Ingersoll*, 158 Cal. 491, 111 P. 360. Upon the facts alleged the plaintiffs were entitled to the relief prayed for."

In the case of *O'Rourke v. Skellenger*, 169 Cal. 270, 272, 146 P. 633, 634, defendant agreed with the heirs of a deceased mortgagor that he would advance money and buy the land involved at the foreclosure sale, thereafter holding it in trust for the benefit of the estate and the heirs. The court said:

"The decisions of this court establish the proposition that, under the circumstances stated, the defendant will be held bound as trustee of the land for the benefit of the heirs of McCabe, and that in equity he is entitled only to be reimbursed for his outlays, with interest, with a lien on the land to secure him in the repayment thereof. The consideration for the purchase of the mortgage from Forster, and of the land at the foreclosure sale, is, under the circumstances stated, deemed to have been paid by the heirs, and a resulting trust is created accordingly. The rule is stated in *Brown v. Spencer*, 163 Cal. 592, 593, 126 P. 493, and many of our decisions in which may be found illustrations of the applications of the rule, are there cited."

In the case of *Parker v. Catron*, 120 Ky. 145, 148, 85 S. W. 740, 741, 742 (117 Am. St. Rep. 575), defendant, pursuant to an oral agreement, purchased at a judicial sale for plaintiff land of which plaintiff was in possession, and in which he owned an interest. The court said:

"It is earnestly maintained that the agreement of Catron, being in parol, is within the statute of frauds. * * * Constructive trusts are held not within the statute because they rest in the end on the doctrine of estoppel, and the operation of an estoppel is never affected by the statute of frauds. *Morris v. Shannon* [12 Bush] 75 Ky. 89. If Parker had not misled Catron, he might have gotten some one else to buy in the land for him; and if Parker had not let him deal with the land as his own, and held himself out as having bought it in for him, he might still have protected himself. To permit Parker to shield himself behind the statute of frauds, and keep the land, would be to sanction a fraud and deny effect to familiar principles of estoppel. In *Martin v. Martin* [16 B. Mon.] 55 Ky. 8, Driffin bought in Martin's land at a commissioner's sale for him under a verbal agreement to this effect, when there was no right of redemption at such sales. It was held that Driffin held the land in trust for Martin, and that the trust was not affected by the statute of frauds. The same conclusion was reached in *Miller v. Antle* [2 Bush] 65 Ky. 407, 92 Am. Dec. 495, and *Green v. Ball* [4 Bush] 67 Ky. 586. It is insisted that these cases are not in point, for the reason that Catron here did not own the land. But he had it in possession and was living upon it. He had a lien on it for the money which he had paid to redeem it from the execution sale. The arrangement with Parker was made to protect his interest, and created no less a constructive

trust when his interest in the land was equitable than if he had held the legal title. It would be no less a fraud on Catron to permit Parker to keep the land in the one case than the other. The estoppel arises equally in either case. An agency to sell land may be created by parol. *Talbot v. Bowen* [1 A. K. Marsh.] 8 Ky. 437, 10 Am. Dec. 747; *Isaacs v. Gearheart*, 12 B. Mon. (51 Ky.) 231. A verbal partnership to buy land is also not within the statute. *Garth v. Davis & Johnson* [120 Ky. 106], 85 S. W. 692, 27 Ky. Law Rep. 505 [117 Am. St. Rep. 571]."

Perry on Trusts and Trustees (6th Ed.) vol. 1, § 171, pp. 268, 269, gives the situation here in an illustration of the doctrine as follows:

"Thus, where one buys land at an execution sale, or sale under a trust deed, under an agreement with the debtor that the latter may redeem, the purchaser holds in trust; it would be a fraud to allow him to repudiate the contract. (a) Mere declarations and admissions of the party to be charged accompanying the transfer of title have been held sufficient to raise a trust."

Treating the transaction as one to redeem the property from the foreclosure sale after expiration of the statutory period of redemption, we find the principles involved fully discussed in the three Bunting Cases, from which the following quotations are taken:

The first case, *Benson v. Bunting*, is reported in 127 Cal. 532, 59 P. 991, 78 Am. St. Rep. 81. Plaintiff in an action to foreclose a mortgage employed defendant's attorneys to make the bid at the sale, and misrepresented through them to defendant that he had twelve months in which to redeem. Defendant, relying on the truth of the representations, neglected to redeem within the six months' statutory period, but tendered a full redemption within twelve months, which tender was refused. It was held that said refusal operated as a fraud upon defendant; that he was entitled to equitable relief and plaintiff was estopped to insist upon the statutory period on the ground that defendant was lulled by his assurances into a false security, notwithstanding the assurances were not in writing, and were made without consideration. In the second case, *Benson v. Bunting*, 141 Cal. 462, 75 P. 59, the above decision was upheld notwithstanding there was no specific finding therein made that plaintiffs offered to redeem. In the third action, *Bunting v. Haskell*, 152 Cal. 426, 429, 93 P. 110, 111, which involved questions in connection with tender of the money necessary to effect redemption within thirty days under the judgment rendered in said above-mentioned second action, the court said:

"But was the redemption authorized by the decree in *Benson v. Bunting* [141 Cal. 462, 75 P. 59] the redemption provided for in section 702 et seq. of the Code of Civil Procedure? As a general rule, the redemption allowed by statute cannot be effected after the expiration of the statutory period allowed therefor. *Tilley*

v. Bonney, 123 Cal. 118, 123, 55 P. 798; *Davidson v. Gaston*, 16 Minn. 202, 230 (Gil. 202). It is well settled, however, that courts of equity may, upon a proper showing of fraud, mistake or other circumstances appealing to the discretion of the chancellor, relieve judgment debtors whose property has been sold on execution from a failure to redeem within the statutory period. In such cases equity 'in its discretion will grant relief on a proper bill, and allow the judgment debtor to redeem after the expiration of the redemption period.' 17 Cyc. 1330; *Grafam v. Burgess*, 117 U. S. 180, 6 S. Ct. 686, [29 L. Ed. 839]; *Branck v. Foust*, 130 Ind. 538, 30 N. E. 631; *Smith v. Huntoon*, 134 Ill. 24, 24 N. E. 971, 23 Am. St. Rep. 646."

To the same effect, see *Wallace v. Dodd*, 136 Cal. 210, 211, 68 P. 693.

[5] The evidence is sufficient to warrant the conclusion that defendant agreed to extend the period of redemption beyond the time fixed by the statute, but in this behalf she earnestly insists that the court should have fixed the interest charge at 1 per cent. per month from date of sale to date of commencement of this action. In this she is in error, for the proceeding to redeem after the statutory period is an equitable one and bears no relation whatever to section 702 of the Code of Civil Procedure. A court of equity may, therefore, in its decree fix such terms for redemption as it may think proper and is not governed by the provisions of said section. See three Bunting Cases hereinbefore cited, especially *Benson v. Bunting*, 141 Cal. 462, 465, 75 P. 59, 60, where it was said:

"Appellant contends that the court erred in fixing the amount of interest which respondents must pay in order to redeem, and that more interest should have been required. The court allowed 2 per cent. per month interest during the six months' statutory period of redemption, and thereafter the legal rate of interest of 7 per cent. per annum. The contention of appellant is that 2 per cent. per month should have been allowed until the time of actual redemption under the judgment; but this contention is not maintainable. Appellant having denied the right of redemption and prevented the exercise of it, cannot recover the extraordinary interest which respondents would have avoided if they could have exercised their right of redemption. Indeed, respondents argue with great force that they should not have been required to pay the 7 per cent. per annum interest, or any interest at all, during the long period after the repudiation of their right to redeem; but respondents are not appealing, and we cannot consider any alleged error against them. However, the appellant, if the case was rightly decided against him in other respects, has no just reason to complain as to the amount of interest allowed him."

See, also, *Bunting v. Haskell*, supra, where it is said:

"But such redemption, when authorized by the decree of a court of equity, finds its support, not in the provisions of the statute allowing redemption within a given time as a matter

of right, but in the provisions of the decree granting to a party the privilege of redeeming upon terms fixed by the court as just."

[6] The point is also made that inasmuch as plaintiff owns only the equitable title to the estate she may not assert either the right to redeem nor the claim to a resulting trust in the real property. This contention, however, is without merit, as a judgment debtor has a right to redeem. Code of Civil Procedure, § 701. And as the equitable owner of the property, plaintiff has the right to insist upon a resulting trust. *Parker v. Catron*, supra.

[7-9] Neither the rule pertaining to express trusts nor the law against perpetuities is involved in this action. The same may be said about the doctrine of "clean hands." As above stated, treating the transaction either as a resulting trust or as an action in equity to redeem from judicial sale, the pleadings, findings, judgment, and evidence are all amply sufficient.

Judgment affirmed.

We concur: WASTE, C. J., and CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; RICHARDS, J.

85 Cal. App. 233

NORTON et al. v. HOULETTE.

NORTON v. SAME.

(Civ. 5056.)

District Court of Appeal, Second District, Division 1, California. Aug. 25, 1927.

1. Appeal and error ⇨1002—Jury's finding on conflicting evidence that automobilist injuring bicyclist was negligent held conclusive on appeal.

In action for injury to bicyclist, jury's finding in effect that defendant automobilist was negligent in colliding with bicycle on which boy was riding while holding to another automobile, based on conflicting evidence, held conclusive on appeal.

2. Appeal and error ⇨1064(1)—Instruction to consider probable permanent effect of plaintiff's injuries and probable likelihood that he would be less able to earn money held not prejudicial as fixing uncertain damages (Civ. Code, § 3283).

In action for personal injuries to boy from being run over by automobile, instruction that jury should determine damages which plaintiff might suffer because of impaired or diminished earning capacity and to consider probable permanent effect of his injuries and probable likelihood, if any, that he would be less able to earn money has reference to determining extent of injury, and, while not to be commended, was not prejudicial as making damages fixed therefor uncertain, contrary to Civ. Code, § 3283.

3. Appeal and error ⇨882(12)—Defendant requesting instruction on last clear chance cannot complain of instruction based thereon.

In action for personal injuries to boy from being struck by automobile, defendant, at whose request instruction was given concerning situation involving last clear chance, cannot complain of instruction involving doctrine of last clear chance.

4. Municipal corporations ⇨706(8)—Instruction allowing recovery if automobilist ought to have realized bicyclist's inability to escape from dangerous position and automobilist had last clear chance to avoid injury held proper, under evidence.

In action against automobilist for running over boy who was riding on bicycle and holding to rear of automobile in front of defendant's, evidence held to render proper instruction that if defendant was aware of plaintiff's dangerous situation so that he realized or ought to have realized plaintiff's inability to escape therefrom, and if defendant had last clear chance to avoid injury by exercise of ordinary care and failed to do so, to find for plaintiff.

5. Negligence ⇨83—To render "last clear chance" doctrine applicable, person responsible for injury, seeing or knowing of peril or facts reasonably showing peril, must have neglected ordinary care to avoid injury.

Before doctrine of "last clear chance" applies, it must appear that person responsible for injury, seeing or knowing peril of injured person or knowing facts from which reasonable man would believe him to be in peril, has not used ordinary care to avoid injury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Separate actions by Mrs. Mark Norton and husband, and by Harry Flood Norton, an infant, by Mrs. Mark Norton, guardian ad litem, against P. E. Houlette, consolidated for trial and on appeal. From a judgment for plaintiffs in each case, defendant appeals. Affirmed.

J. S. Garnett and Joe Crider, Jr., both of Los Angeles, for appellant.

Paul Barksdale D'Orr and G. A. McElroy, both of Los Angeles, and F. M. Bottorff, of Berkeley, for respondents.

HOUSER, J. One of the actions herein involved was brought by the guardian of a minor for damages arising out of a personal injury alleged to have been sustained by said minor and to have been caused by and through the negligence of defendant. The other action was brought by the parents of the minor against defendant to recover damages on account of expenses incurred by said parents in connection with the medical treatment of the minor, made necessary by the injuries received by him. The two cases were

consolidated for the purpose of trial, and defendant appeals from a judgment against him in each of such cases.

Briefly stated, the essential facts appear to be that Henry Flood Norton (the minor) was riding a bicycle near the left rear wheel of an automobile and with his right hand was holding onto such automobile, while with his left hand he grasped the handlebar of the bicycle on which he was riding; that in an automobile driven and owned by him, defendant was closely following plaintiff on his bicycle and the automobile onto which plaintiff was holding; that by reason of the negligence of either plaintiff or defendant, plaintiff fell from the bicycle and was run over by the automobile operated by defendant and received the injuries for which compensation was sought from defendant in the action herein.

[1] One of the points made by appellant for reversal of the judgment is that neither of the verdicts rendered by the jury is supported by the evidence. In that connection it need only be said that on the trial of the action evidence was received in effect that in attempting to drive his automobile around or past plaintiff and the automobile onto which he was holding, without any fault on the part of plaintiff, the automobile driven by defendant collided with the bicycle on which plaintiff was riding, thus causing plaintiff to fall to the ground, and thereupon that one of the front wheels of defendant's automobile passed over the body of plaintiff, which resulted in the injuries of which he complained. While in volume, perhaps more evidence was received which tended to show due care on the part of defendant than was introduced which would justify a finding of negligence, nevertheless, under well-established principles of law, the decision reached by the jury in the premises is conclusive as to the facts.

[2] It is next contended by appellant that the trial court erred in giving to the jury the following instruction:

"I instruct you that if you find for the plaintiff, Harry Flood Norton, it will be your duty to determine from the evidence the amount of his damage which would be compensation for his injuries. In doing so, you should carefully consider from the evidence the nature, extent, and character of the injury sustained. You should also determine whether or not the injuries to the plaintiff are permanent; and you should allow him for all damages which naturally and directly resulted from his injuries, whether in the past or in the future. You should allow him such damages for bodily pain, suffering, and mental anguish as under the evidence you believe him entitled to, and you should allow him such damages for physical disability, if any such there be, as from the evidence you believe him entitled to.

"The law establishes no exact rule by which to fix the amount of damages for bodily pain, suffering, and mental anguish, but leaves it to you to determine from the evidence the reasonable amount thereof. The measure of such damages is the fair and impartial opinion of the

jurors as made up from the evidence under the instruction of the court.

"If you should find from the evidence that the plaintiff will suffer damage by reason of impairment or diminished capacity for earning money, then in estimating this element of plaintiff's damage you will take into consideration the character of his injuries, their probable permanent effect, if any, upon his strength, endurance, and activity, and the probable likelihood, if any, that he would be less able to earn money after he has become 21 years of age, or after being emancipated by his parents (that is, permitted to work for himself) before reaching the age of 21."

Appellant directs particular attention to the language of the instruction which authorizes the jury in determining the damages which the plaintiff might suffer by reason of impaired or diminished earning capacity, to consider the "*probable permanent effect*" of plaintiff's injuries, and the "*probable likelihood, if any,*" that plaintiff would be less able to earn money, etc. Reliance by appellant is principally placed in the case of *Melone v. Sierra Railway Co. of California*, 151 Cal. 113, 91 P. 522, where an instruction was condemned which permitted the jury to take into consideration such physical and mental suffering as the plaintiff "may undergo in the future." It was there pointed out that section 3283 of the Civil Code permitted such damages only as had already resulted or which were certain to result in the future.

As a limitation upon the language of the instruction to which appellant has directed attention, it will be noted that the instruction also contained the following:

"You should also determine whether or not the injuries to the plaintiff are permanent, and you should allow him for all damages which actually (naturally) and directly resulted from his injuries, whether in the past or in the future."

By consulting the dictionary authorities, it will be seen that in the use of the word "actually" the jury was instructed to *establish as a fact* the resulting damage, and by the use of the word "directly" was limited to what grew out of the particular injury in question. The further admonition to the jury was that in arriving at the damage, it must consider the evidence, and if it should be found that the plaintiff would suffer future damage by reason of impairment or diminished capacity for earning money, then, in estimating that element of plaintiff's damage, the jury might take into consideration the character of plaintiff's injuries, their *probable permanent effect*, if any, upon his strength, endurance, and activity, and the *probable likelihood*, if any, that he would be less able to earn money, etc. It thus appears that the jury having reached a conclusion as to the extent of the injury, it then was authorized to fix the damage, which must be *certain*, under section 3283 of the Civil Code. For the damage, the jury was directed that it

must look to the evidence—the person's capacity to earn money, etc. In other words, the use of the words "probable" and "likelihood" have reference to determining the *extent of the injury*, and not to the element of fixing the damage resulting therefrom. While, as contended by respondent, upon an analysis of the several parts of the requested instruction, including that part thereof to which reference has just been had, and upon a proper construction being placed upon the language thereof to which objection is made by appellant, the instruction as a whole may be distinguished from the instruction under consideration in the Melone Case—in view of the fact that by certain other cases decided by the appellate and the Supreme Courts of this state, instructions containing language which apparently was as much in conflict with the literal language of section 3283 of the Civil Code as is the wording to which appellant objects of the instruction here under consideration, were upheld—in the instant case, we are constrained to rule that while not to be commended, the instruction of which complaint is made was not prejudicial to the rights of defendant.

In the case of *Kimic v. San Jose-Los Gatos Interurban Ry. Co.*, 156 Cal. 379, 388, 104 P. 986, 990, the jury was given an instruction which, among other things, contained the following language:

"* * * You are the judges of the fact as to the extent and severity of the injuries sustained by the plaintiff, and also as to the fact of the existence of neurasthenia, or traumatic neurosis, as well as the degree of such disease, and of the *probability of its permanency*. * * *

In commenting on that portion of the instruction to which attention has been directed, among other things, the court said:

"The theory of learned counsel for appellant apparently is that the jury were practically told by this instruction that they might allow damages for such future loss as they thought might 'possibly or probably' follow on account of the injuries, the true rule in this regard being, as stated in *Melone v. Sierra Ry. Co.* [of California] 151 Cal. 117 (91 P. 522), that plaintiff can recover only 'such damages as by the evidence it is reasonably certain he will suffer in the future.' We do not so construe the instruction. It was not an instruction on the subject of damages at all. * * * The whole purpose and effect of this instruction was to impress upon the jury that they were the sole judges as to the extent and severity of the injuries sustained, the then condition of the plaintiff in the respect specified and the probability of its permanency, and that in all these matters the burden was on the plaintiff to establish his case by a preponderance of evidence. It was nowhere intimated to the jury that they might award damages for future losses which were only possible or probable and not reasonably certain to ensue."

In *Rouse v. Pacific Electric Ry. Co.*, 27 Cal. App. 772, 774, 151 P. 164, an instruction to the jury was upheld which contained a statement of law that "the jury will consider what, if anything, has been or *will probably be* the plaintiff's loss of earning power;" and a similar conclusion was reached by the Supreme Court in *Stein v. United Railroads of San Francisco*, 159 Cal. 368, 373, 113 P. 663, 665, with reference to a part of an instruction to the jury that it might consider "whether the injury was *temporary in its nature*, or was *likely* to be permanent in its character." Likewise, in *Walker v. Southern Pac. Co.*, 162 Cal. 123, 121 P. 369, where it appeared that the jury was instructed as to the various elements of damages which might be considered, including "the pecuniary loss *likely* to be sustained by him (plaintiff) during life."

In discussing the feature of probabilities as an item of damage, in *Ruppel v. United Railroads of San Francisco*, 1 Cal. App. 670, 82 P. 1073, 1074, the following is quoted from *Sutherland on Damages* (3d Ed.) vol. 4, § 1263:

"If they [the jury] are satisfied from the history of the family, or the *intrinsic probabilities* of the case, that they were sustained by the loss of bodily care or intellectual culture, or moral training, which the mother had before supplied, they are at liberty to allow for it."

And see *Storris v. Los Angeles Traction Co.*, 134 Cal. 91, 66 P. 72; *Brown v. Beck*, 63 Cal. App. 686, 697, 220 P. 14; *Jones v. United Railroads of San Francisco*, 54 Cal. App. 744, 754, 202 P. 919.

[3] It is also urged by appellant that the trial court erred in giving to the jury an instruction involving the doctrine of "last clear chance." The record, however, shows that at the request of defendant an instruction was given to the jury concerning the identical situation to which he now makes objection. In such circumstances it is clear that appellant is in no position to complain.

[4] Aside from that fact, however, evidence was introduced by defendant on the trial of the action, in substance, that as defendant in his automobile was following plaintiff on his bicycle, defendant saw the front wheel of the bicycle collide with the left rear wheel of the automobile on which plaintiff was holding, which caused plaintiff to fall to the ground. Other evidence in the case in effect tended to show that after plaintiff was thrown from his bicycle it would have been possible for defendant, in the exercise of ordinary care, to avoid injuring plaintiff. Accordingly, it is clear that an instruction to the jury, correctly stating the principle of law embraced in the doctrine of "last clear chance," was appropriate. The instruction to which appellant takes exception was as follows:

"I instruct you that if you believe from the evidence that at the time of said injury the

plaintiff, Harry Flood Norton, was negligent, and as a result of said negligence he was in a situation of danger from which he could not escape by the exercise of ordinary care, or of which danger he was unaware, and that the defendant, P. T. Houlette, was aware of plaintiff, Harry Flood Norton's, dangerous situation, under such circumstances that he realized or ought to have realized the boy's inability to escape therefrom (italics are ours), and that defendant, P. T. Houlette, had a clear chance to avoid injuring plaintiff by the exercise of ordinary care, and that defendant, P. T. Houlette, failed to do so, then you will find for plaintiff. But, if plaintiff became aware of the danger and was able to escape by the exercise of ordinary care, but failed to do so, he cannot blame the burden of the resulting injury upon the defendant. In that case your verdict should be for defendant."

Appellant's criticism is especially directed to the words italicized in the instruction to wit, "or ought to have realized the boy's inability to escape therefrom."

[5] It may be said that in the abstract the law is well settled that before the doctrine of "last clear chance" will apply, it must appear that the person responsible for the injury, seeing or knowing of the peril of the injured person, or knowing facts from which a reasonable man would believe him to be in peril, has not used ordinary care to avoid the injury. *Arnold v. San Francisco-Oakland Terminal Railways*, 175 Cal. 1, 5, 164 P. 798, and cases there cited.

Part of the testimony given by the defendant included the following:

"A. And when this yellow roadster came up alongside the car he (plaintiff) twisted his wheel, his front wheel of his bicycle around, and touched the wheel of the car; I saw him, he fell in a pile on the road with his wheel on top of him, and I was at that time, oh, I should say 18 or 20 feet behind him at that time, going at a speed of about 20 miles an hour, and I threw my brakes, my emergency brake, threw out my clutch, my foot brake; at this time I threw my car to the left and tried to avoid him; my front wheel passed over him. * * *

"Q. When did you begin to put on your brakes? A. Just as soon as the boy fell, I suppose possibly I might have run along 3 or 4 feet, you might say, before I got my brakes on."

It thus becomes evident not only that defendant "ought to have realized the boy's inability to escape," but that as a matter of fact he actually knew of the boy's extreme peril and, as might have been deduced by the jury from his testimony, exercised ordinary care to prevent the happening of the accident. It therefore is manifest that that portion of the instruction to which objection is made resulted in no prejudice to the rights of defendant. But, in addition thereto, in the case of *Palmer v. Tschudy*, 191 Cal. 696, 700, 218 P. 36, 37, the Supreme Court, in discuss-

ing the rule here under consideration made the following statement of law:

"The last clear chance rule presupposes: That the plaintiff has been negligent; that as a result thereof she is in a situation of danger from which she cannot escape by the exercise of ordinary care; that the defendant is aware of her dangerous situation under such circumstances that he realizes, or ought to realize, her inability to escape therefrom; that he then has a clear chance to avoid injuring her by the exercise of ordinary care, and fails to do so."

Considering the facts and the law, it cannot be said that prejudicial error was committed by the trial court either in the giving of the instruction as a whole or in including therein the words to which attention has been directed.

As the judgment rendered in the action brought by the parents of the minor against defendant depended for its soundness upon the validity of the judgment in the action brought by the guardian of the minor, it follows that each of such judgments should be affirmed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

85 Cal. App. 216

**SCHROPSHIRE v. PICKWICK STAGES,
NORTHERN DIVISION et al. ★**
(Civ. 5947.)

District Court of Appeal, First District, Division 2, California. Aug. 23, 1927.

Hearing Denied by Supreme Court Oct. 20, 1927.

1. Pleading $\S$ 79—Expression, "new matter constituting defense," in Code, concerning answer, means something relied on by defendant and not put in issue by plaintiff (Code Civ. Proc. $\S$ 437).

The expression, "new matter constituting a defense," as used in Code Civ. Proc. $\S$ 437, providing what shall be contained in an answer, refers to something relied on by a defendant, which is not put in issue by plaintiff.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, New Matter.]

2. Carriers $\S$ 314(7)—Auto stage company's answer that accident injuring passenger was due to third party's negligence held to present affirmative defense (Code Civ. Proc. $\S$ 437).

Allegation in answer of auto stage company that accident, wherein plaintiff was injured while passenger on company's bus, was due solely to third party's negligence, held to constitute an affirmative defense under Code Civ. Proc. $\S$ 437.

3. Carriers $\S$ 316(4)—Bus company held to have burden of proving affirmative defense that accident injuring passenger was due to third party's negligence (Code Civ. Proc. $\S$ 1869, 1981).

In an action by passenger against an auto stage company for injuries sustained in a collision, where company made affirmative defense

that the accident was caused by the negligence of a third party, *held* that the burden of proving this defense was on the company, in view of Code Civ. Proc. §§ 1869, 1981.

4. Carriers ⚡321(21)—Instruction that bus company injuring passenger must prove affirmative defense of third party's negligence *held* not to place on defendant burden of proving it was not negligent.

In an action against an auto stage company for injuries sustained by passenger from collision, instruction that the defendant company must prove, by preponderance of evidence, its affirmative defense that the accident was due to a third party's negligence, *held* not to place on defendant burden of proving it was not negligent, in view of other instructions.

5. Negligence ⚡134(1)—Plaintiff has burden of proving defendant's negligence by clear preponderance of evidence.

In an action for damages resulting from negligence, plaintiff must prove defendant's alleged negligence, if denied, by a clear preponderance of the evidence in order to recover.

6. Negligence ⚡108(1)—In action for damages resulting from negligence, defendant's negligence must be alleged.

It is essential to a statement of a cause of action for damages resulting from negligence that the defendant's negligence be alleged.

7. Carriers ⚡316(4)—Passenger *held* not relieved of burden of proving bus company's negligence because company had burden of proving affirmative defense.

In passenger's action against auto stage company for injuries sustained from collision, plaintiff is not relieved of burden of proving his case by clear preponderance of evidence by the fact that defendant pleads an affirmative defense in addition to a want of negligence.

8. Evidence ⚡538—One who had driven automobile for 14 years *held* qualified to express opinion as to speed of bus.

One who had driven an automobile for 14 years and was driving at a speed of 37 miles an hour when bus passed him *held* qualified to express an opinion that bus was traveling 40 miles an hour.

9. Evidence ⚡571(8)—Weight of witness' opinion as to speed of automobile is for jury.

In an action for injuries sustained in automobile collision, weight of witness' opinion as to the speed of automobile is for jury.

10. Carriers ⚡317(8)—Testimony of speed of autobus when quarter mile from place of accident *held* not too remote.

In an action against auto stage company for injury to passenger in collision, evidence of the speed of the bus when a quarter of a mile from the place of the accident *held* relevant, as against objection it was too remote.

11. Carriers ⚡320(21)—In action for injuries sustained in a collision, conflicting evidence *held* for jury.

In an action against an auto stage company by a passenger for injuries sustained in a col-

lision, truth of conflicting evidence *held* question for jury.

12. Appeal and error ⚡1002—Where verdict is supported by substantial, though conflicting, evidence, appellate court will not disturb judgment.

Where the evidence in a case is conflicting, and there is substantial evidence to support the judgment, it will not be disturbed on appeal.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by John J. Schropshire against the Pickwick Stages, Northern Division, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

W. I. Gilbert and B. P. Gibbs, both of Los Angeles, for appellants.

E. B. Drake, of Los Angeles, for respondent.

PRESTON, Justice pro tem. This is an appeal by the defendants Pickwick Stages, Northern Division, a corporation, and George L. Toomey from a judgment entered against them upon a verdict of a jury in the sum of \$15,000.

The plaintiff sustained severe personal injuries as a result of a collision between an auto stage of defendant corporation upon which plaintiff was a passenger for hire, and a Ford automobile. Said accident occurred in the said city of Los Angeles. At the time and place of said collision said auto stage was being operated by defendant George L. Toomey, an employee of defendant corporation. The defendants' first and principal ground urged for a reversal of the judgment is that the trial court erred in instructing the jury upon the burden of proof and the preponderance of the evidence. In order to understand this point, it will be necessary to refer to the pleadings.

Plaintiff, among other things, alleges in his complaint (paragraph II):

"That on the 23d day of September, 1923, the plaintiff was being carried as a passenger for hire by said defendant corporation in one of its stages, and while the same was proceeding southerly on Ventura boulevard, the said stage was so negligently operated by the defendants, that at the intersection of Woodley avenue with said boulevard and in said intersection the defendant corporation's said stage struck a Ford automobile being operated easterly by one W. W. Grove, and thereupon left the highway upon said intersection, struck a pole at or near the southeast corner thereof, and ran into a palm tree, and was wrecked, and plaintiff was injured. * * *

Paragraph IV:

"That in said accident, caused alone by the negligence of the defendants as aforesaid, plaintiff was hurt in his health, strength, and activity," etc.

The defendants by their answer make specific denial of the allegations of negligence

alleged in plaintiff's complaint, and allege in a separate paragraph of their answer as follows:

"Further answering plaintiff's complaint, these defendants allege that said accident was due solely and alone to the careless and negligent manner in which the car of W. W. Grove was then and there operated, in that said W. W. Grove was then and there teaching or attempting to teach a probable purchaser of said automobile how to drive and operate said automobile."

This question is therefore squarely presented: Does the above-quoted portion of defendants' answer bring into the case new matter constituting an affirmative defense, or is said allegation merely supplemental to the denial of negligence and superfluous?

[1] The Code provides that the answer shall contain:

"1. A general or specific denial of the material allegations of the complaint controverted by the defendant. 2. A statement of any new matter constituting a defense or counterclaim." Section 437, Code Civ. Proc.

The expression, "new matter constituting a defense," as used in the Code, refers to something relied on by a defendant which is *not put* in issue by plaintiff. 21 Cal. Jur. 132. If the facts referred to in an answer constitute no part of the plaintiff's cause of action, then they come clearly within the definition of new matter used in the Code. *Bank of Paso Robles v. Blackburn*, 2 Cal. App. 146, 83 P. 262.

[2] Measuring the answer by these rules, it seems clear that the defendants, in addition to a special denial of any negligence on their part, have further alleged that the accident and resulting injuries to plaintiff were caused *solely and alone* by the carelessness and negligence of the operator of the Ford car, which brings into the case new matter not raised by the complaint, which constitutes an affirmative defense.

[3] The law in this state is well settled that the burden is on the defendants to prove new matter alleged as an affirmative defense. Sections 1869 and 1981, Code Civ. Proc.; *Valente v. Sierra Railway Co. of California*, 151 Cal. 534, 91 P. 481; *Wilson v. California Cent. R. Co.*, 94 Cal. 172, 29 P. 861, 17 L. R. A. 685; 10 Cal. Jur. 786, 787, and cases there cited.

[4] The instruction complained of reads as follows:

"The defendant states in its defense that the accident was due solely to the negligence and carelessness of the driver of the Ford car, the car of Grove, and the burden is upon the defendant to prove that. That is an affirmative issue, and the burden is upon the defendant to prove that defense by a preponderance of the evidence in the whole case. Unless you find from a preponderance of the evidence on the whole case that this defense is made out, or if you find that the evidence is equally balanced,

you will find against the defendant on that issue."

The appellant contends that this instruction is erroneous, for the reason that it, imposes the burden upon the defendants of proving by a preponderance of the evidence that the accident was due solely to the negligence of the driver of the Ford car, thereby in effect requiring the defendants to prove that it was in no way responsible for the accident, and wholly ignored the well-settled rules in this state that the burden of proof is always upon the plaintiff throughout the trial of the case to prove the negligence of the defendants, and that such negligence was the proximate cause of the injury. With this contention we cannot agree. This instruction refers solely to the affirmative defense raised by the defendants in their answer, as it concludes, "unless you find from preponderance of the evidence on the whole case that this defense is made out, or if you find that the evidence is equally balanced, you will find against the defendant *on that issue*," meaning obviously the issue raised by the affirmative defense in the answer that the operator of the Ford car was alone responsible for the accident, and had no reference to the negligence of the defendants. It is further evident that the instruction complained of related to the affirmative issue raised by the answer, by the fact that the court gave a number of instructions relative to the burden of proof and the preponderance of evidence as between the plaintiff and the defendants.

The court defined negligence and preponderance of evidence, and among other instructions gave the following:

"In this case the plaintiff having alleged negligence on the part of defendant, *the burden is upon plaintiff to prove that negligence by a preponderance of the evidence, and also that that negligence, if there was any, proximately contributed to the injury.*"

The court also instructed the jury as follows:

"In determining the issue of negligence, the burden of proving it is on the party asserting it, but, in determining whether or not there has been such negligence, you will consider all of the evidence bearing on that subject, regardless of which party produced it. * * *"

"* * * While, if the evidence on that issue is, in your judgment, equally balanced or preponderates against such negligence, it is not proved, and you should find that the defendant was not negligent."

"In order, therefore, to find a verdict for the plaintiff, you must not only find from a preponderance of the evidence that the defendant was negligent, but also that such negligence was a proximate cause of the injury."

"Therefore, if you shall find that the driver of the Ford automobile suddenly and without warning swerved his automobile to the left, and before reaching the center of the intersection, and in front of the motorbus in which plaintiff was riding, and that thereafter the driver of the

stage did all in his power to avoid the injury, then he was not guilty of negligence, and your verdict should be for the defendant."

"Of course if the driver of the Ford car violated any of the provisions of the Motor Vehicle Act, about which you have been instructed, then he was guilty of negligence as a matter of law; and, if that negligence was the sole proximate cause of the accident, your verdict would be for the defendant."

The appellants rely upon the case of *Valente v. Sierra Railway Co.*, supra, as supporting their contention that the instruction complained of is erroneous. The facts and pleadings in the *Valente* Case are decidedly different from those in the case at bar. In that case there was a collision of the passenger train in which deceased was riding and a work train operated by the same defendant. The complaint there alleges the happening of the collision and death of Mrs. Valente resulting therefrom. These allegations of the complaint were admitted by the defendant in its answer. The complaint further alleged:

"That said collision was caused by and resulted from the carelessness and negligence of said defendant and its servants and agents in the management and operation of its said train and the death of Marie Valente was caused by and resulted from the carelessness and negligence of said defendant and its servants and agents in the management and operation of its said train."

These allegations were denied by the answer, which further alleged as follows:

"On the contrary, said defendant alleges that said collision and death of said Marie Valente therefrom was and were caused by and resulted from inevitable accident, without any fault or negligence on the part of said defendant or of its servants or agents in any way whatsoever."

Upon the trial of that case, evidence was introduced by the defendant to meet the prima facie case of negligence made by the showing of the accident. Under these circumstances the trial court, after instructing the jury that, by reason of the admission as to the collision and the death of Mrs. Valente therefrom, a presumption arose that the accident resulted from defendant's negligence, and that, in order to rebut such presumption, defendant must show that the collision resulted from some inevitable casualty or unavoidable accident or from some cause which human care and foresight could not have prevented, instructed the jury as follows:

"The burden of showing that the collision occurred by no fault of defendant and from some inevitable casualty or unavoidable accident or cause beyond the power of human foresight to prevent is on the defendant. In order to absolve itself from liability from any loss which may appear from the evidence to have been occasioned by such collision, it must establish by a preponderance of the evidence that such col-

lision was caused by, or resulted from, some inevitable casualty or unavoidable accident or cause beyond human care or foresight to prevent."

This instruction under the pleadings was clearly erroneous, for the reason that the jury was instructed that defendant must show by a *preponderance* of the evidence that it was not negligent, etc., which, of course, is not the law. No affirmative defense was raised by the defendant in that case, and therefore no burden was cast upon the defendant to prove any issue by a preponderance of the evidence. The pleadings raised only the question of defendant's negligence, and all the proof that defendant was required to meet was the prima facie case made by the plaintiff. *Learned v. Peninsula Rapid Transit Co.*, 49 Cal. App. 436, 193 P. 591.

[5, 6] The law is well settled that, as between the plaintiff and defendant in an action for damages resulting from negligence, it is essential to a statement of a cause of action that negligence on the part of a defendant be alleged, and, if denied, it must be proved by plaintiff by a clear preponderance of the evidence in order for plaintiff to recover.

[7] It seems equally well established that in such an action, where a defendant alleges in his answer new matter as an affirmative defense, the burden is on him to prove such affirmative defense by a preponderance of the evidence; otherwise such affirmative defense is not established. However, where a defendant in such an action merely denies negligence on his part, or where, in addition to denying negligence, sets up an affirmative defense, such as contributory negligence on the part of plaintiff, or imputed negligence, or sole negligence on the part of some third party, he is not called upon to prove want of negligence on his part by a preponderance of the evidence, but only required to meet the prima facie case made by plaintiff, and the burden is still on plaintiff to prove negligence on the part of defendant by a preponderance of the evidence and that such negligence was the proximate cause of the injury complained of. Or, in other words, the plaintiff is not relieved from the burden of proving his entire case by a clear preponderance of the evidence by the mere fact that defendant pleads an affirmative defense in addition to a want of negligence on his part.

When all the instructions are considered together, we think that the burden of proof and preponderance of the evidence were clearly and correctly defined to the jury under the issues made by the pleadings.

[8-10] It is next contended by the appellants that the court erred in permitting testimony relative to the speed of the bus a quarter of a mile distant from the place of the accident. The witness testified that he had been driving an automobile for about 14 years.

and was then driving one, and that the bus passed him while he was driving about 37 miles an hour. After qualifying in this manner, he answered the question propounded by the court as to the speed of the bus. His answer was, "Must have been going 40 miles an hour." The defendants contend that this testimony was too remote, and that the answer was irresponsible. We see no merit whatever in either of these contentions. The law in this state is well settled that, where a person observes the speed of an automobile, he or she can give at least an opinion as to its speed, and the weight of that opinion is for the consideration of the jury. *Johnsen v. Oakland, S. L. & H. Electric Ry.*, 127 Cal. 608, 60 P. 170; *Shimoda v. Bundy*, 24 Cal. App. 675, 142 P. 109. The answer, "must have been going 40 miles an hour," simply means that in the opinion of the witness the bus was traveling 40 miles per hour. The place of the speed testified to was not too remote from the scene of the accident because the witness was overtaken in his own car by the bus and followed and observed it up to the place of the accident. The evidence further shows that there were no intervening crossings between the place where the witness saw the bus and the place of the accident.

[11, 12] The evidence in this case is conflicting, but this was a question solely for the jury. The jury evidently accepted plaintiff's and his witness' version of the accident, and, where there is any substantial evidence to support the judgment, it is not within the province of this court to disturb the judgment on that ground. From a careful examination of the record in this case, we think the evidence is amply sufficient to support the verdict of the jury and that there was no prejudicial error committed either in the instruction to the jury or the admission of testimony.

The judgment is therefore affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

85 Cal. App. 258

PEOPLE v. FORD. (Cr. 1498.)

District Court of Appeal, Second District, Division 2, California. Aug. 26, 1927.

1. Homicide $\S$ 228(1)—In murder case, "corpus delicti" is proof of facts forming basis of offense and of criminal agency as cause thereof.

In a prosecution for murder, the "corpus delicti" consists of proof of the facts forming the basis of the offense and of the existence of a criminal agency as the cause thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corpus Delicti.]

2. Homicide $\S$ 228(1)—Corpus delicti held established by evidence of death and finding of criminal agency.

In a prosecution for murder, evidence held to sustain the finding of the jury that the corpus delicti was sufficiently proved; the fact of the death being undisputed, and the finding that it was produced by a criminal means being warranted.

3. Criminal law $\S$ 823(10)—Instruction on corpus delicti stating degree of proof necessary for consideration of confession held not prejudicial as leading jury to believe defendant had confessed, in view of all instructions and evidence.

In a prosecution for murder, where no confession was shown, instruction on corpus delicti, stating that it was not necessary to prove corpus delicti beyond reasonable doubt before proving extrajudicial confession, and that evidence of corpus delicti need not necessarily connect defendant with crime to justify admission and consideration of confession, held not prejudicial, in view of all of the instructions and the evidence.

4. Homicide $\S$ 309(4)—Instruction authorizing conviction of murder in second degree held warranted by evidence.

In a prosecution for murder, evidence held to warrant instruction authorizing jury to return a verdict of murder in the second degree, where there was no evidence of deliberation preceding act and no evidence of provocation and sudden passion.

5. Homicide $\S$ 152—Homicide will be deemed murder, unless there is evidence of circumstances of mitigation reducing crime to manslaughter.

Where the commission of homicide by the defendant is established, the homicide will be deemed murder, unless there is evidence produced affirmatively showing circumstances of mitigation which reduce the crime to manslaughter.

6. Homicide $\S$ 254—Conviction of murder in second degree held sustained by evidence.

In a prosecution for murder, evidence held sufficient to sustain conviction of second degree.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Edward Ford was convicted of murder in the second degree, and he appeals. Affirmed.

Fred Noon, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

CRAIG, J. The appellant was charged by information with the crime of murder. He was tried and by the jury's verdict convicted of murder in the second degree. The trial court denied his motion for new trial, and this appeal is from that order, and from the judgment and sentenced based upon such verdict. A consideration of two grounds urged

for reversal requires a statement of the facts proved and of some of the evidence introduced.

About the hour of 11:15 p. m. of September 17, 1926, appellant was seen by a police officer staggering on one of the main streets of La Jolla. At that time appellant appeared unable to talk, but said he "was shot"; he was wet and quivering; the officer took him to the hospital, where the only thing said by appellant was "girl shot too"; he had two bullet wounds in his forehead, and one on the top of his head; pieces of a flat bullet were extracted from under the scalp on the top of his head; the bullet was 32-caliber; there were powder burns on his forehead. On the following morning a woman's body was found in one of the summer houses at La Jolla park, near the beach; the deceased was one Anna Carleton; there was a bullet wound from left to right through the bridge of her nose, entering at the inner angle of the left eye, and a furrow was cut in the upper lid of the right eye; there was another bullet wound at the outer angle of the left side of her nose, near the alar, going straight through the head, into the base of the brain, which caused death; there were no powder burns on her face; however, there was a powder-stained bullet wound through the second joint of the ring finger of the left hand and powder stains on the inside of the little finger and the middle finger of the same hand. Tracks which the shoes worn by appellant fitted led away from the summer house to the driveway, and from the driveway to the beach, for about fifty feet; on the rocks at the beach about fifty feet from the summer house a 32-caliber revolver was found, which contained five empty shells, and its appearance indicated that it had been fired within twelve hours previously to the time when found. Proof was also introduced as to the position of the body of the deceased when discovered, as well as of various articles of the summer house at that time.

[1,2] It is contended that the corpus delicti was not established. In a trial where the charge is murder, the corpus delicti consists of proof of the facts forming the basis of the offense, and the existence of a criminal agency as the cause of it. In the present case, the corpus delicti consisted of proof of the death of Anna Carleton and that it was produced by criminal means. The autopsy surgeon testified that it was his opinion that although it would have been possible for the deceased to have inflicted the wounds found upon her face, it would have been improbable that she did so; he said that the wound through the nose from one side to the other was a very serious one and would have stunned her; that the other bullet, which pierced the brain, produced death. Consequently, it would follow that whichever one was inflicted first would have prevented the

other from being self-inflicted. The testimony of W. H. Churchman, a police sergeant, was of similar import. He pointed out that it would have been very difficult for the deceased to have inflicted the wound through the nose from left to right. In that connection he called attention to the fact that she could not have held the revolver in her left hand, for that hand was wounded. To have inflicted this wound in the nose by shooting the revolver with the right hand would have been next to impossible. That this is true is obvious. To realize how extremely unlikely it is that the deceased inflicted this wound, it is only necessary to visualize the position which her right hand would have been required to have held; she must have grasped the gun at the full length of her arm from her face, otherwise there would have been powder burns upon it, according to Churchman. There were no such burns. Then, with the right arm fully extended toward the left, she would have been compelled to turn the revolver so as to point it back toward her nose, for it will be remembered that the bullet entered on the left side, and holding the weapon thus, she would have pulled the trigger. Although at one point in his testimony Churchman stated that this would have been possible, later, in reply to another question, he said:

"And I think if I was just to be down straight with myself, I don't think it is possible; if I would just get at my own honest opinion about it, straight and straight, I do not think it is really possible to fix it that way."

If the members of the jury accepted the statements of these witnesses as true, or if they merely reasoned the matter out for themselves from the facts proved, they were amply justified in concluding that the deceased did not commit suicide, and that she died from a criminal agency. That death occurred is not disputed, and this testimony alone, if believed by the jury, would have justified them in concluding that a criminal agency was the cause of death. A number of other circumstances indicate that the deceased did not commit suicide, but it is not necessary to delineate them here. The essential elements necessary to complete proof of the corpus delicti were undoubtedly proved by evidence which justified the jury's conclusion in that behalf.

[3] Appellant contends that the court erred in giving a certain instruction, it being argued that by the use therein of the word "confession" the jury were misled into believing that a statement by the defendant which was introduced in evidence was a confession. The instruction concerning which complaint is made is as follows:

"Proof of the corpus delicti means proof of the body of the crime; that is, first, certain facts forming its basis, and second, existence of criminal agency or means as the cause of them.

And it may be proved by circumstances shown in evidence, or by inferences drawn from the facts proven.

"It is not necessary that the corpus delicti should be proved beyond a reasonable doubt before proof may be made of an extrajudicial confession. Prima facie evidence of the corpus delicti is sufficient; and it is for the court to say whether there is sufficient evidence of the corpus delicti to go to the jury, precisely as in the case of any other material fact.

"The evidence of the corpus delicti need not be of conclusive character, and need not necessarily connect the party informed against with the commission of the crime, in order to justify the admission and consideration of the confession of such parties so charged with the crime."

It is true, appellant made no confession. Some of the statements made by him, however, were of a character susceptible of a construction such as to render them admissions of a damaging character. This was not a case where it was proper to give the instruction in question; yet, in view of all of the instructions and the evidence before the jury, we cannot believe that its members were led to believe that the defendant had confessed to guilt of the crime with which he was charged or of which he was convicted. In this connection the court instructed the jury that he had not expressed or intended to express or to intimate any opinion as to what facts had been established or what inferences should be drawn from the evidence adduced, and that if any expression of his seemed to indicate an opinion relating to any of these matters, such expression must be entirely disregarded.

[4-6] Another point mentioned, but not strongly urged, by appellant is that it was error for the trial court to instruct the jury that a verdict of murder in the second degree might be returned. There is no merit to this claim. The proof established a case where such an instruction was peculiarly apt—in fact, necessary. The evidence against the appellant was almost entirely circumstantial; there was no definite proof of motive, nor as to what conduct or conversation immediately preceded the killing. Although the jury believed that the appellant slew the deceased, there was no evidence of that deliberation preceding the act which is necessary to constitute murder of the first degree. On the other hand, there was also an absence of proof of provocation and sudden passion which would bring the offense within the definition of manslaughter, and without which the only lawful verdict must have been one finding the defendant guilty of murder. This is so since upon the commission of homicide by a defendant having been established, the crime is murder unless there is evidence produced either by the prosecution or the defense affirmatively showing circumstances of mitiga-

tion which would bring the murder within the definition of manslaughter. Therefore the jury legally and logically returned a verdict of murder in the second degree, for the circumstances of the killing were certainly such as to show an abandoned and malignant heart.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

MEMORANDUM DECISIONS

85 Cal. App. 75

In the Matter of the Application of Joseph O. MORRIS, for Admission to Practice Law before the Courts of California. (No. 4925.) District Court of Appeal, Second District, Division 2, California. Aug. 12, 1927. Application for admission to the bar. W. T. Craig, of Los Angeles, for petitioner. William W. Clary, of Los Angeles, for respondent Los Angeles Bar Association.

WORKS, P. J. This is an application for admission to the bar, notwithstanding an adverse report of the state board of bar examiners. Issues were framed in the proceeding, which involve the questions whether petitioner possesses the requisite moral qualifications to entitle him to admission, and whether, petitioner having come from another state, he had been engaged in the actual practice of the law in a sister state "for a period of at least three years within the period of seven years immediately preceding the filing of his application" here, as required by section 279 of the Code of Civil Procedure. The proceeding went to a referee, who took evidence and who has made findings favorable to petitioner upon both issues. Since these findings were filed, the respondent has withdrawn its opposition to petitioner's admission. Notwithstanding this withdrawal, which we find to have been entirely proper, we have felt it our duty to examine the transcript of the evidence heard by the referee. From such examination we find that the findings are amply supported by the record. We deem it proper to say that the evidence presented upon the issue as to petitioner's moral qualifications is particularly full and satis-

fyng. We should also remark, in justice to the state board of bar examiners, that the evidence taken by the referee, because of certain inadvertences on the part of petitioner when before the board, is more complete than that heard by the board, and covers matters the omission of which left the board in a position of justified doubt as to petitioner's qualifications. The findings of the referee are adopted as the findings of the court. The clerk of the court will issue to petitioner a certificate in the usual form admitting him to the bar.

We concur: THOMPSON, J.; CRAIG, J.

85 Cal. App. 215

I

In the Matter of the Application of John Gardner SCOTT for Admission as an Attorney and Counselor at Law. (No. 5063.) District Court of Appeal, Second District, Division 2, California. Aug. 22, 1927. Application for admission to the bar, notwithstanding an adverse report of the State Board of Bar Examiners. Granted. Rupert B. Turnbull, of Los Angeles, for petitioner. Albert E. Sherman, of Los Angeles, for State Board of Bar Examiners.

WORKS, P. J. This matter was confided to a referee, with directions to take evidence and to make findings upon the issues framed by the petition of the applicant and the answer of respondent thereto. The referee has performed his duty and all his findings are favorable to petitioner. Respondent has taken exception to none of the findings, but despite that fact we have thought it our duty to examine minutely the record made before the referee. As a result of that labor we determine that each of the findings is supported by a satisfactory preponderance of the evidence. The findings of the referee are adopted as the findings of the court. The clerk of the court will issue to petitioner a certificate in the usual form admitting him to the bar of the state.

Justice THOMPSON, deeming himself disqualified, does not participate in the foregoing opinion.

I concur: CRAIG, J.

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BOYER et al. v. MURPHY. (S. F. 11444.)

Supreme Court of California. Aug. 23, 1927.

1. Deeds ☞100—Testimony of conditions surrounding execution of deed is considered only for aid in construing deed.

In action to quiet title in which principal issue is construction of deed, testimony concerning conditions surrounding execution of deed will be considered to extent only of assistance it affords in construing deed.

2. Deeds ☞143—Whether grantor, sole owner of fee, reserved life interest for benefit of husband out of grant is determined by parties' intention.

In view of Civ. Code, §§ 1066, 1636, in construing a deed whether the sole owner could create by reservation or otherwise a life interest for benefit of her husband, who was stranger to the title, is to be determined by the parties' intention, especially the intention of the grantor, regardless of the common-law rule that granting clause overrules repugnant habendum clause.

3. Deeds ☞143—Deed by sole owner of fee reserving life estate to herself and husband held to establish life estate in surviving husband (McEnerney Act).

Where wife, declared sole fee owner in proceeding under McEnerney Act (St. 1906 [Ex. Sess.] p. 78, as amended), granted remainder of fee reserving to her and her husband ownership and possession during their lives and life of survivor, life estate was reserved to grantor's husband surviving her.

4. Appeal and error ☞731(5)—Objection, that failure of bill of exceptions to specify particulars in which findings are unsupported precludes review of evidence, is unavailing where findings are based on erroneous construction of deed (Code Civ. Proc. § 648).

Although Code Civ. Proc. § 648, requires bill of exceptions to specify particulars in which it is claimed findings are unsupported in action to quiet title, where decision on trial and on appeal was predicated entirely on construction of deed and there was no conflict in evidence, objection that sufficiency of evidence could not be reviewed for failure of bill of exceptions to contain particulars in which findings were not supported is ineffective on appeal, since findings were in reality conclusions of law.

5. Quieting title ☞47(2)—Where conclusion depended on erroneous construction of deed, finding that defendant's claim was without right held unsupported conclusion of law, subject to reversal.

In action to quiet title where conclusion arrived at on merits was solely founded on deed which was wrongfully construed, finding that defendant's claim was without right amounted to no more than unsupported conclusion of law, which should be reversed on appeal.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. E. Woolley, Judge.

Action to quiet title by Alice M. Boyer and another against Edward F. Murphy. Judgment for plaintiffs, and an order denying a motion to vacate it and to enter judgment for defendant, were reversed in the District Court of Appeal (258 P. 91), and defendant petitions the Supreme Court for a hearing. Reversed, with direction.

Herman J. Widman, Wm. M. Madden, and Charles J. Heggerty, all of San Francisco, for appellant.

Haswell, Peterson & Martin, of San Francisco, Fred C. Peterson, of Oakland, and Ivan T. Crase, of San Francisco, for respondents.

PER OURIAM. A hearing in this court was granted after decision by the District Court of Appeal in and for the Third Appellate District (53 Cal. App. Dec. 813), for the reason that, while satisfied with the reasoning of said opinion, we arrived at the conclusion that the order of reversal and direction to the trial court with which the same concludes should be modified. We therefore adopt the opinion of Mr. Justice Hart of said court (with the exception of its concluding order and direction) which reads as follows:

"This is an action by the plaintiffs to obtain a decree quieting their alleged title to certain improved real property situated in the city of San Francisco, as against the alleged claim of defendant to an interest or estate therein 'adverse to said plaintiffs.'

"The complaint alleges that the claim so made by the defendant 'is without any right whatever, and that said defendant has not any estate, right, title, or interest whatever in said land or premises, or any part thereof.' The prayer, besides asking for an adjudication that defendant has no interest, etc., in said real property and that he be enjoined from asserting such claim, asks that 'an account be taken of all the rents, issues and profits of said property, which have accrued to the defendant since the 1st day of April, 1919, and for such other relief,' etc., as may be justified in equity. The answer consists of specific denials of the material allegations of the complaint.

"The court found (finding No. 2) that defendant 'claimed an interest or estate therein (the real property specifically described in the complaint and the findings) adverse to plaintiffs, but that said claim was without right by said defendant, and said defendant had no right, title, or interest of any kind, character, or description in and to said described premises, either as set out in defendant's answer or otherwise'; that (finding No. 3) 'on the 21st day of March, 1919, the premises described in such complaint were the separate property of Teresa Doyle Murphy, and that at said time defendant, Edward F. Murphy, did not have any right, title, or interest in and to said property of any kind, character, or description'; that (finding No. 4) 'on the 21st day of March, 1919, the said Teresa Doyle Murphy, and Edward F. Murphy, defendant herein, executed and delivered to the plaintiffs James E. Murphy and Alice M. Boyer a certain indenture in writing,

which indenture in writing is in certain words and figures, as follows, to wit,' following which is a deed executed by Teresa Doyle Murphy and Edward F. Murphy, conveying the fee in said property (therein specifically described) to the plaintiffs herein, the habendum clause of said deed reading as follows:

"To have and to hold the said premises, together with the appurtenances, unto the parties of the second part, and to their heirs and assigns forever, reserving to the parties of the first part the ownership and possession thereof during the lifetime of the parties of the first part and the survivor of them."

"The court further found that Teresa Doyle Murphy died in the city and county of San Francisco on April 1, 1919; 'that in and by virtue of said instrument in writing the said Edward F. Murphy did not take a life estate in and to the said premises described herein, or take any interest of any kind or character in and to the premises described therein.'

"The conclusions of law are in accord with the findings, and judgment was entered for the plaintiffs in conformity to the prayer of the complaint. Defendant made a motion for a new trial and also a motion to vacate the judgment made and entered and to give and enter a judgment in favor of the defendant. Both motions were denied.

"The defendant appeals from the judgment and also from the order denying his motion to vacate the judgment made and entered and in lieu thereof to make and enter a judgment in his favor. The appeals are supported here by a record made up in the form of a bill of exceptions.

"From the testimony it appears that the defendant, Edward F. Murphy, and Teresa Doyle Murphy were husband and wife, and were the parents of the plaintiffs; that, in the month of April, 1906, the records pertaining to the title to real property in controversy, as were all the public records of the city and county of San Francisco, were destroyed by fire; that thereafter, and on December 30, 1912, Teresa Doyle Murphy, separately and alone, in pursuance of the provisions of an act of the Legislature popularly known as the 'McEnerney Act,' instituted an action in rem, 'against all the world' in the superior court in and for the city and county of San Francisco, to secure a decree restoring the records pertaining and also quieting her title to the real estate in dispute; that, after due proceedings had under said act, said superior court, on April 30, 1913, rendered its judgment in said action restoring the records affecting said property and quieting Teresa Doyle Murphy's title thereto as follows:

"(a) That plaintiff was at the time of the commencement of this action the owner in fee-simple absolute, and in the possession of the real property above described and of the whole thereof.

"(b) That her title thereto be and the same is hereby established and quieted against all the world as of said date.

"(c) That at said time no other person had any estate, right, title, interest, or claim in or to said property or any part thereof, either legal or equitable, present or future, vested or contingent."

"On the 1st day of April, 1919, Teresa Doyle Murphy passed out of this life and said deed

was, subsequent to the date of her death, duly recorded in the official records in the office of the county recorder of said city and county.

"The defendant testified that the deed referred to in the complaint and the findings was jointly executed by him and his wife; that he and his wife bought the property at a probate sale in 1897 or 1898, and was acquired 10 years after their marriage; that when they acquired the property 'in 1898, there was a little cottage and two flats thereon. Sometimes,' defendant continued, 'the flats were rented, and sometimes I would collect the rents and sometimes my wife would. When I did, I would give them to my wife. We were living in the cottage in the rear during this time. After the fire in 1906, we constructed two flats on the property, that is, the cottage on the rear was moved to the front and became a part of those two flats, and my wife and I lived in one of the flats, and rented the other. Sometimes I would make payments to the bank on the mortgages (the property having been mortgaged to secure a loan of \$2,000 to be used as in part payment of the purchase price of the property), and sometimes my wife would. I have taken rent money and paid it to the bank on these mortgages.' He further testified that 'up to the fire and earthquake in 1906, the property in question was occupied by myself and wife—a part of it, a little cottage—and from that time until the death of my wife, my wife and I were in possession of the property.' He testified that his wife 'did not receive any gifts of any property—not a dollar of money or anything else that I ever knew of. She never inherited any property from any relative.'

"Defendant proceeded to testify, without objection, that some of the money—about \$1,000, which he had earned as wages prior to his intermarriage with Teresa Doyle Murphy and which he had on deposit in a bank—was contributed to the payment of the purchase price of the property and that, from time to time after his said marriage, he contributed portions of his wages to the same purpose; that the money received by him and his wife for rent of certain parts of the premises and such of his wages as he intended should be applied to the extinguishment of the mortgage debt on the property were placed in a single deposit in the bank, and the two funds were therefore commingled. All this testimony—that is, all of the defendant's testimony to the effect that much of his earnings as a laborer or mechanic had been used as in part payment of the indebtedness against the property or the purchase price thereof—was, on motion of counsel for the plaintiffs, at the close of defendant's direct examination, stricken out upon the theory that such testimony would involve a collateral attack upon the judgment obtained by Mrs. Murphy under the McEnerney Act (St. [Ex. Sess.] 1906, p. 78).

[1] "The foregoing constitutes a statement in substance of all the testimony received respecting the defendant's connection with or relation to the property here in dispute; and, while it is set forth herein, it is to be understood that we attach importance to the testimony to the extent only of whatever assistance it may afford and has afforded in the construction of the deed in question and may lend support to the result at which we have arrived as to the effect of said deed with respect to any interest in the property therein described which

Mrs. Murphy thereby sought to vest in her husband, the defendant herein.

[2] "The theory upon which the case was tried and decided below is that, inasmuch as Mrs. Murphy was the sole owner in fee of the property described in the deed, it was not legally competent for her to create, by way of a reservation or otherwise, out of the fee in said property, which she at the same time granted to the plaintiffs in remainder, a life interest therein to and for the benefit of her husband, he being a stranger to the *title*. The polestar in the determination of this question is the intention of the parties to the deed, particularly that of the deceased wife of the defendant, to be ascertained by a consideration of the deed itself, and, if necessary, the circumstances surrounding the execution thereof, by the light of the rules by which any other contracts are construed or interpreted, where construction or interpretation is necessary to ascertain the intention of the parties to such instruments as to the scope and effect thereof. *Barnett v. Barnett*, 104 Cal. 298, 300, 301, 37 P. 1049; *Pacovich v. Southern Pac. R. Co.*, 150 Cal. 39, 45-47, 87 P. 1097; *Parks v. Gates*, 186 Cal. 151, 155, 199 P. 40; *Duncan v. Wolfer*, 60 Cal. App. 120, 212 P. 390; *Devlin on Deeds* (3d Ed.) §§ 843, 843a, 844a, 850. In 17 *Ruling Case Law*, § 6, p. 619, the rule now generally followed in the construction of deeds is thus stated:

"It was a rule of the common law that if the habendum or any later clause in a deed was repugnant to the granting clause, the granting clause would override the repugnant clause or clauses, and under this rule if a grant is to one and his heirs and the habendum clause or a later clause is to the grantee for his life, or life of another, the habendum or later clause is considered void as being repugnant to the meaning conveyed by the words 'his heirs' as previously used. The modern tendency, however, is to abandon the strict common-law rule of construction, the broad doctrine being asserted that in the construction of deeds as in the construction of other instruments the intention of the parties thereto as gathered from the whole instrument must govern. In jurisdictions which adhere to this doctrine it is held that where a deed appears from the premises to give a fee, but the habendum makes it clear that a life estate is intended, the grantees will take a life estate only. And where the granting part of a deed creates a life estate only, it has been decided that the use of the word 'heirs' in the warranty clause is not sufficient to show that the real intention was to convey a fee."

"Referring to the same subject, our Supreme Court, in *Barnett v. Barnett*, supra, approves the rule as it is above declared in *Ruling Case Law*. It is there said:

"A grant is to be interpreted in the same manner as any other contract (section 1066), so as to give effect to the intention of the parties, if that intention can be ascertained (section 1636); and for the purpose of ascertaining that intention 'the whole of the contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other' (section 1641). The intention, it is sometimes said, is to be gathered from the four corners of the instrument, and in case of a grant the habendum, as well as any other portion of the instrument, is to be considered. The ordinary use of the

habendum is to define or limit the quality of interest, or the estate which the grantee is to have in the property granted, and, although usually made a separate portion of the instrument, is not necessarily so, but may be wholly omitted, and the interest or estate granted may be defined or limited in the premises or granting part of the conveyance. *Montgomery v. Sturdivant*, 41 Cal. 290. The rule that if the habendum is repugnant to the premises it is to be disregarded, is only another form of the rule that "if several parts of a grant are absolutely irreconcilable the former part prevails." Civ. Code, § 1070. The intention of the parties to the grant is to be gathered from the instrument itself, and determined by a proper construction of the language used therein, but for the purpose of ascertaining this intention the entire instrument, the habendum as well as the premises, are to be considered, and, if it appear from such consideration that the grantor intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause the habendum will prevail over the granting clause. *Faire v. Daley*, 93 Cal. 670 [29 P. 256]; *Pelissier v. Corker*, 103 Cal. 516 [37 P. 465]. "It is in such case to be considered as an addendum or proviso to the conveyancing clause, which by a well-settled rule of construction must control the conveyancing clause or premises, even to the extent of destroying the effect of the same." *Bodine's Adm'r's v. Arthur*, 91 Ky. 53 (14 S. W. 904), 34 Am. St. Rep. 162."

[3] "It will not be questioned that Teresa Doyle Murphy intended to convey the fee in the premises to the plaintiff as a remainder over after the determination of a life estate therein to herself and her husband 'and the survivor of them.' The language of the habendum clause of the deed so plainly and unequivocally confirms this proposition as to remove it beyond the realms of disputation. This conclusion is not only clearly warranted by the language itself of said clause of the deed, but is reinforced by the uncontradicted testimony of the defendant. Thus it was shown (and this particular part of the defendant's testimony did not fall within the scope of the motion to strike and the order striking out certain of the testimony given by him) that the premises in controversy were acquired jointly by him and his wife some 10 years after the date of their intermarriage, and that the couple jointly held continuous actual possession thereof and together resided thereon down to the date of the death of the wife on April 1, 1919. Under these circumstances, it was only natural that the wife, having, long after they acquired the property, obtained a decree under the *McEnerney Act* adjudging her the sole owner in fee of the property, should not only desire but *intend* to provide for her life companion, to be enjoyed during the remaining years of his rapidly waning life, at least such an interest in the premises as would assure him an abiding place at the 'old homestead' and, peradventure, vouchsafe to him, in his old age, protection against want of the common necessities of life. There is, however, no serious claim here that the deceased wife of the defendant did not intend and attempt to carve out of the fee in the property a life interest therein for the benefit of herself and husband 'and the survivor of them.' The point urged here by the plaintiffs is, as stated, that

Mrs. Murphy utterly failed legally in whatever attempt she might have made to provide for a life estate in her husband, to be enjoyed by him after her death, if she predeceased him. In other words, we may pardonably repeat, the contention of the plaintiffs is that the defendant being a stranger to the *title* to the property, his wife, the sole owner of the fee therein, could not legally create in him a life interest or estate in the premises, and that, therefore, the instant she died the life estate reserved in the property to herself terminated and simultaneously therewith the right of the plaintiffs to the enjoyment of the estate passing to them, under the terms of the grant, inured to them. Obviously, in so far as the habendum clause of the deed applied to the wife of the deceased, there was a reservation of a life estate out of the fee. Undoubtedly, as before stated, Mrs. Murphy intended and undertook to create a life estate in her husband (the defendant).

"But, whether the life interest which Mrs. Murphy sought to withhold from the fee for the benefit of her husband constitutes a reservation, in the technical sense of that term, is a matter of no particular consequence in determining the rights of the defendant herein, although it may be well enough to say that the authorities generally, to which our attention has been called, in considering whether the attempted creation, for the benefit of a third party, of a life estate out of the fee in real property which has been granted by the owner of the fee to another, declare that to create a life estate by way of a reservation, the party for whom such estate purports to be created must be a party or not a stranger to the *deed* or *grant* (they do not say to the *title*) conveying the fee in remainder. See Devlin on Deeds (3d Ed.) § 222, p. 318; 18 Cor. Jur. § 339, p. 342, and cases named in the footnotes; 8 R. C. L. § 148, pp. 1091, 1092, and cases cited in footnotes; Butler v. Gosling, 130 Cal. 422, 426. We have found one case in which the rule as so expressed has been interpreted to mean: 'When the books and the cases say that a reservation in a grant, in order to be valid, must be for the benefit of the grantor, or some one of the grantors, and that a reservation cannot be made for the benefit of a stranger to the deed, it is meant and the language used connotes that the reservation must be for the benefit of that grantor who, having an interest in the thing granted, may logically reserve from the operation of the grant a part of the estate or thing granted, or some right growing out of or appurtenant thereto.' Lemon v. Lemon, 273 Mo. 484, 496, 201 S. W. 103.

"But, as before in effect declared, we are not required to express an opinion herein upon the question whether that part of the habendum clause of the grant purporting to reserve a life estate out of the fee in the real property in dispute to the defendant is, strictly speaking, a reservation, for, as pointed out above, the language of the grant, particularly the *reddendum* words embraced within the habendum clause, must be so construed as to give effect to the intention of Mrs. Murphy with respect to the interest in the fee which evidently she desired to withhold therefrom for the benefit of her husband, regardless of the technical form in which it may be found to be necessary to sustain and carry out such intention, provided, of course, that such intention may be worked out,

as in our opinion it may be, without doing violence to any of the canons of construction established and commonly invoked as a guide to the ascertainment of the meaning and intent at the bottom of contracts in general. If, therefore, the clearly manifested intention of Mrs. Murphy to provide a life interest for her husband in the property in question cannot be sustained upon the theory that such intention has been evinced in the form of a reservation, as that term in law is technically understood, then, it is clear that the provision for the defendant, in order to enforce the manifest intention of Mrs. Murphy, may, in practical effect, be invested with the force of a reservation by construing it as an exception to the estate granted to plaintiffs, whereby Mrs. Murphy, for the benefit of her husband, excepted, for a specified time, from the operation of the grant to plaintiffs of the fee, an interest which must cease to exist in the manner expressed by or necessarily implied from the language of the habendum clause of the grant before the right of the plaintiffs to the enjoyment or beneficial use of the estate passing to them arises or inures to them. Or, stating the proposition in other language, the plaintiffs, being granted the whole of the estate in fee, subject to a certain interest therein which was expressly withheld or excepted therefrom by their grantor, are not in the very nature of the situation entitled to the enjoyment of the beneficial use of the fee until the excepted interest shall have ceased to exist, or has terminated, according to the terms of the instrument creating it. This construction legally facilitates the carrying out of the plain or manifest intention of Mrs. Murphy and is in consonance with the theory according to which the courts and other authorities hold that deeds of like character to the one here should be construed, where it is necessary to do so, to effectuate the clear intention of the grantor with respect to several different estates sought to be carved out of a single fee in real property. A few excerpts from the statement of the rule as it is formulated by the text-writers which we conclude controls in the construction of the deed in question, and which rule as so stated is predicated upon or approved by the cases generally, will be sufficient for our purposes here.

"Mr. Devlin, in his very excellent work on Deeds, vol. 2 (3d Ed.) § 982, says:

"'A stranger to a deed cannot take title by reservation. But it may operate, when so intended by the parties as an exception from the thing granted.'

"In 8 Ruling Case Law, § 148, p. 1092, the rule is thus stated:

"'Generally it is declared that a reservation must be in favor of a grantor or party executing the conveyance, and not to a stranger.

"'A better statement of the rule is that, a reservation in a deed to a stranger being by right of authority invalid as a reservation, the tendency of the courts is to effectuate the intention of the grantor by treating it as an exception.

"'A reservation is none the less made to a grantor if it is so made that others can derive advantage from it; it will be considered as made to him when valuable rights are secured to him, though others may be benefited by it.'

"In 18 Corpus Juris, § 339, p. 340 et seq., it is stated:

"A reservation is a clause in a deed whereby the grantor reserves some new thing to himself out of that which he granted before. It differs from an exception which is ever of part of the thing granted and of a thing in esse at the time. The office of an exception is to take something out of the thing granted that would otherwise pass. While this distinction between a reservation and an exception has been uniformly recognized, the terms "reservation" and "exception" are often used interchangeably; and the technical meaning will give way to the manifest intent, even though the technical term to the contrary is used."

"Again, in the same volume of the same work, section 340, page 343:

"The true rule is said to be that, where words taken according to their technical meaning do not create a legal reservation and are notwithstanding construed to amount to a reservation, it is always done with a view to advance the intent of the parties, but not to defeat or destroy it. And words not technically amounting to a reservation are not to be so construed unless to effectuate a manifest intention. Where not repugnant to the grant, a reservation or exception may appear in any part of the deed." See, also, the many cases cited in the footnotes, which support the text.

"In *Martin v. Cook*, 102 Mich. 267, 272, 60 N. W. 679, on page 680, the grantor reserved to himself and to his daughter, who was a stranger to the deed and to the title, an estate for the lives of both in the property conveyed. The court said:

"While the rule that a reservation in favor of a stranger to the instrument is invalid as a reservation has been adhered to, yet, in order to effectuate the intention of the grantor, such a reservation has uniformly been treated as excepting from the grant the thing reserved." See, also, *Burchard v. Walther* [58 Neb. 539] 78 N. W. 1061; *In re Dixon* [156 N. C. 26] 72 S. E. 71.

"Nothing further need be said upon the question under consideration than what is declared in the above authorities. The case here unquestionably falls within the rule as to exceptions as declared therein.

[4] "In conclusion, it is proper to say that, in taking up this record for consideration, we did not overlook the point made by respondents at the outset of the argument presented in their brief, that the 'attempt on the part of the appellant to attack the sufficiency of the evidence to support the findings of fact' cannot be reviewed for the reason that the bill of exceptions does not contain a specification of the particulars in which it is claimed that the findings are not thus supported. Code Civ. Proc. § 648. While the rule as declared in that section of the Code in cases where the appeal is supported by a bill of exceptions, and where the findings are challenged for want of sufficient evidence to support them, should generally be followed, yet in the instant case the decision below, as is the decision here, was predicated entirely upon the construction of the deed constituting the foundation of this action. There was little evidence received in the case and in that there was no conflict whatever, viz.: The testimony of the plaintiff Mrs. Boyer, giving the date of her mother's death, the defendant's tes-

timony, of which a synoptical statement is hereinabove given, and the deed. The findings, which might be sufficient as such under other circumstances, are in the present situation in reality conclusions of law following the construction of the deed.

[5] "The conclusion arrived at upon the merits, as stated, and as is obvious, is wholly founded on a construction of the grant. The finding, therefore, that the defendant's claim of interest in the property is without right, etc., amounts to no more than an unsupported conclusion of law. See *Carr v. Carr*, 15 Cal. App. 480, 495, 496 (115 P. 261); *Rosenberg v. Bump*, 43 Cal. App. 376, 398 (185 P. 218)."

The judgment and order of the trial court are reversed, with direction to said court to make and cause to be entered its judgment herein decreeing the plaintiffs herein to be the owners in fee of the parcel of land described in the complaint herein, subject, however, to the right of the defendant to have and enjoy freely the use and possession thereof during the term of his natural life.

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**PACIFIC TELEPHONE & TELEGRAPH CO.
v. STATE BOARD OF EQUALIZATION
et al. (S. F. 12535).★**

Supreme Court of California. July 2, 1927.

Rehearing Granted Aug. 1, 1927.

1. Taxation ☞59—Owner of property must pay tax thereon (Pol. Code, § 3628).

Owner of property subject to taxes has duty of paying tax thereon, in view of Pol. Code, § 3628.

2. Taxation ☞116—Use fixes status of property relative to whether it is operative within provision authorizing state tax on property of certain corporations in lieu of other taxes (Const. art. 13, §§ 1, 14a).

Use of property determines whether it is operative, within meaning of Const. art. 13, §§ 1, 14a, providing for state tax on property used by telephone and certain other companies in lieu of all other taxes, but it is its use by owner that fixes its status.

3. Taxation ☞124½—Constitutional provision authorizing state tax on gross receipts of certain companies in lieu of other taxes limits property exempted to that owned and excludes leased property (Const. art. 13, § 14).

Provision of Const. art. 13, § 14, that, in lieu of all other taxes and licenses, telephone and other companies shall pay tax measured by given percentage of gross receipts, limits property on which such tax must be paid to property owned by companies, and cannot be held to include leased property not owned by them.

4. Taxation ☞155—State tax, imposed on gross income in lieu of other taxes of telephone companies, remains essentially property tax (Const. art. 13, § 14).

State tax, imposed by Const. art. 13, § 14, on gross receipts of telephone companies in lieu

of all other taxes, merely creates a new method of taxing property and franchises, and tax so imposed remains essentially a property tax.

5. Taxation ☞37—Provision in Constitution authorizing state tax on gross income of certain companies in lieu of other taxes prevails if conflicting with statutory definition (Pol. Code, § 3665b; Const. art. 13, §§ 1, 14a).

If Pol. Code, § 3665b, defining term "operative property," within meaning of Const. art. 13, §§ 1, 14a, providing for state tax on gross income of certain companies in lieu of all other taxes, is not in harmony with Constitution, the provision in the Constitution must prevail.

6. Taxation ☞251—Companies claiming exemption of operative property from local assessments and taxation must show property belongs to them: "belonging to" (Const. art. 13, § 14; Pol. Code, §§ 3665b, 3665c, 3668e).

Under Const. art. 13, § 14, authorizing state tax on gross receipts of certain companies in lieu of other taxes, and Pol. Code, §§ 3665b, 3665c, 3668e, for carrying such scheme of taxation into effect, in order that companies whose property is subject to taxation for state purposes may claim exemption of operative properties from local assessment and taxation, it must appear that property belonged to claimant, since term "belonging to," under provision authorizing lien on property and franchises belonging to company, means "to be property of."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, *Belong—Belonging*.]

7. Taxation ☞155—That leased buildings contribute to telephone company's receipts is immaterial on determining exemption from local taxation (Const. art. 13, § 14).

The fact that buildings leased by telephone company contribute to company's receipts is immaterial in determining exemption from local taxation, under Const. art. 13, § 14, unless such property comes within constitutional definition of property set aside for taxation for state purposes.

8. Taxation ☞47(4)—Telephone company voluntarily agreeing to pay tax on leased property may not use fact as basis for claim of double taxation (Const. art. 13, § 14).

If a telephone company in leasing buildings voluntarily assumes contractual obligation to pay the tax it is not required by law to pay, it will not be permitted to use that fact as basis for claim of double taxation by virtue of state tax on gross receipts, under Const. art. 13, § 14.

9. Taxation ☞80—Ordinarily owner of property is liable for taxes notwithstanding leasehold interest therein.

Ordinarily, property is taxed to owner notwithstanding leasehold interest therein, and which party shall bear burden is not a matter of public concern.

Preston, J., dissenting.

In Bank.

Original application by the Pacific Telephone & Telegraph Company for writ of mandate, prayed to be directed to the State Board of Equalization and others, to compel the listing of certain leased property as operative. Writ denied.

Pillsbury, Madison & Sutro, of San Francisco, and Oscar Lawler, of Los Angeles (Lawler & Degnan, of Los Angeles, of counsel), for petitioner.

U. S. Webb, Atty. Gen., Frank L. Guerna, Deputy Atty. Gen., Everett W. Mattoon, County Counsel, and J. A. Tucker, Deputy County Counsel, both of Los Angeles, for respondents.

Dixwell Pierce, of Sacramento, amicus curiae.

WASTE, O. J. This application for a writ of mandate involves the question whether or not improved real property, leased by a telephone company and used by it in the operation of its business in this state, is subject to local taxation. Pursuant to section 3665c of the Political Code the Pacific Telephone & Telegraph Company, in April of this year, filed with the state board of equalization its annual report, showing in detail (among other items) all its property which it claimed came within the definition of operative property. It included in the report improved real property located in the cities of San Francisco, Oakland, and San Jose, which, while used exclusively in the operation of its telephone business, is not owned by the telephone company, but by others, and leased to it. The several county assessors protested against the inclusion of these properties as operative, on the sole ground that they are leased, and not owned, by the telephone company. The board of equalization, after due hearing, advised the telephone company that it has sustained the protests of the assessors on the ground specified. This application for a writ of mandate is to compel the board to reverse its ruling and to list the leased properties as operative, thereby rendering them exempt from local taxation.

[1] Prior to 1910 the Constitution of California provided that all property in the state, not exempt under the laws of the United States, should be taxed in proportion to its value, to be ascertained as provided by law. Under the amendment of that year, providing for the separation of state and local taxation and for taxing certain public service corporations for state purposes only, it is now provided that all property in the state, except as otherwise in the Constitution provided, not exempt under the laws of the United States, shall be taxed according to its value, to be ascertained as provided by law, "or as [in the Constitution] provided,"

and that "in lieu of all other taxes and licenses, state, county, and municipal," all telephone and other enumerated companies "shall annually pay to the state upon their franchises * * * poles, wires, pipes, canals, conduits, rights of way, and other property, or any part thereof used exclusively in the operation of their business in this state," a tax measured by a given percentage of gross receipts, equal, in the case of telephone companies, to 5½ per cent. upon the gross receipts from operation within the state. Const. art. 13, §§ 1 and 14a. The underlying theory of taxation in this state has always been that the owner of property subject to taxation must pay the tax. It needs no citation of authority to that effect. Our whole scheme of taxation rests upon that theory. Pol. Code, § 3628. Petitioner is here contending, however, that in the case of the "operative" property of companies liable to taxation for state purposes only, it is unity of operation in the use of property, regardless of ownership, and not ownership, that determines who shall pay the tax. It takes the position that, as the leased buildings are used in its business and as part of its telephone system, they are operative property and contribute to its revenues, and, consequently, to the amount of its taxes, in no way different from property owned by it, for which reason it contends that it should not pay the gross receipts tax to the state and also pay the local taxes on property the use of which yields the gross receipts. The false quantity in its reasoning is that petitioner will not be liable for the tax if the leased property be locally assessed. No matter how we may decide the controversy, the amount to be paid by the petitioner as its state tax will not be affected. It must pay the fixed percentage on its gross receipts. Neither will the amount of local taxes which the petitioner is required to pay by the tax laws of the state be affected. For the usual purposes of taxation this state does not recognize any segregation of interest between a leasehold and the reversion. The whole tax is assessed against the owner of the fee, and the tax, in the absence of any agreement between the lessor and the lessee, will be paid by the owner. If the petitioner in this case is compelled to pay the local tax, it is because it has voluntarily agreed with the lessors to do so.

[2, 3] The question involves a construction of the section of the Constitution. It is undoubtedly true that property used in the public service frequently acquires a value in the use which is something greater than the value of the property not engaged in such use. By the systemization and unification of such properties in use they in the aggregate acquire a special value by virtue of this unity of use. It is on the theory that a fair tax upon gross earnings of the utility bears such a relation to the values of these properties

under their unity of use as to justify a tax upon revenue as being a legal and commuted, or substituted, tax for other taxes which previously were or might be levied that the courts have sustained the present method of taxing public service companies. *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 425, 143 P. 700. Petitioner cannot claim that before the change in the method of taxing public service companies went into effect it was liable for taxes levied on leased property occupied by it and used in its business. This court has always considered the present form of taxing such companies to be in fact what it purports to be; namely, a tax upon the property of the utility as it is described in the Constitution. *Pullman Co. v. Richardson*, 185 Cal. 484, 489, 197 P. 346. We are now asked to enlarge section 14, supra, beyond its commonly accepted scope, and to place upon its provisions an interpretation which we believe the entire context of the section does not warrant. We may concede that it is the use of the property that determines whether or not it is "operative" in character (*San Bernardino v. State Board of Equalization*, 172 Cal. 76, 79, 155 P. 458), but it is "use by the owner" that fixes its status. We are of the view that the provision in section 14, that, in lieu of all other taxes and licenses, telephone and other companies shall annually pay to the state upon *their* franchises, etc., and other property, or any part thereof used exclusively in the operation of *their* business, a tax measured by a given percentage of gross receipts, limits the property on which such tax must be paid to property owned by the companies, and cannot be held to include leased property not owned by them. In addition to what we accept as the plain meaning of the constitutional provision, through the use of the pronoun "*their*" in pointing out the property liable for the substituted tax, we cite, in support of our conclusion, the reason for and history of the adoption of the amendment (see *San Francisco v. Pacific Tel. & Tel. Co.*, 166 Cal. 244, 135 P. 971), circumstances connected with its adoption, and legislative action following its ratification. While such matters are not conclusively binding on the court, they are of assistance in the present case, for they confirm our view as to the proper construction to be applied in the case.

[4] While the constitutional amendment of 1910 worked a radical change in the system of taxation in this state, the purpose of which was to divide the subjects of state and local taxation by imposing upon persons and corporations engaged in certain callings the obligation to pay taxes to be applied exclusively to state purposes, the tax imposed by article 13, § 14, is not radically different from the tax provided by the Constitution before the amendment. Under the old system, the property and franchises of the companies, now

specially set apart, were taxed for both state and local taxes. The amendment merely creates a *new method of taxing such property* and franchises, and appropriates the revenue so raised to state purposes solely. *San Francisco v. Pacific Tel. & Tel. Co.*, supra. The tax so imposed remains essentially a property tax. *Pullman Co. v. Richardson*, 185 Cal. 484, 487, 197 P. 346. In submitting the proposed change to the people in 1910, the commission on revenue and taxation, in its analysis of the provisions of the constitutional amendment, contained in its report (page 18), says (italics added):

"It [the amendment] leaves the old sections unchanged, except in so far as they are modified by the new section. * * * The amendment provides that certain taxes on the *property* of certain classes of companies, as named and described below, shall be exclusively for state purposes. *It leaves the old system of ad valorem taxation on property in general, other than that of the classes named*, for the use of the counties, cities, school and other districts. * * *

"The taxes reserved for the state are:

"(1) On the operative *property* of railroad companies, etc.

"(2) On the *property* of sleeping car, * * * etc., companies, etc.

"(3) On the *property* of express companies, etc.

"(4) On the *property* of telegraph and telephone companies, etc.

"(5) On the *property* of all light, heat and power companies, etc.

"All the nonoperative property of the above corporations is left subject to location taxation."

It seems most reasonable to say that the commission, in explaining to the voters the nature of the change to be brought about by the new system of taxation, used, and expected the people to understand, the expression "property of" in the plain and ordinary sense of "belonging to," and as indicating ownership in the public service companies which at that time were assessed for and were compelled to pay local as well as state taxes on all property owned by them. Property not owned by the companies, but leased to them, was not assessed to them, and they were not required by law to pay taxes, state or local, thereon.

[5, 6] When, following the adoption of the amendment, it enacted the necessary procedural statutes for carrying the new scheme of taxation into effect (see Stats. 1911, p. 530), the Legislature declared (see Pol. Code, § 3665b) that the term "operative property," as used in the Code and as applied to telegraph and telephone companies doing business in the state, shall include (subd. [d]):

"The franchises, rights of way, poles, wires, pipes, conduits, cables, switchboards, telegraph and telephone instruments, batteries, generators, and other electrical appliances, and exchange and other buildings used in the telegraph and telephone business and so much of the land on which said buildings are situate as

may be required for the convenient use and occupation of said buildings."

In subdivision (e) occurs the following:

"* * * The operative property of the companies enumerated in this section shall also include any other property not above enumerated that may be reasonably necessary for use by said companies exclusively in the operation and conduct of the particular kinds of business enumerated in section 3664a of this Code."

Because of the occurrence of the phrase "exchange and other buildings *used* in the telegraph and telephone business" in subdivision (d), and of the general definitions last quoted (subd. [e]), petitioner argues that the Legislature has made unity of use in the business the test of whether or not the property is operative. We need not discuss this contention further than to say that, if the definition of "operative property" in the Code is not in harmony with the Constitution, the provision in the Constitution must prevail. *San Diego, etc., Ry. v. State Board*, 165 Cal. 560, 565, 132 P. 1044; *Lake Tahoe Ry., etc., Co. v. Roberts*, 168 Cal. 551, 556, 143 P. 786, Ann. Cas. 1916E, 1196. But we are of the view that, considered in their entirety, the Code sections are in harmony with the Constitution on this matter. The next succeeding section (3665c) makes it mandatory upon each of the public service companies, when filing its annual report to the state board of equalization, to report in such detail as the board shall prescribe "all of *its property* (italics added) in this state which comes under the definition of operative property" in section 3665b. By another provision (section 3668c) the Legislature made the taxes for the support of the state, under the provisions of the Constitution, supra, and the sections of the Political Code enacted to carry them into effect, a lien upon all the property and franchises of every kind and nature "*belonging to*" the companies subject to taxation for state purposes, the tax to have the effect of an execution duly levied against "all property of the delinquent." The primary meaning of the phrase "belonging to" is "to be the property of." 7 C. J. 1039. The judgment is not satisfied nor the lien removed until the tax, penalty, and costs are paid, or the property sold for payment. We therefore conclude that, in order that the companies whose property is subject to taxation for state purposes may claim an exemption of their operative properties from local assessment and taxation, it must first appear that the property belongs to the claimant, that is, in the sense that it is owned by it.

[7, 8] The fact that the leased buildings contribute to the company's receipts is immaterial, unless such property comes within the constitutional definition of the property set aside for taxation for state purposes. *Lake Tahoe Ry., etc., Co. v. Roberts*, supra, page 555, 143 P. 786, Ann. Cas. 1916E, 1196.

The further contention that, unless it be held that leased property may be operative property, it will be subjected to double taxation, and that a "serious constitutional question" will arise, is answered by the decision of this court in *Bank of California v. Roberts*, 173 Cal. 398, 403, 160 P. 225. If petitioner has voluntarily assumed a contractual obligation to pay a tax it is not required by law to pay, it should not be permitted to use that fact as the basis for a claim of double taxation.

We have examined the authorities relied upon by the petitioner to support its claim for an exemption of the leased buildings from local taxation. Almost the precise question submitted by the application now before us was considered in *Southern California Telephone Co. v. Hopkins* (O. C. A.) 13 F. (2d) 814, in a case involving certain parts of "talking sets" leased by the telephone company from another corporation and used as integral parts of certain instruments in the operation of the company's business. The Circuit Court of Appeals held that unity of use, and not ownership, determined whether or not the property was properly classed as "operative," under the provisions of the California Constitution. The cause has been transferred to the Supreme Court of the United States, where it now awaits final decision. We find ourselves in direct disagreement with the construction adopted by the federal court, because of what we believe to be the plain intent and meaning of the constitutional provisions. In *Merrill Ry. & L. Co. v. City of Merrill*, 119 Wis. 249, 96 N. W. 686, the court was construing a statute subjecting those engaged in operating street railways to a charge graduated upon their gross revenues, in lieu of other taxation, and which provided that other property "owned and actually and necessarily used by such person, company, or corporation in the operation of its business" should be exempt from taxation. By a divided court it was held that, under a liberal construction, the word "owned," as used in the statute, might be satisfied by something less than absolute and entire ownership, and that a leasehold interest was not subject to local taxes. Mr. Justice Marshall, dissenting, was of the view that the court should have gone only so far as to hold exempt all property which would be taxable by the general system of taxation to the railroad company if it were not for such license method. "To go further," he says, "and include property taxable to other persons under such general system and justify it by the power of the court to judicially construe, goes outside the limits of such power into that of legislation." In *City of Superior v. Allouez Bay Dock Co.*, 163 Wis. 76, 164 N. W. 362, unity of use of the property taxed does not appear to have been considered, the question being whether or

not the defendant dock company was, in legal effect, a railway company under the terms of the statute, and hence not subject to an income tax. Neither does that question appear to have been involved in *City of Detroit v. Detroit Manufacturers' R. R. Co.*, 149 Mich. 530, 113 N. W. 365. The question was whether or not the defendant was a railroad company organized under the general railroad law, or to be considered a street railway. The cases from Illinois (e. g., *People v. Wiggins Ferry Co.*, 257 Ill. 452, 100 N. E. 956) hold that, for the purpose of taxation under the peculiar statute of that state, a railroad company is the owner of land occupied by it for its right of way, without regard to where the fee title to the land rests. We deem it unnecessary to cite the further authorities relied on by petitioner. Other than the two first above cited, they deal with questions so unlike those involving our own Constitution and statutes that they are useful only by way of illustration. After reading all these decisions, we are still of the view that this court is not justified in extending the provisions of section 14 of article 13 of the Constitution, providing a substituted tax for public service corporations, by applying it to property not taxable to them by our system of taxation before the amendment was adopted.

[9] During the argument, the suggestion was offered that relief, to a certain extent, might be accorded to the petitioner through regarding its interest in the leased properties as operative property, the value of such interest to be considered as proper deductions by the respective local assessors when making the assessments against the owners. The law makes no specific provision for separate assessment of leasehold interests to the lessor and reversion to the owner. While it has come to be regarded as settled law that, where the state or other public authority owns the reversion, the private owner of a leasehold interest is not exempted from paying the tax upon his interest because the interest of the state is not taxable, in the ordinary case the value of the leasehold is included in the value assessed to the owner of the fee. *San Pedro, etc., R. R. Co. v. Los Angeles*, 180 Cal. 18, 23, 179 P. 393. Assessment of possessory rights under leases for the extraction of oil and like substances from the land has been held to be proper, because of their essential difference from the ordinary possessory interests under leases. *Mohawk Oil Co. v. Hopkins*, 196 Cal. 148, 236 P. 133. In ordinary cases, however, the whole property is taxed to the owner, and which party shall bear the burden is not a matter of public concern.

The respondent board of equalization having correctly ruled that the property here in question is not subject to taxation for state

purposes, the application for the writ is denied.

We concur: CURTIS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

I dissent: PRESTON, J.

SOUTHERN CALIFORNIA TELEPHONE COMPANY (a Corporation), Applicant, v. **STATE BOARD OF EQUALIZATION** of the State of California and John C. Corbett, Fred E. Stewart, R. E. Collins, H. G. Cattell, and Ray L. Riley, as members of and constituting the said State Board of Equalization, Respondents. (S. F. 12536.)★

Supreme Court of California. July 2, 1927.

Rehearing Granted August 1, 1927.

In Bank.

Application for writ of mandate prayed to be directed to the State Board of Equalization, to compel the listing of certain leased property as operative. Writ denied.

Pillsbury, Madison & Sutro, of San Francisco, and Oscar Lawler, of Los Angeles (Lawler & Degnan, of Los Angeles, of counsel), for petitioner.

U. S. Webb, Atty. Gen., Frank L. Guereña, Deputy Atty. Gen., Everett W. Mattoon, County Counsel, and J. A. Tucker, Deputy County Counsel, both of Los Angeles, for respondents.

Dixwell Pierce, of Sacramento, amicus curiæ.

WASTE, C. J. This application for a writ of mandate involves the precise question this day decided in *Pacific Telephone & Telegraph Co. v. State Board of Equalization* (S. F. No. 12535) 259 P. 42, which is whether or not improved real property leased by a telephone company, and used by it in the operation of its business in this state, is subject to local taxation.

Pursuant to section 3665c of the Political Code the Southern California Telephone Company, in April of this year, filed with the state board of equalization its annual report, showing in detail (among other things) all its property which it claimed came within the definition of operative property. It included in the report certain real property, together with the improvements thereon, situate in the city of Los Angeles, and not owned by it, but leased to it, and used exclusively in the operation of its telephone and telegraph business in said city. The county assessor of Los Angeles county protested against the inclusion of this property as operative property, on the sole ground that it was leased and not owned by the telephone company. The board of equalization, after due hearing, advised the telephone company that it has sustained the protest of the assessor on the ground specified. This application for a writ of mandate is to compel the board to reverse its ruling and to list the leased property as operative.

For the reasons and on the grounds stated in the decision in *Pacific Telephone & Telegraph*

Co. v. State Board of Equalization, supra, the application for a writ is denied.

We concur: CURTIS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

I dissent: PRESTON, J.

201 Cal. 474

PEOPLE v. CLARK. (Cr. 2818.)

Supreme Court of California. June 30, 1927.

1. Criminal law $\S$ 1131(5)—Appellate court may dismiss appeal of fugitive from justice.

Appellate court, independent of statutory authority, has power to dismiss appeal of defendant, who is a fugitive from justice.

2. Constitutional law $\S$ 271—Dismissing appeal because of prisoner's escape is not denial of due process.

Dismissal of an appeal on account of the escape of prisoner is not denial of due process of law.

3. Criminal law $\S$ 1131(7)—Appellate court, if having power to reinstate appeal dismissed because of prisoner's escape, should do so only when denial will work palpable injustice.

Appellate court, if it has power to reinstate an appeal dismissed on account of escape of prisoner, should exercise such power only in cases where it is plainly made to appear that a denial of its exercise would work a palpable injustice or wrong on appellant.

4. Homicide $\S$ 253(1)—Evidence held to sustain conviction of first degree murder.

In prosecution for murder, evidence held sufficient to sustain conviction for murder in the first degree.

5. Homicide $\S$ 338(3)—Admitting evidence of deceased's statement to companions as to being stabbed held not prejudicial, in view of testimony of defendant's using knife.

In prosecution for murder, admission of evidence as to deceased's statement to companions just after leaving defendant's place that he had been stabbed held not prejudicial, in view of positive testimony as to defendant's using a knife in encounter between him and deceased.

6. Criminal law $\S$ 1170½(2)—Overruling objection to question of witness as to what defendant directed her to do in house where they were living held not prejudicial where answer was indefinite.

In prosecution for murder, overruling objection to question asked witness relative to what defendant had directed her to do in house in which they were living held not prejudicial, where answer to question was "several things;" being so general and indefinite as to mean nothing whatever.

7. Homicide $\S$ 174(6)—Evidence that defendant, on morning after encounter with deceased, secured gun held admissible as indicating consciousness of guilt.

In prosecution for murder, evidence that defendant, on morning after his encounter with

deceased, secured a gun from another and had it with him at time of arrest held admissible as tending to indicate a consciousness of guilt.

8. Homicide ⇨172—Evidence indicating that defendant was selling liquor and keeping disorderly house, necessary to establish conditions under which deceased and others entered defendant's place, held admissible.

In prosecution for murder, evidence establishing conditions under which deceased and companions entered defendant's place, which tended to show that defendant was engaged in illegal selling of liquor and keeping disorderly house, held competent and relevant, notwithstanding it constituted proof of other offenses.

9. Criminal law ⇨1131(7)—Appeal dismissed because of escape from custody will not be reinstated, where record on appeal presents no showing justifying reversal.

Where record on appeal from conviction of first degree murder presents no sufficient showing that would justify reversal of judgment, motion to reinstate appeal after dismissal because of escape from custody will be denied in that it would accomplish no useful purpose, since consideration of appeal after reinstatement would only result in affirmance of judgment.

Preston, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Earl J. Clark was convicted of first degree murder, and he appeals. On defendant's motion to reinstate appeal after dismissal because of his escape from custody. Motion denied.

See, also, 198 Cal. 453, 245 P. 1112.

John F. Groene and Buel R. Wood, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

CURTIS, J. Motion to reinstate appeal heretofore dismissed by this court for the reason that appellant had escaped from jail subsequent to the taking of said appeal and was a fugitive from justice at the time of the dismissal thereof. The appellant was convicted of murder in the first degree and sentenced to suffer the death penalty. He appealed to this court from the judgment of conviction. On the 8th day of March, 1926, said appeal, after the same had been argued herein, was submitted for decision. On the 16th day of March, 1926, appellant escaped from the county jail of the county of Los Angeles, where he was being detained pending the determination of his appeal. After his escape from jail, and prior to his recapture, this court, on April 7, 1926, upon motion of the Attorney General, made an order that said appeal stand dismissed unless appellant, within 30 days from said date, return to the custody of the sheriff of said county of Los Angeles. Appellant failed to

return to the custody of said sheriff within said period of 30 days, and this court, on the 6th day of June, 1926, entered its order finally dismissing said appeal. Thereafter appellant was apprehended and returned to the custody of said sheriff, and on the 8th day of March, 1927, he presented his motion to set aside and vacate said order of dismissal and to reinstate his appeal. The Attorney General resists said motion and bases his objection to the granting thereof on the ground that this court has no jurisdiction over said appeal after its order of dismissal, and, therefore, that it has no power to reinstate the same.

[1, 2] There is no statute governing the subject in this state. That the court, independent of statutory authority, has power to dismiss the appeal of an appellant who is a fugitive from justice has long been accepted as a proper exercise of the jurisdiction of the appellate courts of this state. *People v. Redinger*, 55 Cal. 290, 36 Am. Rep. 32; *People v. Elkins*, 122 Cal. 654, 55 P. 599; *People v. Sitz*, 21 Cal. App. 54, 130 P. 858. It is also the settled law in other jurisdictions. 17 C. J. 193, and cases cited. In the state of Texas the right is given by statute. *Cobb v. State*, 69 Tex. Cr. R. 619, 154 S. W. 1195; section 880, Texas Code Crim. Proc. The dismissal of an appeal on account of the escape of a prisoner is not a denial of due process of law. *Allen v. Georgia*, 166 U. S. 138, 17 S. Ct. 525, 41 L. Ed. 949. There is little to be found in the reports as to the power of a court, after the dismissal of an appeal upon this ground, to thereafter set aside the order of dismissal and reinstate the appeal, after the appellant has voluntarily surrendered himself, or has been returned to custody. The Texas statute provides that the order dismissing the appeal shall be set aside if it shall be made to appear that the accused has voluntarily returned to custody within 10 days after the date of said order. Under this statute it has been held that the court was without power to set aside the order of dismissal, except in the case of the voluntary return of the accused to custody within the 10-day limit, and that the recapture of the prisoner and his forcible return to custody within 10 days after his escape therefrom did not give the court power to set aside the order of dismissal. *Lunsford v. State*, 10 Tex. App. 118; *Ex parte Wood*, 19 Tex. App. 46; *Loyd v. State*, 19 Tex. App. 137. On the contrary, the Supreme Court of Louisiana, in which state there is no statute governing the subject, has held that it has power to reinstate the appeal of an appellant, dismissed by reason of his escape from custody. *State v. Thibodeaux*, 48 La. Ann. 600, 605, 19 So. 680, 682. As to its power in this regard, the court said:

"Considering this a case in which the accused has been sentenced to the extreme penalty of the law, and that our decrees should in doubtful cases favor the liberty of the citizen, and the right of appeal, we have concluded to grant the application and reinstate defendant's appeal."

[3] We think it unnecessary, however, to decide the question whether this court has or has not the power to reinstate an appeal dismissed on account of the escape of the prisoner. Assuming, for the sake of argument, that the court has such power, it should only be exercised in those cases where it is plainly made to appear that a denial of its exercise would work a palpable injustice or wrong upon the appellant. We are satisfied in the present action that no advantage would accrue to the appellant by the reinstatement of his appeal. We have already referred to the fact that the appeal in this action was perfected and the cause argued and submitted for decision while appellant was in legal custody. The record on the appeal is, therefore, before us. Both the opening and closing briefs of appellant and respondent's brief are on file herein, and this court has had the benefit of argument of counsel on behalf of the respective parties. We think, therefore, that it is proper for us to look into the record of this appeal on file herein and, with the assistance of the argument of counsel already presented and their briefs before us, to consider the merits of said appeal before finally ruling upon the motion to reinstate the same; for, if the appeal is without merit, it would be a useless proceeding for this court to reinstate the same, and thereafter, upon the consideration of its merits, to deny it. Such a course would simply prolong this proceeding without securing to the appellant any beneficial results.

[4] An examination of the record shows that the contention of the prosecution was that the deceased, Silva, met his death as the result of a murderous assault made upon him by the appellant, in which appellant, with a knife, stabbed the deceased in the lower part of his abdomen, as a result of which Silva died a few hours thereafter. The main contention of appellant on this appeal is that the evidence is insufficient to justify the verdict of the jury finding the appellant guilty, and particularly that there is no evidence that in said assault the appellant used a knife upon the deceased, or that he had a knife in his hands during said assault. This contention can best be met by a brief review of the testimony of those present at the time of the encounter between appellant and the deceased.

The evidence shows that the deceased, Silva, and three companions, Kilbey, Utrecht, and Lane, were sailors on the vessel City of Los Angeles, which, on the evening of the 18th of April, 1925, was lying in the harbor

of San Pedro. These four, on that evening, in company with two taxicab drivers, Densmore and Card, went to appellant's place, located some 4 or 5 miles from San Pedro. This place was a dwelling house which appellant had recently rented and moved into, and in which he was illegally selling intoxicating liquor. There was also residing in this house a young girl named Mamie Stephens, and the evidence tended to show that she was being kept at said place by appellant for immoral purposes. After arriving at the house, the six men were served with drinks by appellant. They had been in the house about a half hour when the altercation took place between the appellant and the deceased. It began in the room occupied by the girl, Mamie Stephens, but was soon transferred to the adjacent and main room, where the other men were. Whether it arose over the accusation by appellant that Silva and his companion had not paid for the drinks they had received from appellant, or over the girl, Mamie Stephens, or for both of these reasons, is not clear, nor is it material. As to the details of this encounter, the persons present testified at the trial, and we will briefly refer to such evidence, and particularly to that portion which tends to show whether appellant used or did not use a knife upon the deceased.

The witness Kilbey testified:

"I was sitting at the doorway there, the entrance to the bedroom in the sitting room, and all of a sudden there I heard the door open and here comes Silva backing out with his hands up like this. * * * As soon as the door opened, he simply backed out with his hand on the defendant, pretty close to him. Right directly I got up and I followed Lane out, Mr. Lane out of the house."

The witness Lane testified:

"Of course, as quick as he opened the door I seen the condition of things, I started out.

"Q. What do you mean, you saw the condition of things? what did you see? A. I saw Mr. Silva come out like this with his hands lifted.

"Q. Over his head? A. Over his head; so I seen there was trouble, and I thought I would get out of it and walked out, and Mr. Kilbey followed me. * * *

"Q. Where was Silva when you saw him there? A. Standing in the middle of the door coming out of room 2.

"Q. Right in the threshold? A. Yes, sir.

"Q. Did you see Clark at that time? A. Clark was right in front of him, standing with his right hand behind him in that manner (indicating).

"Q. Did you see where his left hand was? A. It was at his side.

"Q. Is that all you saw at that time? A. That is all I saw; I was leaving the room."

Mamie Stephens' testimony was as follows:

"Silva started to walk out of the room and kind of walked backwards and Clark was shoving him, he wasn't really shoving him but push-

ing him along, and Silva went out of the room, and I don't know what he said, when he turned around to say something Clark had his hand on his shoulder, and he had his hand behind him—Clark had his hand, his right hand behind him, and I thought I saw a knife in his hand, so I—

"Mr. Groene: I object to what she thought, your honor, as incompetent, irrelevant, and immaterial.

"The Court: Yes; describe what you saw.

"Mr. Groene: I move that it be stricken from the record.

"A. (continuing). Well, he had something in his hand, and I went over and picked at whatever he had, and he pushed me, and I went on in the bathroom, and I changed my dress into a pair of sailor pants and went on the outside."

Utrecht's testimony:

"Then Clark grabbed hold of Silva by the coal lapel; he had one end (hand) up against Silva's body, and I was on my feet there and I got over near the bedroom door, and Kilbey and Lane and Card came in there from the other room. He heard the argument between Silva and Clark, and he said, 'Come on, fellows, let's get out of here,' and Clark and Silva then, they were arguing, one saying he paid for the drinks and the other saying he hadn't paid for them, and all of this time Clark had one arm up to Silva that way, and Silva assumed that attitude; then I saw Clark's arm go this way three times right at Silva's body, and then I saw Densmore, he came in from the bathroom into the bedroom, and then into the sitting room where we were."

Testimony of the witness Card:

"Q. Where were you at that time? A. I was right in here, in the kitchen doorway.

"Q. Yes; and you saw Silva coming out of that door? A. Well, he was coming out kind of fast and making considerable noise.

"Q. What did he say? A. Kind of conglomeration. I could not understand his words, except that he was going to pay something.

"Q. Then what happened? A. Then Clark got ahold of him some way by the coat, and I don't know, he made several rapid motions with his right hand, and he stepped back from the doorway, then with his right hand behind him, and he says, 'I will kill you, I will kill you.'

"Q. Then what happened? A. Then Silva, he had been having his hands in the air, kind of gesticulating, he had— He was about ready to go and quit."

Testimony of witness Densmore:

"This Clark then, he says, 'Well,' he says, 'I don't care, I want you to get out of here, the whole bunch of you.' So then Silva said something to him about all right, he would leave; and then Clark told him, he says, 'If you fellows want trouble, I will give it to you,' and he stood with one hand on Silva's collar and his right hand was in back of him, so when he made that remark he pulled his right hand out and he cut Silva three times in the stomach—

"Q. Did he say anything at that time? A. Not that particular moment, but at about two

seconds later after he had cut Silva, he told him then, 'I will kill you, you son of a B, I will kill you.' * * * So then he turned Silva loose. Silva says, he says, 'I will go.'"

Later on, we find the following in this witness' testimony:

"Q. (by Juror): Did you testify that you saw the defendant make two or three distinct jabs that afternoon at Silva, the deceased? A. When he stabbed him?

"The Juror: Yes. A. He struck one blow and then he kind of withdrew the knife—that is to say, this way, and give two more, but it was not withdrawn clean from the man's body.

"The Juror: You saw the knife in his hand? A. Yes, sir."

The witness Densmore, a short time after the affray between the appellant and the deceased, took the appellant and the girl, Mamie Stephens in Densmore's machine away from the house in which the affray took place. He testified that, as they were leaving the premises, in answer to a question asked him by the prosecution:

"Well, before he (Clark) got into the car he threw something in an underhanded way out into the grass, and after I had backed the machine out on to the street and started away from the house, then he spoke up to me and says, through the window, he was sitting in the back with the girl, and I was sitting in the front seat, and there was a window between, and he opened the door and stuck his head out of the window and he said, 'They will never find that.' I said, 'What?' He says, 'That knife.' He said, 'I broke it all up and threw it away.'"

The next day, and after the arrest of the defendant at Culver City, where he had gone with the girl, Mamie Stephens, the officers found on the premises, where the encounter between appellant and the deceased had taken place, the handle of a knife, in which, according to the testimony of one of said officers, "the blade or the middle part had—was fresh. It looked as if it had recently been broken."

This evidence was, without doubt, sufficient to justify the jury in believing that the wound inflicted upon the deceased had been made by a knife in the hands of the appellant. While only Densmore testified positively that he had seen the appellant stab the deceased with the knife, the others saw the encounter between the two men, and some of them testified to movements made by appellant with his hands, which strongly corroborated the testimony of Densmore that appellant used a knife upon the deceased. But, independent of the evidence of these last-mentioned witnesses, the testimony of Densmore is positively and directly to the effect that the appellant used a knife in his assault upon the deceased. His testimony alone is sufficient to justify the verdict of the jury, and with it in the record, this

court would not be justified in setting aside the verdict on the ground of its insufficiency.

Immediately after the trouble between the two men, Silva, with his three companions and Card, left in the latter's taxicab, and were taken by Card to San Pedro, where they immediately boarded their ship. The only unusual circumstance regarding the evidence as a whole is that Silva gave no outward evidence that he had received a serious wound. While he did say, on his way back from the house of the defendant to his ship, that he had been stabbed, he did not act the part, nor did this remark seem to make any perceptible effect upon his companions. On arriving at the harbor he insisted on paying for the taxicab, and, with his companions, Kilbey, Utrecht, and Lane, went on board their vessel, each man going to his own room. But within a few minutes—one witness gives the time as about 3 minutes—he heard Silva holler, and, hastening to his room, the three men found Silva, partially undressed, lying in his bunk with a severe cut or wound on the left side of his abdomen, slightly below the navel. It had taken them only about 30 minutes to drive from appellant's house to the place where their ship was docked. From the effect of this wound Silva died a few hours thereafter. There was no evidence tending in the slightest degree to show that Silva had or could have received the wound after he left appellant's house. He was not out of the sight of his three companions from the time they left appellant's house except for the short space of about 3 minutes after he left them to go to his room upon the ship. Their rooms were in close proximity to each other, and had any assault or encounter taken place between Silva and any other person they would have heard it. This circumstance therefore, while unusual, would not be sufficient to overcome the effect of the other testimony in the case, pointing to the guilt of the appellant.

[5] Appellant claims that it was error for the court, over his objection, to admit in evidence the statement of Silva, made to his companions in the taxicab just after leaving appellant's place, that he had been stabbed. Conceding this evidence to be inadmissible, as not being a part of the *res geste* and not made in the presence of the appellant, its admission could not have seriously prejudiced the appellant's case in view of the positive testimony of Densmore that the appellant used a knife in the encounter between him and the deceased.

[6] A further assignment of error is made by appellant to the action of the court in overruling his objection to a question asked of the witness Mamie Stephens as to what appellant directed her to do in the house in which they were living. The question was answered before the objection was made, and appellant did not ask to have the answer stricken out. The only answer, how-

ever, given by the witness to this question was, "Several things." It may be conceded that, as the objection was overruled, a motion to strike out the answer would have been denied. We fail to see, however, how the answer, "Several things," given by the witness, could have been harmful to appellant. It was so general and indefinite that it meant nothing whatever, and could not have helped the case of the prosecution, nor damaged that of appellant.

[7, 8] The further contention is made that the court erred in permitting witnesses to testify as to what occurred just prior to the men going to appellant's house, and as to events transpiring after leaving appellant's place. As to the evidence regarding events that transpired just prior to the appearance of the men at appellant's house, as far as we are able to gather from the record and from appellant's briefs, the only testimony given by the witnesses was that they rode out in a car driven by Densmore, and that Card was sitting alongside of him on the front seat of the car. The court sustained all objections to any evidence of conversations had between the men during the ride and prior to the beginning thereof, and, on motion of appellant's counsel, struck out all conversations which had been admitted without objection. We can see no ground upon which the appellant can base any claim of error in this regard. As to occurrences happening after the men left the appellant's place, these simply covered the acts of the four men in returning to their ship, were of slight consequence, and had no particular bearing, one way or the other, upon any phase of this controversy. The only one of these circumstances which might be questioned was the conversation between these men in which Silva stated that he had been stabbed, and which we have already referred to and considered. Under this assignment appellant takes exception to evidence to the effect that the next morning after his encounter with Silva he secured a gun from one James Valenti in San Pedro, and had it with him at the time of his arrest. This evidence was admissible as tending to indicate a consciousness of guilt. Appellant makes the further contention that he was injuriously affected by the introduction of evidence tending to prove that he was guilty of other crimes, such as the selling of intoxicating liquor and the keeping of a disorderly house. It is true that the evidence is capable of such a construction. But it was competent to show the conditions under which the men entered appellant's place, to the end that they might not appear to be intruders and unbidden guests of the appellant. The circumstances surrounding their visit indicate clearly that appellant was engaged in the illegal selling of liquor and in the keeping of a disorderly house, and that he was not adverse to Silva and his companions entering his place and purchasing

his wares. This evidence showed that the men were in the house with the consent and approval of appellant, and if it showed the commission of other crimes by him, this fact did not affect its admissibility. It was competent and relevant, notwithstanding it was proof of other offenses. *People v. Craig*, 152 Cal. 42, 91 P. 997; *People v. Hatch*, 163 Cal. 368, 125 P. 907.

The final complaint of the appellant is that the district attorney in his opening statement to the jury and in his final argument of the case was guilty of such misconduct as to prejudice the rights of the appellant to have a fair and impartial trial. We have read in full the remarks of the district attorney before the jury, and we fail to find anything therein that could be reasonably construed as prejudicial to appellant's legal rights. Appellant has made but few specifications of misconduct on the part of the prosecuting officer, none of which are well taken. We cannot feel that there is any merit in this contention.

[9] The record on appeal before us presents no sufficient showing that would justify a reversal of the judgment. It would accomplish no useful purpose, and it would avail nothing to the appellant to reinstate his appeal, as a consideration thereof could only result in an affirmation of the judgment. We therefore feel constrained to deny appellant's motion to set aside the order dismissing his appeal, and it is so ordered.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.

I dissent: PRESTON, J.

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LU DY v. ZUMWALT et al. (Civ. 3298.)★

District Court of Appeal, Third District, California. Aug. 15, 1927.

Rehearing Denied Sept. 14, 1927. Hearing Denied by Supreme Court Oct. 13, 1927.

1. Mortgages ⇨154(4)—Record of lien given by land purchase optionee before exercise of option was not, under recording statute, notice to purchase-money mortgagee (Civ. Code, § 1213).

Recording of lien given by one who held only option to purchase, but who subsequently exercised the option, was not constructive notice thereof, under recording statute (Civ. Code, § 1213), to subsequent purchase-money mortgagee.

2. Mortgages ⇨158—Title of purchaser under option agreement did not, by relation, date back to agreement, hence lien given in interim was not superior to purchase-money mortgage.

Title of purchaser under option agreement did not by the fiction of relation date back to date of option, hence lien given in interim was

not superior to vendor's purchase-money mortgage.

3. Vendor and purchaser ⇨18(1/2)—The only possible equity land purchase optionee has in the property is possible right to specific performance.

While the optionee of a land purchase agreement may be entitled to have such agreement specifically enforced, it is to that extent only that he can claim, if he can do so at all, an equity in the property involved in the agreement.

4. Mortgages ⇨158—Land purchase optionee had no such interest in land as to make lien then given superior to subsequent purchase-money mortgage.

Defendant's option to purchase land gave him no such interest in the land as to make a lien given by him under an irrigation contract before his actual purchase right was exercised superior to lien of purchase-money mortgage, although water lien was on record, but not known of by vendor, at time option was exercised.

On Petition for Rehearing.

5. Vendor and purchaser ⇨18(3)—Doctrines of relation and after-acquired title, relative to time one exercising land purchase option acquired title, held same in effect.

Where contention was made that the court incorrectly applied the doctrine of title by relation, instead of the doctrine of after-acquired title, to the question as to when one exercising a land purchase option acquired title, held, that the doctrines are, in effect, the same.

6. Vendor and purchaser ⇨18(3)—Option becomes binding contract only when exercised according to agreement, being not a sale, but right to exercise privilege.

Since an option is not a sale, but a right to exercise a privilege, only when that privilege has been exercised in the manner provided in the agreement does it become a binding contract.

Appeal from Superior Court, Glenn County; Claude F. Purkitt, Judge.

Action by Sarah Elizabeth Ludy against I. G. Zumwalt and wife and the Western Canal Company. Judgment for plaintiff, and defendant Western Canal Company appeals. Affirmed.

Guy C. Earl and W. H. Spaulding, both of San Francisco, for appellant.

Ware & Ware, of Chico, and U. W. Brown and I. G. Zumwalt, both of Colusa, for respondents.

HART, J. The plaintiff brought this suit to foreclose a mortgage upon certain lands situated in Glenn county, given by the defendants I. G. and Mattie B. Zumwalt to plaintiff to secure the payment to the latter of a promissory note, dated January 13, 1920, for the sum of \$42,601.30.

The complaint is in the usual form in foreclosure proceedings. It alleges, however,

that the appellant Western Canal Company and certain other parties "have, or claim to have, or assert, some interest in or claim upon said mortgaged lands and premises, or some part thereof, the exact nature of which is unknown to plaintiff, and for said reason she cannot allege or state the nature thereof, but she alleges that all of said liens, claims, or interests of any of said defendants are subsequent to and subject to the lien of plaintiff."

The Zumwalts answered, denying that the note "is now due" and also the allegation of the complaint, which accords with a provision of the mortgage in that respect, that 2 per cent. of the amount found due as principal and interest on said note "is a reasonable amount for attorney's fee in the foreclosure of said mortgage," and setting up "a separate defense" to the effect that, prior to the commencement of this action, and since the 13th day of January, 1924, the plaintiff in writing extended the time for the payment of said note to January 13, 1925. At the trial, however, the Zumwalts withdrew their denial that the note was due and their affirmative defense that plaintiff had extended the time for the payment thereof, leaving as the only issue as between the plaintiff and the Zumwalts the question, raised by their answer, whether the attorney's fees claimed by the complaint and as provided for in the mortgage would constitute a reasonable sum to be awarded plaintiff for that purpose.

The appellant Canal Company, a corporation organized for the purpose, among others, of supplying water to owners of land conveniently adjacent to its water system for the purpose of irrigation, answered the complaint, and in its answer embodied, in effect, a cross-complaint, in which it set up a lien upon the lands in question, growing out of a contract with the Zumwalts, whereby it agreed to furnish the latter, at specified rates, for a number of successive years, sufficient water with which to irrigate the lands in controversy, alleged that said lien was prior and superior to the lien of plaintiff's mortgage, to foreclose which is the object of this action, and prayed that a decree be entered so adjudging.

The plaintiff answered the affirmative allegations of the so-called answer, and, after certain denials, and with more or less detail, recited the facts leading to the several transactions out of which the present controversy has developed and of which such consideration will hereinafter be given as will conduce to a proper understanding of the issues tried and determined below and now submitted here for review.

The findings by the trial court are favorable to the plaintiff, and, consequently, negative the claim by the appellant of a lien upon said lands prior in point of time to that of the plaintiff. As a matter of law the court concluded (conclusions of law) that the plain-

tiff was entitled to judgment against the Zumwalts for the sum of \$41,601, as principal, and \$1,554.62 and \$1,383.24, accruing, respectively, as interest to the date of the verification of her complaint, and subsequent to such verification, to January 13, 1925; that plaintiff is entitled to judgment decreeing that her mortgage is a first lien and "prior to any lien or claim of any character or kind whatever of any defendants, including the Western Canal Company, upon the lands described in the complaint"; that the plaintiff is entitled to have her mortgage and lien foreclosed, and is entitled to a judgment of foreclosure of the same and of the sale of said lands described in the complaint; that she is entitled to a provision in said judgment that she has a first lien upon all of said land for the payment of the sums found by the court that she is entitled to; that Western Canal Company is entitled to a judgment against the Zumwalts for the sums of \$2,159.81 and \$6,723, and interest on said sums from, respectively, December 1, 1921, and from December 1, 1922; that appellant is entitled to have a provision inserted in said judgment that "it has a lien upon the said 866 acres of land (the land upon which plaintiff's mortgage and the appellant's lien subsist) in the foregoing findings mentioned for the payment of said sums for which it is entitled to judgment, which lien is second to and subordinate to the lien in plaintiff's favor, as aforesaid."

Judgment was entered in harmony with the findings and conclusions of law.

The appeal is by Western Canal Company upon the judgment roll alone, from so much of said judgment as adjudges or decrees that its lien upon said lands is secondary and subordinate to the plaintiff's mortgage lien thereon.

The facts as disclosed by the findings may be herein stated as they are set out in appellant's opening brief, and which are among the facts specifically found by the court:

"Plaintiff owned an undivided one half interest in a 923-acre tract of land in Glenn county. The other half interest was owned in equal shares by eight other persons, her children. On September 22, 1919, in consideration of the payment of \$5,000 by defendant I. G. Zumwalt to said children, plaintiff and her children granted said Zumwalt an option for the purchase of said 923 acres. While said option was still alive, and on December 11, 1919, a contract was made between said Zumwalt and said appellant for the sale of water to irrigate all irrigable land in said tract, which proved to be 866 acres thereof, particularly described in the findings of fact and being all of said 923-acre tract 'save the sloughs and small waste parts and portions thereof.' On December 15, 1919, this water contract was recorded in Book 6 of Contracts and Agreements, at page 435, in the office of the county recorder of said county of Glenn, and later recorded, on January 5, 1920, in Book 44 of Mortgages, at page 188 thereof, in said office of said county recorder.

"At the time this contract was made, and at all times until after the commencement of this action, appellant was informed and believed that said I. G. Zumwalt owned all the property described in said contract, free and clear of any and all liens and incumbrances, except, of course, the lien of said contract for the payment of water bills, and had no actual information or actual knowledge to the contrary, and would not otherwise have furnished any water upon any of the lands described in said agreement. By the terms of said contract appellant was granted a permanent lien upon said lands as security for the payment of all moneys due or to fall due thereunder, such lien to be a first and prior lien.

"On January 13, 1920, plaintiff and her said eight children conveyed by deed the said 923 acres to said Zumwalt, plaintiff being at that time the owner of an undivided one-half interest in the said lands, and the eight children then owning each an undivided one-sixteenth interest therein. Simultaneously with the execution of said deed said Zumwalt paid said eight children in full for their aggregate one-half interest in said land the sum of \$42,601.30, including said \$5,000. Said Zumwalt paid plaintiff nothing in cash, but in consideration of her half interest in said property said Zumwalt executed and delivered at that time to plaintiff his note for \$42,601.32, secured by a mortgage from said Zumwalt and his wife to said plaintiff covering said 923 acres; said note and mortgage being given to secure to said plaintiff her one-half share of the purchase price of said land as owner of the half interest therein. Plaintiff, at the time she took said note and mortgage, had no knowledge or information of said contract between said Zumwalt and Western Canal Company or that said Western Canal Company claimed any lien upon any of said land, and would not have accepted said note and mortgage had she known of said lien in favor of appellant. Said mortgage was thereafter, on January 16, 1920, recorded in the office of the said county recorder.

"Under the terms of said contract appellant did, during the year 1921, furnish on said lands water of the value of the principal amount of \$2,159.81, and likewise during the year 1922 water of the value, under said contract, of \$6,723.

"Said Zumwalt paid neither of said water bills nor any interest thereon. Having also defaulted in payment of his note to plaintiff, plaintiff brought suit to foreclose her said mortgage."

It may be added to the above statement that the court, both as a matter of fact and of law, found that I. G. Zumwalt and Mattie B. Zumwalt, prior to the execution of the deed by plaintiff and her children conveying the land in question to I. G. Zumwalt—

"had no right, title, or interest in the lands and premises described in plaintiff's complaint and they had no right, title, or interest therein at the time of the execution of said agreement in the form of Exhibit A (the agreement between appellant and I. G. Zumwalt for the furnishing by the former of water for irrigation purposes to said Zumwalt), or at the time of the recordation of said agreement in the form of Exhibit A on the 5th day of January, 1920, as alleged in the answer of said defendant Western Canal Company, except that said defendant I. G. Zum-

walt obtained from the parties executing the deed as aforesaid, on September 22, 1919, in consideration of the payment of \$5,000 by said I. G. Zumwalt, to the parties other than plaintiff executing the deed as aforesaid, an option for the purchase of the lands described in said deed, which said option was in full force and effect at the time of the execution and also at the time of recordation of said agreement in form of Exhibit A aforesaid," etc.

The court, among its findings, also made the following, which, it is to be noted, partakes as well of the nature of a conclusion of law as of a finding of fact:

"That the said mortgage so made, executed, and delivered by defendants I. G. Zumwalt and Mattie B. Zumwalt to plaintiff was and is wholly a purchase-money mortgage and was given, made, and executed in order to secure the payment to plaintiff by said I. G. Zumwalt and Mattie B. Zumwalt of the purchase price agreed upon at the time of the sale of said property to the said I. G. Zumwalt, as aforesaid."

The plaintiff urges several different points in support of the judgment. The most important of these are the following: 1. That, as the court found, the mortgage to foreclose which is the object of this action, is "a purchase-money mortgage," it having been given by the nonappealing defendants to secure the payment of the purchase price of the lands, and that it takes precedence over and is superior to the previously recorded lien growing out of appellant's water contract of December 11, 1919. 2. That, at the time of the recordation of the appellant's lien, the Zumwalts were in no way connected with the title of record to the mortgaged premises, hence the recordation of appellant's lien imparted no notice of the existence of such lien upon the mortgaged premises and therefore cannot hold the position of priority over the lien of plaintiff's mortgage.

[1] The briefs of counsel are devoted mainly to the discussion of the point first above stated, but the consideration thereof herein is not required or necessary, since it seems to be clear that upon the authorities, as well as upon principle, the judgment must be sustained upon the ground that as the Zumwalts, at the time of the making and the recordation of the water contract with appellant, or at the time plaintiff's mortgage was recorded, had no title of record or were in no manner connected with such title to the mortgaged premises, the lien attached to said premises by the water contract gave no notice to any one of the existence thereof on said lands, and was consequently subordinate or subservient to plaintiff's lien. Section 1213 of the Civil Code, relating to the recordation of conveyances of real property, or so much thereof as is pertinent to the present inquiry, reads as follows:

"Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with

the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees."

Bothin v. California Title Insurance & Trust Co., 153 Cal. 718, 723, 724, 96 P. 500, 503, was a case in which the Title Company issued to the plaintiff (Bothin) a policy insuring and guaranteeing the title to certain real property, numbered lot 71, situated in the city of San Francisco, and the plaintiff thereupon purchased said property. It was discovered after the transfer of the property had been made to plaintiff that one Partridge, prior to the date of the transfer of said lot to plaintiff, had conveyed to the trustees of a bank by a trust deed a lot in said city, which said trust deed included, though not by name or reference to the number thereof, 14 feet of plaintiff's said lot, and that the said bank had duly recorded said trust deed; that upon said lot so conveyed to the bank, at the time of said conveyance by Partridge, there was a building which extended onto and occupied said 14 feet of plaintiff's lot. The trust deed not showing by the description of the property therein contained that lot 71, or any portion thereof, was either by name or otherwise embraced within said description, the fact that it embraced any portion thereof could only be determined by a survey according to the calls of the trust deed. Action was by plaintiff to recover damages against the Title Insurance Company for a breach of the covenant of its insurance policy guaranteeing that there was no defect in the title of the lot or real property purchased by the plaintiff. The Supreme Court sustained the judgment of the trial court in holding that, inasmuch as the public records did not show that Partridge was in any way connected with the title of record to plaintiff's lot 71, or to any portion thereof, his trust deed to the bank did not and could not constitute notice that said 14 feet had thereby been conveyed to the bank by Partridge, or, contrary to the contention of plaintiff in said action, did not "create any defect in the record title" of said lot No. 71, or in any portion thereof. On this subject, the court, discussing the rule in such cases in its abstract as well as in its concrete application, said:

"One who is not connected by any conveyance whatever with the record title to a piece of property and makes a conveyance thereof, does not thereby create any defect in the record title of another when such title is deducible by intermediate effective conveyances from the original owners to that other. This we think so clear that it is idle to attempt to elaborate it. Such a deed would not even be constructive notice. Our Code provides that every conveyance of real property, acknowledged and recorded, is from the date of recordation constructive notice of its contents to subsequent purchasers and mortgagees. Civ. Code, § 1213. This language is very general, applying in terms to every conveyance, but it is held that this only contemplates conveyances by one having

legal title to the property conveyed and is applied where there are conflicting conveyances made by persons claiming under the same common grantor. It does not apply to a deed by a stranger; one who is not connected in any manner with the title of record. No notice whatever is conveyed by such a deed. Long v. Dollarhide, 24 Cal. 218; Garber v. Gianella, 98 Cal. 529 (33 P. 458); Sharon v. Minock, 6 Nev. 377; Rankin v. Miller, 43 Iowa, 19; Edwards v. McKernan, 55 Mich. 526 (22 N. W. 20)."

In Garber v. Gianella, 98 Cal. 529, 33 P. 458, cited in the above extract from Bothin v. California Title Insurance & Trust Co., in an action in conversion, the plaintiff sued to and did recover judgment against the defendant for the alleged conversion of certain wheat. By a deed of conveyance from one Lorenzo Gianella, the plaintiff acquired title to and ownership of a certain tract of land. Prior to that transaction, the grantor had given his son, Vincenza Gianella (defendant), a lease of said land upon a money rent for the term of 5 years. The said lease was not acknowledged and never recorded. During the term of the lease, and before the transfer of said land to plaintiff, Vincenza Gianella subleased the land to one Boulware. By the terms of that sublease, Boulware was, as a consideration, to pay Vincenza a yearly rent or sum in the form of one-third of the crops "in the stack at the machine." Said sublease to Boulware was recorded at the request of Vincenza. The deed to plaintiff granted or conveyed to him the land, "together with the rents, issues, and profits thereof," and warranted, for the grantor and his heirs, peaceful and quiet possession of said premises in the grantee and his heirs and assigns against the grantor "and his heirs, and against all and every person and persons whomsoever lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend, subject, however, to a lease to Daniel Boulware, which said lease expires November 1, 1889." The deed contained nothing to indicate from whom Boulware obtained his lease. The wheat which the plaintiff (grantee of the land) claimed in his action was converted by Vincenza Gianella was that which Boulware delivered to the former under the terms of the sublease between Vincenza and Boulware. When negotiating for the purchase of the land, plaintiff was informed of the existence of the Boulware lease and of the fact that it would not expire until a year from the date (April 12, 1888) of the conveyance of the land to him. Affirming the judgment in favor of plaintiff, the Supreme Court, among other things, made the following observations which involve a statement of the reason of the rule now under consideration:

"The conveyance from Lorenzo Gianella to the plaintiff had the effect to transfer to him the entire ownership of the land, including its

rents, issues, and profits, subject to only such limitations as were contained in the instrument of transfer, or of which the plaintiff had either actual or constructive notice. As the lease to the defendant from his father was not recorded, there was no constructive notice thereby to the plaintiff of its existence. The lease was a 'conveyance' of the land within the definition of section 1215 of the Civil Code, and the interest in the land that was thereby created in the defendant, though limited to a right to receive the products of the land, was as void as against the plaintiff, by reason of the failure to have it recorded, as if it had been an unrecorded conveyance in fee. The record of the lease from the defendant to Boulware was not constructive notice of the lease to the defendant, or that he had any interest in the land. The provisions of recording acts are for the protection of subsequent purchasers and incumbrancers from the common grantor, and do not affect the rights of strangers to the claim of title. *Chicago v. Witt*, 75 Ill. 211; *Lozey v. Simpson*, 11 N. J. Eq. 249; *Traphagen v. Irwin*, 18 Neb. 198 [24 N. W. 684]; *Ely v. Wilcox*, 20 Wis. 523 [91 Am. Dec. 436]; *Long v. Dollarhide*, 24 Cal. 227; 2 *Pomeroy's Equity Jurisprudence*, §§ 658, 701. Records are only constructive notice of a title of which they enable a party to obtain actual notice or knowledge by means of a search."

The following California cases are to the same effect: *Millett v. Lagomarsino*, 4 Cal. Unrep. 883, 38 P. 308; *Dobbins v. Economic Gas Co.*, 182 Cal. 616, 189 P. 1073, the opinion being written by Mr. Justice Olney, and the doctrine under consideration therein stated with the clearness characterizing his judicial opinions. To the California cases named may be added the following from other jurisdictions in which the proposition in hand is discussed, and in which the conclusions announced are in harmony with our own decisions: *Heffron v. Flanigan*, 37 Mich. 274; *Donovan v. Twist*, 105 App. Div. 171, 93 N. Y. S. 990; *Ryder v. Cobb*, 68 Iowa, 235, 26 N. W. 91; *Ransom v. Sargent*, 22 Kan. 516; *Bradley v. Bryan*, 43 N. J. Eq. 396, 13 A. 806; *Boyd v. Mundorf*, 30 N. J. Eq. 545. In the last-named case it is well said:

"Where, as in this case, the vendor of real estate records his mortgage [to secure the purchase price] at the same instant that the deed from him is recorded, he surely can have no occasion to examine the records for incumbrances created by his vendee on the property, prior to the recording of his conveyance."

[2, 3] The position of appellant here, as is obvious, is that the conveyance by plaintiff to the Zumwalts of the land in controversy established the title of the latter to the lands in controversy as of the date of the option agreement whereby the plaintiff gave to the Zumwalts the right to purchase the property. But, as is said in the case of *Hawkins v. Harlan*, 68 Cal. 236, 237, 9 P. 108, 109, and equally applicable to the facts of the instant case:

"This [referring to a position taken by counsel similar to the position of appellant here] is by operation of the doctrine of relation, which is a fiction of the law adopted solely for the purposes of justice, and will not be given effect when, as in the present case, it would work manifest injustice. *Gibson v. Chouteau*, 13 Wall. 101 [20 L. Ed. 534]; *Shay v. McNamara*, 54 Cal. 169."

[4] The plaintiff in the present case would manifestly have no reason to investigate the public records to ascertain whether I. G. Zumwalt or any other stranger to the title had created, or any person had acquired, a lien upon the property prior to the execution of the deed by plaintiff to the Zumwalts conveying the lands to them and the simultaneous execution of the mortgage by the latter to secure the purchase price thereof, or at least so much of such purchase price as plaintiff was entitled to. And even if she had for any reason examined the records for that purpose, she would not, under our index system of recording written instruments required by law to be recorded, have obtained any knowledge of the lien of appellant, unless she had gone further in her investigation of the records than the law contemplates. Pol. Code, § 4132, subs. 1, 2, and 26. But the more important consideration in this connection, and one which more pointedly than any other exposes the utter futility of any attempt to apply the doctrine of relation here is the fact that by the option agreement the Zumwalts acquired no interest in the lands in dispute other than that which is comprehended within the mere right to purchase said lands within a specified time for a specified consideration. While the optionee of an option agreement, valid in all essentials and fair, may be entitled to have such agreement specifically enforced, it is to that extent only that he can claim, if strictly speaking he can do so at all, an equity in the property involved in the agreement. Manifestly, it cannot logically be held that, by virtue of his mere right to purchase the property which is the subject of the option, the optionee acquires any actual interest in the property itself which is the subject thereof, or that he can acquire any such interest until he has seasonably accepted or exercised his option to purchase according to the terms of the agreement. "An option," says the Supreme Court, in *Hicks v. Christeson*, 174 Cal. 712, 716, 164 P. 395, 397, "is by no means a sale of property, *but the sale of the right to purchase.*" (Italics ours.) *Dreyfus v. Richardson*, 20 Cal. App. 800-805, 130 P. 161; *Pehl v. Fanton*, 17 Cal. App. 247, 119 P. 400. See, also, *Menzel v. Primm*, 6 Cal. App. 204, 209, 91 P. 764; *Howard v. D. W. Hobson Co.*, 38 Cal. App. 445, 455, 176 P. 715; *Ware v. Quigley*, 176 Cal. 694, 698, 169 P. 377. An excellent definition of an option is given in 29 Am. & Eng. Ency. of Law (2d Ed.) p. 606, as follows:

"The distinction between a contract to purchase or sell real estate and an option to purchase is that the contract to purchase or sell creates a mutual obligation on the one party to sell and on the other to purchase, while an option merely gives the right to purchase within a limited time without imposing any obligation to purchase."

It, of course, follows from the foregoing considerations, that, in making the agreement of option, the minds of the plaintiff and her children, on the one hand, and that of I. G. Zumwalt, on the other, could have come together on but one proposition, to wit, the giving by the former and the acceptance by the latter of the *right to purchase the property* for the stipulated sum within the time specified in said agreement—a right which Zumwalt was at liberty to waive or refuse to exercise. Thus it is very clear, if, indeed, there could be any doubt as to the legal stability of the proposition after an examination of the cases above considered, that the Zumwalts, prior to the conveyance of the property to them, had absolutely no interest in said property upon which they could create a lien which would or could take precedence over the plaintiff's mortgage lien. Certainly, the fact, as found by the court, that the sum of \$5,000 paid by I. G. Zumwalt as a consideration for the option, was, agreeably to plaintiff, paid to her children, co-owners of the property, even if said sum was to be applied towards the payment of the latter's respective shares of the purchase price, if Zumwalt exercised the right with which he was invested by the option to purchase the property, did not have the effect of changing the nature of the transaction, in so far as the agreement of option was concerned. In other words, said payment did not impart to said agreement of option any greater dignity in legal effect than that of the ordinary option conferring upon a party the right to purchase real property. But it is unnecessary further to pursue the inquiry. We have carefully examined the cases cited by counsel for the appellant, and we find nothing in them which conflicts with the conclusion herein arrived at.

The judgment is obviously legal and just, and it is accordingly affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

On Petition for Rehearing.

PER CURIAM. [5, 6] In their petition for a rehearing, counsel for the appellant declare that they did not and do not rely upon the doctrine of relation for the establishment of their position in this case; yet they assert in the petition that what they have always claimed and still contend is that the moment that the Zumwalts acquired title to the land through or by means of the deed to them from the plaintiff and her children, such "after-ac-

quired" title in effect imparted validity to the appellant's lien, or, in other words, said conveyance inured to the benefit of the appellant as a lien claimant upon the land. The doctrine of "after-acquired" title is, in effect, the same as the doctrine of relation. The repudiation of the doctrine of relation by counsel for the appellant as the breastworks of their position warrants the assumption that it is by it granted that its lien was wholly without validity and legal force until the Zumwalts acquired title to the property. But, be that as it may, the proposition upon which appellant mainly relies in its petition is that its lien takes precedence over the mortgage lien of plaintiff because the former lien was recorded prior to the recordation of the latter lien.

The difference, however, between appellant's position and the conclusion arrived at by this court is that the appellant assumes, contrary to its declaration in the petition regarding the doctrine of relation, that the Zumwalts became identified or connected with the title to the property by virtue of the agreement of option; whereas, our position is, as indicated in the former opinion, that the option agreement did not have any such effect; that said option merely involved a unilateral agreement not binding upon the optioner from the date of its execution, but which does not become a contract *inter partes* in the sense of an absolute contract to convey on the one side and to purchase on the other, until exercised by the optionee; that, in other words, an option is not a sale, but a right to exercise a privilege, and only when that privilege has been exercised in the manner provided in the agreement does it become a binding contract (*Barnes v. Rea*, 219 Pa. 279, 68 Atl. 836; *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703); that, such being the case, the filing for record of appellant's lien did not impart constructive notice to the plaintiff or to any one else of the existence of such lien, since such agreement could not vest in the Zumwalts title to the land or connect them in any way therewith.

The appellant in its petition cites a number of cases other than those mentioned in its original briefs as in support of the position they assume in this case. Those cases are from other jurisdictions, and some of them construe the statute law of their respective states, which is in terms the same as section 1213 of our Civil Code, in harmony with the view of appellant. Other cases that are so cited or rather named in connection with the cases cited, and which are referred to in 25 A. L. R. at page 89, construed the section of our code just named as it is interpreted by the Supreme Court in *Bothin v. California Title Ins. Co.*, 153 Cal. 718, 723, 724, 96 P. 500, Ann. Cas. 1914D, 634, which is cited in our original opinion. We still adhere to the view expressed in the original opinion that the California case just mentioned and other cases referred to in the original opinion clearly,

hold that the recordation of a conveyance by a party having no interest in or connection with the title thereto does not have the effect of imparting notice to the real owner of the property or the public of such conveyance. If the Zumwalts, at the time of executing the contract with the appellant, were connected in any way with the record title to the property, then the position of appellant here would be impregnable; but, as stated, it is clear to our minds that at the time mentioned the Zumwalts had no more connection with the title to the property than any other person having no transaction with the owner of the land regarding said property.

The petition for a rehearing is denied.

85 Cal. App. 161

Ex parte ADAMS. (Cr. 1511.)

District Court of Appeal, Second District, Division 1, California. Aug. 18, 1927.

1. Habeas corpus $\S$ 30(2)—On habeas corpus after conviction complaint charging possession of intoxicating liquor held sufficient without alleging possession was not within statutory exceptions (Volstead Act [27 USCA § 4 et seq.], as adopted by state of California [St. 1921, p. 79]).

On application for a writ of habeas corpus after conviction for violating Volstead Act, made and provided by National Prohibition Act, tit. 2 (27 USCA § 4 et seq. [U. S. Comp. St. §§ 10138½-10138½z]), as adopted by the state of California (St. 1921, p. 79), complaint charging possession of intoxicating liquors fit for beverage purposes held sufficient without alleging that the possession was not within the exceptions making possession lawful under certain circumstances.

2. Habeas corpus $\S$ 30(2)—On habeas corpus after conviction, complaint charging possession of still for manufacturing intoxicating liquor held to charge an offense (Volstead Act [27 USCA § 4 et seq. and § 39], as adopted by state of California [St. 1921, p. 79]).

On application for a writ of habeas corpus after conviction, complaint charging possession of still for manufacture of intoxicating liquors contrary to Volstead Act made and provided by National Prohibition Act, tit. 2 (27 USCA § 4 et seq.), as adopted by the state of California (St. 1921, p. 79), held to charge an offense within 27 USCA § 39 (U. S. Comp. St. § 10138½m), without alleging possession was not within statutory exceptions.

Application for habeas corpus by Terry Adams to be directed to the Chief of Police of the City of Los Angeles, to secure petitioner's release after conviction of the possession of a still and certain intoxicating liquor. Petitioner remanded.

Le Roy Reames and James Jaffray, both of Los Angeles, for petitioner.

El. J. Lickley, City Prosecutor, and Vernon S. Gray, Deputy City Prosecutor, both of Los Angeles, for respondent.

YORK, J. This is an application for a writ of habeas corpus, wherein the petitioner is attacking the sufficiency of two complaints, one charging him with possession of a certain still which was alleged to have been "designed, used, and intended to be used for the manufacture of alcoholic intoxicating liquors for beverage purposes, containing alcohol of more than one-half of 1 per cent. by volume," which is therein alleged to be contrary to the provision of the Volstead Act, made and provided by title 2 of the National Prohibition Act, enacted by Congress of the United States on the 28th day of October, 1919 (27 USCA § 4 et seq.; U. S. Comp. St. §§ 10138½-10138½z), and as adopted by the state of California (St. 1921, p. 79), and the other complaint charging said Terry Adams with having in possession certain alcoholic intoxicating liquors which are fit for use for beverage purposes, which did then and there contain more than one-half of 1 per cent. by volume "contrary to the provisions of the Volstead Act, made and provided by title 2 of the National Prohibition Act, enacted by Congress of the United States on the 28th day of October, 1919, and as adopted by the state of California." This complaint further alleges prior conviction of a similar offense.

The objection of the petitioner to the complaint as briefly stated by him in his closing brief is (1) possession is not a crime; (2) possession is not proof of a crime; (3) having possession does not charge a crime; (4) conclusions are not essential facts.

Our decision in this matter is based upon the following authorities: *People v. Cencevich*, 64 Cal. App. 39, 220 P. 448; *People v. Buttulia*, 70 Cal. App. 444, 233 P. 401; *In re Von Perhacs*, 190 Cal. 364, 212 P. 689, with a special reference to the opinion of the court on rehearing contained on page 368; *In re Hayward*, 62 Cal. App. 177, 216 P. 414; *In re Moore*, 70 Cal. App. 483, 233 P. 805; *Beyer v. United States*, 282 F. 226; *Page v. United States*, 278 F. 41; *Rose v. United States*, 274 F. 245; *People v. Silva*, 67 Cal. App. 351, 227 P. 976.

The Supreme Court denied an application for writ of certiorari in the case of *Page v. United States*, supra, in 42 S. Ct. 461, and denied certiorari in *Rose v. United States*, supra, 257 U. S. 655.

[1] A great deal of the argument presented by petitioner would have a great deal of force if presented upon a demurrer upon the ground of uncertainty, but we are dealing here with an application for a writ of habeas corpus after conviction, and, while it is true

that there are a great many circumstances under which possession of liquor in California is not a crime, the provisions under which liquor may be possessed are permissive provisions of the statute, and even in a case like that of *People v. Bonfanti*, 40 Cal. App. 614, 181 P. 80, it was held that the defect in omitting an express statutory exception in the information would not warrant a reversal of the judgment. The court said:

"An examination of the record immediately discloses that the omission in question affected the trial not at all; in fact, the trial proceeded as if the allegation were there. * * * It could not be contended, even by the defendant, that if the information had contained the statement that the victim of the assault was not his wife, the trial would have proceeded with one iota's difference from the course it took, or that the verdict of the jury or the judgment of the court would have been other than it was.

"Under these circumstances, it appears to us that there could hardly be a case to which to apply more appropriately the rule of decision laid down by the Constitution."

The court was referring to section 4½ of article 6 of our state Constitution.

It was held in the case of *People v. Cencevich*, 64 Cal. App. 39, 220 P. 448, part of the opinion by the court on petition for rehearing, page 44:

"It is urged that neither the aforesaid complaint in the justice's court nor the information herein stated a cause of action in that there is no allegation in either that the defendant's possession of intoxicating liquor was not within the exceptions contained in the Volstead Act making the possession of such liquors lawful under certain circumstances. It was not necessary to plead that the defendant's possession was not within such exceptions. *Matter of Lieritz*, 166 Cal. 298 (135 P. 1129); *Ex parte Hornef*, 154 Cal. 355 (97 P. 891); *People v. Dial*, 28 Cal. App. 704 (153 P. 970)."

The law of California prohibits the possession of alcoholic intoxicating liquors fit for use for beverage purposes containing more than one-half of 1 per cent. by volume of alcohol, excepting only when the liquor was obtained before the act went into effect and is kept in the owner's dwelling for use therein by him, his family, and bona fide guests, or in certain cases where certain per-

mits are granted either for medicinal use, or, in accordance with certain of the provisions of the act, allowing special permission under special circumstances. In other words, it is unlawful to possess intoxicating liquor not permitted by any statutory authorization.

In the instant case it is not necessary for us to go further than to hold what the rule on an application for a writ of habeas corpus would be, and we do not intend hereby to lay down any rule of law stating the law of California having reference to its applicability to a ruling on a special demurrer. Some of the cases which we have cited may go that far, but it is only necessary for us in this matter to consider strictly the ruling on habeas corpus after conviction.

[2] As to the possession of the still charged in one of the complaints on which conviction was had, chapter 85, tit. 2, § 25, 41 Stats. 315, as found on page 856, *Barnes' Federal Code*, § 8352, Cum. Supp. 1919-24 (27 USCA § 39; U. S. Comp. St. 10138½m), provides:

"It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this chapter or *which has been so used*, and no property rights shall exist in any such liquor or property." (Italics ours.)

Therefore, it will be seen that the complaint charging possession of one still "which was designed, used, and intended to be used for the manufacture of alcoholic intoxicating liquors for beverage purposes containing alcohol of more than one-half of 1 per cent. by volume, which property and apparatus is described as follows: One still contrary to the provisions of the Volstead Act, made and provided by title 2 of the National Prohibition Act enacted by Congress of the United States on the 28th day of October, 1919, and as adopted by the state of California," would, on the authority of the cases hereinbefore cited and the provisions of the said laws hereinbefore referred to, state a cause of action.

The writ of habeas corpus as heretofore issued is dismissed and the petitioner remanded to the custody of the respondent, James C. Davis, as chief of police of the city of Los Angeles.

We concur: CONREY, P. J.; HOUSER, J.

NOYES v. BANK OF ITALY. (Civ. 5491.) *

District Court of Appeal, First District, Division 1, California. Aug. 25, 1927.
Hearing Granted by Supreme Court Oct. 24, 1927.

1. Bankruptcy §185—Trustee in bankruptcy stands in place of creditors, as respects right to assert invalidity of chattel mortgage, not acknowledged (Civ. Code, § 2957).

A trustee in bankruptcy stands in place of creditors as their personal representative, as respects his right to assert the invalidity of a chattel mortgage, because it is not acknowledged as required by Civ. Code, § 2957; the trustee acquiring no superior right by virtue of his office as trustee.

2. Bankruptcy §184(3)—Bankruptcy trustee as general creditor, might not assert chattel mortgage was invalid because not acknowledged, as against mortgagee in possession (Civ. Code, § 2957).

Where neither the trustee in bankruptcy nor any creditor had a lien by legal proceedings on mortgaged chattels or were armed with process authorizing seizure of the property, so that the trustee stood in the position of a mere general creditor at large without lien or process, trustee might not urge that he was creditor, under Civ. Code, § 2957, making chattel mortgage void as to creditors, subsequent purchasers, and incumbrancers in good faith and for value unless acknowledged, as against a mortgagee in possession under the mortgage.

3. Chattel mortgages §198—Creditor without lien or process cannot question recorded chattel mortgage not complying with statutory formalities as against mortgagee in possession (Civ. Code, § 2957).

A mere general creditor at large who has not acquired a lien upon mortgaged chattels by virtue of some legal proceeding, or who is not armed with process authorizing the seizure of the property, cannot assert that recorded chattel mortgage is invalid as failing to comply with formalities required by Civ. Code, § 2957, as against a mortgagee in possession of the property with the consent of the mortgagor or in possession of the property by legal process.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action for wrongful conversion of personal property brought by C. W. Noyes, trustee of the estate of Paul Petrich, doing business as the Coronado Fish Company, an involuntary bankrupt, against the Bank of Italy. From a judgment for plaintiff, defendant appeals. Reversed.

Ward, Ward & Ward, of San Diego, and Haas & Dunnigan, of Los Angeles, for appellant.

Morris Binnard, of San Diego, for respondent.

CAMPBELL, Justice pro tem. This is an action instituted by C. W. Noyes, trustee in bankruptcy of the estate of Paul Petrich,

doing business under the name of Coronado Fish Company, against the Bank of Italy, a corporation, for the alleged wrongful conversion of personal property.

The case was tried before the court with a jury, which returned a verdict awarding the plaintiff the sum of \$10,000, and from the judgment entered thereon the defendant, Bank of Italy, has prosecuted this appeal.

The complaint in the action alleges that one Paul Petrich was doing business as the Coronado Fish Company at San Diego prior to and during part of the year 1923, and that during that time and while he was so engaged in business the defendant bank came upon the premises where he was doing business and took possession of the business and personal property in connection therewith, and converted it and sold it. That Paul Petrich subsequently was adjudicated a bankrupt, and the plaintiff was appointed the trustee in bankruptcy. That the trustee, being the representative of the creditors of the bankrupt, has the right to recover this property alleged to have been converted or damages for its conversion. By way of answer, the defendant set forth and alleged that it had taken possession of the property, but justified such taking under a chattel mortgage upon the particular property taken, and that whatever acts it did were done in pursuance of its rights as a mortgagee in a lawful attempt to foreclose and realize upon this mortgage.

The facts are not in dispute that Paul Petrich, doing business under the name of Coronado Fish Company, carried on a fish business at San Diego, and during a large portion of each year his business was devoted almost entirely to the canning of tuna and other fish, and that during the canning season he employed a large force of helpers to assist in this work. During the balance of the year Petrich conducted a wholesale and retail fresh fish business. The facts further disclose that during the canning season of 1921 and 1922, the appellant bank advanced Paul Petrich a total of approximately \$22,000 with which to finance his canning business, and that on March 23, 1923, there remained due the Bank of Italy the sum of \$8,705.65, and to obtain security for the payment of this sum the appellant obtained from Paul Petrich a chattel mortgage, covering this unpaid balance. It is further admitted that the chattel mortgage as taken was placed of record on March 26, 1923, but was devoid entirely of any proper acknowledgment as required by section 2957 of the Civil Code. The appellant offered to prove, and some testimony is embodied in the record, that possession of the chattels under the mortgage was taken by the appellant bank on July 28, 1923, and that after compliance with the Code provision relative to the sale of mortgaged chattels as a pledge, the chattels were offered for sale on August 28,

1923, and were bought in by the appellant bank as there were no other substantial bids. The record further discloses, and in fact the pleadings admit, that an involuntary petition in bankruptcy was filed by creditors of Paul Petrich on August 10, 1923, and an adjudication in bankruptcy was made during the month of October, 1923, and that plaintiff herein, C. W. Noyes, qualified as trustee of the estate of Paul Petrich, bankrupt. Plaintiff's Exhibit Q discloses the claims filed in the bankruptcy proceedings by creditors of Paul Petrich. The information disclosed in Exhibit Q establishes that certain of the creditors may be classed as both prior and subsequent creditors in relation to the date on which the chattel mortgage was given; but the creditors' statement, in so far as this exhibit shows—which is the only evidence on the question to be found in the record—does not disclose what portion of their claim existed at the date the chattel mortgage was given or what portion of the claim was incurred subsequent to that date.

As grounds of appeal, appellant urges the following errors: I. The court erred in excluding the mortgage offered in evidence. (a) Lack of formalities in the execution of a chattel mortgage can be questioned only by a creditor who has acquired a lien on the property by attachment or by levy of execution. (b) The trustee in bankruptcy has no right to maintain such a suit unless some creditor, prior to the taking possession, had actually secured a lien on the property by attachment or levy of execution. (c) If the mortgage was void as to any creditors, it was void only as to creditors whose claims arose after the mortgage was given and before possession was taken. (d) When possession was taken by mortgagee, the relation of pledgor and pledgee with respect to this property was established. (e) The mortgage should have been admitted in evidence to show good faith of mortgagee. (f) The mortgage was not shown to have created a voidable preference. II. The court erred in instructing the jury that there was no issue upon the question of conversion. III. The court erred in refusing to instruct the jury that the verdict should be limited to an amount equal to the amount of claims which arose from credit being extended after the mortgage was given.

It will be observed that appellant offered to prove that the chattel mortgage was executed by Paul Petrich to appellant bank on March 23, 1923; that it was filed for record on March 26, 1923; that the personal property described in the chattel mortgage was taken into the possession of the bank under a provision of the chattel mortgage on July 28, 1923; that the property was sold in compliance with the Code provisions on August 28, 1923; and that Paul Petrich was not adjudged a bankrupt until in October, 1923.

The jury was not instructed to make any finding of fact as to whether Paul Petrich

or the Coronado Fish Company were insolvent, either at the time the chattel mortgage in question was given or at the time the appellant took possession under the terms of its security, nor was the chattel mortgage given within the time in which it would be presumed, under the Bankruptcy Act (11 USCA), to be fraudulent as against creditors, but, as conceded by respondent, the trial court held the chattel mortgage to be void as to all creditors, because it was devoid of a proper acknowledgment under the terms of section 2957 of the Civil Code, and that no issue arose upon the trial of the case as to whether or not there had been any voidable preference under the Bankruptcy Act.

If, therefore, it be determined that the chattel mortgage was valid as between the parties, and the trustee in bankruptcy representing the creditors was a mere creditor at large and not a creditor who had acquired a lien upon the mortgaged property and was not such a creditor as could question a compliance with the formalities lacking in the mortgage, and the judgment must therefore be reversed, all questions raised on this appeal will be disposed of, as the remaining questions grow out of the decision of the trial court on the validity of the chattel mortgage as against creditors. Appellant has cited us to *Adlard v. Rodgers*, 105 Cal. 327, 38 P. 889, and *Lemon v. Wolff*, 121 Cal. 272, 53 P. 801, as authority for his contention that the chattel mortgage is valid as against creditors not having acquired a lien, and which case holds that a chattel mortgage omitting the formalities required by the Code is void as against attaching creditors of the mortgagor, unless the mortgagee has reduced the property to possession prior to the attachment. In *Lemon v. Wolff*, 121 Cal. 272, at page 274, 53 P. 801, 802, the court uses this language:

"As between the mortgagor and the mortgagee, such a mortgage is valid and may be enforced, even though the formalities prescribed in section 2957 of the Civil Code have not been observed. *Works v. Merritt*, 105 Cal. 467 (38 P. 1109). This section makes a failure in such compliance available only to creditors of the mortgagor, and subsequent purchasers and incumbrancers in good faith. Only a creditor who has acquired a lien upon the mortgaged property by virtue of some legal proceeding, or who is armed with some process authorizing a seizure of the property, can question the compliance with these formalities. A mere creditor at large, without some process for the collection or enforcement of his debt, cannot question the sufficiency of a mortgage which is valid between the parties thereto. *Jones on Chattel Mortgages*, § 245; *Jones v. Graham*, 77 N. Y. 628; *Button v. Rathbone, etc. (Sard. &) Co.*, 126 N. Y. 187 (27 N. E. 266); *Cameron v. Marvin*, 26 Kan. 612. If the defendants obtained possession of the property with the consent of the mortgagor, before the plaintiff acquired a lien thereon, they acquired a right thereto, irrespective of any irregularities in their mortgage."

Here the record does not disclose whether or not the mortgagee secured possession with the consent of the mortgagor obtained at the time of taking possession, but appellant did at least offer to prove that it took possession under the consent contained in the terms of the mortgage, and before other creditors of the mortgagor obtained any lien or made any levy upon the mortgaged property.

Respondent contends, in view of the decision in *Loosemore v. Baker*, 175 Cal. 420, 166 P. 26, that *Adlard v. Rodgers and Lemon v. Wolff*, cannot be considered as any authority for the question presented here. We do not agree with respondent's contention; on the contrary, we are of the opinion that *Loosemore v. Baker* reaffirms the rule laid down in *Lemon v. Wolff* from which we have quoted. It is true that the *Loosemore* Case holds that a mortgagee of personal property, in possession thereof with the consent of the mortgagor, under a chattel mortgage that was never recorded and that was not accompanied by the affidavit of the parties thereto as required by law, is not entitled to priority over an attaching creditor of the mortgagor. The facts in the *Loosemore* Case do not parallel the instant case, as here the creditor is not an attaching creditor, nor has he acquired any lien upon the property. Neither is *Ruggles v. Cannedy*, 127 Cal. 290, 53 P. 911, 59 P. 827, 46 L. R. A. 371, cited in the *Loosemore* Case, in conflict with the rule quoted from *Lemon v. Wolff*. That was also a case of an unrecorded mortgage, and there the court said:

"But it is insisted that, even if an unrecorded mortgage is void at the instance of creditors, only those creditors may take advantage of the law who by judgment and execution levy, or at least by attachment levy, have acquired a lien upon the property before recordation. * * * 'The record of a mortgage being only a substitute for the mortgagee's possession, it follows that, in the absence of any record, possession taken by the mortgagee before others have acquired any interest in the property makes his mortgage lien complete.' To this the answer is that such is not the law of this state. In terms, this rule is limited to those cases where immediate recordation is not required by law, and in our state, as has been discussed, as well as in other states under similar and well-nigh identical statutes, as will be shown, immediate recordation is exacted."

In the present case the mortgage was made on March 23 and recorded on March 26.

Loosemore v. Baker, supra, which respondent contends overrules or supersedes *Lemon v. Wolff*, quotes approvingly from *Lemon v. Wolff*, and reaffirms the principle applicable here:

"*Lemon v. Wolff*, 121 Cal. 272 (53 P. 801), also relied upon by appellant, contains nothing bearing upon this case. It declares the sound and familiar principle that even a chattel mortgage void for lack of recordation or void for defective verification and acknowledgment may still be good between the parties,

and that a mere creditor at large is not in a position to attack it, it being said that 'Only a creditor who has acquired a lien upon the mortgaged property by virtue of some legal proceeding, or who is armed with some process authorizing seizure of the property, can question the compliance with these formalities.' In this case the creditor had acquired a lien and was armed with process."

Here neither the trustee nor any creditor in whose place he stands had acquired a lien or was armed with process.

In *Union National Bank v. Oium*, 3 N. D. 200, 54 N. W. 1036, 44 Am. St. Rep. 533, the Supreme Court of North Dakota, cited by respondent, in a very luminous discussion of the question of chattel mortgages, void as against creditors, uses this language:

"While an unfiled chattel mortgage may be void as to a general creditor, he cannot avail himself of the statute until he has armed himself with attachment or execution and levied on the property, or has in some other way secured a lien thereon. Before he has seized the property covered by the chattel mortgage, or secured some lien thereon, he is in no position to raise the question that the mortgage is void as to him. * * * The mortgage is void as to creditors, and nothing is said in the statute about the necessity of a creditor's having secured a lien on the mortgaged property. The fact that the creditor cannot assail the mortgage until he has seized the property is of no moment in determining whether he belongs to the class of persons as to whom the mortgage is void. Whether he belongs to that class is one question; whether he is in a position to derive benefit from belonging to that class is another, and entirely different, question. The two inquiries are distinct, and each is independent of the other. When he arms himself with process, and seizes the mortgaged property, the court will then inquire whether he is a 'creditor,' within the meaning of the statute which declares void the mortgage as against 'creditors.' * * * It is true that he must seize the property before he can raise the point, but he need not seize it before the instrument is filed. Whenever he does seize it, whether before or after the filing of the mortgage, he is then in a position to urge that he was before the mortgage was filed a 'creditor,' within the meaning of the statute."

[1, 2] The trustee in bankruptcy acquires no superior right by virtue of his office as trustee; he stands in the place and stead of the creditors as their personal representative, and neither he as trustee, nor any creditor, seized the property by attachment, execution or any process, and therefore, while he, representing the creditors, may come within the class of creditors as to whom the mortgage is void, he has not placed himself in a position to urge that he is a creditor within the meaning of the statute. *Martin v. Commercial Nat. Bank of Macon, Ga.*, 245 U. S. 513, 38 S. Ct. 176, 62 L. Ed. 441.

[3] The rule may be safely stated as going at least to the extent of holding that a mere general creditor at large, who has not ac-

quired a lien upon the mortgaged property by virtue of some legal proceeding, or who is not armed with some process authorizing seizure of the property, cannot question the formalities required by section 2957 of the Civil Code, as against a mortgagee of a recorded chattel mortgage, in possession of the property, with the consent of the mortgagor, or who has acquired possession thereof by legal process.

Appellant offered to prove that possession of the chattels, under the terms of the mortgage, was taken by the appellant bank, and after compliance with the Code relative to the sale of mortgaged chattels as a pledge, the chattels were sold, which taking, possession, and sale occurred sometime prior to the adjudication of Paul Petrich, a bankrupt, and the appointment of respondent as trustee; offered as evidence the chattel mortgage, containing the affidavit of the mortgagor and the mortgagee, that the mortgage was made in good faith and without design to hinder, delay, or defraud creditors, being devoid only of the acknowledgment, and that the mortgage was good as between the parties. This evidence under the objection of respondent was excluded from the record. These issues were not tried, and this judgment cannot stand until they have been tried and determined adversely to appellant's position. The judgment must be reversed, and upon a new trial permission should be granted defendant to establish, if it can, the validity of its mortgage between itself and the owner, and it is accordingly so ordered.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

85 Cal. App. 140

WITTMANN v. WHITTINGHAM.
(Civ. 5496.)

District Court of Appeal, First District, Division 1, California. Aug. 17, 1927.

1. Contracts §10(2)—Contract between defendant, about to form a corporation, and plaintiff for latter to work for corporation held not to lack mutuality.

Where defendant, about to form a corporation, contracted with plaintiff to work for the corporation when formed, and plaintiff did so, contract held not to lack mutuality as between these parties.

2. Master and servant §8(1)—Employment contract not specifying duration held not indefinite as to time, where it was to endure until certain shares of stock had earned dividends sufficient to pay notes.

Although employment contract did not specify the time of its existence it was not indefinite as to time, since it was to endure until certain shares of stock had earned dividends sufficient to pay certain notes.

3. Corporations §306—In action on employment contract, facts held to show defendant was the alter ego of employing corporation, hence bound by acts which bound corporation.

In action on employment contract, facts held to show defendant was the alter ego of employing corporation since he owned practically the entire stock and controlled the corporation, hence he was personally bound by acts which bound the corporation.

4. Appeal and error §1075—Where appellant's brief concedes proper instruction relative to measure of damages, his claim that no evidence of damage existed will be rejected.

Where appellant's brief concedes in specific language that the court properly instructed as to the measure of damages, his claim of error that no evidence of legal damage existed will be rejected.

5. Master and servant §40(3)—Evidence held to warrant finding of breach of employment contract by employer.

In action for breach of contract of employment, evidence held to warrant jury's finding of breach on the part of the employer.

6. Appeal and error §204(1)—Admitting evidence brought out by questions propounded to witness, to which no objections were made, held not ground for complaint.

In action for breach of employment contract where defendant claimed plaintiff was employed by corporation of which defendant was director, admitting books of account of certified public accountant showing payments by corporation to defendant held not ground for complaint by defendant, where evidence was brought out by questions propounded to accountant, to which no objections were made, and report was never read to jury nor seen by them until given to them when they retired to deliberate under stipulation by attorneys for both sides that jury might have all the exhibits.

7. Appeal and error §928(4)—Where record did not indicate at whose request alleged erroneous instructions had been given, it was presumed they were given upon appellant's request.

Where the record did not indicate whether alleged erroneous instructions had been given at the request of the plaintiff or of the defendant, it is presumed they were given at the request of the appellant.

8. Appeal and error §882(12)—One cannot predicate prejudice on erroneous instructions submitted to jury at his request.

A party cannot predicate prejudice on erroneous instructions submitted by the court to the jury at his request.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by William A. Wittmann against Major Whittingham. Judgment for plaintiff, and defendant appeals. Affirmed.

George Beebe and J. Marion Wright, both of Los Angeles, for appellant.

Wheaton A. Gray and J. M. Fursee, both of Los Angeles, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from a judgment in favor of respondent entered upon the verdict of the jury awarding \$2,000 damages against appellant, in an action to recover \$23,080.

Appellant urges as grounds for a reversal of the judgment: (1) The verdict is contrary to the evidence, and there is a variance between the pleadings and the proof: (a) The evidence of plaintiff does not establish any definite or valid contract on which he might sue; (b) the evidence and the special verdict of the jury show that the plaintiff was employed by the corporation and not by Whittingham individually, and that the corporation and not Whittingham discharged him; (c) there is no evidence of any legal damage sustained by plaintiff. (2) The court erred in the admission of evidence. (3) The court erred in its instructions: (a) Instructions were given at the request of plaintiff which were erroneous; (b) the court improperly modified instructions requested by defendant; (c) the instructions as a whole were confusing, and in some particulars failed to enlighten the jury on some issues.

As disclosed by the evidence, in 1919, appellant gave respondent employment as a bookkeeper, at the same time respondent had other persons for whom he did bookkeeping. This ran along until about August, 1920, when appellant discussed with respondent the matter of forming a corporation. The business was growing and appellant desired to expand. Respondent continued in the employment of appellant as bookkeeper until the corporation was formed in October, 1920, when respondent was made a director of the corporation and its secretary and 11 shares of stock were given to him by appellant, 1 share of which was given him so that he could qualify as a director and the remaining 10, as appellant claims, so that respondent would feel an interest in the business, but, according to respondent, in payment for services performed. From and after the incorporation of "The Whittingham Printing Company," respondent was paid \$40 a week by the corporation. When appellant decided to incorporate his business it was agreed between appellant and respondent that respondent should give up all his other business and serve appellant as an accountant, bookkeeper, and as general manager and should receive as compensation \$40 per week, and as a further compensation respondent should have the privilege of purchasing 60 shares of stock of the Whittingham Printing Company, a corporation, soon to be formed, and as a part of such agreement it was further agreed and understood that respondent should give the defendant his note for \$4,800, with interest at 6 per cent. per annum, and that respondent should not be re-

quired to pay anything on said note, but that he should remain in the employ of appellant until the dividends and profits of the stock were sufficient to pay off the note. When the note was paid off by the dividends and profits, it was to be given up and canceled and the stock, which was issued to respondent and held by appellant as collateral, was to be returned to respondent. There seems to be no special dispute over the fact of the contract, nor as to its terms; appellant contending that respondent was to work as a salesman and not as bookkeeper and manager, and that he was to work in the employ of the corporation and not in the employ of appellant; that respondent's services were to be satisfactory to appellant, and that the services performed were unsatisfactory to him and therefore he had the right to discharge him; and, further, that the contract was entered into with the corporation, which is not made a party to the suit.

The shares of stock of the corporation were of the par value of \$100 each, and the authorized capital stock was 750 shares, 503 of which were issued under permit to issue that amount by the corporation commissioner. In December, 1921, the date of the alleged breach of the agreement, the books of the corporation show the stock to be issued as follows: Appellant Major Whittingham, 340 shares; W. F. Whittingham, 90 shares; respondent William A. Wittmann, 71 shares; George Beebe, 1 share; and J. M. Wright, 1 share. During the year 1921, up to the time when respondent retired as a director, the directors were appellant Whittingham, respondent Wittmann, and George Beebe; J. M. Wright being elected as a director to replace respondent when the latter retired from the board.

Respondent continued in his employment until December 31, 1921, when he was discharged. Appellant thereafter transferred the stock issued to respondent and which he held as security for respondent's note to himself. Appellant denies that he employed respondent, but asserts that the corporation did; that respondent was not in his employ, but in the employ of the corporation "the Whittingham Printing Company"; and, further, that the corporation and not appellant discharged respondent.

The jury returned a verdict for plaintiff and fixed the damages in the amount of \$2,000, and returned a special verdict answering certain interrogatories propounded to them as follows:

"(1) How much money would plaintiff have earned under his agreement of employment with defendant had he not been discharged prior to the expiration of his said agreement? Answer. \$2,600.

"(2) Under plaintiff's employment with defendant, for what period was plaintiff to be employed? Answer. Until 60 shares of stock were paid for by his earned dividends,

"(3) Under said employment, when did said employment commence? Answer. October 1, 1920.

"(4) Under said employment, on what date would said employment terminate? Answer. When 60 shares of stock were paid for by dividends earned.

"(5) From and after September 1, 1920, was plaintiff employed by defendant or by Whittingham Printing Company, a corporation? Answer. Whittingham Printing Company, Inc.

"(6) Was plaintiff discharged by defendant or by Whittingham Printing Company, a corporation? Answer. Whittingham Printing Company, Inc.

"(7) Was Whittingham Printing Company, a corporation, owned and controlled by Major Whittingham, the defendant? Answer. Yes.

"(8) On what date would the dividends or profits of the Whittingham Printing Company have paid for the 60 shares in controversy? Answer. Do not know.

"(9) What was the actual value of the 60 shares of stock of the Whittingham Printing Company on the date of the alleged breach of the contract by defendant, if you find that it was breached by the defendant? Answer. \$6,000. Also give the highest value since the alleged conversion of the stock? Answer. \$8,000.

"(10) What amount of dividends or profits was the plaintiff prevented from receiving by being discharged by defendant? Answer. Estimated \$2,000.

"(11) What were the profits of Whittingham Printing Company, a corporation? Answer. Total to December 31, \$18,372.48."

Appellant does not claim that the contract was not entered into, but that the contract is not definite or valid; that the special verdict shows the contract or employment of respondent to have been with the corporation instead of appellant and no legal damage was sustained.

The first complaint under the assignment is that the contract lacks mutuality, and being entirely one-sided, should not stand, and, further, that it had no definite time for its existence.

[1, 2] There seems to be no lack of mutuality in the contract. It is alleged and testified to by respondent that, in consideration of his giving up all other business and serving appellant as an accountant, bookkeeper, and general manager, he should receive \$40 per week and should have the privilege of purchasing 60 shares of stock in the corporation to be formed. As to the claim that the contract had no definite time for existence it may be said that according to the contract, as testified to by respondent, the 60 shares of stock were to be delivered to him when the dividends or profits on the stock had paid his note. This is sufficient as to the time of the duration of the contract. In *Brown v. Birmingham Water Works Co.*, 169 Ala. 230, 52 So. 915, the court holds that, where the contract was to furnish a consumer with water at a specified price as long as she used the

premises as a dwelling, it is not defective for indefiniteness as to the length of time that it was to run. In *Hauser v. Harding*, 126 N. C. 295, 35 S. E. 586, the court says:

"A contract not to engage in the practice of medicine within a certain territory, without specifying any time, is not invalid for uncertainty, since it is to be construed as enduring for the life of the promisor."

In *City of Superior v. Douglas County Tel. Co.*, 141 Wis. 363, 122 N. W. 1023, the court holds that a contract, binding a telephone company operating in a city to maintain without charge telephones in the public offices as long as it maintains and operates a telephone exchange in the city, fixes a time for the termination of the contract and the contract is binding. As to the claim that the evidence and the special verdict of the jury show that the plaintiff was employed by the corporation and not by Whittingham individually, and that the corporation and not Whittingham discharged him, it may be said that the jury also made a finding that the Whittingham Printing Company was owned and controlled by Major Whittingham, the defendant, and there is sufficient evidence to support this finding. In appellant's opening brief, under the heading "Some undisputed facts in the case," he says:

"Defendant gave him (plaintiff) work as a bookkeeper, and at the same time plaintiff had other persons for whom he did bookkeeping. This ran along until about August, 1920, when defendant discussed the matter of forming a corporation. The business was growing and defendant naturally wanted to expand. Up to October 1, 1920, he had been paying plaintiff for doing the bookkeeping, and a few days after that date the arrangement between the two men was entered into verbally. For convenience, plaintiff was to be a director and secretary of the company."

And in the record of the testimony of appellant is the following:

In speaking of his idea for incorporating his business he said, "If I have a corporation, why, you will have to be the goat and be secretary, Bill," and later on in his testimony appears the following:

"Q. Why should you have an account and he not? You were president and he was treasurer, and you were both stockholders? A. Well, it was not supposed that he was to have an account, Judge.

"Q. Why? A. Because it did not come within the horizon of what I contemplated for Wittmann that he should have an account.

"Q. That was because you owned and controlled the whole thing (the corporation), and nobody should have an account without your consent, is that it? A. I would say so; yes."

Further, the note given for the 60 shares of stock was not given to the corporation, but was given personally to Whittingham, who personally held the Wittmann stock. As to appellant's brother's interest, the brother,

according to Whittingham's testimony, lives in another state and is not consulted at all by Whittingham as to any act of the corporation, and it does not appear that any stock was ever actually issued or delivered to the brother. The evidence also shows that of the 503 shares of stock—the entire amount issued—500 shares originally belonged to appellant. Appellant, Beebe, his attorney, and respondent were the original incorporators and there was issued 1 share of stock to each for the purpose of making them directors. Neither Beebe nor respondent had any interest in the business, and appellant testified that he issued 10 shares to respondent that he might be made secretary.

[3] We are of the opinion that there is ample evidence from which to conclude that appellant was the alter ego of the corporation, and comes within the rule laid down in *Minifie v. Rowley*, 187 Cal. 481, 202 P. 673:

"Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice."

See, also, *Erkenbrecher v. Grant*, 187 Cal. 7, 200 P. 641; *Wenban Estate, Inc., v. Hewlett*, 193 Cal. 675, 227 P. 723; *Shorb v. Beaudry*, 56 Cal. 450; *Deming v. Maas*, 18 Cal. App. 330, 123 P. 204; *United States Farm Land Co. v. Bennett*, 55 Cal. App. 304, 203 P. 794.

In *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 214, 155 P. 986, Ann. Cas. 1917D, 1050, the court says:

"We entertain no doubt of their sufficiency to raise an estoppel against Abbott Kinney personally. And upon a proper showing that the Abbott Kinney Company, a corporation, was but the instrumentality through which Abbott Kinney for convenience transacted his business, by all of the authorities not only equity, looking through form to substance, but the law itself, would hold such a corporation bound as the owner of the corporation might be bound, or, conversely, hold the owner bound by acts which bound his corporation."

[4, 5] As to appellant's claim of error that there is no evidence of any legal damage, it is sufficient to say that appellant in his brief concedes that "the court properly instructed the jury as to the measure of damages." As to the evidence, respondent testified that he had kept his contract faithfully; that appellant had not complained that he was not

making good, but that he just discharged him from his employment and took this stock away from him, because he thought that he (respondent) was making too much money; that the business had turned out more prosperous than he thought it was going to; that appellant gave himself such bonuses and such salary that there would be no income or profits. The jury was therefore warranted in finding that the defendant had violated his contract.

[6] We find no error in the admission of evidence, as assigned by appellant under his second assignment, that "the court erred in the admission of evidence." Appellant's principal objection is to the admission of the report of the books of account of the Whittingham Printing Company, made by Ernest E. Godfrey, certified public accountant. The record shows, however, that the evidence complained of, that is, the evidence of a bonus of \$7,500 and extra salary of appellant of \$750 a month and an additional salary of \$1,000 a month, was brought out by questions propounded to the expert accountant, to which no objections were made. Furthermore, this written report was never read to the jury, nor seen by them until it was given to them when they retired to deliberate, along with the other exhibits in the case, under a stipulation by the attorneys for both sides "that the jury may have all of the exhibits."

[7, 8] We do not agree with appellant in his final assignment of error; that the court erred in its instructions; that erroneous instructions were given at the request of plaintiff; that they were improperly modified; and that the instructions as a whole were confusing. The language of the court in *Bognuda v. Pearson*, 71 Cal. App. 105, 110, 111, 234 P. 857, 859, is applicable to the instant case and we adopt it here:

"But there is still another obstacle in the way of reviewing the objections to the instructions in this case in the fact that there is nothing to indicate or show at whose request the instructions were given—whether at the request of the plaintiff or the defendants. The presumption is, therefore, that they were given at the request of the defendants. *Gray v. Eschen*, 125 Cal. 1, 5, 57 P. 664; *Sutter Butte Canal Co. v. American Rice & Alfalfa Co.*, 182 Cal. 549, 553, 554, 189 P. 277. A party cannot predicate prejudice on erroneous instructions submitted by the court to the jury by his request."

This disposes of the objections urged by appellant, and from what has been said it follows that we find no error in the record.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

85 Cal. App. 192

PAVEY v. SUPERIOR COURT IN AND FOR ORANGE COUNTY. (Civ. 5780.)

District Court of Appeal, Second District, Division 1, California. Aug. 20, 1927.

Indictment and information $\S$ 146—Court need not rule on demurrer to indictment not presented in open court by defendant or counsel, but merely filed with clerk (Pen. Code, $\S\S$ 977, 990, 1003).

Where defendant, indicted under Pen. Code, $\S$ 107, filed a demurrer to the indictment but the demurrer was not actually presented in open court either by defendant or counsel representing him, under sections 977, 990, 1003, writ of mandate would not be granted to compel court to rule on demurrer.

Application by Verne C. Pavey for writ of mandate, to be directed to the Superior Court of the State of California in and for the County of Orange, to compel respondent to rule on a demurrer to an indictment. Writ denied.

Verne C. Pavey, in pro. per.

CONREY, P. J. The petition has been received by the court by mail from Leavenworth, Kan., with request by letter that the court act thereon and grant the writ.

The petition shows that on December 20, 1926, an indictment was returned into the superior court of Orange county, charging the petitioner herein with the crime of felony, committed by willfully, etc., escaping from the county jail of said county while imprisoned therein after conviction of a crime. Presumably the indictment was intended to charge an offense under the provisions of section 107 of the Penal Code. In re Haines, 195 Cal. 605, 622, 234 P. 883.

Petitioner alleges that thereafter, on March 31, 1927, he filed in said superior court a demurrer to said indictment; "that thereafter, on the 8th day of April, 1927, an order was made by said superior court of the state of California, county of Orange, by which said demurrer was placed off the calendar of said court, and the court has declined to act upon the demurrer to the great harm and prejudice of this petitioner. A true copy of the court's order declining to act upon said demurrer is hereto attached and made a part of this petition." In fact, there is no attached copy of the order, but there is a copy of a document addressed by the district attorney to the defendant under date April 8, 1927, notifying the defendant that on that day the demurrer was "placed off the calendar of said court, the same to be restored to the calendar at time of arraignment, if you so desire."

It is provided by the Penal Code that upon indictment for a felony the defendant must be personally present upon his arraignment

before the court; that he may "in answer to the arraignment, move to set aside, demur, or plead to the indictment or information"; that "both the demurrer and plea must be put in, in open court, either at the time of [the arraignment] or at such other time as may be allowed to the defendant for that purpose." Pen. Code, $\S\S$ 977, 990, 1003. According to these provisions of law, apparently it is not intended that in a felony case an absent defendant may demur to the indictment merely by causing such demurrer to be filed in the office of the clerk of the court. Or, assuming that the demurrer might be so filed, the court is not required to rule upon the demurrer until it is actually presented in open court either by the defendant personally or by counsel representing him. In this case it is apparent that the demurrer never was so presented, and that the court never has been called upon to hear or determine the same.

The petition for writ of mandate is denied.

We concur: HOUSER, J.; YORK, J.

85 Cal. App. 209

Application of CRUICKSHANK. (Civ. 5303.)

District Court of Appeal, Second District, Division 2, California. Aug. 22, 1927.

1. Attorney and client $\S$ 61—Evidence held to show disbarred attorney's legal and educational knowledge sufficient to justify readmission to bar.

On application of disbarred attorney for readmission to the bar, evidence held to show that his legal and educational knowledge was sufficient to justify readmission.

2. Attorney and client $\S$ 61—Finding of referees concerning mental qualifications of disbarred attorney petitioning for readmission must be tested by determining where preponderance of evidence lies.

Finding of referees concerning legal and educational qualifications of disbarred attorney petitioning for readmission to the bar must be tested by considering the question as to where the preponderance of the evidence lies.

Application by Vernon Cruickshank for readmission to the bar. Granted.

Kimball Fletcher, of Los Angeles, for petitioner.

Guy R. Crump and Eugene Overton, both of Los Angeles, for respondent Los Angeles Bar Ass'n.

WORKS, P. J. This is an application for readmission to the bar after disbarment. Petitioner was disbarred in 1918 because of the commission of an act involving moral turpitude. The grounds upon which he was ex-

cluded from the profession are shown in the opinion in *re Cruickshank*, 47 Cal. App. 496, 190 P. 1038, by which the judgment of disbarment was affirmed. The present proceeding was sent to referees with directions to take evidence and to find whether petitioner is possessed of the moral and mental qualifications necessary to entitle him to a readmission. The findings of the referees are now before us.

The referees find that petitioner "is possessed of such moral qualifications as entitle him" to readmission. This finding is so amply sustained by the record made before the referees that we forbear to state the evidence which supports it.

Upon the other issue it is found by the referees that "there is such doubt as to the mental qualifications of applicant that an examination is necessary to test them." Petitioner has interposed written exception to this finding, and we have therefore been inspired to a minute exploration of the record upon which the finding is made. Petitioner, after having had a common school education—during the course of which, however, he did not complete a high school course—and after having read law a little, matriculated with the Chattanooga College of Law, in Tennessee, which conducted a 3-year course. He was permitted by the dean of the school to enter the junior class, however, his course thus being limited to 2 years. At the end of his first year, after having done both junior and senior work, he took a bar examination before the state board of examiners of Tennessee, passed, and was admitted to the bar. Notwithstanding this fact, he completed his second year. In his course during the 2 years, comprising a term of 8 months in each, he took lectures in 20 subjects. One who was an instructor in the law school during petitioner's attendance testified that petitioner passed all his examinations, that "in many of his subjects he was at the head of his class, and in many others near the head of his class," and that when he left the school "he had a good legal foundation." Soon after completing his law school course petitioner came to California and was admitted to the bar of the state. This was in 1916. He was engaged in the active practice of the profession until a short time before his disbarment in 1918. We have carefully examined a file in which is presented copies of notices of motion, affidavits, pleadings, trial briefs, findings, judgments, decrees, and other papers prepared by petitioner during the period of his practice. These various documents were filed with the referees as a part of the record before them. At the hearing before the referees petitioner testified that during his practice he was engaged in actual trial work "two or three times a month," and a lawyer with whom he was associated immediately preceding his disbarment gave a minute description of the nature of his practice and of the manner in which he performed his

work. From all this evidence we find that at the time of his disbarment petitioner was possessed of at least average ability as a lawyer, and his ability was perhaps above the average for one who had practiced for so brief a period—only about 2 years.

The question yet to be determined is whether petitioner, during the period since his disbarment, has kept this ability intact by his methods of thought and through the nature of the pursuits which he has followed. Immediately after his disbarment petitioner engaged in a business enterprise which operated in that part of Los Angeles known as San Pedro. The business was soon incorporated under the name of the Channel Construction Company. The nature of the operations conducted by the corporation was thus described by its president:

"This corporation was incorporated for the sum of \$50,000, but it has acquired property, both real and personal property, of the approximate value of \$600,000. It has in a large way done excavating and filling work in San Pedro, taken public contracts for the excavation, filling, and improvement of public streets and paving and matters of that sort, upon occasion there being as many as 90 to 100 men employed, and I think there has been about a million cubic feet of earth that has been excavated, and great areas filled in the West Basin of San Pedro and San Pedro proper, involving many hundreds of thousands of dollars."

Petitioner owns half of the stock of the corporation and has been in active control of its operations as manager. We shall now quote from the testimony of several witnesses who appeared before the referees. The president of the corporation above mentioned, who is a lawyer, said:

"Mr. Cruickshank * * * has had charge of the actual operations, the making of contracts, and the collection of moneys during practically all this period. The legal phases of the matter, and matters to some extent of policy, have been mutual affairs between the officers of the corporation and Mr. Cruickshank. * * * Of course, in conducting this business—it is really one of the largest businesses in San Pedro, where we have handled innumerable contracts, and many, many legal questions have arisen that were of interest to all of us personally, and while Mr. Lynden Bowring, who is secretary and treasurer of the corporation, and myself handled the legal matters in connection with it, we discussed these questions usually with Mr. Cruickshank, and in an academic way discussed other legal questions with him, * * * and I came to the conclusion that while probably Mr. Cruickshank was not keeping up, as his business was so onerous there, with all the decisions as they were coming down, yet he had, it seems, books like *Corpus Juris* and many others in his place that he was endeavoring to keep up with in a considerable way, and his foundation seemed to be very good. His method of reasoning was logical, and he seemed to have a very good foundation of the general principles of law."

Another lawyer said he had known petitioner for four years and testified, further:

"Mr. Cruickshank has visited the office I should say on an average of once a week * * * and has discussed legal questions and matters of a character that might pass between lawyers, and of course between business men, too. * * * I have been practicing law for 40 years and I would say that Mr. Cruickshank has as much technical ability as 50 per cent. of the lawyers I have known during that time, or perhaps 60."

This was said by another lawyer, who spoke of times following the disbarment:

"As to [petitioner's] ability, I have found in the matters with which I came in contact with him, that he seemed to possess an ability very much above the normal, and in the matter of the preparation of contracts and in matters of street law, which were the legal matters concerning which I had occasion to have experience with him, he has shown a very pronounced ability."

One lawyer testified concerning frequent talks he and two other lawyers had with petitioner about the legal affairs of the Channel Construction Company, and said:

"[I]n all of those matters Mr. Cruickshank seemed to have just as keen a knowledge of the law as any of the rest of us that were talking about it, and seemed to grasp the legal questions involved."

Petitioner himself testified:

"Q. Since your disbarment, you have retained part of your law library, have you? A. Yes; I am still keeping it up. Mr. Moore [a former associate] has some. The Corpus Juris I am keeping up and I buy different text-books that come out on matters of law, and I am keeping up with the Codes just in a general way."

The former associate of petitioner who has just been mentioned said:

"[M]y judgment is that [petitioner] is quite capable of handling a law business. * * * In my visits with him our conversations have been usually on general topics, and the thing that has impressed me most was his resolute ambition to increase his learning, not only in the law but in books generally, and whenever we got into a discussion of some philosophical or historical subject, why, it so awakened his interest that he immediately decided he wanted to find out about it, and I would notice thereafter, when I went to visit his home, that I would find some of these books pertaining to the subject that we had discussed before, which evidenced the fact that his mind still dwelt upon the thought and that he was trying to inform himself. * * * I think he is far superior to a large number and quite a large percentage of our lawyers."

The secretary and treasurer of the Channel Construction Company, a lawyer, testified:

"Q. From your acquaintance with Mr. Cruickshank * * * have you an opinion as to what his technical ability has been since the time of his disbarment? A. I have. Ever since the Channel Construction Company was organized,

it has had constantly presented to it questions of law of all kinds, from mere cases involving collections to matters of considerable interest, involving street improvements and overlapping of street improvements, and the validity of contracts, and matters that have engaged considerable of my time as a lawyer and considerable of Mr. Potter's time, who is president of the company and who is also a lawyer. In all those matters, we have considered them and discussed them in connection with Mr. Cruickshank * * * and have had the benefit of his ideas and opinions regarding them, and I have been * * * in practically constant consultation with Mr. Cruickshank. There hasn't been a week passed in the last five years that I have not had one or several conferences with him in matters that are really the subject of a lawyer. I found that in all those matters that he has a good grasp of legal principles, and also the practical application of them, and I know that my own preconceived ideas on many subjects, that is, as to the application of various principles of law * * * were not correct, and that suggestions made by Mr. Cruickshank proved to be the correct view. * * * I lived about a year and a half or so next door to him in San Pedro * * * and I used to see him practically every night during that period * * * and I know that during that period and at other times when I have been at his house, that he has kept law books about him. I know he has continued to subscribe to the Corpus Juris and Cyc. system, the Codes, and so forth, and he has kept about him legal literature, and that whenever any question arose, he was looking it up on * * * his own account, and to my own knowledge, he has kept to a considerable extent abreast of the statutory laws so far as it affected our business, which was the street law and the law of contracts and all that sort of thing, and I always found him active in applying himself to the solution of problems that arose in connection with those matters.

"Q. Would your same favorable criticism extend also to matters in relation to the several large lawsuits which have been conducted and the matters of corporation law that have been met with in connection with the corporation in the way of bond issues? A. Yes. I would say that every question of law of any importance whatever, that has arisen, has been discussed with Mr. Cruickshank and his ideas exchanged with mine and Mr. Potter's, and the statement that I have made regarding the soundness of his views would apply to all those matters. I have found him to have, in my opinion, good judgment. * * *

"Q. Well, in your opinion, is Mr. Cruickshank now qualified from a technical standpoint to practice law? A. He is. In my opinion, he is qualified to an extent much greater than the average practitioner * * * that is admitted to the bar. * * * His judgment I have found to be good on questions that have been presented."

[1, 2] From this state of the record we conclude that the preponderance of the evidence is opposed to the finding of the referees which concerns the mental qualifications of petitioner, and we have recently decided that such a finding must be tested by the question as to where a preponderance of evidence lies. In re

Stevens (Cal. App.) 257 P. 218. We think that as to petitioner's "grasp of the law there is no question." In re Stevens, 197 Cal. 408, 241 P. 88.

The finding of the referees that petitioner is possessed of the moral qualifications entitling him to a readmission to the bar is adopted as the finding of the court. The finding expressing doubt as to his mental qualifications is set aside. The petition for readmission is granted, and the clerk of the court will issue to petitioner a certificate of admission to the bar in the usual form.

We concur: CRAIG, J.; THOMPSON, J.

85 Cal. App. 224

OSBORNE v. BAUGHMAN et al., Members of Board of Dental Examiners of California.★
(Civ. 5462.)

District Court of Appeal, Second District, Division 2, California. Aug. 24, 1927.

Hearing Denied by Supreme Court Oct. 20, 1927.

1. **Certiorari** ⇨28(3)—Writ of review may be used to determine whether board of dental examiners had any testimony warranting revocation of practitioner's license.

The writ of review may be used to determine whether there was any testimony to establish certain facts without the existence of which a board of dental examiners had no power to act in license revocation proceedings and revoke practitioner's license.

2. **Physicians and surgeons** ⇨11(3)—In license revocation proceedings, inference dentist knew of employee's unlawful practice cannot be drawn in face of uncontradicted evidence to contrary.

In license revocation proceedings, the board of dental examiners may not infer that dentist knew of unlawful practices of his employee, when there is uncontradicted evidence to the contrary.

3. **Physicians and surgeons** ⇨11(3)—Evidence held not to warrant revocation of dentist's license for unlawful practices.

Evidence held not to warrant revocation of dentist's license for permitting unlawful practices of an employee.

4. **Physicians and surgeons** ⇨11(2)—Under dental act relative to revoking licenses, words "aid and abet" make knowledge necessary before it can be found dentist aided or abetted unlicensed person to practice (Deering's Gen. Laws 1923, Act 2048).

Under dental practice act (Deering's Gen. Laws 1923, Act 2048), relative to revoking dentists' licenses, the words "aid and abet" require knowledge of unlawful act before it can be said a dentist has aided or abetted an unlicensed person to practice.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Aid and Abet.]

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

S. R. Osborne's license to practice dentistry was revoked by the Board of Dental Examiners, consisting of Leo M. Baughman and others. The board's order was annulled by the superior court, and the board appeals. Affirmed.

Jesse W. Carter, of Redding, Harry W. McNutt, of Los Angeles, and Frank J. Burke, of Petaluma, for appellant.

Rosecrans & Emme, of Los Angeles, for respondent.

THOMPSON, J. This is an appeal from a judgment of the superior court annulling, upon writ of review, and order of the state board of dental examiners whereby the license of respondent to practice dentistry in the state of California was revoked. The questions to be determined are whether there was any testimony adduced before the board showing that respondent was chargeable with knowledge that his unlicensed employee was practicing dentistry, and whether such knowledge is necessary before it can be said that a dentist is aiding or abetting an unlicensed person to practice dentistry.

[1] Inasmuch as appellant has argued that it is not the province of a court in certiorari proceedings to concern itself further than to determine whether the quasi judicial body, such as is the board of dental examiners, has exceeded its jurisdiction, it should be here observed that where such tribunal or board has acted, not upon a conflict in the evidence, but in spite of a lack of any competent evidence, it has exceeded its jurisdiction. It may be put in this language: That the writ of review may be used to determine whether there was any testimony to establish certain facts without the existence of which the board has no power to act. *Goodall v. Superior Court of Santa Barbara County*, 37 Cal. App. 724-727, 174 P. 924; *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 P. 35.

In this case the respondent was operating two dental offices, one in the city of Glendale and the other in the city of Los Angeles. He testified that Wilson, the employee, was a dental mechanic, and that he employed him as a laboratory man only; that he always had a dentist in the Los Angeles office, except for a few days after a Dr. Marr had quit and before he secured the services of a Dr. Walsh, and that during that time he left instructions that "Dr. Fridd was to take care of any patients that should come in, either come over there or have the patient sent over to the other office." Thomas Wilson testified that he was employed as a dental mechanic; that during the time they were expecting a new dentist to take the place vacated by

Dr. Marr, a Mrs. Koch came in, and that he took an impression for some bridgework, made an appointment with her to return, and gave her the price of the work; that he never did any other operative work; that he knew that Dr. Osborne did not know that he was operating; that he simply took a chance on this occasion, and that during these few days they were making appointments in anticipation of Dr. Walsh, and when he did not arrive they called in another dentist. The testimony further established that Wilson was arrested and convicted of practicing dentistry without a license (the act thereof consisting of taking the impression referred to), and that 10 or 12 years before he had been convicted of practicing dentistry without a licence in San Diego.

[2, 3] The appellants assert that from the fact that Dr. Osborne had heard that Wilson had been accused of practicing without a license in San Diego, and from the fact that Wilson was managing his office in Los Angeles—which Dr. Osborne had not visited in two or three months—they were justified in believing that respondent had knowledge of the fact that Wilson was doing operative dentistry. This argument would be more forceful, had there been a series of acts instead of an isolated instance; but as it stands we may only suspicion that there was more than one act, and, building upon suspicion rather than proof, if we adopt appellants' argument, infer that the doctor must have had knowledge by reason of its continuity. No inference is legally justifiable in this situation, and there is uncontradicted evidence in the record that Wilson's one act of practice was without Dr. Osborne's knowledge. But even if an inference were justified, the positive uncontradicted testimony to the contrary would dispel the inference. It has been held on several occasions by our courts that inferences which may be drawn from certain facts disappear when direct evidence to the contrary is offered. *Maupin v. Solomon*, 41 Cal. App. 323, 183 P. 198; *Martinelli v. Bond*, 42 Cal. App. 209, 183 P. 461; *Everett v. Standard Accident Ins. Co.*, 45 Cal. App. 332-339, 187 P. 996; *Fahey v. Madden*, 56 Cal. App. 593-598, 206 P. 128; *Musachia v. Jones*, 65 Cal. App. 283-298, 223 P. 1006; *Dowd v. Atlas Taxicab & Auto Service Co.*, 187 Cal. 523, 202 P. 870; *Mar Shee v. Maryland Assur. Corporation*, Baltimore, 190 Cal. 1-8, 210 P. 269.

[4] The question remaining for disposal is whether it is necessary for a dentist to know or to be chargeable with knowledge that he is in fact "aiding or abetting an unlicensed person to practice dentistry unlawfully" before the board may revoke his license for that offense. The act under which the respondent was proceeded against (*Deering's Gen. Laws*, 1923, p. 682) defines unpro-

fessional conduct in the language we have just quoted, and these appellants argue that had the Legislature intended that knowledge or consent were necessary it would have so stated in the act. We cannot assent to the broad statement thus made, for the reason that aid and abet in this character of a proceeding necessarily implies knowledge. The expression is a familiar one in the domain of criminal law, and as there used it means that one has, with guilty knowledge and intent aided the actual perpetrator to commit the offense. 7 Cal. Jur. 889; *People v. William Yee*, 37 Cal. App. 579, 174 P. 343. We have no doubt but that the Legislature used the expression in this sense. It is difficult to believe that the valuable right that an upright and qualified citizen has to practice a profession could be made dependent upon an act done by another, of which the former has no knowledge. This construction is borne out by the analogy which may be drawn between disbarment proceedings and the one here under consideration. It has been uniformly held that disbarment proceedings are in the nature of criminal charges, and all intendments are in favor of the accused. *Matter of Haymond*, 121 Cal. 385, 53 P. 899.

By this analogy we think it must be apparent that knowledge is necessary before it can be said that a dentist has aided or abetted an unlicensed person to practice dentistry unlawfully.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

85 Cal. App. 204

GODFREY v. GODFREY. (Civ. 4542.)

District Court of Appeal, Second District, Division 2, California. Aug. 22, 1927.

1. Appeal and error ☞1011(1)—Judgment supported by substantial, though conflicting, evidence will not be disturbed.

Where a judgment is rendered upon conflicting evidence, it will not be disturbed on appeal, if supported by substantial evidence.

2. Replevin ☞11(2)—In claim and delivery action where defendant claims ownership, demand need not be pleaded or proved, and failure to find demand is not error.

In an action of claim and delivery for certain household belongings where the defendant claims ownership, it is not necessary for the plaintiff to plead or prove a demand, and failure of the court to find a demand is not error.

3. Husband and wife ☞138(10)—Where defendant's husband, buying furniture, had bill of sale executed to plaintiff without defendant's knowledge, plaintiff did not obtain title as against defendant.

Where defendant's husband, buying furniture and furnishings for their home, caused a

bill of sale to be executed in plaintiff's name without defendant's consent or knowledge, held, that it did not constitute a valid transfer of title to plaintiff or impair defendant's title.

4. Principal and agent **25(1)—Statements made by defendant in presence of one whom plaintiff alleged was her agent held admissible, though not made in plaintiff's presence.**

Where plaintiff alleged and attempted to prove that defendant's husband was plaintiff's agent in the purchase of furniture, conversations between her alleged agent and the defendant were admissible, notwithstanding they were not made in plaintiff's presence.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Mary Ayer Godfrey against Bertie H. Godfrey. From the judgment, both parties appeal. Affirmed.

Leo V. Youngworth and Harry J. McClean, both of Los Angeles, for plaintiff.

Joseph Scott, Anderson & Anderson, Wm. M. Morse, Jr., and A. G. Ritter, all of Los Angeles, for defendant.

CRAIG, J. The pleadings and the evidence in this case show that the plaintiff had an adopted son named John Phillips Godfrey, and that he and the defendant in this action intermarried on or about February 3, 1922; that the plaintiff then resided at her home on Western avenue, in the city of Los Angeles; that shortly after their marriage John Phillips Godfrey and his wife removed from a hotel to a residence which they had established at Beverly Hills, in Los Angeles county; that the furniture and furnishings, which were the property of the plaintiff, were placed in the Beverly Hills home of the plaintiff's adopted son and his wife; that Godfrey and wife thereafter purchased additional furniture from various merchants in the city of Los Angeles, with whom accounts were opened by Godfrey, and for a large portion of which purchases the plaintiff was compelled to pay. On June 17, 1922, the plaintiff brought this action in claim and delivery, alleging ownership of all the furniture and furnishings, that the defendant claimed to be the owner thereof, that prior to said last-mentioned date John Phillips Godfrey, acting as the agent for the plaintiff, demanded possession of said personal property, and praying judgment that it be "redelivered" to the plaintiff or that she have damages in the sum of \$10,000. The defendant answered, denying each of the material allegations of the complaint, and the case was tried before the superior court without a jury, whereupon the plaintiff was awarded judgment for possession of the property which had been removed from the Western avenue residence, and denied judgment for the furniture and furnishings which were purchased

by the defendant and her husband as above mentioned, from which judgment each of the parties appealed.

[1] Plaintiff contends that the evidence is insufficient to sustain the judgment rendered against her, but we think this claim is untenable, since there were several witnesses who testified for each of the parties, and the evidence is sharply conflicting. There is no dispute of the fact that the Western avenue furniture was the property of the plaintiff, but the defendant insisted at the trial, and argued upon appeal, that it was given to her. The defendant and her minor daughter, of the age of about 11 years, testified that the plaintiff stated to them and at various times in their presence that she had made them a present of her furniture in view of the fact that she expected to make her home with her adopted son and the defendant. The plaintiff emphatically denied that such conversation had ever occurred; that she had had much of the furniture for many years, some of which consisted of heirlooms, and that she did not intend to, and in fact had said that she would not, part with title to the property, but merely loaned it to the younger people for their temporary use. It was admitted that the plaintiff did not execute or deliver to the defendant a bill of sale to the furniture. Upon the record thus presented, the trial court may well have believed that title did not pass to the defendant to the property of her mother-in-law, and where a judgment is rendered upon conflicting evidence it will not be disturbed upon appeal if supported by substantial evidence.

[2] It is next argued by the defendant that the judgment should be reversed for the reason that there was no evidence that demand had been made by the plaintiff, previous to the commencement of this action, for the property removed from the Western avenue house, and that the trial court failed to find that a demand was made, though alleged in the complaint. *Burke v. Maguire*, 154 Cal. 456, 98 P. 21, is cited in this connection, but it is obvious from the defendant's own quotation therefrom that the case is not here in point, since it holds that "one lawfully in possession of property which he does not claim and which he has not converted to his own use, but is holding for the rightful owner with the intent to deliver it to him on demand," is entitled to a demand, as a prerequisite to the maintenance of a claim and delivery action for such property. The defendant in this suit denied the plaintiff's title and insisted throughout her testimony that she was the owner of the property in question. The only other authority upon which the defendant attempts to rely is *Davenport v. Alexander*, 53 Cal. App. 688, 200 P. 771, which, although holding that demand was necessary in that case, plainly in-

dictated that the property in controversy had been sold under a conditional sale contract, and that the plaintiff was not entitled to possession. It is settled law in this state that where, as here, property is in the lawful possession of one claiming to be the owner, a demand would be unavailing, and hence need not be pleaded or proved, and that under such circumstances the defendant will not be heard to object that no demand was made. *San Diego Construction Co. v. Mannix*, 175 Cal. 548, 166 P. 325. We think the trial court was justified in finding that this furniture belonged to the plaintiff, and its failure to find upon the question of demand was not error.

[3] The plaintiff does not claim to have purchased the other furniture which was placed in the Beverly Hills residence of the defendant, but she contends that it was purchased with her authority. This, however, was contradicted by the defendant's evidence, which tended to show that the latter and her husband, at times individually and at other times together, made the purchases upon the account of Godfrey; that his mother was not present, but later guaranteed to the merchants that Godfrey would pay the bills; that when asked if the charges should be entered upon the plaintiff's account, Godfrey replied, "No, this is for my own home, and I want it on my separate account." The defendant also testified that she paid some of the bills with her own money, and in some instances turned in other furniture for credit upon the accounts. True, the plaintiff was thereafter compelled to make good her guaranty, and to pay balances due the merchants, and on at least one occasion Godfrey caused a bill of sale to be executed in the name of the plaintiff. This action was instituted, however, for the purpose of attempting to acquire possession of the furniture, and the trial court found upon an abundance of conflicting evidence, much of which tended to support the judgment, that the plaintiff was not entitled to possession, and had never been the owner, of this portion of the property. We cannot therefore say, as a matter of law, that the court was in error in so finding, and such being true, the execution of a bill of sale by a third party, without the consent or knowledge of the defendant, would not constitute a valid transfer of title to the plaintiff or impair the title of the defendant, since she was not a party to the transaction.

[4] A Mrs. Weller was permitted to testify to statements alleged to have been made by the defendant in the presence of her husband, but not in the presence of the plaintiff, which statements plaintiff's counsel moved to strike out. The court denied the motion upon the ground that the plaintiff by her pleadings and in her testimony averred that Godfrey was her agent in all of the transactions in ques-

tion, and it is argued that such ruling constituted prejudicial error, requiring a reversal of the judgment. In this the plaintiff assumes the novel, and we think untenable, position of claiming Godfrey as her agent in all respects wherein it would serve her purpose to do so, and yet objecting to conversations between her alleged agent and the defendant in this action which do not tend to support her theory of the case.

There are no other points requiring discussion, and since we find no prejudicial error the judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

85 Cal. App. 201

JONES, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 5771.)

District Court of Appeal, Second District, Division 1, California. Aug. 22, 1927.

1. Master and servant $\S$ 388—Claim of decedent's father-in-law, upon daughter's death, for balance of death compensation awarded her, came too late when not within year of son-in-law's death (Workmen's Compensation Law 1917, $\S$ 11 [b] [2], 14 [c], [e], 17 [c], as amended by St. 1919, p. 917).

Where father-in-law's claim for death benefits under Workmen's Compensation Law was not made within one year of son-in-law's death, and he was not mentioned by daughter, in her original claim, as deceased's dependent, he was not, in view of Workmen's Compensation Law (St. 1917, p. 831) $\S$ 11 (b) (2), and $\S$ 14 (c) (e), 17 (c), as amended by St. 1919, p. 917, entitled to the unexpired balance of the award upon his daughter's death.

2. Master and servant $\S$ 388—Industrial Commission is restricted to original record in ascertaining subsequent beneficiaries after death of first (Workmen's Compensation Act).

Under Workmen's Compensation Act (St. 1917, p. 831), the Industrial Accident Commission may not, upon death of first beneficiary, go beyond the record in the original proceedings to discover other beneficiaries to whom the unexpired balance of the award may be paid.

William J. Jones petitioned the Industrial Accident Commission for the unexpired balance of an award payable by the Fidelity & Casualty Company of New York for the death of Michael Deranleau. To review an order denying the petition, petitioner applies for certiorari. Writ denied.

W. Matthews and H. W. Shaw, both of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CONREY, P. J. By an award of the Industrial Accident Commission, dated November

12, 1923, compensation in the sum of \$5,000, payable in weekly payments, was allowed against the employer's insurance carrier, Fidelity & Casualty Company of New York, and in favor of Cora M. Deranleau, surviving wife of Michael Deranleau, who was killed by accident on June 30, 1923. Cora M. Deranleau died on the 13th day of December, 1926, at which time there remained unpaid of said award the sum of \$1,366.46. Apparently it is not claimed that there was any delinquency on account of payments due, but this was the unexpired balance of the award.

On the 4th day of February, 1927, the petitioner, William J. Jones (father of Mrs. Deranleau), filed with the Industrial Accident Commission a petition requesting that the commission set apart or reassign to him the unpaid balance of said death benefit. It did not appear in any of the proceedings down to the time of the death of Mrs. Deranleau that Jones was a dependent of the deceased employee. At the time of the hearing before the referee on the 7th day of April, 1927, the claim of dependency of Jones upon the deceased employee was mentioned for the first time. Jones was then permitted to amend his petition by alleging "that, at the time of the death of the said Michael Deranleau, the said petitioner William J. Jones was in ill health and was dependent upon said Michael Deranleau for support." Upon the ground that the petition did not state a cause of action and was not within the provisions of subdivisions (c) and (e) of section 14 of the Workmen's Compensation, Insurance, and Safety Act of 1917 (St. 1917, p. 831), as amended (St. 1919, pp. 917, 918), the referee refused to take any testimony on behalf of the petitioner. Thereafter the commission made its order denying his said petition. In due course he filed this petition for a writ of review.

[1] According to section 11 (b) (2) of the act, any proceeding by or on behalf of Jones for the collection of a death benefit must have been commenced within one year from the date of the employee's death. As no claim was made by petitioner within that time, he can obtain no benefit from the commission's award unless it be held that the claim made by his daughter, and the award made to her, may be construed as a claim and award made in behalf of her father as well as on her own account. "There shall be but one cause of action for each transaction coming within the provisions of this act." Section 17 (c), St. 1919, p. 919. It may be conceded that, if the original proceedings had shown that Jones

was a dependent of the deceased employee, the award might have been made in favor of both Mrs. Deranleau and Jones as such dependents, or might have been made in her favor, not only for her own support, but in trust for the support of her father. For aught that appears herein, if such claim had been made by him, she would have contested it and would have insisted that she should be recognized as the sole dependent beneficiary. Section 14 (e) of the act reads as follows:

"The commission may, anything in this act contained to the contrary notwithstanding, set apart or reassign the death benefit to any one or more of the dependents in accordance with their respective needs and as may be just and equitable, and may order payment to a dependent subsequent in right, or not otherwise entitled, upon good cause being shown therefor. Such death benefit shall be paid to such one or more of the dependents of the deceased or to a trustee appointed by the commission or a commissioner for the benefit of the person or persons entitled, as may be determined by the commission. The person to whom the death benefit is paid for the use of the several beneficiaries shall apply the same in compliance with the findings and directions of the commission. In the event of the death of a dependent beneficiary of any deceased employee, if there be no surviving dependent, the death of such dependent shall terminate the death benefit, which shall not survive to the estate of such deceased dependent, except that payments of such death benefit accrued and payable at the time of the death of such sole remaining dependent shall be paid upon the order of the commission to the heirs of such dependent or, if none, to the heirs of the deceased employee, without administration."

[2] Counsel for petitioner state that they have not been able to find any decision upon the point now presented for decision. It is our opinion that the commission was not authorized, and that we are not authorized, to go beyond the record as it existed at the time of the death of Mrs. Deranleau, for the purpose of discovering a dependent beneficiary not known to the original proceedings. It must be conceded that petitioner has no claim here as an heir at law of his deceased daughter. His right to make claim as a dependent of the deceased employee has expired by lapse of time, and, in the plain language of the statute, that portion of the death benefit not yet "accrued and payable" to Mrs. Deranleau at the time of her death was terminated by that event.

The petition is denied.

We concur: HOUSER, J.; YORK, J.

85 Cal. App. 77

PEOPLE v. MAYFIELD.
(Cr. 1470.)

District Court of Appeal, Second District, Division 1, California. Aug. 13, 1927.

Criminal law — § 1186(4)—Error, if any, in refusal to let person, defended by public defender, examine witnesses held not cause for reversing conviction of burglary (Const. art. 6, § 4½).

In prosecution for burglary, where public defender appeared with defendant at trial at suggestion of court and defendant did not entirely disclaim his assistance and took no exception to his statement to court that defendant handed him list of witnesses to be subpoenaed and did not object to his examining state's witnesses, refusal to let defendant examine witnesses on ground that he had lawyer with whom he could advise, if error, as compelling defendant to accept counsel not chosen by him and denying right to present his own defense without counsel, was not cause for reversal, in view of Const. art. 6, § 4½, requiring error to result in miscarriage of justice to warrant reversal.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

R. C. Mayfield was convicted of burglary, and he appeals. Affirmed.

Wm. T. Aggeler, Public Defender, of Los Angeles, for appellant.

S. V. O. Prichard, of Los Angeles, amicus curiæ.

U. S. Webb, Atty. Gen., and J. L. Flynn, Deputy Atty. Gen., for the People.

CONREY, P. J. The only ground of appeal presented by defendant consists of a claim that he was compelled to accept counsel not chosen by him, and was denied the right to present his own defense without counsel.

At the time of entering defendant's plea he was represented by attorneys, who thereafter at the defendant's request were permitted to withdraw from the case. The court then asked the public defender, "in view of the defendant's attitude, to sit in on the case and render such assistance as the defendant is willing to accept from him." The public defender appeared with the defendant at the trial. The defendant stated to the court that he had made arrangements with another attorney who at the time was out of the state of California, and therefore could not be present. That defendant did not entirely disclaim the assistance of the public defender at that time is indicated by the fact that the public defender stated to the court that the defendant had handed to him a list of witnesses whom he wished subpoenaed in the case. To this statement defendant took no exception. The public defender cross-examined the state's witnesses without any further objection from the defendant.

After the close of the case on the part of the people, the defendant was sworn, and testified in answer to a series of questions propounded to him by the public defender as his counsel. At that time the defendant made no objection to this procedure. Thereafter, one George K. Home was called as a witness for defendant, apparently for the purpose of proving the good reputation of the defendant. The witness having been sworn, the defendant asked for the privilege of questioning the witness; the court replied:

"No, you have a lawyer here. Let the lawyer ask your questions. You can advise with your lawyer."

The witness, being asked whether he knew the defendant's reputation in the community in which he resides for truth, honesty, and integrity, replied, "I do not." Defendant then asked to be allowed to question the witness, and this request was denied by the court. Thereafter other witnesses were examined on behalf of the defendant by the public defender.

That the defendant was guilty of the crime charged, the record leaves no reasonable doubt; he simply stands upon the proposition that he was denied the constitutional right of representing himself at the trial without counsel. The record to which we have referred indicates that the defendant did not firmly and consistently insist upon his rights in the matter, but to some extent at least made affirmative use of the services of the public defender. Nevertheless, we take into consideration the fact that probably the defendant was not well acquainted with legal procedure, and we assume, for the purposes of the argument, that the services of the attorney were forced upon him, and that his right to defend himself without counsel was denied, and that this was error. The question is thus presented whether or not for that reason alone the judgment should be reversed and the cause remanded for a new trial. We think that this question should be answered in the negative. The case furnishes a proper occasion for the application of the rule stated by the Supreme Court in *People v. O'Bryan*, 165 Cal. 55, 66, 130 P. 1042, 1046, where the court, speaking through Mr. Justice Sloss, declared that section 4½ of article 6 of the Constitution has at least the effect of abrogating the old rule that prejudice is presumed from any error of law, and further said:

"But it does not follow that every invasion of even a constitutional right necessarily requires a reversal. It may well be that the court, after examining the 'entire cause including the evidence,' is of the opinion that the error complained of, whatever its character, has not resulted in a miscarriage of justice. The mere fact that the assignment of error is based upon a provision of the Constitution is not conclusive. The final test is the opinion of the appellate

court upon the result of the error. No doubt this view requires the court, to some extent, to weigh the evidence, and form conclusions upon its weight—a function which, heretofore, has been reserved for the jury. But it cannot be doubted that the legislators, in proposing the amendment, and the electors, in adopting it, intended to put upon the courts the performance of just that function. We are not substituted for the jury. We are not to determine, as an original inquiry, the question of the defendant's guilt or innocence. But, where the jury has found him guilty, we must, upon a review of the entire record, decide whether, in our judgment, any error committed has led to the verdict which was reached. If it appears to our satisfaction that the result was just, and that it would have been reached if the error had not been committed, a new trial is not to be ordered."

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

85 Cal. App. 241

PEOPLE v. WHITE. (Cr. 1381.)

District Court of Appeal, Second District, Division 1, California. Aug. 25, 1927.

1. False pretenses ⚡33—Conviction on false pretense charge may be based on any alleged material misrepresentation, although proof fails as to other misrepresentations.

In prosecution for obtaining money under false pretenses, conviction may be based on any material misrepresentation alleged in the indictment if the evidence in the record is sufficient, although as to other misrepresentations the proof fails.

2. False pretenses ⚡29—Indictment for obtaining money by false pretenses, designating certain contract a sale of "gas units and interests," held sufficient.

Language of indictment calling certain contracts sale of "gas units and interests" was sufficient to inform defendant, charged with obtaining money under false pretenses, of the charge he was called upon to meet, hence he was not prejudiced by the inaccuracy of description.

3. False pretenses ⚡38—Under charge of obtaining money under false pretenses, variance between pleadings and proof as to matters not relied upon held immaterial.

In charge of obtaining money under false pretenses, variance between indictment and proof as to a preliminary statement of defendant in describing contract to purchaser was immaterial, where purchaser had read written contract and had not relied upon oral description.

4. False pretenses ⚡7(5)—Salesman's representations as to prospective dividends, being mere predictions, would not support charge of obtaining money under false pretenses.

Salesman's representations as to the amount of dividends prospective buyer would

receive on purchase of gas corporation units were mere predictions of future events, hence would not alone support verdict of guilty on charge of obtaining money under false pretenses.

5. False pretenses ⚡7(5)—Misrepresentation that for money paid defendant would deliver certain property interests held mere statement of intention, insufficient to support charge of obtaining money under false pretenses.

Defendant's representation that if purchaser would pay him a certain sum of money he would sell and deliver certain gas units and interests held mere statement of intention, the falsity of which would not support a charge of obtaining money under false pretenses.

6. False pretenses ⚡49(4)—Evidence held insufficient to support finding that representation as to value of gas units sold was false.

In prosecution for obtaining money under false pretenses through sale of gas units, evidence held not to justify a finding that representation of value of units was false.

7. False pretenses ⚡49(4)—In prosecution for obtaining money under false pretenses, evidence held not to establish falsity of defendant's statements as to dividend payments.

In prosecution for obtaining money under false pretenses by sale of gas units, evidence held not sufficient to establish beyond a reasonable doubt the falsity of defendant's statements as to the dividends his company was then earning and paying upon gas interests sold.

8. Criminal law ⚡935(1)—If, under false pretense charge, court was not satisfied beyond reasonable doubt that complainant relied upon pretenses, he properly granted new trial.

If, in trial on charge of obtaining money under false pretenses, court was not satisfied beyond a reasonable doubt that complainant relied upon pretenses, court properly granted a new trial after jury's verdict of guilty.

9. False pretenses ⚡52—In false pretense prosecution, instruction law forbids corporation to pay "dividend" out of capital held unduly to limit term "dividend."

In prosecution for obtaining money under false pretenses through sale of certain gas interests, instruction that the law forbids a corporation to use any part of its capital stock to pay dividends, thus limiting "dividends" to the earnings of corporate stock, held erroneous, since "dividends" is a term of quite general meaning, signifying the division of a fund into aliquot parts and distribution thereof to the common owners.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dividend.]

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Floyd G. White was convicted of obtaining money under false pretenses. From an order granting a new trial, the people appeal. Affirmed.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., Asa Keyes, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

Edward N. Barnard, of Detroit, Mich., and Guy Eddie, of Los Angeles, for respondent.

SHAW, Justice pro tem. This is an appeal by the people from an order granting a new trial. The respondent and two others were tried on an indictment containing nine counts, of which the first charged a conspiracy by the defendants to obtain money by false pretenses from Mrs. Catherine Bayne Stephens, Mrs. Lunette W. Smith, and other persons to the grand jury unknown, and set up eight different overt acts alleged to have been committed in pursuance of the conspiracy, and the subsequent counts dealt specially with the same transactions which were alleged as overt acts in the first count, charging as to each of them that the defendants had committed the offense of obtaining money by false pretenses. During the trial the indictment was dismissed as to one of the defendants, who thereupon testified for the prosecution. No evidence being given in behalf of the defense, the case was submitted to the jury on the evidence of the prosecution, and the court advised the jury to acquit both defendants remaining in the case upon all of the counts. The jury followed this advice as to one defendant, but not entirely as to the respondent, who was acquitted upon the first eight counts and convicted upon the ninth count. Thereupon respondent made a motion for a new trial, specifying as one of the grounds thereof the insufficiency of the evidence, and the court granted the motion on this ground alone.

The rules governing the consideration of appeals such as this are well established. The case of *People v. Knutte*, 111 Cal. 453, 44 P. 166, is parallel with that now before the court in many respects. There the offense charged was obtaining money by false pretenses, the case was submitted to the jury on the evidence of the prosecution alone, the court advised the jury to acquit, but instead they found the defendant guilty, and the trial court made an order granting a new trial from which the people appealed. In affirming this order, the Supreme Court said:

"The case was argued here by both parties upon the assumption that the new trial was granted upon the ground that the evidence was deemed insufficient to sustain the verdict; and while no specific ground is stated in the order of the court, it may be safely taken, from the court's action in advising the jury to acquit, that this assumption of counsel is correct. It has been so repeatedly held here as to become axiomatic that where a new trial is granted upon this ground, or where it is one of various grounds upon which the trial court may have based the order, its action will not be disturbed, except in a case showing a manifest and un-

mistakable abuse of discretion. * * * While it is the exclusive province of the jury to find the facts, it is nevertheless one of the most important requirements of the trial judge to see to it that this function of the jury is intelligently and justly exercised. In this respect, while he cannot competently interfere with or control the jury in passing upon the evidence, he nevertheless exercises a very salutary supervisory power over their verdict; in the exercise of that power he should always satisfy himself that the evidence as a whole is sufficient to sustain the verdict found, and, if in his sound judgment it is not, he should unhesitatingly say so, and set the verdict aside. *People v. Lum Yit*, 83 Cal. 130 [23 P. 228].

"It can, of course, make no difference in the exercise of this power by the court that the evidence in the case was wholly that of the prosecution, and stands, in the sense at least that it is not controverted by evidence on behalf of defendant, without conflict. The same duty rests upon the judge in such a case as where the evidence is conflicting, to satisfy himself that guilt has been established; and notwithstanding the evidence may be all one way, he is not required to believe it. * * *

"Nor does it affect the question that the evidence in the case may have a legal tendency to prove all the material facts. Guilt is to be established beyond a reasonable doubt; and while there may be some evidence to support each fact, this does not signify that it is necessarily such as to satisfy the conscience of the judge that a case is made which warrants conviction."

No decision in conflict with these rules can be found, and in *People v. Canfield*, 173 Cal. 309, 159 P. 1046, which likewise involved an appeal by the people from an order granting a new trial, the Supreme Court said, after referring to article 6, § 4½, of the Constitution:

"But this section of the Constitution was not designed to take from the trial court and transfer to the appellate courts the high discretion vested in that tribunal. The judge who presided at the trial of the cause, who heard the testimony, who observed the jurors and had an opportunity also of testing the truth of the defendant's statements by noticing his demeanor, was in a peculiarly favorable position for determining justly the question whether or not the defendant had been accorded a fair trial. * * * We can hardly manufacture in fancy a hypothetical situation in which a reviewing court would be justified in questioning the discretion of a trial court who should grant a new trial in a case involving a criminal charge."

The false pretenses alleged in counts 2, 3, 4, and 5 related to the affairs of the Interstate Oil Corporation, and those alleged in counts 6, 7, 8, and 9 related to the Brown Process Company. The several counts relating to the Brown Process Company are identical as to the party defrauded and the false representations charged, differing only as to the dates and the amounts obtained by the alleged false pretenses. The eighth and ninth counts are alike, even as to the dates on which it is alleged the false pretenses were

made and the money obtained. The ninth count, upon which respondent was convicted, charged that the offense was committed on January 17, 1924, and that on that date the defendants, with intent to defraud Mrs. Catherine Bayne Stephens of her money and property, falsely represented to her—

"(1) that they, the said defendants, had on hand for sale certain 46 gas units and interests of a corporation, by name the Brown Process Company; (2) which said gas units and interests were then and there of the value of \$1,000 each; (3) that the same were then and there earning and paying a dividend of 33 per cent. per annum, upon the basis of a value of \$1,000 for each of said gas units and interests of said Brown Process Company; (4) that, if she would purchase these certain gas units and interests of said Brown Process Company, she would immediately commence to receive and would continue to receive dividends of 33 per cent. per annum, payable on the 22d of each month; (5) and that within 3 years from the time of said purchase of said gas units and interests, the money she would pay them for said gas units and interests would be returned to her by the said defendants; (6) that the said gas units and interests of the Brown Process Company were secured by the total assets of the said corporation of the actual cash value of \$1,000,000; (7) that, if she, the said Mrs. Catherine Bayne Stephens, would then and there pay over and deliver to them the sum of \$46,000, lawful money of the United States, and then and there the personal property of her, the said Mrs. Catherine Bayne Stephens, the said defendants would then and there sell and deliver to her, the said Mrs. Catherine Bayne Stephens, 46 gas units and interests of the said Brown Process Company, a corporation as aforesaid." (For convenience of reference we have inserted the numbers in parentheses before the several representations alleged.)

Following this are the necessary allegations to complete the cause of action, showing the falsity of the representations and defendants' knowledge thereof, belief in the truth of the representations by Mrs. Stephens, and her payment of \$46,000 to the defendants in reliance thereon. No point is made as to the latter allegations, and hence we do not state them in detail.

[1] The appellant contends that the evidence not only justified, but required, a verdict of guilty on the ninth count, and that for this reason the trial court erred in granting a new trial. Appellant's argument mainly revolves about the representation which we have numbered 3, its claim being in effect, though not in words, that all the necessary allegations in regard to that representation were proved beyond a reasonable doubt. In this sort of cases, however, a verdict of guilty may be based on any material misrepresentation alleged in the indictment, if the evidence in regard to it is sufficient, although as to others the proof fails. For this reason it is necessary to give some consideration to all

the false pretenses charged in the ninth count.

It clearly appears from the evidence that, as a part of the transaction referred to in this count, Mrs. Stephens entered into a certain written contract with Brown Process Company. All the representations made by respondent related to this contract, and in order to consider them intelligently it is necessary to have in mind its principal terms. The contract is dated January 17, 1924, but Mrs. Stephens testified that she did not sign it until after February 11, 1924. It recites that Brown Process Company, designated as the party of the first part, has an oil treating plant and refinery at Maricopa, in which it has invested upwards of \$400,000, that it is operating under dehydrating patents owned by it which greatly increase its profits, that it has purchased as a location for an additional oil refining plant 18 acres of land in the county of Los Angeles (describing it), which is held partly by deed and partly by agreement to purchase, that it has constructed and is completing and is now operating in part an oil treating plant on said land, and that it needs additional funds to complete the purchase of the land and to complete and add to its treating plant and refinery thereon; and thereupon it is agreed that Mrs. Stephens, referred to as the party of the second part, will forthwith pay to the company \$46,000 to be used by it in paying balances due on the said land and buildings and adding to the present improvements and conducting its business, that she shall have no right, title, or interest in any other property of the company, but her only interest shall be limited to the compensation referred to in the agreement and an interest in the 18 acres of land above mentioned and the oil treating plant thereon.

The contract also contains this provision:

"For each \$1,000 invested by second party first party hereby agrees to pay to second party one-thirtieth of 1 cent per barrel for all oil treated or topped by said refinery, but not exceeding 90,000 barrels in any one month; provided oil can be treated at a margin of 18 $\frac{1}{4}$ cents per barrel between cost and selling price. Cost price to be the price paid for crude oil delivered at the plant, and selling price to be the net amount received from the sale of all the products derived from each barrel of oil treated.

"Should said margin be less than 18 $\frac{1}{4}$ cents, first party shall pay to the second party, for each \$1,000 invested, one-fiftieth of the net amount received per barrel, in excess of 15 cents per barrel, said 15 cents per barrel being agreed to be, as between the parties hereto, the cost of treating said oil."

Following this is a provision for the keeping of accounts by the company and the inspection thereof by Mrs. Stephens, and for payment on or before the 30th day of each month of the amount due her on account of

oil treated in the preceding month. There is also a provision that on the sale of said land and refinery in whole or in part, Mrs. Stephens shall be paid by the company " * * * such proportion of the amount received from such sale as the sum of all his investment in said property bears to the amount invested, in said entire plant, including lands and pipe line, less the amount charged off for depreciation as shown by the books of the first party at the time of such sale." The contract also declares that the parties are not partners or joint adventurers, and should either sustain a loss the other shall not be liable to contribution therefor, and that the company reserves the right to purchase all rights of Mrs. Stephens under the contract on giving her a certain notice and paying her "the amount originally advanced" by her, plus 10 per cent., and provides that additional contracts of like character may be made by the corporation with Mrs. Stephens or with other parties.

The exact nature of this contract is a matter of some doubt, for it does not readily lend itself to precise classification, but it was clearly not a subscription for or a sale of any of the capital stock of the corporation, and it gave Mrs. Stephens no interest in such stock. It is also clear that by the terms of the contract she has no right in the net profits or surplus of the corporation as such. Its obligation to pay her a specified amount per barrel of oil treated or topped, while not mature and enforceable until the thirtieth day of the following month, becomes absolute in all other respects as soon as each barrel of oil is run through the refinery, or at least upon a sale of the products derived therefrom, and cannot be defeated or affected by proof that its entire business shows a loss instead of a profit. Payment on this obligation can be compelled from any assets of the corporation regardless of whether they are such as may lawfully be used to pay dividends on its stock.

[2, 3] The respondent contends that there was a variance between the indictment and the proof as to representation No. 1, basing his argument upon a claim that what he offered to Mrs. Stephens was not properly described as "gas units and interests," and could not be the subject of sale. Several similar contracts were made by Mrs. Stephens with the Brown Process Company through the solicitation of respondent, and in discussing them with her he referred to them sometimes as "units" and sometimes as "contracts." He also negotiated a similar contract with the witness G. A. Stephens, and while so doing referred to such contracts as "units." The contracts referred to created in the parties dealing with the corporation some sort of an interest, the nature of which we do not find it necessary to define exactly, in a certain oil refinery and oil-treating plant of the corporation in which gasoline would of course be

produced. The word "gas" is a common abbreviation for gasoline, and was doubtless so used in the indictment. The contract cannot be described with complete accuracy in any short form of words. In view of these facts, we do not see how the respondent could have been prejudiced by the designation of these contracts as "gas units and interest," or by the reference to the making of them as a "sale," even though it be conceded that these terms are not accurate and precise descriptions of the matters to which they were so applied. The language used was sufficient to inform respondent of the charge which he was called upon to meet. Furthermore, this representation is not the substantial matter upon which Mrs. Stephens relied in paying her money to respondent, but is a mere preliminary statement intended to identify the contract to which the subsequent representations related. It appears from her testimony that she read the contract before she signed it and understood the nature of the payments which were to be made to her by the corporation. Under these circumstances, an incorrect description of the contract by the respondent in discussing it with her would not afford a basis for a charge of obtaining money by false pretenses, and a variance between the pleadings and the proof in regard to his description of it is immaterial.

There is no evidence that representation No. 2 was ever made by respondent. No representation as to the value of the units and interests was testified to by any witness. The only showing in regard thereto is in the contract itself, which states that for each \$1,000 paid to the corporation by the other party such other party will receive certain returns, but does not purport to fix \$1,000 as the value of the interest for which that amount is paid.

[4, 5] We pass for the time representation No. 3, which requires somewhat extended consideration. Representations 4 and 5 were manifestly either mere predictions of events to occur in the future or expressions of opinion, and the verdict of the jury could not be upheld upon them alone. *People v. Green*, 22 Cal. App. 45, 133 P. 334; *People v. Walker*, 69 Cal. App. 475, 231 P. 572; *People v. Gibbs*, 98 Cal. 661, 33 P. 630; *People v. Kahler*, 26 Cal. App. 449, 147 P. 228; *In re James*, 47 Cal. App. 205, 190 P. 466. It is therefore unnecessary to consider the evidence in regard to these representations. Representation No. 7 is a mere statement of intention, the falsity of which would not support the charge. Moreover, it is unquestionably shown to be true. Mrs. Stephens on payment of her money did receive the "gas units and interests" referred to.

[6] There is no evidence of the making of the whole of representation No. 6. The only statement made as to security is contained in the contract itself, which clearly shows that it is secured only by an interest of some sort

in the oil-treating and refining plant situated on the 18 acres of land already mentioned, and that the corporation has another similar plant and other property which the contract does not affect. There is testimony by Mrs. Stephens that the respondent told her the corporation had assets worth over \$1,000,000. The only testimony as to the total value of the assets is that they had a book value in round numbers of \$1,786,000 of which \$995,000 was the book value of a patented process owned and used by the corporation. There is in the record testimony that this process was of great utility and better than any other process for dehydrating oil, but no definite statement as to its value. This evidence would not justify a finding that the representation of value was false.

[7] The only representation remaining for consideration is No. 3. Respondent contends that the evidence is not sufficient to establish its falsity beyond a reasonable doubt, and we think this contention must be sustained. The purport of this representation was that contracts like that between Mrs. Stephens and Brown Process Company were then earning and paying 33 per cent. per annum. To prove the falsity of this representation, the people called as a witness W. Arthur Brown, who testified that when Mrs. Stephens was discussing her investment with respondent he was president of the corporation and in charge of its field operations and the plant in question, and was also familiar with its financial condition; that the corporation was then in need of money to carry on its business; that its current assets were always rather small as compared to its current liabilities; that the current assets at the end of 1923 were about \$234,000, and the current liabilities at the same time were \$733,000; and that from its entire business the corporation sustained a loss of \$155,000 in 1923, and a further loss of \$112,000 in 1924. Basil Jones, an expert accountant, also called by the people, testified that he had examined the books of the corporation, and he gave certain figures as to its financial condition derived from the books, which were substantially the same as those stated by Brown, but which went further back and showed that the corporation also sustained a loss in 1922. This testimony, which was not disputed, would no doubt amply establish the proposition that the corporation was not earning and was not in a position to pay any dividends on its capital stock, but as we have already pointed out, that proposition has no bearing on the matter now under consideration. The representation concerned the earnings then being made and paid by contracts like that into which Mrs. Stephens was about to and did enter. To discover the truth as to this matter it would be necessary to inquire into the capacity of the refinery, the amount of oil then being treated therein, the margin of profit at which

it was treated, and perhaps other matters going to show whether persons who had invested in similar contracts were earning and receiving 33 per cent. per annum on their investment. The witness Brown testified on cross-examination that at the time when the representation in question was made the capacity of the plant was sufficient to handle 90,000 barrels of oil per month, and the corporation was able to treat oil therein at a margin of 18½ cents per barrel. If the plant was worked to its full capacity under these conditions, each \$1,000 invested under the contract in question would earn \$360 per year, or 36 per cent. per annum. Brown was not asked, and no witness testified, how much oil was actually being treated by the plant at the time in question, and without this information the jury could not find that the earnings of each \$1,000 were less than 33 per cent. per annum.

In addition to the foregoing testimony, there is one other circumstance bearing upon the matter. Mrs. Stephens, as appears from her testimony, invested \$75,000 in a contract of the same kind on September 25, 1923, and \$25,000 in another such contract on November 13, 1923, upon the same representations by respondent as were made regarding the contract referred to in the ninth count. She also testified that the first money which she received by way of income or payments from the corporation on these contracts was \$2,000, received on December 20, 1923, and that she received nothing more until February 4, 1924, when she was paid \$1,383.85. This was much less than 33 per cent. per annum on her investment already made. Even assuming that each of these contracts did not begin to earn any income until the 1st of the month following that in which it was made, still the earnings of the \$75,000 contract at 33 per cent. per annum would have been \$2,062.50 for October and a like amount for November, and the amount due for each month should have been paid to her not later than the 30th of the following month, according to the contract, or the 22d according to the representation charged. In December the earnings of the two contracts should have been \$2,750, payable in like manner. It thus appears that her first payment was one month late and less than half of what it should have been at the time it was made, and the next one was about half the proper amount without making up the deficiency. She also testified to later receipts which were at no greater rate. These facts show that in January, 1924, payments were not being made as represented, and from them an inference is possible that these contracts were not earning as much as was represented. We do not think, however, that this inference as to earnings was so conclusive as to preclude the court from granting a new trial on this point, for a deficiency in payments might be accounted for on other

grounds than a deficiency in earnings, and no further showing on the latter point was before the court. The burden was upon the people to show the falsity of the representation as to earnings, and we cannot say that there was proof beyond a reasonable doubt.

[8] Moreover, the inference from this testimony of Mrs. Stephens cuts two ways. The first two payments under her previous contracts, which amounted to less than 50 per cent. of what they should have been, according to the representations testified to by her, were made before she entered into the contract and paid the money which form the subject-matter of the ninth count. The trial court may have concluded from this fact that she had information before entering into the last-mentioned contract of the falsity of the representations, which were made to her in regard to earnings and payments, and hence that her reliance upon these representations was not established beyond a reasonable doubt. Such a conclusion would have required the granting of a new trial, and we cannot say that it was not warranted by the evidence.

[9] At the request of the people, the court instructed the jury as follows:

"You are instructed that directors of a corporation cannot lawfully make dividends except from the surplus profits arising from the business of the corporation. In other words, the law forbids a corporation to use any part of its capital stock to pay dividends. By capital stock is here meant 'the actual property of the corporation contributed by the shareholders of the corporation'; that is, the money or other property which they pay or give for the shares of stock of the corporation."

No doubt the reason for giving this instruction was that several counts of the indictment set up certain transactions by which, as charged, the respondent sold preferred stock of Interstate Oil Corporation and obtained money therefor by false representations as to the dividends which that stock was then earning. For the present purpose we assume that as to such a transaction the instruction was correct. But the indictment also refers to the earnings of the contract covered by the ninth count as "dividends," and charges the respondent with a false representation as to the "dividends" which such "units and interests" were then earning and paying. The term "dividends" is not limited in its significance to the earnings or corporation stock, but is one of quite general meaning. "Both in common and legal parlance, the term implies a portion of a fund divided among several others. * * * The term carries with it the idea of a division of a fund owned by several parties, and the dividend is the aliquot portion of the estate of the common owners." 18 Corpus Juris, 1406; In re Fielding (D. C.) 96 F. 801. As thus defined,

the term could be applied to the payments made as a result of dividing the income of the oil refinery among the persons investing in such contracts as were made with Mrs. Stephens, of which the evidence showed that several were outstanding. In view of the meaning of the term "dividend" and its use in the indictment to designate the payments to be made under the contract here involved, we think the jury must have understood from the foregoing instruction that the Brown Process Company could not pay to Mrs. Stephens the sums called for by that contract, except from its surplus profits; and it may have been by applying such a rule to the above-mentioned evidence as to its financial condition that they concluded that the representations as to the earnings of the contract were false. As we have already stated, this is an erroneous view of the nature and effect of the contract, and the instruction referred to should not have been given without some qualification limiting its application to the payment of dividends on corporate stock. On a new trial it should be omitted altogether, the other counts being disposed of by the acquittal.

The order appealed from is affirmed.

We concur: CONREY, J.; HOUSER, J.

202 Cal. 75

KIER SINGH DOOT v. SKIRVING WAREHOUSE CO. (BEDWELL, Intervener).
(Sac. 3731.)

Supreme Court of California. Sept. 1, 1927.

1. Warehousemen $\S$ 34(7)—Evidence of warehouseman's failure to deliver rice held to sustain judgment for conversion.

In action by one having lien on rice crop for services, evidence of latter's failure to deliver receipts for rice crop in accordance with terms of contract held to sustain findings and judgment for conversion, in the absence of evidence showing justification.

2. Chattel mortgages $\S$ 138(1)—Lien on rice for threshing and hauling held superior to pre-existing mortgage (Civ. Code, $\S$ 3051).

Lien of improver of personal property for threshing, sacking and hauling rice crop, under Civ. Code, $\S$ 3051, held to take precedence over pre-existing chattel mortgage of landlord thereon, in action by such lienholder against warehouseman for conversion for delivering rice in violation of agreement to mortgagee, who intervened.

3. Agriculture $\S$ 14—In action against warehouseman for misdelivery, thresher's lien held not waived by giving receiver option, never exercised, to take rice and pay charges (Civ. Code, $\S$ 3051).

In conversion action against warehouseman for misdelivery by one having lien on rice for

improvement, under Civ. Code, § 3051, lien held not waived by lienholder's agreement giving receiver an option either to take crop and pay lienholder or to have warehouse receipts issued to him; receiver never having elected to take rice and pay threshing charges.

In Bank.

Appeal from Superior Court of Sacramento County; Malcolm C. Glenn, Judge.

Action for conversion by Kier Singh Doot against the Skirving Warehouse Company, in which J. F. Bedwell intervened. Judgment for plaintiff, and defendant and intervener appeal. Affirmed.

William E. Kleinsorge, of Sacramento, for appellant Warehouse Co.

Ralph W. Smith, of Sacramento, for intervener appellant.

Arthur M. Bundy, of Marysville, for respondent.

PER CURIAM. The hearing by this court was granted herein after decision by the District Court of Appeal in and for the Third Appellate District, wherein the judgment of the trial court was affirmed, in order that further consideration might be given by this court to the question presented upon this appeal. Upon such further consideration this court is satisfied with the correctness of the decision of the appellate tribunal, written by Mr. Justice Pullen, pro tempore, and therefore hereby adopt the same as the decision of this court. Such decision reads as follows:

"On the 14th of February, 1920, J. F. Bedwell, the intervener herein, was the owner of certain lands situated in Placer and Sutter counties, which on that date intervener leased to Habib Ulla and Rahmat Ulla, who agreed to pay intervener certain cash rentals and in addition thereto one-third of all crops of rice raised on said lands delivered by them to the warehouse free and clear of all claims and demands. The lease also contained a crop mortgage on one-half of the lessees' interest in the crops which might be grown upon the lands, as security for the faithful performance of all the terms of the lease.

"The first cash payment provided to be paid under the lease was paid, and the lessees went into possession. In the spring of 1920 they planted the lands to rice and about the latter part of November, 1920, began cutting the rice. After having cut approximately 30 acres they were prevented from further cutting of the crop on account of the unseasonable rains.

"Apparently the lessees became financially involved and were unable to proceed further with their farming operations, whereupon the lessees Habib Ulla and Rahmat Ulla and the receiver of the First National Bank of Gridley, who held an unpaid chattel mortgage on the crop of the lessees, and Kier Singh Doot, the plaintiff herein, entered into an agreement in writing wherein Kier Singh Doot, the

plaintiff, agreed to thresh, sack, and deliver to the warehouse all the rice crop at a price in said agreement agreed upon, the receipts therefrom to be divided one-third to the landlord, J. F. Bedwell, and two-thirds to be retained by the warehouseman, and, upon five days' notice to the receiver of the bank, he, at his option, could pay certain designated expenses incurred by plaintiff, whereupon the receipts were to be delivered to said receiver, but, if the receiver should elect not to pay the expenses so designated, the receipts should be issued to plaintiff herein. Thereafter, and in accordance with said agreement, plaintiff threshed, sacked, and delivered the crop of rice to the warehouse of defendant and thereafter the receiver elected not to exercise his option under the agreement and within the time stipulated so notified defendant; thereupon plaintiff demanded that the receipts for two-thirds of the crop be delivered to him, he having already delivered one-third of the rice to the intervener as provided in the lease. About the same time intervener made a similar demand on defendant, claiming that he, the intervener, was the only person entitled to the receipts under the terms of his lease and crop mortgage, and later defendant, ignoring the demands of plaintiff, delivered to intervener the warehouse receipts for all of the rice in controversy, aggregating about 1,725 sacks.

"Subsequently intervener sold all of the rice and after deducting certain expenses for storage charges to defendant applied the balance, \$1,725.79, as a credit upon the cash rental which fell due January 15, 1921, as specified in the lease.

"Plaintiff, being dissatisfied with the disposition of the proceeds of his labor, brought this action against the defendant warehouse company for conversion, and at the proper time the landlord, J. F. Bedwell, intervened and became a party to the action. Defendant denied the allegations of the complaint and set up as a defense that Bedwell was entitled to the possession of all said rice. Bedwell, in his suit in intervention, set up his claim to the rice, and upon the issues joined the cause was tried by the court, and judgment was rendered finding that plaintiff was entitled to the rice in question, less certain charges, and from this judgment both the defendant warehouse company and Bedwell, intervener, have appealed.

"The cause was tried upon the theory that plaintiff had a lien on the crop and the findings are so drafted; but appellants urge that plaintiff waived his lien and in the negotiation between himself and the receiver of the First National Bank agreed to accept two-thirds of the crop in full compensation for his services. Having waived his lien, he took the two-thirds interest in the crop, subject to the liens and crop mortgage entered into between Ulla and Bedwell, of which plaintiff had constructive notice, and, inasmuch as the

cash installment of rent was at that time due, and unpaid, the proceeds from the rice should be applied thereon.

[1] "This is an action in conversion, and there is no doubt in cases of this class as to the burden of proof, for proof of the deposit and failure of the bailee to redeliver in accordance with the terms of the contract makes a prima facie case, and the burden, therefore, is upon the warehouseman to excuse the failure to make such redelivery. *Taussig v. Bode & Haslett*, 134 Cal. 260, 66 P. 259, 54 L. R. A. 774, 86 Am. St. Rep. 250. The evidence in this case fails to disclose any justification by the warehouseman for his failure to deliver and there is no question of the sufficiency of the evidence to support the findings and judgment upon this issue.

[2] "Plaintiff bases his claim to the rice or the proceeds from the sale thereof by virtue of a laborer's lien as provided for by section 3051 of the Civil Code. In the case of *Wilson v. Donaldson*, 121 Cal. 8, 53 P. 404, 43 L. R. A. 524, 66 Am. St. Rep. 17, the court held that a laborer, employed by the occupant of land to harvest a crop of grain, has a lien upon the harvested grain dependent upon his possession thereof under the above section, but his lien is subject to the prior lien of a chattel mortgage upon the growing crop. This case, however, was directly overruled by the case of *Mortgage Securities Co. v. Pfaffmann*, 177 Cal. 109, 169 P. 1033, L. R. A. 1918D, 118, and the rule now clearly is that the possessory lien of the improver of personal property is superior to the pre-existing lien of a chattel mortgage. That plaintiff is entitled to the benefits of such statutory lien as is contemplated by section 3051 of the Civil Code was, in *Wilson v. Donaldson*, supra, recognized for the purpose of that case. And upon principle, to some extent at least, this is recognized by the case of *Douglass v. McFarland*, 92 Cal. 656, 28 P. 687.

[3] "Conceding that respondent is such a person as has rendered such service to the owner of the unthreshed rice as to entitle him to the statutory lien granted by section 3051 of the Civil Code, and that such lien is superior to the recorded chattel mortgage held by the intervener as owner of the lands upon which such rice was grown, has plaintiff done anything to waive the right so conferred by law? Appellants claim that, by the terms of the contract between plaintiff and the receiver of the First National Bank of Gridley and lessees that plaintiff waived his lien, and that he agreed to accept two-thirds of the crop in full of his labor as such, and, having so waived his lien, he took his two-thirds interest in the crop, subject to the terms of the chattel mortgage held by inter-

venor, which mortgage was duly of record, and of which thereby plaintiff received constructive notice.

"The portion of the contract between respondent and the receiver upon which appellant relies is as follows:

"It is understood and agreed by and between the parties hereto that Kier Singh Doot agrees to thresh, sack, and deliver at the nearest available warehouse all of said rice at the price of 55 cents per 100 for threshing, \$2 per ton for hauling to Ketrick Warehouse on N. E. R. R. (or going hauling wage, if to any other warehouse) sacks and twine at market prices, and it is understood and agreed that the warehouse receipts are to be issued one-third to the landlord and the warehouseman is hereby directed to hold the receipts for the two-thirds share until all rice is threshed and delivered, when upon five days' notice in writing to the said A. L. James, receiver, Gridley, Cal., the said A. L. James, at his option, may pay all necessary expenses incurred by said Kier Singh Doot, whereupon the receipts for said two-thirds share shall be issued to said receiver; if said A. L. James shall elect not to pay said expenses incurred by said Kier Singh Doot in said threshing, sacking, and hauling, then said warehouse receipts shall be issued to Kier Singh Doot, and the said receipts shall be Kier Singh Doot's property, free and clear of all claims by said mortgagee, the said First National Bank, A. L. James, receiver; and in such latter event the said Kier Singh Doot agrees to accept the said warehouse receipts for said two-thirds share in full payment for all his charges and expenses in connection with the threshing, sacking, and hauling of said crop. Said A. L. James is to have five days' notice in which to accept or reject said warehouse receipts as herein provided, and it is agreed that he shall, in writing, notify said warehouseman of his election to accept said receipts and pay the said charges and expenses, or he shall, in writing, notify said warehouseman of his election to reject to pay said charges, in which latter event, said warehouseman is authorized at once to issue receipts to the said Kier Singh Doot as herein provided."

"We find nothing in the agreement that supports the claim of appellants. The rule of law we concede to be that, where one enters into a contract, the complete performance of which, according to its true intent and terms, is inconsistent with the existence of a lien given by law, he thereby foregoes and waives the lien which the law would otherwise give him; but there is nothing contained in the language of the agreement referred to that could be construed as a waiver of any claim or possessory right, at least until the receiver had elected to receive the rice and pay for the threshing charges."

For the foregoing reasons, the judgment is affirmed.

FICKLING v. JACKMAN et al. (Civ. 4541.)★

District Court of Appeal, Second District, Division 2, California. Aug. 19, 1927.

Hearing Granted by Supreme Court Oct. 17, 1927.

1. Stipulations ⇨18(1)—Stipulation that mechanic's lien was valid held to preclude defendants from questioning validity.

In mechanic's lien action, stipulation between plaintiff and defendants that plaintiff's claim together with mechanic's lien securing it on the real property described in the complaint was admitted as established and further proof waived, and that claim of another defendant should be deemed established, and that the two mechanic's lien claims should be upon an absolute equality held to preclude defendants from subsequently questioning the validity of plaintiff's lien as insufficiently describing property absent any claim of fraud or mistake.

2. Appeal and error ⇨1047(3)—Striking out testimony respecting trust deed held not ground for complaint, where facts were conceded.

Defendants might not complain because the court struck out a witness' testimony that a trust deed, executed to secure the payment of part of the cost of construction work, could be transferred with the owner's consent and that it was recorded before the work was commenced, where these facts were conceded.

3. Evidence ⇨471(29)—Striking out testimony that trust deed was prior to mechanics' liens held proper as conclusion.

In mechanic's lien action, witness' testimony that a trust deed, given to secure the payment of a part of contract price of construction work, was senior to mechanics' liens subsequently accruing held purely conclusion of law and properly stricken out.

4. Mortgages ⇨151(3)—Where mortgage filed requires advances, lien thereof is prior to mechanics' liens subsequently accruing, but if advances are optional, lien attaches as of date of advances as against incumbrances or liens of which mortgagee has notice.

Where a mortgage filed prior to the commencement of work on a building contains an enforceable obligation binding the mortgagee to advance money or material, the lien of the mortgage for the advances is prior to mechanics' liens subsequently accruing for labor done or materials furnished, but where the mortgage makes it optional with the mortgagee whether to make advances, the lien attaches as of the date of the advancements, at least as against incumbrances or liens of which he has notice.

5. Mortgages ⇨151(3)—Trust deed securing payment of contract price and providing that contractor should furnish labor and materials obligates him to pay therefor as regards priority over mechanics' liens.

Provision of deed of trust given to building contractor to secure the payment of part of the contract price for erecting buildings, that the contractor would furnish all labor and materials necessary for the erection and completion of the buildings, held to obligate the contrac-

tor to pay for all labor done and materials used in erection of buildings as regards question of priority of trust deed over mechanics' liens.

6. Mortgages ⇨151(3)—Lien of deed of trust securing contractor and obligating him to pay for labor and materials held inferior to mechanics' liens (Code Civ. Proc. § 1193).

Under deed of trust given to building contractor to secure to him the payment of the contract price for erecting buildings and obligating him to furnish all labor and materials necessary and thereby requiring him to pay for all labor and materials which was duly recorded, lien of deed of trust held inferior to lien of subsequently accruing mechanics' liens, since, under Code Civ. Proc. § 1193, claim of a contractor is subsequent to claims for work done and materials furnished.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Action to foreclose a mechanic's lien brought by J. M. Fickling against W. T. Jackman, the Hammond Lumber Company, the Title Guarantee & Trust Company, and others. From the judgment of foreclosure, the two defendants last named appeal. Affirmed.

R. L. Horton, of Los Angeles, for appellants.

Peyton H. Moore, of Los Angeles, for respondent.

THOMPSON, J. On July 11, 1921, A. Schneider (since deceased), as owner, entered into a building contract with the defendant W. T. Jackman Company, as contractor, for the erection of a bungalow court. The contract provides that of the total contract price "Ten thousand (10,000) dollars * * * shall be due and payable on or before four years after date of completion of said buildings and shall be payable in installments of two hundred fifty (250) dollars per month beginning thirty days after the completion of the said buildings." After provision for interest at 7 per cent. per annum, it was further stated that the note evidencing this sum "is to be secured by a trust deed on said property and shall be drawn in favor of Kathryn Thompson, a single woman, and shall be filed for record at once. Said note to be put in trust at Hellman Bank till bldg. completed." The deed of trust was signed on July 12, 1921, in accordance with the understanding, and placed of record on the next day, July 13, 1921. On July 14, 1921, Schneider placed the note in the hands of the Hellman Commercial Trust & Savings Bank, with instructions, signed by himself alone, that the note and trust deed, when returned from the recorder's office, should be held by the bank until he should notify them to deliver it to W. T. Jackman Company. It is conceded that the note and trust deed were executed, and the trust deed recorded, prior to the commencement of any work on the

buildings. During the progress of the work the appellant Hammond Lumber Company informed the contractor and owner that it would not proceed further with the delivery of materials unless it were given security superior to its mechanic's lien rights. After some negotiation the trust deed note was assigned and delivered to it, contemporaneously with the following instrument:

"Los Angeles, Cal., September 7, 1921.

"Hammond Lumber Company, 2010 So. Alameda Street, Los Angeles, Cal.—Gentlemen: The undersigned, W. T. Jackman Company, have contracted construction work for Abraham Schneider, part payment for which is a trust deed of \$10,000 made by said Abraham Schneider in favor of Kathryn Thompson. Said trust deed shall be valid only upon completion of the building according to plans and specifications and contract, or upon the owner signing notice of completion.

A. Schneider.

"Abraham Schneider: If building is completed and trust deed is valid, then you shall hold same security to this or any other account of W. T. Jackman Company under terms in accordance with your collateral note pledge, copy of which is hereto attached. Yours truly, W. T. Jackman Company, 4372 So. Hoover St., by W. H. Prince. Kathryn Thompson. 1240 No. Cahuenga."

It is apparent and conceded that Kathryn Thompson had no interest in the note, but held the same for W. T. Jackman Company. Notice of completion was filed December 16, 1921.

The plaintiff and respondent did plumbing work upon the buildings and brought action to foreclose his mechanic's lien. The contest revolves around the question whether the trust deed is superior or inferior to the mechanic's lien of plaintiff. Judgment was entered for the amount of plaintiff's lien, in the sum of \$4,380.23, together with interest and costs, and for the amount of the appellant Hammond Lumber Company's lien, in the sum of \$20,413.23, together with interest and costs. It was further adjudged that upon sale of the property these amounts should be paid prior to the payment of the trust deed note. The appeal is from the judgment.

[1] Appellants assign three reasons for a reversal of the judgment, one of which is that the mechanic's lien of plaintiff is insufficient for the reason that while the buildings were constructed upon lots 31 and 32 of tract No. 3499, the lien of plaintiff only refers to lot 32, and that the description of the property by street number is not satisfactorily complete, because it describes the property "as being 1240 and 1244 Cahuenga avenue," when in fact the property was numbered "1240, 1242, and 1244." Whatever question might have been raised as a result of this description is not available to the appellants, for a very obvious reason. Prior to the trial counsel for plaintiff and counsel for the defendant Hammond Lumber Company and Title Guarantee & Trust Company entered

into a stipulation concerning the facts, the material portions of which read as follows:

"The claim of J. M. Fickling for \$4,055, and interest thereon at 7 per cent. per annum from January 12, 1922, as set forth in his complaint, together with a mechanic's lien, securing said amount, upon the real property described in the complaint of the said J. M. Fickling, is hereby admitted as established, and further proof thereon is hereby waived. * * * The claim of the Hammond Lumber Company, as set forth in its complaint in a certain action instituted in this court, and numbered 105044 of the records of this court, wherein Hammond Lumber Company was plaintiff and W. T. Jackman et al. were defendants, together with its right to a mechanic's lien for the amount of said claim upon the real property described in the complaint in said action, shall be deemed established, and further proof of the amount of said claim and of the right to a lien upon the real property, referred to in said complaint, is hereby waived. * * * It is stipulated that the mechanic's lien claims of the said J. M. Fickling and of the said Hammond Lumber Company, respectively, as above stipulated for, shall be deemed as standing on the same basis, and upon an absolute equality under the law, neither having a preference over the other; it being understood, however, that no stipulation is made as to whether that certain trust deed, executed by Abraham Schneider in favor of the Title Guarantee & Trust Company, upon the real property set up in plaintiff's complaint, and securing a note for \$10,000 in favor of Kathryn Thompson, which said note was assigned to the Hammond Lumber Company, is a prior lien upon said real property superior to the mechanic's lien of J. M. Fickling, the plaintiff above named, the priority between the lien of said trust deed and the lien of the mechanic's lien claim of J. M. Fickling being left for the determination of the court in this action."

It is inconceivable that as between two contestants the lien could be both valid and invalid. It is equally impossible that an invalid claim of lien could stand "upon an absolute equality," with a valid lien. In the absence of any claim of fraud or mistake, the appellants by their stipulation are foreclosed of the right to question the validity of the lien.

[2, 3] Appellants also assert that the trial court committed error in striking out portions of the testimony of the witness Paul Hallingby. The witness was relating a conversation had in the presence of W. H. Prince, representing the Jackman Company, and A. Schneider, and among other things testified that "Mr. Prince said that he could give us the trust deed as security with Mr. Schneider's consent;" that "he said that it [the trust deed] was recorded before any work was done;" and that in response to a query concerning its priority to mechanics' liens Mr. Prince said "that was a point they were very particular about, because they had a sale arranged for this trust deed." Manifestly, appellants cannot complain because of the exclusion of the statements that the trust

deed could be transferred with Schneider's consent, and that it was recorded before work was commenced, for the reason that these facts are conceded. The other statement stricken is in effect that the trust deed was senior to the mechanics' liens. It is purely a conclusion of law on the part of the speaker, and could not possibly have aided the court in its determination. The ruling was proper.

[4] We now turn to the most serious question in the case, whether, under the circumstances of this situation, the trust deed is prior to the mechanics' liens. We collect the rule from the cases of *Savings & Loan Soc. v. Burnett*, 106 Cal. 514, 39 P. 922, *Tapia v. Demartini*, 77 Cal. 383, 19 P. 641, 11 Am. St. Rep. 288, *Hall v. Glass*, 123 Cal. 500, 56 P. 336, 69 Am. St. Rep. 77, *Valley Lumber Co. v. Wright*, 2 Cal. App. 291, 84 P. 59, *Fuller & Co. v. McClure*, 48 Cal. App. 185, 191 P. 1027, *Harper Reynolds Co. v. Hammond Lumber Co.*, 51 Cal. App. 74, 193 P. 97, and *San Francisco Lumber Co. v. Yates*, 54 Cal. App. 109, 204 P. 423, that where the mortgagee in a mortgage recorded prior to the commencement of work on the building is by an enforceable obligation under the duty of advancing money or materials, the lien of the mortgage for the advances is prior to and superior to mechanics' liens subsequently accruing by reason of labor done or materials furnished; but that where, as in the case of *Fuller & Co. v. McClure*, supra, it is optional with the mortgagee named whether he makes the advances, the lien only attaches as of the date of the advancement—at least as against those incumbrances or liens of which he has notice. This result is reached by the law of contract, the promise to advance a definite amount furnishing the consideration for the lien of the mortgage in the one instance, and the advancement itself being the consideration in the other.

[5] The present case, however, instances a situation different from any to which our attention has been directed, in this, that while the beneficiary named was a third party—a stenographer in the employ of the contractor—yet for the purposes hereof it may be deemed (it is conceded) that the beneficiary was the contractor. While by contract there was an enforceable obligation on its part to erect the buildings, there is also included in the provision that it, the contractor, "will furnish all labor and materials necessary for the erection and completion of the buildings"—an obligation on its part to pay for all materials used and labor done in their erection. In the case of *Callan v. Empire State Surety Co.*, 20 Cal. App. 483, 129 P. 978, 981, which was an action brought by the owner against the surety of the contractor to recover moneys paid out to discharge claims for labor and material after

abandonment by the contractor, it was definitely determined that a similar clause in a building contract obligated the contractor, not merely to furnish, but to pay for the labor done and material furnished.

[6] Let us suppose, to give the situation greater clarity, that the contractor in this instance obligated itself to advance to the owner the sum of \$10,000, and that it had failed, neglected, and refused to advance that or any other sum. Could the contractor or its assignee, who stands squarely in its shoes, urge that the trust deed was superior to the liens for labor and material? Yet that is the argument now advanced. To give the lien of the trust deed preference over the mechanics' liens would amount to preferring the contractor to the laborers and materialmen, contrary to the plain intent of section 1193 of the Code of Civil Procedure. By this section the Legislature has declared that the claims for work done and materials furnished shall have a preference over any claim of the contractor, who is primarily obligated therefor, and has said, in effect, that the contract price shall constitute a fund for their protection. It would be grossly inequitable to permit a contractor, through the device of a recorded incumbrance, to gain for himself an advantage over his creditors. And, of course, what he cannot gain for himself, he cannot gain for his assignee. Or to put it another way—and again upon the law of contract—the contractor, having failed to discharge the claims for labor and material in an amount in excess of the trust deed note, has failed in the consideration agreed to be furnished for the trust deed, and the mechanics' liens therefore must be held to be superior.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

LA FRANCE v. KASHISHIAN et ux.*
(Civ. 5064.)

District Court of Appeal, Second District, Division 1, California. Aug. 25, 1927.

Hearing Granted by Supreme Court Oct. 24, 1927.

1. Landlord and tenant §130(2)—Lease which is silent as to guaranty of ownership carries implied warranty of title in lessor (Civ. Code, § 1927).

A lease which is silent as to guaranty of ownership of the leased premises by the lessor carries an implied warranty of the title in him and consequent quiet possession in lessee, in view of Civ. Code, § 1927.

2. Evidence §393(1)—Implied warranty in lease contract cannot be contradicted or varied by parol evidence (Civ. Code, § 1625; Code Civ. Proc. § 1856).

Under Civ. Code, § 1625, and Code Civ. Proc. § 1856, providing that where contract is

written no evidence, except as contained within the contract, may be received, an implied warranty in a contract of lease may not be contradicted or varied by parol evidence, notwithstanding its terms are not set forth in the contract.

3. Evidence $\Leftrightarrow$ 419(9)—Recital of consideration in lease held conclusive and parol evidence to prove other consideration held inadmissible, notwithstanding statute (Civ. Code, § 1625; Code Civ. Proc. § 1856, and § 1962, subd. 2).

Recital of consideration in a lease held conclusive and parol evidence to prove that lessee made agreement to take risk of paramount title in third party as part of the consideration was inadmissible, under Civ. Code, § 1625, and Code Civ. Proc. § 1856, notwithstanding Code Civ. Proc. § 1962, subd. 2, providing that presumption of truth of facts recited in written instrument, does not apply to recital of consideration.

4. Landlord and tenant $\Leftrightarrow$ 180(3)—Where bad faith was not in issue in lessee's action against lessor on implied warranty of title, parol evidence that lessee had taken risk of title held inadmissible (Civ. Code, §§ 3304, 3306).

In a lessee's action against his lessor for damages for eviction from the lease where bad faith of the lessor was not in issue, under Civ. Code, § 3306, providing for a different measure of damages in case of bad faith than ordinarily provided by section 3304 in case of breach of covenant of warranty, parol evidence that lessee had taken risk of title held inadmissible and improperly admitted, notwithstanding contention that it was admissible on damage issue.

Appeal from Superior Court, Los Angeles County; Erwin W. Owen, Judge.

Action by George La France against G. S. Kashishian and wife. Judgment for defendants, and plaintiff appeals. Reversed.

McWhinney & Clock, of Long Beach, for appellant.

Denio & Hart, of Long Beach, for respondents.

HOUSER, J. The salient facts herein appear to be that for a term of 10 years plaintiff leased and hired from defendant a certain piece of real property at a stated consideration of \$25 per month for the first 7 years of the term, and \$35 per month for the remaining 3 years thereof; that approximately 2 years and 10 months after the execution of the lease, plaintiff was evicted from the leased premises by one who had established paramount title to the property; and that thereupon, on account of damages ensuing from such eviction, plaintiff commenced an action against defendant which resulted in a judgment for defendant. It is from such judgment that the appeal herein is prosecuted.

On the trial of the action it was shown that defendant's claim of title to the leased

property was by virtue of a tax title only, which fact was known to each of the parties to the lease prior to its execution, and that the defense interposed by defendant to the action in effect was that before the lease was signed by the parties thereto, a contemporaneous oral agreement was entered into between them, in substance, that in consideration of the low rental to be paid for the use of the property as specified in the lease, plaintiff would take the risk of paramount title being established in another person. The introduction of all evidence tending to show such oral negotiations between the parties, not included within the terms of the lease, was received over plaintiff's objection, and it is upon such claimed error of the court that appellant bases his argument for reversal of the judgment.

As is substantially declared in section 1625 of the Civil Code and section 1856 of the Code of Civil Procedure, the general rule is that where a contract between parties thereto has been reduced to writing, no evidence of terms of the agreement other than as contained within the contract as thus expressed may be received.

[1,2] The lease in question contained no express warranty of title in the lessor. The law, however, seems to be well established that a lease which is silent as to guaranty of ownership of the leased premises by the lessor nevertheless carries an implied warranty of the title in him, and consequent quiet possession in the lessee during the term specified in the lease. Section 1927, Civ. Code; *McDowell v. Hyman*, 117 Cal. 67, 70, 71, 48 P. 984; *Agoure v. Lewis*, 15 Cal. App. 71, 75, 76, 113 P. 882; *Tiffany on Landlord and Tenant*, vol. 1, pp. 518, 540; 24 Cyc. 1057. Coupled with such principle of law, it is contended by respondent, as set forth in several authorities, that an implied covenant of warranty may be rebutted by parol evidence. See *Miller v. Van Tassel*, 24 Cal. 459, 465; *Johnson v. Powers*, 65 Cal. 179, 3 P. 625; 22 Corp. Jur. 1097, 1261. But the weight of authority, especially as bearing upon a matter such as is here presented, is to the effect that an implied stipulation in a contract is of as great force as though it were fully set forth therein, and such implied stipulation may no more be contradicted or varied by parol evidence than may be that which is clearly expressed.

In the case of *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 750, 103 P. 938, 939, among other things, the following appears as the language of the court:

"* * * It is a well-settled principle that that which is implied by law becomes as much a part of the contract as that which is therein written, and if the contract is clear and complete when aided by that which is imported into it by legal implication, it cannot be contradicted by parol in respect of that which is im-

plied any more than in respect of that which is written. * * *

Also, in *Peterson v. Chaix*, 5 Cal. App. 525, 527, 90 P. 948, 954, it is said:

"* * * There is another principle to be observed, namely, that whatever the law implies from a contract in writing is as much a part of the contract as that which is therein expressed; and to the extent that the contract, with that which the law implies, is clear, definite and complete, it cannot be added to, varied or contradicted by extrinsic evidence. * * *

To the same effect, see *California Drilling & Machinery Co. v. Crowder*, 58 Cal. App. 529, 531, 533, 209 P. 68.

Supported by a long list of authorities, the rule is stated in 17 Cyc. 570, as follows:

"The legal effect of a written instrument, even though not apparent from the terms of the instrument itself but left to be implied by law, can no more be contradicted, explained, or controlled by parol or extrinsic evidence than if such effect had been expressed. * * *

We are therefore of the opinion that, so far as the questioned evidence had the effect of varying or contradicting the implied warranty of title of defendant in the leased premises, the contention of appellant should be sustained.

[3] But respondent suggests that the evidence to which appellant objects was admissible for the reason that it involved an element of consideration for the execution of the lease, and as such, came within the general exception to the rule which forbids any evidence which will have the effect of varying the terms of a written contract. Section 1625, Civ. Code; section 1856 and subd. 2 of § 1962, Code Civ. Proc. Subdivision 2 of section 1962 of the Code of Civil Procedure is as follows:

"The following presumptions, and no others, are deemed conclusive: * * *

"2. The truth of the facts recited from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration."

The rule which respondent urges as being here applicable is aptly stated in *Deaver v. Deaver*, 137 N. C. 240, 243, 49 S. E. 113, 114, as follows:

"* * * Where the payment of the consideration is necessary to sustain the validity of the deed or the contract in question, the acknowledgment of payment is contractual in its nature and cannot be contradicted by parol proof, but where it is to be treated merely as a receipt for money it is only prima facie evidence of the payment, and the fact that there was no payment, or that the consideration was other than that expressed in the deed, may be shown by oral evidence. * * *

The difficulty with the situation, so far as the admissibility of the evidence in question is concerned, is that the consideration ex-

pressed in the lease constituted something more than a mere "receipt for money." According to the written stipulation of the parties, the payment of the rent became and was the complete measure of the burden to be assumed by the lessee during the term of the lease, and for which, by the implied covenant of the lessor, the lessee was guaranteed the quiet enjoyment and possession of the leased premises. Anything other than the payment of the rent, to be added to the responsibilities or the duties to be placed upon the shoulders of the lessee, was in effect a modification of the understanding of the parties to the lease as expressed in their written memorandum covering their agreement. The rule for which, respondent contends goes to the vitals of the contract. The price to be paid by the lessee for the privilege of using the land of the lessor was of the greatest importance to the lessee. Whether the price (or consideration) was great or small, whether it consisted of the performance by the lessee of some specified labor, or of the assumption by the lessee of some particular duty or burden, was to him a matter of utmost concern. So far as the lessee, at least, was concerned, the specification of the consideration for the lease went to its very essence. If the written stipulation of the parties in that regard could be varied by the effect of their prior oral negotiations, no limit could be placed on the extent or number of changes which might be permitted. The matter of what consideration was to be paid or yielded by the lessee was thus an essential element of the contract itself, and as such was no more subject to modification by reason of precedent oral representations or promises of either party to the contract than was any other equally important stipulation thereof. The rule, as clearly expressed in 17 Cyc. 661, is approved in the case of *Harding v. Robinson*, 175 Cal. 534, 542, 166 P. 808, 811, where many authorities are cited. It is there said:

"* * * Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of payment of a money consideration, and is of a contractual nature, as where the consideration consists of a specific and direct promise by one of the parties to do certain things, this part of the contract can no more be changed or modified by parol or extrinsic evidence than any other part, for the party has the right to make the consideration of his agreement of the essence of the contract, and when this is done the provision as to the consideration for the contract must stand upon the same plane as the other provisions of the contract with reference to conclusiveness and immunity from attack by parol or extrinsic evidence" (citing many cases).

It follows that on the ground of varying the consideration specified in the lease, the questioned evidence was inadmissible.

[4] But it is urged by respondent that in

any event the evidence to which plaintiff objected on the trial of the action was properly admitted on the question of the amount of damages, if any, to which the plaintiff might be entitled.

In the main, it was plaintiff's contention that the measure of damages was the difference between the rental agreed to be paid and the rental value of the leased premises for the remainder of the term. On the other hand, the defendant contended that the rule which governed the measure of damages was that expressed in sections 3304 and 3306 of the Civil Code as follows:

"The detriment caused by the breach of a covenant of 'seisin,' of 'right to convey,' of 'warranty,' or of 'quiet enjoyment,' in a grant of an estate in real property, is deemed to be:

"1. The price paid to the grantor; or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property;

"2. Interest thereon for the time during which the grantee derived no benefit from the property, not exceeding five years;

"3. Any expenses properly incurred by the covenantee in defending his possession.

"The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

The gist of respondent's contention is that by the provisions of sections 3304 and 3306 of the Civil Code the plaintiff would be entitled to nominal damages only, excepting that if he could show "bad faith" on the part of the lessor, the plaintiff would then become entitled to "the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach"; which in effect (in case of bad faith) would be practically the same damages which plaintiff claimed in any event.

In the absence of governing statute, each of the respective rules has its judicial adherents, with perhaps the weight of authority favoring that announced in 24 Cyc. 1136, as follows:

"The general rule is that the measure of the tenant's damages in case of eviction is the difference between the actual rental value of the demised premises, that is, the value of the use of the premises, and the rent reserved, estimated for the term of the lease, together with other damages naturally resulting from the breach."

Such a rule, however, can have no application in the face of a statute expressing a different measure of damages, such as is contained in the two sections to which reference has been had. Sections 3304 and 3306, Civ. Code.

In the case of *Kline v. Guaranty Oil Co.*, 167 Cal. 476, 140 P. 1, it appeared that, without having title to the property, the defendant leased to the plaintiff certain land. In an action for damages arising from the breach of the covenant for quiet possession, it was held that under either the provisions of section 3304 or section 3306 of the Civil Code, because of the "bad faith" of the defendant, the damages recoverable by the plaintiff "would be those which would ordinarily and proximately follow from the breach of such a contract under the peculiar circumstances which were known to both parties."

It is said in *McCormick v. Marcy*, 165 Cal. 386, 389, 132 P. 449, 451, that:

"The Civil Code provides that the measure of damages for a breach of the covenant of warranty or of quiet enjoyment, in a grant of an estate in real property, is [stating the rule hereinbefore announced in section 3304 of the Civil Code]. This was also the rule of damages in this state before the enactment of the Code. *McGary v. Hastings*, 39 Cal. 369, 2 Am. Rep. 456."

It may therefore be said that, at most, the rule suggested by appellant to the effect that the measure of damages in an action of the character of that before the court is the difference between the rental agreed to be paid and the rental value of the leased premises for the remainder of the term, is correct only where "bad faith" on the part of the lessor is shown to have existed. The transcript of the record of the lower court discloses the fact that on the part of plaintiff no attempt was made to show "bad faith"; in fact, at the close of the case counsel for plaintiff made the statement that "there is no question about that." Nor did the complaint in the action present such an issue. Such being the situation, so far as plaintiff's case was concerned, no occasion existed on the part of defendant to rebut anything in the way of evidence to that effect. It results that on the score of "bad faith," the evidence introduced by defendant, and to which exception was taken by plaintiff, was inadmissible. That such evidence was directly responsible for the judgment which was rendered by the trial court is unquestioned.

It follows that the judgment should be reversed. It is so ordered.

I concur: CONREY, P. J.

85 Cal. App. 180

KAHRIMAN v. FITZGERALD. (Civ. 5226.)

District Court of Appeal, First District, Division 2, California. Aug. 19, 1927.

Chattel mortgages ⚡89—Mortgage held void against third party where automobile remained without county where mortgaged over 30 days, though being repaired and thereafter returned (Civ. Code, § 2965).

Chattel mortgage on automobile held void as to attaching creditor where the automobile was taken from the county where the mortgage was executed to another county where the mortgage was never recorded and remained there for more than 30 consecutive days, though the automobile remained in latter county because of an accident necessitating repairs, and though the automobile was returned to the county where the mortgage was executed long before the attachment, under Civ. Code, § 2965, exempting personal property from operation of mortgage, except between parties, in certain cases.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action in replevin brought by A. K. Kahriman against E. F. Fitzgerald. From a judgment for defendant, plaintiff appeals. Affirmed.

Edward Schary, of Fresno, for appellant.
Roy Fitzpatrick, of Fresno, for respondent.

KOFORD, P. J. This was an action in replevin to recover an automobile. Defendant, as constable, levied an attachment upon the automobile in a suit by a creditor. Plaintiff herein claims against the defendant and superior to the attaching creditor because of a chattel mortgage. Judgment was for defendant upon the ground that plaintiff's chattel mortgage was void. The evidence showed the mortgage was executed in Fresno county, and that thereafter the automobile was taken out of Fresno county and remained in Los Angeles county for more than 30 consecutive days. The mortgage was never recorded in Los Angeles county. The automobile afterwards was returned to Fresno county and remained there for about two years before taken in the attachment suit.

Appellant states that the judgment holding the mortgage void was based solely on Civil Code, § 2965, although respondent points out other reasons for the invalidity of the mortgage. Appellant contends that notwithstanding the provisions of that section the mortgage should not be held to be void because, first, the automobile remained in Los Angeles county by reason of repairs made necessary by an accident there and not by the deliberate intention of the possessor, and, second, because at the time of the attachment it had long since been returned to the county of the execution and recordation of the mortgage.

Both of these contentions are fully disposed of adversely to appellant by *Hopper v. Keys*, 152 Cal. 488, 92 P. 1017.

The judgment is affirmed.

We concur: **STURTEVANT, J.**; **NOURSE, J.**

85 Cal. App. 113

Petition of MORGANSTERN. (Civ. 5485.)

District Court of Appeal, Second District, Division 2, California. Aug. 15, 1927.

1. Attorney and client ⚡61—In proceeding for readmission by disbarred attorney, morals and mental attainments are to be regarded separately in deciding as to mental attainments.

Although in broad and general sense individual's morals, if bad, affect question of mental attainments, in proceeding by disbarred attorney to be reinstated morals and mental attainments should be regarded as separate and distinct as far as deciding on mental attainment is concerned.

2. Attorney and client ⚡61—In proceeding by disbarred attorney for reinstatement, evidence held to show sufficient mental attainment of petitioner.

In proceeding by disbarred attorney for reinstatement, evidence held to show that petitioner had sufficient mental attainment to be attorney.

3. Attorney and client ⚡61—Attorney, disbarred for acts involving high degree of moral turpitude, should be reinstated only on clear and convincing proof of reform.

Attorney, disbarred for acts involving high degree of moral turpitude, should be reinstated only on clear and convincing evidence amounting to overwhelming proof of reform, based on conduct sufficient time after disbarment to show such reform.

4. Attorney and client ⚡61—Eleven months' residence in state after disbarment held not sufficient time to prove reformation of gambling habits which caused improper acts resulting in disbarment.

In application by disbarred attorney to be reinstated, eleven months' residence in state after disbarment held not sufficient time to prove reformation of gambling habits which led to acts resulting in his disbarment.

Original application by Alfred J. Morganstern for reinstatement as an attorney at law. Application denied.

Curtis Hillyer, of San Francisco, and Alfred J. Morganstern, of San Diego, for petitioner.

Wirt Francis and Eugene Daney, Jr., both of San Diego, for respondent San Diego Bar Ass'n.

WORKS, P. J. Petitioner was admitted to the bar of California in 1889. He took up his residence in San Diego in 1908 and engaged

in a lucrative law practice in that city from that time to the period of his disbarment. The judgment which thrust him from the profession was entered January 9, 1922, pursuant to an accusation which was filed September 6, 1921. The grounds of the accusation are stated in the opinion *In re Morganstern*, 61 Cal. App. 702, 215 P. 721, in which the judgment of disbarment was affirmed upon appeal.

Petitioner's application in the present proceeding was filed October 2, 1926. Thereafter, and following the filing of an answer to the petition by respondent San Diego Bar Association, the matter was sent to referees for the taking of evidence and for findings upon the questions whether petitioner is possessed of both the mental and moral qualifications entitling him to readmission to the bar. The referees took evidence, as directed, and have filed their findings. One of the findings is to the effect that there is such doubt as to petitioner's mental qualifications as to render necessary an examination to test them. To this finding one of the three referees entered his dissent. The written exception of petitioner to the finding has been interposed.

Upon the score of petitioner's mental qualifications we shall refer to the testimony, given before the referees, of several of those who were the associates of petitioner as fellow practitioners at the bar of San Diego before his disbarment. One of these said:

"I have not seen him in court this last year, but speaking to him and seeing him personally I see no difference in his mental attitude now and what it was when he was practicing law. * * * He is very acute; he is a good lawyer; he is a good trial lawyer. * * * [I believe] he has the ability to perform the duties of an attorney at law in an efficient and able manner. * * *

Another lawyer testified:

"Q. Have you had an opportunity to judge of his mental and legal attainments? A. Well, I have always regarded Mr. Morganstern as a very brilliant man, a man with a wonderful mind, and a man of some attainments, and as I said, I regard him as rather brilliant. * * * [U]nless he has deteriorated since he has been disbarred I regarded him as competent then, and I have no reason to change my opinion. * * * I have seen him and I have not seen any evidence of deterioration. * * * I say if he has abandoned [certain bad habits which will be referred to later in this opinion] he certainly has the ability; he is brilliant; he is learned; he is shrewd and competent in every way."

Another testified:

"Q. In your opinion, has he the ability and requisite degree of facility with which to enable him to practice law with credit? A. I should say, so far as his mental attainments and legal attainments are concerned, that he had; yes.

"Q. He has at the present time? A. Yes, sir."

Another lawyer said:

"Mr. Morganstern possesses a mentality that is considered by many unequaled at least in this city, and not surpassed by many men at the bar anywhere. * * * [H]e is so considered by the bar. * * *

"Q. And that is your opinion, too? A. From my own experience with him, from hearing him discuss cases, hearing him argue cases, my knowledge of his briefs, that is my opinion.

"Q. Have you talked with him or seen him * * * the past year? A. Oh, yes; naturally.

"Q. Have you seen any signs of mental deterioration? A. No. * * *

Yet another member of the bar said:

"I regard Mr. Morganstern as one of the very best attorneys I have ever known in my life, either here or where I practiced before, both as a consultationist, as a jury lawyer, or as a court lawyer. He has the finest legal memory of any lawyer I ever met and equalled only by one other lawyer I think that I have met. * * *

Finally, yet another lawyer testified:

"His legal qualifications I would say are the best.

"Q. How about his mental? A. Of the best."

[1] No evidence was offered in contradiction of these flattering testimonials. Further, at the oral argument before us in the present proceeding, the counsel for respondent Bar Association conceded petitioner's mental attributes and remarked that in his view the proceeding must turn upon the question of petitioner's moral qualifications. We can understand the finding of the majority of the referees only upon the theory that they viewed the question of petitioner's moral attributes as affecting his mental qualifications. In a broad and general sense, of course, the morals of an individual, if bad, will affect the question of his mental attainments, but in a proceeding like the present the two attributes are to be regarded as separate and distinct each from the other.

[2] We regard petitioner as one of those—following the language of the Supreme Court—"concerning whose grasp of the law there is no question." *In re Stevens*, 197 Cal. 408, 241 P. 88. The finding which expresses a doubt as to his mental qualifications cannot stand.

We turn now to the controlling branch of the proceeding. The referees all joined in a finding that petitioner "does not possess the moral qualifications required to be possessed by a person exercising the office of an attorney and counsellor at law." Petitioner takes written exception to the finding.

While petitioner was disbarred because of the commission of the certain specific acts charged in the accusation against him, it is practically conceded that his delinquencies were accountable to and arose from his inordinate passion for gambling. In this pro-

ceeding petitioner himself has frankly testified:

"Q. Reference has been made in cross-examination of some of these witnesses to your reputation here with regard to visiting the race track and gambling and issuing checks. A. All quite true. I know of nothing in the way of amusement that I am as fond of as a horse race. I know of nothing, that is I know of no man who has had a greater obsession for gambling than I did; no matter what my earnings were, at the end of the year I was in debt. I cannot remember a single year that I did not owe some bank money at the end of the year. * * * I want to say * * * that there never was an irregularity in my life, never an unhappiness in my life, that was not traceable directly to [gambling]. * * * I was on one occasion, and it was told of me around here with a good deal of gusto, I went to Tia Juana many years ago and lost a great deal of money playing faro bank. I had a dollar or two left and sat down and played a game called pangingi where the stakes were five cents, and they tell me that I spent the remainder of the night playing that game after losing thousands of dollars. In other words, it was the passion of playing. * * *

In one place in his testimony petitioner said, with a context showing that he intended to apply the observation to himself:

"I don't know whether you understand from observation what is meant by a card drunkard."

We are to inquire here, then, not whether, since his disbarment, petitioner has refrained from the commission of acts similar to those which led to the judgment removing the ermine of the profession from him, but whether his passion for gambling has been put under foot. Upon this broad issue must the present proceeding be determined.

[3] Certain principles affecting the question before us, under the testimony developed before the referees, have been laid down in the decided cases. One who has been disbarred for acts involving a high degree of moral turpitude—and those committed by petitioner were of that character—"should not be reinstated in the ranks of the legal profession except upon the most clear and convincing, nay, we will say upon overwhelming, proof of reform," proof which we could with confidence lay before the world in justification of a judgment again installing him in the profession. In re Cate, 60 Cal. App. 279, 212 P. 694. When an attorney has been disbarred, his readmission to the profession "should only come when he has lived long enough after his disbarment in honorable intercourse with his fellow citizens to demonstrate that he is both tried and true." In re Shepard, 35 Cal. App. 492, 170 P. 442.

[4] The element of time necessarily is to be considered in determining whether evidence of reform is sufficient to entitle an applicant to readmission under the language of the first of these quotations, and it is specifically con-

templated by the language of the second. It is to this element of time that we now propose to address ourselves.

Petitioner's application for readmission was filed a little less than four years and nine months after the judgment of disbarment which was pronounced against him. Soon after the judgment was rendered he went to Europe, after consultation with certain officers of the United States government at Washington, upon a mission to European governments, which was highly creditable to him and which brought him in touch with prominent officials of foreign countries. After spending some considerable time abroad, he returned to the eastern part of the United States, and, after conferences there, again went to Europe. He did not return to California until eleven months before the filing of his petition for readmission to the bar. These circumstances, to our minds, exert a controlling influence over the disposition of petitioner's application. He testified before the referees, it is true, that he has overcome his passion for gambling, and he pledged himself in the most solemn manner never to engage in the practice again. We are not under the slightest impulsion to discredit his asseverations in these respects. On the other hand, we yield to them full credit. As far as we may judge from the typewritten page, his attitude is marked by the highest degree of sincerity, his mind is colored by the healthful influence of a high resolve. He undoubtedly believes that his reform is permanent. If his rights alone were involved, we should not hesitate to order his readmission. We confess a feeling of deep sympathy for this mind which has emerged from turmoil into a sense of triumph. The promptings of charity forbid us wantonly to utter a word which may change this feeling to one of discouragement or despair. The public interest in the issue of this proceeding, however, is paramount to every consideration looking alone to the fate of petitioner. Under all the circumstances shown by the record, we cannot yet confide in a conclusion that petitioner's reform is complete and final, and it would be unfair to the public interest to order a readmission except upon a feeling, bordering upon conviction, that he has forever put under foot the temptations of the past.

The shortness of petitioner's actual residence in California since his disbarment materially affects the conclusion which we shall reach. He has not been long enough in the state—the scene of his old temptations—to satisfy us that he has finally risen above the old practices and to make us join in the feeling of confidence which so thoroughly imbues him. He has not been here long enough to prove himself among those to whom, as the record shows, extreme publicity of his former habits was given—those who with diligence and sometimes with venom will be scrutinizing his every act. For these reasons, and for

these alone, we think the finding of the referees as to lack of moral qualifications must be upheld.

The finding of the referee which expresses a doubt as to petitioner's mental qualifications is set aside. The finding that he lacks moral qualifications is adopted as the finding of the court. The petition for readmission to the bar is denied.

We concur: CRAIG, J.; THOMPSON, J.

85 Cal. App. 8

DICKEY v. KUHN et ux. (Civ. 5824; S. F. 11599.)★

District Court of Appeal, First District, Division 2, California. Aug. 9, 1927.

Hearing Denied by Supreme Court Oct. 7, 1927.

1. Judgment ⇨720—Judgment, in suit to cancel note for fraud and want of consideration, conclusively determined those issues.

Judgment in suit to cancel note, given as part of purchase price for restaurant, because of fraud and want of consideration because seller failed to procure landlord's consent to assignment of lease, conclusively determined issues of fraud and want of consideration, and in later suit on note evidence regarding assignment of lease should not have been admitted.

2. Sales ⇨345—Where lease was to be assigned only upon payment of note, tender of lease was unnecessary before suit on note.

Court having found in previous suit to cancel note that lease covering premises of restaurant, for which note was given, was to be assigned only upon payment of note, it was unnecessary for seller of restaurant to tender assignment of lease before commencing action on note.

3. Sales ⇨345—Assignment of lease of premises, on which restaurant sold was located, before suing on note for restaurant was excused by buyer's abandoning premises (Civ. Code, § 1511).

If tender by seller of restaurant of premises, on which restaurant was located, was necessary before commencing suit on note for purchase price of restaurant, such tender was excused by action of buyer of restaurant in abandoning premises, under Civ. Code, § 1511.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by John Dickey against A. Kuhn and wife upon a promissory note. From a judgment for defendants, plaintiff appeals. Reversed.

Clarence De Lancey, of San Francisco, and Ramsey Probasco, of Oakland, for appellant.

Clark, Nichols & Eltse, of Berkeley, for respondents.

NOURSE, J. Plaintiff sued upon a promissory note in the sum of \$3,500. The cause was tried before a jury and resulted in a

verdict in favor of the defendants. From the judgment following the verdict the plaintiff has appealed upon a typewritten record.

The litigation arises out of a written contract, executed July 31, 1922, wherein the plaintiff sold to the defendants a restaurant located in the city of Berkeley for the agreed purchase price of \$5,000. Pursuant to the contract the defendants paid the plaintiff \$500 in cash and executed and delivered to the plaintiff three promissory notes, one for \$500 payable August 10, 1922, one for \$500 payable August 30, 1922, and one for \$3,500 payable January 31, 1923. Respondents took possession of the restaurant on July 31, 1922, and paid the first promissory note within a few days after it became due. Prior to the due date of the second promissory note the defendants in this action commenced a suit in the superior court to rescind the contract of sale upon the grounds of fraud and misrepresentation. In the complaint filed in that action the contract of sale was pleaded in full and several charges of fraud were alleged, among which was the failure of the seller to procure the landlord's consent to an assignment of the lease of the premises in which the restaurant was operated. In this connection the complaint alleged that:

"Defendant has not produced any lease for the said premises, and plaintiffs are informed and believe, and upon such information and belief, state the facts to be, that the defendant cannot give them such lease as aforesaid."

It was also alleged in the complaint in the former action that, in addition to the moneys paid on account of the contract, the purchasers had given one promissory note in the sum of \$500 then due, and one for the sum of \$3,500 due January 31, 1923. Damages were claimed in the sum of \$5,400, "which said sum will be reduced by the amount of \$4,000 whenever the defendant gives up to be canceled the said notes." The prayer of the complaint in that action was that the defendant be required to give up these notes for cancellation or that the plaintiffs have a proper judgment to relieve them against all liability of the notes, and that the defendant be required to pay to the plaintiffs the moneys theretofore paid out by them.

In answer to the complaint in that action the defendant denied all the allegations of fraud, and specifically alleged that the lease to the premises was agreed to be transferred to the plaintiffs only upon the payment in full of the purchase price of the business and that the failure of the plaintiffs to pay the purchase price of the business was the reason for the failure of the defendant to transfer the lease. By way of cross-complaint the defendant in that action then pleaded the promissory note for \$500 which was then due and demanded affirmative relief to that ex-

tent. In answer to this cross-complaint, the plaintiffs in that action alleged that the note sued upon was void for want of consideration, and that it "is one of the notes, the cancellation of which is in issue in this action."

Upon the trial in the action for rescission, judgment went in favor of the defendant, who is the plaintiff and appellant herein, on findings adverse to the plaintiffs on all their charges of fraud and misrepresentations. Judgment was also given the defendant therein on his cross-complaint for the promissory note of \$500. In reference to the defendant's failure to transfer the lease, the trial court found:

"That it is true that said lease to said property was to be transferred to plaintiffs only upon the payment in full of the purchase price of said business; that said purchase price has not been paid in full; that said lease has not been transferred to the plaintiff."

On the issue of damages the trial court found that it was not true that the plaintiffs had been damaged in the sum of \$5,400, or any other sum whatsoever, but "that said equipment, utensils, and property comprising the said restaurant was of the reasonable value of \$5,000."

The plaintiffs in the former action perfected their appeal from the judgment as entered, and pending said appeal the note for \$3,500 fell due and this action was instituted by the plaintiff herein for its collection. To the complaint filed herein the defendants pleaded the same charges of fraud which had been litigated in the former action and also alleged that:

"The validity of the said note is involved in this court in cause No. 70390, which said cause of action is now on appeal to the appellate court of the state of California."

On November 26, 1922, and prior to the decision in the superior court in the original suit for rescission, the purchasers under the contract (the plaintiffs in that action) abandoned the premises without a notification to the defendant therein. On February 8, 1923, the judgment denying relief to the purchasers was entered, and this judgment was affirmed by the District Court of Appeal on March 18, 1924 (66 Cal. App. 227, 225 P. 867). Upon the return of the remittitur the appellants in that action, having delayed prosecuting this action upon the promissory note on the ground that the same note was involved in the action on appeal, filed an amended answer setting up the failure of the seller to procure the written consent of the landlord to the transfer and assignment to the purchasers of the lease to the premises wherein the restaurant was conducted, and also alleged that because of a controversy between the landlord and the seller it had become impossible for the latter to procure the landlord's consent to such a transfer. For this

reason it was claimed that the consideration for the note in suit had failed.

Upon the issue so framed the cause went to trial before the court sitting with a jury. The plaintiff made proof of the note in suit and rested. The defendants thereupon sought to establish their allegations of fraud and want of consideration, and particularly the failure of the plaintiff to procure the written consent of the landlord to the assignment of the lease. Objection was made to this testimony upon the ground that it was a matter adjudicated in the prior action. The trial judge held that nothing had been decided in the former case regarding the note in suit, and overruled the objection. Thereupon evidence was received over the objection of the plaintiff, which went to show that at some time after the defendants had taken possession of the premises the plaintiff had had a controversy with the landlord over the matter of the assignment of the lease, and that the landlord had declined to consent to the assignment until the plaintiff satisfied a claim which the landlord made against him, amounting to approximately \$100.

Throughout the trial, and on this appeal, the plaintiff and appellant herein insisted that the trial of this issue was merely a retrial of the issue presented in the former action, based upon some new evidence showing this controversy between the landlord and the appellant. It is pointed out that the action for rescission was based upon fraud and want of consideration, and that the \$3,500 note, as well as the whole purchase price, was definitely put in issue in that action; that the question of consideration was found adversely to the purchaser; that this appellant was given judgment in the former action under his cross-complaint upon the \$500 note which was identical with the one here in suit, except as to amount, and which was put in issue by the purchasers in the same way; that in the former action it was found that the seller was under no obligation to transfer the lease until the full purchase price had been paid.

In *Bingham v. Kearney*, 136 Cal. 175, 177, 68 P. 597, the Supreme Court, in discussing the application of the rule of *res adjudicata*, said:

"It is not the policy of the law to allow a new and different suit between the same parties, concerning the same subject-matter, that has already been litigated; neither will the law allow the parties to trifle with the courts by piecemeal litigation."

In *Quirk v. Rooney*, 130 Cal. 505, 510, 62 P. 825, 827, it is said:

"But the plaintiff had her day in court, her case was tried upon the evidence she then had, and a final judgment reached. If a new action could be commenced, and a case retried, because of the discovery of new facts, after the case had been finally disposed of, there would

be no end of litigation, and a case could be kept in court forever."

We find the rule aptly stated in 23 Cyc. 1215, as follows:

"A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and cannot again be litigated in any future action between such parties or privies, in the same court, or in any other court of concurrent jurisdiction, upon the same or a different cause of action."

This whole subject has been recently considered by our Supreme Court in *Price et al. v. Sixth District Agricultural Ass'n*, 258 P. 387, and nothing is to be gained by reiterating the rules of law stated in that opinion.

[1] Here the validity of the \$3,500 note was definitely put in issue in the former action where it was specifically pleaded that, after having been issued through fraud and as a part of the purchase price of the restaurant, the consideration for it had failed. This allegation was followed with a prayer that this particular note be followed up and canceled, and that the plaintiffs therein have judgment protecting them from any liability upon this note. The judgment adverse to the plaintiffs on that issue having become final, it conclusively determined both the issue of fraud and of want of consideration. The finding in the former action that the lease was not to be assigned until the full purchase price had been paid precluded any testimony in the second trial tending to show that this assignment should have been made at a different time or that because of a controversy with the landlord the appellant might have had some difficulty in procuring the assignment if the respondents had elected to stand by the contract and satisfy the note on its due date.

[2, 3] It is argued that, notwithstanding the manifest error in retrying before this jury the issues adjudicated in the former action, the judgment should be sustained because the respondents offered a good defense in the showing that the appellant had failed to tender an assignment of the lease before commencing this action on the note. The obvious answer is that, the court having found in the former action that the property sold, exclusive of the lease, was of the value of \$5,000 and that the lease was to be assigned only upon the payment of this note, the tender should have come from the respondents rather than from the appellant. Furthermore, if any tender by appellant were necessary, it was excused by the action of the respondents in abandoning the premises—an action which at least made a tender fruitless, if it did not wholly put it out of the power of the appellant to secure the landlord's consent to

an assignment of the lease. *Hulen v. Stuart*, 191 Cal. 562, 569, 217 P. 750; *Hoppin v. Munsey*, 185 Cal. 678, 685, 198 P. 398; Civ. Code, § 1511.

Other errors are assigned by the appellant, but because of the foregoing views the judgment must be reversed, and it is, therefore, unnecessary to discuss them.

Judgment reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a hearing herein in this court is denied. We, however, withhold our approval from that portion of the decision of the appellate tribunal wherein it seems to have been held that the judgment in the former action was res adjudicata as to whether the defendant in the action would have had the right to show that upon the due date of the note sued upon herein he had offered or was prepared to pay the same, but that the plaintiff was then unable to procure the assent of the original landlord to a transfer of the lease, and that for that reason the consideration of said note had failed. Having, however, abandoned the premises prior to the due date of said note, and having never offered to pay the same upon the above conditions, he was no longer entitled to defend against its payment upon that ground.

85 Cal. App. 255

ASSOCIATED CREDIT EXCHANGE OF
SAN FRANCISCO v. BARNETT, Justice of
the Peace. (Civ. 5881.)

District Court of Appeal, First District, Division 1. California. Aug. 26, 1927.

1. Certiorari ☞9—Granting certiorari rests within court's discretion.

Certiorari is not a writ of right, the granting or refusing of it being discretionary with the court.

2. Certiorari ☞6—Certiorari will not issue where right of appeal existed, though lost by delay.

Where the right of appeal existed, certiorari will not issue whether the writ be applied for prior to or after the expiration of the time limited by law for such appeal.

3. Justices of the peace ☞194(2)—Where there was right of appeal from justice's court to superior court, certiorari would be denied (Code Cr. Proc. §§ 859, 974, 975, 980, 1068).

Where petitioner for certiorari, claiming that justice's court violated limitation statute (Code Cr. Proc. § 859) in setting aside default judgment, had right of appeal to superior court, under sections 974, 975, and superior court had power to vacate judgment, under section 980, writ would be denied, in view of section 1068, providing that a writ of review may be granted when "there is no appeal."

Application for certiorari by the Associated Credit Exchange of San Francisco to annul an order of A. T. Barnett, Justice of the Peace of the State of California in and for the City and County of San Francisco, setting aside a default judgment. Writ denied.

F. H. Ainsworth, Jr., of San Francisco, for petitioner.

Jacob S. Meyer, of San Francisco, for respondent.

KNIGHT, J. A proceeding in certiorari has been instituted herein for the purpose of reviewing and having annulled an order made by respondent, as justice of the peace, setting aside a default judgment, the ground of the application being that the motion pursuant to which said order was made was not presented within the limitation of time fixed by statute.

The facts are as follows: Petitioner brought an action in the justice's court in claim and delivery to recover possession of a sewing machine or its alleged value, \$122. Although personally served with summons, the defendants failed to appear and on April 12, 1927, judgment by default was entered against them in accordance with the prayer of the complaint. On the following day the clerk of said court mailed to the defendants a notice of the entry of judgment, addressed to them at their San Francisco address. On the ninth day thereafter, and on April 22d, said defendants served and filed a notice of motion, supported by affidavit, that on April 25th, twelve days after the mailing of the notice of the entry of judgment, they would move said court to set aside the default judgment, one of the grounds urged in support of the motion being that defendants held a receipt in full for the debt sued upon. In accordance with said notice of motion said justice fixed April 25th as the time for hearing said motion, and on May 2d granted the same. Subsequently, and on May 9th, the action was tried on the merits, petitioner participating in the trial by producing witnesses in support of its case, the substance of whose testimony was, as the petition herein alleges, that the receipt held by defendants "was given in error, and that said defendants were erroneously credited with the payment on their account which should have been credited on the account of a third party, and that said defendants were still indebted to said company in the sum of \$25." The trial resulted in the entry of a judgment for the defendants, and on May 12th the present proceeding was commenced.

Petitioner contends that section 859 of the Code of Civil Procedure, from which justice's courts derive power to act in default matters, requires not only that a notice of motion to set aside a default judgment be given within ten days after notice of the entry of judgment, but that the motion itself must be presented within the

same limitation of time, and that since the motion in the present case was not presented within the period of time mentioned, the justice's court was without legal authority to grant the same.

Section 1068 of the Code of Civil Procedure provides:

"A writ of review may be granted by any court, except a police or justices' court, when an inferior tribunal, * * * exercising judicial functions, has exceeded the jurisdiction of such tribunal, * * * and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy."

As stated in California Jurisprudence (vol. 4, p. 1054), the provision of the section quoted "is not limited to the case where no appeal lies to the court petitioned for certiorari, but applies where no appeal lies to a court of common law jurisdiction, which can itself in a proper case issue the writ. Consequently, the latter will not be granted by the Supreme Court or the District Court of Appeal to review the judgment of a court of limited jurisdiction where the right of appeal to the superior court exists."

[1, 2] In other words, certiorari is not a writ of right, the granting or refusing to issue it resting in the discretion of the court; and it will not be issued where the matter sought to be reviewed can be heard and determined on appeal (*Olcese v. Justice's Court of the First Judicial Tp. of Contra Costa County*, 156 Cal. 82, 103 P. 317); furthermore, it is immaterial whether the writ be applied for prior to or after the expiration of the time limited by law for such appeal, the controlling question being whether the right of appeal exists, and not whether advantage has been taken thereof (*Postal Telegraph-Cable Co. v. Superior Court of Yolo County*, 22 Cal. App. 770, 136 P. 538; *Maidenberg v. Justice's Court, of Los Angeles Tp.*, 32 Cal. App. 686, 163 P. 872; *McCue v. Superior Court*, 71 Cal. 545, 12 P. 615).

[3] As shown by the facts hereinabove set forth, petitioner proceeded to trial on the merits in the justice's court after the order now claimed to be void was granted, by adducing evidence in support of its complaint, with the result that an adverse judgment was obtained. Therefore sections 974 and 975 of the Code of Civil Procedure afforded petitioner a remedy by appeal from that judgment to the superior court on questions of law, which, if invoked, would have subjected to review "all orders affecting the judgment appealed from," the order setting aside the judgment by default being necessarily included therein; and the superior court would have been given power, in the exercise of its appellate jurisdiction, to annul the latter order and to vacate the judgment appealed from, without granting a new trial. Code Civ. Proc. § 980. Assuming, therefore, as petitioner contends, that the justice's court was without legal author-

ity to grant the order complained of because of the failure to present the motion therefor within the limitation of time fixed by said section 859 (Simon v. Justice's Court, 127 Cal. 45, 59 P. 296; Storey v. Mueller, 21 Cal. App. 301, 131 P. 763; Roberts v. Justice's Court of Los Angeles Tp., 29 Cal. App. 768, 157 P. 511), no valid reason appears why the matter now sought to be reviewed on certiorari should not have been presented, heard, and determined on appeal to the superior court; consequently, under the decision in Olcese v. Justice's Court, supra, the writ should be denied. It is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

85 Cal. App. 199

OHSAKI et al. v. AHERN. (Civ. 5814.)

District Court of Appeal, First District, Division 2, California. Aug. 22, 1927.

Landlord and tenant $\S$ 213(5)—Lessees having no time to plant rice crop because of foreclosure sale held entitled to recover rent paid.

Where leased land was sold under foreclosure proceedings, lessees losing possession before they had time to plant crop for first cropping season under lease held entitled to recover entire amount of advance rent paid, as against contention of lessor that their recovery was limited to value of lease as whole which was claimed to be less than rent reserved, regardless of whether lessees' action be regarded as one to recover fruits of rescission or to recover rent paid in advance.

Appeal from Superior Court, City and County of San Francisco, Pat R. Parker, Judge.

Action by Kansaburo Ohsaki and another against W. J. Ahern to recover money paid under a lease. From a judgment for plaintiffs, defendant appeals. Affirmed.

L. M. Hoefler, Finlay Cook, and George F. Snyder, all of San Francisco, for appellant. Crofton & Wetmore, of Marysville, and Charles A. Wetmore, Jr., of San Francisco, for respondents.

KOFORD, P. J. Defendant appeals from a judgment of \$6,000 upon the ground that the court applied the wrong measure of damages.

Defendant leased to plaintiffs a tract of rice land in Sutter county for the term of three cropping seasons. Plaintiffs paid \$6,000 rent in advance, which was, as the lease stated, the rent for all the first year and part of the second. Owing to defendant's failure to pay, when due, a deed of trust which he had previously executed, the land was sold under foreclosure proceedings. The purchaser, as the new owner, asserted his rights superior to the rights of plaintiffs under their lease, and plaintiffs thereupon surrendered to him. The lease was executed

November 16, 1920. The deed of trust fell due January 1, 1921, and title passed out of defendant by foreclosure May 7, 1921. The plaintiffs therefore obtained no benefit whatever from the lease, as they did not have time to plant a crop for the first cropping season. The plaintiffs served on defendant proper notice of rescission of the lease and demanded back the \$6,000 upon the ground of failure of consideration. Judgment was for plaintiffs upon this theory.

It is the claim of defendant that the court should have applied what he claims to be the correct and only measure of damage for eviction; i. e., the difference between the rent reserved and the value of the use and occupation. He claims he had the best of the bargain, that the rent reserved was much greater than the value of the use and occupation, and that, therefore, the plaintiffs cannot recover the full amount paid, but only the value of their lease as a whole, having regard to the claim that the agreed rent was more than the use of the land was worth. If defendant wanted to keep the benefit of his bargain, he should have performed his part of it. His argument takes no account of the fact that the rent was paid in advance for a part of the term not enjoyed. Plaintiffs were awarded no damages for the violation of their contract right to occupy the land in exchange for the agreed rent. Defendant gave to plaintiffs no enjoyment of the leasehold and is not entitled to keep the rent paid in advance for it any more than he could recover unpaid rent for a period after eviction. Mallette v. Hillyard, 117 Ga. 423, 43 S. E. 779; Underhill on Landlord and Tenant, $\S$ 334, 697, and 698.

Whether this be an action to recover the fruits of a rescission for an entire failure of consideration or an action to recover rent paid in advance for a period of leasehold subsequent to an eviction, the judgment for the amount paid in advance by the plaintiffs is correct.

Judgment affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

85 Cal. App. 173

FARMERS' & MERCHANTS' NAT. BANK
OF LOS ANGELES v. ZIEGLER et al.
(Civ. 5494.)

District Court of Appeal, First District, Division 1, California. Aug. 19, 1927.

1. Sales $\S$ 359(1)—Evidence held to support finding that consideration for note had not failed.

In action on note given for interest in lease and garage equipment, defended on ground of failure of consideration through failure of payee, who leased from makers of note, to pay rent for premises during term of lease and to keep garage open day and night, as agreed, evidence that lease was of greater value than when it and tools and equipment were purchased by defend-

ants *held* to support trial court's finding that consideration for note had not failed.

2. Sales ⚡347(2)—Lessors' agreement to accept new tenant held to preclude their defense of failure of consideration on note, through failure of first tenant to pay rent.

In action on note given for lease and garage equipment, where defendants, makers of note, leased garage to payee, who paid two months' rent in advance, which was credited on first and last months of year, and within month from execution of lease to him payee and defendants agreed in writing to substitute new tenant, who was accepted by defendants, defense of failure of consideration because of first tenant's failure to pay rent could not be set up by defendants, when sued on note by indorsee.

3. Bills and notes ⚡384—Holder of note transferred in good faith for value before maturity is not subject to counterclaim or offset existing against prior party.

Under both Code and law merchant, holder of negotiable note, transferred in good faith, for value, before maturity, is not subject to counterclaim or offset existing against any prior party.

4. Bills and notes ⚡384—No Code provision in regard to set-offs and counterclaims affects negotiability of commercial paper or right of bona fide transferees.

No Code provision in regard to set-offs and counterclaims affects negotiability of commercial paper, or right of bona fide transferees of notes for value before maturity.

5. Bills and notes ⚡525—Evidence held to sustain finding that agreement to keep garage open was not part of transaction in which note was given, so as to put indorsee of note on notice thereof.

In indorsee's action on note, defended on ground of failure of consideration, evidence *held* to support finding that agreement by payee to keep garage open day and night was not contemporaneous with note and part of same transaction, so as to put indorsee on notice thereof.

Appeal from Superior Court, Los Angeles County; Paul Burks, Judge.

Action by the Farmers' & Merchants' National Bank of Los Angeles against Clara B. Ziegler and husband. From a judgment for plaintiff, defendants appeal. Affirmed.

Francis D. Adams and Earl Curtis Peck, both of Los Angeles, for appellants.

Lawler & Degnan and M. Felix, all of Los Angeles, for respondent.

CAMPBELL, Justice pro tem. This is an action brought by plaintiff to recover from defendants \$11,500, together with interest and attorney's fees, alleged to be due and owing on a certain promissory note, and assigned to Farmers' & Merchants' National Bank by F. C. Trickey, the payee named in the note, which assignment is alleged to have been made before maturity and in the usual course of business. The complaint is in the usual

form of an action on a promissory note. The answer denies that the note was assigned before maturity in the usual course of business, and alleges that the note has been fully satisfied and discharged; and as a further and separate answer and defense, the defendants allege that by reason of the failure of F. C. Trickey, the payee in the note, to pay the rent for certain garage premises according to the terms of his lease, and his failure to keep the garage open day and night as a first-class garage, such lease and leasehold have been abandoned, and the consideration for the note for \$11,500 has wholly failed.

The defendants, as owners, on or about December 1, 1921, leased to one Homer A. Brunell certain real property for a period of approximately 9 years at a rental running from \$160 per month to \$210 per month for the last 5 years of the lease, upon which property Brunell conducted a garage; the lease by its terms was assignable, without the necessity of the owner's consent. Thereafter, on or about December 6, 1921, the lease, together with the machinery and equipment contained in the garage, were acquired by F. C. Trickey; on December 23, 1921, F. C. Trickey sold to defendant George J. Ziegler his interest in the Brunell lease, together with the equipment, for a consideration of \$11,500, the transaction being consummated by defendants George J. Ziegler and Clara B. Ziegler, his wife, and F. C. Trickey in the following manner: George J. Ziegler, Clara B. Ziegler, and F. C. Trickey, on December 23, 1921, went to the plaintiff bank; there Mr. Lemmon, an officer of the bank, at their request made out a promissory note in the sum of \$11,500, payable to F. C. Trickey on or before one year after date, without interest, which was signed by the defendants George J. Ziegler and Clara B. Ziegler, and delivered to F. C. Trickey, who thereupon indorsed the note and placed it with the plaintiff bank for collection, and as collateral security for such note there was left with the bank an assignment of the Brunell lease and a bill of sale of the equipment of the garage, to be delivered to the Zieglers upon payment of the note. Immediately thereafter defendants, for a rental of \$300 per month, leased the garage premises and the equipment therein contained to Trickey for the period of one year.

The day following the execution and delivery of the note and consummation of the transaction at the bank, according to the testimony of Trickey, he (Trickey) went to Ziegler's place of business, and there signed a brief agreement to keep the garage open day and night for the period of one year, for which period he had leased the premises from the Zieglers. According to the findings of the trial court, and which find support in the evidence, it was never the intention of the par-

ties that this agreement should in any way be connected with the payment of the \$11,500 promissory note. Prior to December 23, 1921, F. C. Trickey had borrowed from the plaintiff bank \$5,000 for the purpose of acquiring the Brunell lease on the garage premises and the garage equipment. On January 26, 1922, Trickey assigned and transferred the Ziegler note, then being held for collection, to the plaintiff bank as security for his indebtedness to the bank, which at that time had been reduced to the sum of \$4,000, and afterwards, on February 3, 1922, reduced to \$3,000, and at the time of the trial of this action this amount was wholly unpaid. This note for \$11,500 executed by defendants is the note sued on here.

Appellant urges as grounds for reversal of the judgment the following assignments: (1) That the finding that the note was indorsed to plaintiff before maturity and without notice of defendants' defense against the payee is not supported by the evidence; (2) that the uncontradicted evidence shows defendants have a defense as against the payee of said note; (3) that the breach of the terms of Defendants' Exhibit A (agreement to keep the business open day and night) on the part of the payee is a defense to the note as against plaintiff; (4) that the evidence shows that it was the intent of the maker and payee of said note that said note was evidence of payment to be made by defendants only in the event payee performed the terms of the contemporaneous agreement and was not intended to be negotiable; (5) that plaintiff should not recover more than the amount unpaid on the Trickey note.

[1] Appellants' defense as against Trickey, the payee, as gleaned from their answer, is that, as a result of Trickey's alleged breach of the agreement to keep the garage open day and night and his failure to pay rent under his one-year lease, the consideration for the promissory note sued upon has wholly failed, and the property described in the bill of sale and the lease have become valueless. The court on this issue specially found:

"It is not true that the consideration for said note for \$11,500 has wholly, or at all failed; nor is it true that the property or lease described in said bill of sale have become valueless. On the contrary, the court finds that the fair rental value of said premises on December 22, 1921, was at least \$200 a month, and at the date of the trial was at least \$400 a month; that the rental paid under the Brunell lease was substantially less than the amounts aforesaid; that one of the purposes of the sale of said lease, garage business, and equipment was the acquisition by the Zieglers of the Brunell lease and the attendant right of leasing the premises for a rental in excess of the rental therein provided for; that, after such acquisition by the sale aforesaid, said Zieglers did rent the premises to one Lamb for a period of five years at a rental in excess of the amount required to be paid for the like period under the Brunell lease. There was no testimony offered

by defendants that the tools or equipment constituting a part of the subject-matter of the sale by Trickey to Ziegler, was of no value; hence the court finds that the allegation to that effect is not true."

Appellant has not directed our attention to any testimony, nor have we found any in the record, as to the value, or lack of value, of the tools or equipment. As to the finding that the consideration for the note has not wholly or at all failed—that the lease is of greater value than it was when the lease and tools and equipment were purchased by appellants from Trickey, there is ample evidence in the record to support such finding. The witness W. W. Scott, a real estate broker who had been engaged in the business of rentals, leases, and general real estate in Los Angeles since 1911, testified that the garage ought to be worth around \$400 or \$450 a month, and that the rental value would be four times what it was in 1921, and the property was leased on October 24, 1922, during the one-year term of the Trickey lease, by Mrs. Ziegler to Mr. Lamb for a term of five years at the rental of \$150 a month for the first 18 months, then \$200 a month for the next 18 months, and \$225 a month for the remaining 24 months of the term.

[2] As to the payment of the rent under the lease, the evidence shows that Trickey, when he took possession under the lease made to him, at the time he sold the Brunell lease to the Zieglers, paid two months' rent of the one-year term in advance, which payments were credited on the first and last months, and that on January 10, 1922, within a month from the execution of the lease, Trickey, as alleged in defendants' answer, entered into an agreement in writing with one C. T. Mosley, whereby Mosley was substituted in place of Trickey as lessee in the lease and agreed to carry out its terms, and to give a bond in the sum of \$2,000 for the faithful performance of the agreement and the return of all property in good condition, and it is further alleged in defendants' answer that the defendants "do hereby agree to the within agreement and do hereby accept the said C. T. Mosley as tenant of the said premises for the term of the said lease expiring January, 1923." It is true that Mr. Lemmon testified that he was sure he read Exhibit A, the agreement to keep the garage open day and night, dated January 1, 1922, when it was left at the bank; that he recalled several sheets were left unfastened and he fastened them together, but that he knew nothing about the transaction between Mr. Ziegler and Mr. Trickey; and Victor H. Rosetti, an officer of the bank, testified that he saw Exhibit A on January 26, 1922, but that was subsequent to the date defendants accepted Mosley in place of Trickey. Whatever obligation Trickey was under regarding the terms of his one-year lease naturally ceased on January 10, 1922, when the Zieglers accepted Mosley as tenant in place of Trickey.

It is difficult to understand, under such state of facts, what credit or offset, if any, defendants have against the note, even as against Trickey, the payee, and we cannot agree with appellant that the uncontradicted evidence shows that defendants have a defense to the note as against the payee.

[3,4] We do not disagree with appellants' statement of the law that "one who holds a note, invalid in the hands of the payee, as collateral security for a pre-existing debt, can recover from the maker only the amount of the indebtedness due by the payee"; but where a negotiable note is transferred in good faith, for value, before maturity, the holder is not subject to any counterclaim or offset existing against any prior party. This is the rule of the Code, as well as of the law merchant, and no provision of the Code in regard to set-offs and counterclaims affects the negotiability of commercial paper or the right of such bona fide transferees. 19 Cal. Juris. 1013, § 162, and cases cited.

[5] This principle is not disputed by appellants, their claim being that the evidence shows that Exhibit A, containing the agreement on the part of the payee to keep the garage open day and night, was contemporaneous to the note, a part of the same transaction, was deposited contemporaneously with the note, and is sufficient knowledge to put respondent on notice of the terms of the lease, Exhibit B. The court found:

"It is not true that at the time of said sale, or as part of the agreement thereof, it was agreed and understood between the defendant George J. Ziegler and F. C. Trickey that for one year subsequent to December 23, 1921, or for any other period, said F. C. Trickey would cause said garage business to be conducted in a first-class manner, or that he would keep said garage open during said or any period, day and night," and that "it is not true that said lease was executed or delivered to induce the execution or delivery of said promissory note of \$11,500, or the possession of the property aforesaid, by said George J. Ziegler, and it is not true that such lease constituted any part of the sale heretofore found."

If there is substantial evidence to support these findings, the judgment must be affirmed, and reference to the remaining points urged by appellants is rendered unnecessary. According to the testimony of the witness F. C. Trickey, the defendants and himself went to the bank and were referred to Mr. Lemmon; that he told Mr. Lemmon that he had sold a certain garage and a nine-year lease to Mr. and Mrs. Ziegler for \$11,500, and that they were going to give him their note for the amount due in one year; that he told Mr. Lemmon that he owed the bank some money, and wanted to leave the note with the bank in escrow until the note is paid as collateral to his note. Mr. Lemmon said, "You don't mean escrow; you mean for collection," and

Trickey said, "Yes, that is what I mean; I want to leave it for collection." "They [referring to the Zieglers] are going to leave the bill of sale to the garage and this nine-year lease as collateral to this note until it is paid." Trickey had the nine-year lease and bill of sale with him at the time. Mr. Lemmon wrote the note, and, when he came to the place where they write in the collateral, Trickey showed him these papers. Mr. and Mrs. Ziegler signed the note, and Mr. Lemmon put a stamp indorsement on the back of the note, and Trickey signed his name under it. Mr. Lemmon then gave Trickey a receipt for the note. Nothing was said to any one at the bank regarding the details of the sale. Mr. and Mrs. Ziegler were present at the bank window all the time. The bill of sale did not have appended to it a list of the garage equipment, and Trickey gave Mrs. Ziegler the bill of sale he received from Brunell, and she took it home to copy the list of the equipment, and the next day, December 24th, Trickey went to the Zieglers' place of business and there signed an agreement to keep the garage open day and night, and Mrs. Ziegler had made the copies of the garage equipment, and Mrs. Ziegler, Trickey, and Mr. Stone, driving the car, went to the bank and delivered a copy of the equipment of the garage to Mr. Lemmon, which was attached to the bill of sale.

After they left Mr. Lemmon's window, the day the note was signed, they went to a little round table in the bank and executed the one-year lease to Trickey. Mr. Ziegler said:

"I am glad to get that lease back [Brunell lease]. We were tied up in a bad lease there; and I expect to pay that off [Trickey note] in about 30 days; I have got a deal pending where I expect to get the money."

The facts testified to by Trickey as occurring at the bank window are in the main corroborated by Lemmon, and who testified that he knew nothing about the transaction between Ziegler and Trickey, other than that related as occurring at his window at the bank; that he did not learn of them at any time thereafter prior to the institution of the suit by Mr. Ziegler.

Appellant has cited cases and directed our attention to certain sections of Ruling Case Law to sustain his contentions, but the questions presented here, as we view them, are questions of fact, and not of law, and therefore, if there is substantial evidence in the record to sustain the findings of the trial court, under the well-established rule, the judgment will not be disturbed on appeal.

We are of the opinion that the evidence amply sustains the findings, and the judgment is therefore affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

85 Cal. App. 194

PEOPLE v. JUNOD. (Cr. 1532.)

District Court of Appeal, Second District, Division 2, California. Aug. 20, 1927.

1. Criminal law ⚡274—That defendant believed he would receive lighter punishment by pleading guilty held not ground requiring court to allow plea to be withdrawn.

Refusal to allow defendant charged with embezzlement and issuing checks without funds to withdraw plea of guilty held proper, notwithstanding contention that his attorney persuaded him that, in the event probation was denied, he could still withdraw his plea, especially since the attorney denied having made such a representation.

2. Criminal law ⚡274, 1149—Allowing withdrawal of plea of guilty is discretionary with trial court, and its decision will not be disturbed.

Action upon a motion to withdraw plea of guilty is one which is within the discretion of the trial court, whose decision will not be disturbed unless an abuse of discretion clearly appears.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Emil Junod was convicted of embezzlement and issuing checks without sufficient funds, and he appeals. Affirmed.

Hugh L. Dickson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, J. This appeal presents but one question for our determination: Shall the action of the superior court in refusing to permit the defendant to withdraw his plea of guilty and enter a plea of not guilty be reversed or affirmed? The contention of the defendant is briefly stated by his counsel to be that through the representations and assurances of his attorney he was induced and persuaded to enter a plea of guilty to the information filed against him, and was assured that, in the event probation was denied by the court, he could still withdraw his plea of guilty and enter a plea of not guilty. The defendant entered a plea of guilty to each of two charges contained in separate informations, one of which charged embezzlement, and the other issuing checks without sufficient funds. In each case he made application for probation, which applications were denied, and he then asked leave to withdraw his pleas, advancing as a reason for the granting of his motion the contention above quoted.

[1] There is no merit in the appeal. If it was a fact that the defendant, who does not appear to have been in ignorance of the consequences of his act, believed, and was led by his counsel to believe, that he would re-

ceive milder punishment as a result of pleading guilty than otherwise, it is not a ground requiring the trial court to allow a plea of guilty to be withdrawn. *People v. Manriquez*, 188 Cal. 602, 206 P. 63, 20 A. L. R. 1441. However, the attorney denied having made such a representation to appellant.

[2] As was said in the case last cited, action upon a motion to withdraw a plea of guilty and to enter one of not guilty is one which is within the judicial discretion of the trial court, whose exercise will not be disturbed unless an abuse thereof clearly appears. Many other decisions might be cited to the same effect. No peculiar circumstances, such as existed in *People v. Schwartz* and *Wallingford* (Cal. Sup.) 257 P. 71, cited by appellant, are presented in the instant case.

The judgment is affirmed.

We concur: **WORKS, P. J.; THOMPSON, J.**

85 Cal. App. 170

Ex parte SCOTT. (Cr. 1423.)

District Court of Appeal, First District, Division 1, California. Aug. 19, 1927.

1. False pretenses ⚡8—Elements of crime of "fraudulently issuing check" are knowledge of insufficiency of funds and credit and intent to defraud (Pen. Code, § 476a).

Elements of crime of "fraudulently issuing bank check," within Pen. Code, § 476a, are the knowledge of the drawer, at the time of drawing and delivery, that he has not sufficient funds in or credit with the bank to meet the check in full on its presentation and an intent to defraud.

2. False pretenses ⚡7(5)—Where drawer had sufficient funds when he drew check, and was arrested before date on check, he could not be held for fraudulently issuing check (Pen. Code, § 476a).

Drawer, who had sufficient funds when he drew the postdated check to meet it, and was arrested before the date on the check, held not guilty of violating Pen. Code, § 476a, relating to fraudulently issuing a bank check, notwithstanding there were not funds to meet the check when it was presented.

Application for habeas corpus by H. W. Scott, to be directed to the Sheriff of the City and County of San Francisco, to secure release of petitioner from custody on a charge of violating Pen. Code, § 476a, relating to crime of fraudulently issuing bank check. Writ granted.

Frank P. Webster, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and Peter J. Mullins, Deputy Dist. Atty., both of San Francisco, for respondent.

TYLER, P. J. Habeas corpus. Petitioner alleges that he has been held to answer, after an examination in the police court of the city and county of San Francisco, without reasonable or probable cause, of violating section 476a of the Penal Code, relating to the crime of issuing a bank check with intent to defraud. It appears from the transcript of the proceeding had before that court that petitioner at some time, the exact date not being shown, gave a check to the White House, a mercantile establishment located in San Francisco, a postdated check upon a particular bank for the sum of \$26.50. The check was dated July 18, 1927. After receiving the same, the cashier of the establishment altered its date to June 18, 1927; but the record is silent as to whether such alteration was made in the presence of petitioner, or with or without his consent. It further appears that on the 18th day of June, 1927, the day the check was apparently made and delivered, the defendant had on deposit with the bank upon which it was drawn a balance of \$57.10. The check, after passing through the clearance house, reached the bank about June 21, 1927, at which time petitioner had reduced this balance by withdrawals to the sum of \$4. Without discussing the effect of the act of the cashier of the establishment in altering the check in the manner indicated, it seems clear to us that there was no reasonable or probable cause in holding petitioner to answer.

[1, 2] Section 476a of the Penal Code provides in substance that every person who willfully, with intent to defraud, makes or draws or utters or delivers to another person any check or draft upon a bank, knowing at the time of such making or uttering that he has not sufficient funds in or credit with such bank to meet such check or draft in full upon its presentation, is punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than 14 years. The gist of the offense denounced by the state is the fraudulent intent, with which a check or draft is drawn and delivered, and knowledge by the drawer, at the time of such drawing and delivery, that he has not sufficient funds in or credit with such bank to meet such check or draft in full upon its presentation. *People v. Wilbur*, 33 Cal. App. 511, 165 P. 729. It is essential, therefore, that there should be, on the part of one giving a check, both present knowledge of the insufficiency of funds and absence of credit with the bank to meet the check or draft in full upon its presentation and an intent to defraud. *People v. Bercovitz*, 163 Cal. 636, 126 P. 479, 43 L. R. A. (N. S.) 667. That petitioner had sufficient funds on June 18, 1927, the date when the check was presumably made and delivered, there is no question; for an officer of the bank testified that on that day there were sufficient funds to meet its payment. The

check, however, was postdated July 18, 1927, and the record does not show that it was not accepted in the manner drawn in payment for the merchandise purchase. Whether or not on that day there would or would not have been sufficient funds to meet it we have no means of knowing, for petitioner was arrested and held to answer prior to such date. He had an account with the bank, and could have made provision for the payment of the check. Under the circumstances, he does not come within the purview of the statute.

The writ is granted, and the prisoner is discharged.

We concur: CASHIN, J.; KNIGHT, J.

JOHNSTON et al. v. KITCHIN. (Civ. 5500.)★

District Court of Appeal, First District, Division 1, California. Aug. 26, 1927.

Hearing Granted, and Petition Subsequently Stricken by Order of Supreme Court, Oct. 24, 1927.

1. Executors and administrators ⚡383—Where court had jurisdiction to sell interest of decedent's estate in hotel, no errors in exercising jurisdiction could render decree void.

Where notices of sale of interest of decedent's estate in hotel were regular and petition for confirmation was sufficient to give the court jurisdiction, no errors in the exercise of the jurisdiction could render its decree void.

2. Partnership ⚡249—Surviving partner is trustee for representatives and heirs of deceased partner (Civ. Code, §§ 2410, 2411).

A surviving partner is a trustee for the representatives and the heirs of his deceased partner, under Civ. Code, §§ 2410, 2411, providing that partners are trustees for each other.

3. Partnership ⚡254—Surviving partner may purchase interest of estate of deceased partner in partnership property (Civ. Code, §§ 2410, 2411; Code Civ. Proc. § 1524).

Although a surviving partner is a trustee for the representatives and heirs of his deceased partner, under Civ. Code, §§ 2410, 2411, he may purchase the interest of the estate of the deceased partner in partnership property, under Code Civ. Proc. § 1524.

4. Partnership ⚡254—Surviving partner's purchase of deceased partner's interest must be fair and free from fraud, and surviving partner must disclose voluntarily all knowledge respecting value of interest (Civ. Code, §§ 2410, 2411; Code Civ. Proc. § 1524).

When a surviving partner purchases the interest of his deceased partner's estate in the partnership property, the transaction must be fair and free from fraud or it will not be sustained, and the surviving partner must acquaint decedent's representative and the court with full information, voluntarily disclosing all facts within his knowledge from which a sound judgment as to the value of the interest may be formed, and it is not sufficient to not withhold

or conceal facts, under Civ. Code, §§ 2410, 2411, and Code Civ. Proc. § 1524.

5. Trusts ⇨371(2)—One seeking to establish trust, based on constructive fraud, must allege all facts giving rise to trust.

In an action to establish a trust, based on a constructive fraud, all of the facts relied upon as giving rise to the trust must be alleged.

6. Trusts ⇨371(2)—In action to establish trust, based on constructive fraud, where it appears defendant was fiduciary and gained advantage, allegations of actual fraud are unnecessary.

While in an action to establish a trust, based on constructive fraud, the general rule is that all facts relied upon as giving rise to the trust must be averred, where it is admitted that a fiduciary relation existed and it appears that an advantage was gained by the fiduciary, allegations of actual fraud are unnecessary as the transaction is presumed to be constructively fraudulent.

7. Trusts ⇨107—Where fiduciary gains advantage over one to whom he sustains relation, transaction is constructively fraudulent and fiduciary must show utmost good faith, fairness, and full knowledge of facts.

Where one standing in a fiduciary relation gains an advantage over one to whom he sustains the relation, transaction is presumed to be constructively fraudulent, and the fiduciary has the burden of showing not only that he exhibited the utmost good faith, but that the transaction was in all respects fair and that it was entered into with a full knowledge of the facts.

8. Partnership ⇨258(8)—Finding that surviving partner purchasing interest of deceased partner showed requisite fairness and good faith held not sustained by evidence in action by heirs to establish trust (Civ. Code, §§ 2410, 2411; Code Civ. Proc. § 1524).

In action by heirs to establish a trust brought against a surviving partner who purchased the interest of his deceased partner's estate in partnership real property at a sum much less than its value, evidence held not to sustain finding that surviving partner sustained burden of showing the degree of fairness and good faith required, under Civ. Code, §§ 2410, 2411, and Code Civ. Proc. § 1524.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action to establish a trust brought by Charles Johnston and others against George W. Kitchin. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

Marshall Stimson and Noel C. Edwards, both of Los Angeles, for appellant Charles Johnston.

Bicksler, Smith & Parke, of Los Angeles, for appellants Bessie Johnston, Ida Johnston-Humphrey, and Ruth Elma Johnston. Anderson & Anderson, of Los Angeles, for respondent.

CASHIN, J. An action to have a trust declared as to an interest in certain real property purchased by the defendant from the estate of David S. Johnston, deceased.

The property, which consists of lots 15 and 16 in block 1 of Wiltshire Boulevard tract, in Los Angeles county, was acquired by the deceased and the defendant in the year 1910, and in 1911 was improved by the erection thereon of a four-story brick apartment hotel known as the Hotel Shoreham.

David S. Johnston died intestate in Los Angeles county on November 18, 1919, and at the time of his death the property was incumbered by a mortgage originally executed for \$35,000, but of which \$5,000 had been paid, and the time for the payment of the balance extended to December 28, 1921.

None of the heirs of the deceased resided in California, and on December 17, 1919, letters of administration on the estate were granted to the public administrator of Los Angeles county.

An inventory and appraisement of the estate was filed on January 23, 1920, from which it appears that the deceased, in addition to his interest in the hotel, the appraised value of which was \$40,000, owned other real and personal property, the total appraised value of the estate being \$59,801.80.

[1] Thereafter, on January 28, 1920, the administrator caused to be posted and published in accordance with the provisions of the statute a notice that the interest of the estate in the hotel property would be sold at private sale to the highest and best bidder for cash, subject to confirmation by the court.

The defendant, who so far as shown was the only bidder, agreed to assume and pay the proportionate part of the mortgage chargeable to the estate, viz., \$15,000, and in addition to pay the estate the sum of \$21,000, a total of \$36,000, this sum being 90 per cent. of the appraised value of the interest of the estate in the hotel.

It was alleged in the petition for confirmation that the sale would be for the best interest of the estate and was necessary in order to pay claims, and, further, that the amount bid by the defendant was fair and reasonable and not disproportionate to the value of the interest sold.

The notices of sale were regular and the petition sufficient to give the court jurisdiction, and no errors in its exercise would render the decree void. *Burris v. Kennedy*, 108 Cal. 331, 41 P. 458; *Estate of Bette*, 171 Cal. 583, 153 P. 949; *Estate of Spriggs*, 20 Cal. 121.

After a hearing, which was duly noticed, the sale was confirmed to the defendant on March 3, 1920, following which a deed was executed by the public administrator.

Upon the petition of plaintiff Charles John-

ston, who was a brother of the deceased, the letters granted to the public administrator were revoked on March 9, 1920, and letters of administration were duly issued to the petitioner.

The complaint alleged, with respect to the hotel:

"That at the time said property was acquired said David S. Johnston and G. W. Kitchen were and had been for some time past partners, and during the years of 1910 and 1911 as partners they erected the building on the above-described property known as the 'Hotel Shoreham,' and that from the date that they acquired the property until the death of said David S. Johnston they were partners in the ownership and conduct of the business connected with the above-described property and the Hotel Shoreham, and that the defendant George W. Kitchen managed the affairs of the partnership, collected the rents, and paid all of the charges and attended to all of the business of the partnership, giving to the said David S. Johnston monthly statements of account,"

—these allegations not being denied by the answer.

It was also averred that by a fraudulent arrangement between the public administrator and the defendant the fact that the sale proceedings were pending was concealed from the heirs and their attorneys; that the defendant, to induce the public administrator to institute the proceedings and procure the decree mentioned, represented to the latter that in the event the sale was not made it was his intention to bring suit for a partition of the property, falsely represented the terms of the mortgage thereon, that there would be difficulty in renewing the same, that the hotel was in need of repairs, that the lessee in possession was in default in the payment of rent, and that the lease was about to expire; that the public administrator, influenced by the defendant, made no effort to procure higher bids, and that the price paid to the knowledge of both was less than the reasonable market value of the interest sold; that the public administrator, induced by the representations of the defendant as to the value and condition of the property, falsely represented to the court that the sale was necessary in order to pay claims, was for the best interests of the estate, and that the amount bid by the defendant was fair and reasonable.

The allegations of fraud were denied, and all the allegations of the complaint, with the exception of those admitted by the answer, were found by the trial court to be untrue, and upon its findings judgment was entered for the defendant.

The plaintiffs appealed, and urge as grounds for reversal that the facts shown by the evidence and those admitted sustain their contention that the conduct of the defendant was actually and constructively fraudulent, and that the findings and judgment are unsupported.

Without reviewing in detail the evidence in support of the allegations of a fraudulent arrangement between the defendant and the public administrator, a concealment by the latter of the fact that the proceedings were pending, and a failure to use due diligence in the matter of obtaining higher bids, it will be sufficient to say that the findings of the trial court on these issues were fully sustained, as was also the finding against the allegation that the administrator fraudulently misrepresented the value of the hotel property and the condition of the estate to the probate court.

It was testified by the defendant that it was his intention in the event he was unable to purchase the interest of the estate in the hotel to bring suit for a partition, and that he so stated to the administrator; that he further stated that both the mortgage and the lease had something over a year to run; that the hotel could not be again leased without repairs; and that the rent had previously been in arrears, but that subsequently the payments were made.

The evidence shows that certain repairs were necessary and that with the exception of the statements as to the date of the maturity of the mortgage and that there would be difficulty in renewing the same, the other representations were substantially true.

[2, 3] Although a surviving partner is a trustee for the representative and the heirs of his deceased partner (Civ. Code, §§ 2410, 2411; *Little v. Caldwell*, 101 Cal. 553, 36 P. 107, 40 Am. St. Rep. 89), he may purchase the interest of the estate in the property of the firm (*Kimball v. Lincoln*, 99 Ill. 578; *Valentine v. Wysor*, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788; *Ludlum v. Buckingham*, 35 N. J. Eq. 71-80; *Didlake v. Roden Grocery Co.*, 160 Ala. 484, 49 So. 384, 22 L. R. A. [N. S.] 907, 18 Ann. Cas. 430; *Bradbury v. Barnes*, 19 Cal. 120), it being the duty of the court before confirming a sale of any partnership interest to a surviving partner or any other person to inquire into the condition of the partnership affairs and to examine the surviving partner, if in the county and able to be present in court (Code Civ. Proc. § 1524).

[4] The transaction, however, must be fair and free from fraud, or it will not be sustained. In making the purchase he cannot place the representative at arm's length and seek a profitable bargain for himself, but is bound to acquaint the representative and the court with full information as to the facts, and it is not sufficient that he does not withhold or conceal such information, but it is incumbent upon him to disclose voluntarily all the facts within his knowledge from which a sound judgment as to the value of the interest of the estate may be formed. *Welbourn v. Kleinle*, 92 Md. 114, 48 A. 81; *Tennant v. Dunlop*, 97 Va. 234, 33 S. E. 620; *Newcomb v. Brooks*, 16 W. Va. 32.

As stated, the heirs were nonresidents, and with the exception of plaintiff Charles Johnston, who arrived in Los Angeles county on February 15, 1920, were not within the state or represented by local counsel previous to the confirmation of the sale, nor so far as appears did any of them receive notice or have knowledge that the sale was pending.

It is clear from the evidence that the existence of the partnership relation was not disclosed to the public administrator or to the court, and it further appears that the defendant on March 28, 1920, in an application for a loan to be secured upon the property, stated its value to be the sum of \$110,000. The loan was made thereon for \$40,000 upon an appraisal by the mortgagee of \$90,000, and expert witnesses called by the respective parties placed its value in the months of January and February, 1920, at amounts varying from \$85,000 to \$110,000.

[5, 6] It was not alleged in the complaint that the partnership relation was not disclosed, and it is contended by the defendant that to establish a constructive fraud all the facts relied upon as giving rise to the trust must be averred.

[7] That such is the general rule may be conceded, but where a fiduciary relation is admitted and it appears that an advantage was gained by the one standing in that relation, allegations of actual fraud are unnecessary. *Alaniz v. Casenave*, 91 Cal. 41, 27 P. 521. The transaction under such circumstances is presumed to be constructively fraudulent, and the burden is upon him to show not only that he exhibited the utmost good faith, but that the transaction was in all respects fair and was entered into with a full knowledge of the facts. *Cox v. Schnerr*, 172 Cal. 371, 156 P. 509; *Wright v. Rohr*, 41 Cal. App. 265, 182 P. 469; *Bauchle v. Smylie*, 104 App. Div. 513, 93 N. Y. S. 709.

[8] The court found in effect that none of the representations by the defendant were fraudulently made, and it appears that his statement of the date of the maturity of the mortgage, though incorrect, did not mislead the public administrator, as the true date was contained in the inventory and appraisal filed by him before the proceedings leading to the sale were commenced.

Although these findings are fairly supported, no explanation was made of the failure to apprise the administrator or the court of the partnership relation, and it further appears beyond reasonable question that the value of the interest of the estate in the property was in fact and to the knowledge of the defendant largely in excess of the price paid.

The defendant by reason of the partner-

ship relation occupied a position of advantage which enabled him to procure a profitable bargain, which, had the relation been known, would not have been approved by the court without an inquiry into the partnership affairs and a close scrutiny of the transaction. Moreover, it is reasonably certain that had all the facts as to the value of the property known to the defendant been fully disclosed the sale would not have been confirmed for the price offered.

In view of the relations of the parties and the circumstances shown, we are satisfied that the defendant failed to show that decree of fairness and good faith which the law required of one in his position, and that the implied conclusion of the trial court to the contrary was not sustained by the evidence.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

85 Cal. App. 189

MOSKOWITZ v. McGLINCHEY. (Civ. 5823.)★

District Court of Appeal, First District, Division 2, California. Aug. 20, 1927.

Hearing Denied by Supreme Court Oct. 17, 1927.

Judgment ~~§~~ 143(8)—Refusal to appear after service of summons on erroneous advice held not to entitle defendant to have default judgment set aside (Code Civ. Proc. § 473).

Where defendant gave summons to attorney who was present, and who had represented him in prior case, and who stated objections and returned it to plaintiff, and defendant had not appeared at trial on advice of attorney, though service of summons was good, mistake was one of law and refusal to set aside default judgment in proceeding, under Code Civ. Proc. § 473, was not abuse of trial court's discretion.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy Judge.

Action by Charles Moskowitz against William McGlinchey. From an order denying a motion to set aside a default judgment, defendant appeals. Affirmed.

Cooley & Gallagher, of San Francisco, for appellant.

Jos. F. O'Malley, of San Francisco, for respondent.

KOFORD, P. J. This is an appeal by the defendant from an order of the court below denying defendant's motion to set aside a default judgment. The motion was heard upon affidavits, under the provisions of section 473 of the Code of Civil Procedure. The facts as shown by the affidavits were briefly as follows: Defendant herein was a defendant in a criminal prosecution in the police court growing out of the same automobile accident involved in this action. On the trial

of that case one of the attorneys for the defendant and appellant herein was attorney for the defendant therein, and the attorney for the plaintiff and respondent herein was special prosecutor. After that trial was concluded and the parties came into the street, plaintiff's attorney approached the automobile in which the defendant herein was seated with his counsel, and handed defendant a copy of a complaint and summons in this action, stating "Here is a summons for you" (disputed). Defendant's counsel immediately took from defendant's hands the paper served on him, opened it (disputed), and called out objections to the service, claiming the copy of summons was unsigned by the county clerk, and demanding that the original summons be exhibited to the defendant. He took the summons over to the automobile of plaintiff's attorney, told him that the service was not good, and threw the summons on or at the plaintiff's automobile. He then returned to defendant's automobile and told the defendant not to pay any attention to the document. At least for the purposes of this appeal it is conceded now by appellant that this advice was erroneous, and that the service was good. Defendant did nothing more concerning the matter, but followed the advice of the attorney and paid no attention to the document. His default was taken October 20, 1924, and judgment some time thereafter was entered in favor of plaintiff. Immediately before the expiration of the period of 6 months a motion was made to be relieved from the default judgment.

While the affidavits are conflicting, they sustain the conclusion that the defendant knew he had been handed a summons in a civil action. Although his attorney had not yet been employed to represent or advise him in this case, defendant accepted and acted upon the advice given him, and we cannot see that this circumstance puts him in a more favorable position than if he had employed and paid an attorney for advice or in a more favorable position than if he had acted for himself in the same manner. In either case, it was a mistake of law in thinking that the service was invalid. Numerous cases have been cited in which relief from judgments occasioned by mistake of law has been either granted or denied.

The authorities in which the trial court's order is affirmed are in large part governed by the principle that a sound discretion is left to the trial court in determining the facts and in granting or refusing relief. Those authorities in which the orders affirmed grant relief are governed in large part by the additional principle that courts favor a trial upon the merits. There are two cases, however, in which the trial court's determination of an application for relief upon the ground of mistake of law has been

reversed. In *Shearman v. Jorgensen*, 106 Cal. 483, 39 P. 863, the trial court *granted* relief for the mistake of an attorney in believing that notice of overruling demurrer served by mail was unauthorized. This order granting relief was reversed as an abuse of discretion. On the other hand, in *Waite v. Southern Pacific Co.*, 192 Cal. 467, 221 P. 204, the trial court *refused* relief applied for on the grounds of mistake of law in believing that the federal and not the state court had jurisdiction of the action. This order denying relief was reversed as an abuse of discretion. In the former of these two cases a mistake of law was held inexcusable, and in the latter excusable. The facts of the two cases have differences as well as similarities. There are differences in the difficulty of the legal question erroneously decided, in the manner of solving it, and in the reasons and motives that actuated counsel in not resolving the question in the direction of safety.

This case should be governed by the principle of *Shearman v. Jorgensen*, *supra*, and by those authorities which uphold the discretion as exercised by the trial court.

Judgment affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

85 Cal. App. 196

HEEBNER v. SENDERMAN. (Civ. 5811.)★

District Court of Appeal, First District, Division 2, California. Aug. 22, 1927.

Hearing Denied by Supreme Court Oct. 20, 1927.

1. Joint adventures ⇐1—Partnership ⇐17—
Nature of contract involving purchase of two
carloads of catsup held question of parties'
intention.

Whether a contract involving the purchase of two carloads of catsup was a contract for a sale, partnership, or joint venture *held* question of parties' intention, rights of third parties not being involved.

2. Joint adventures ⇐1—Partnership ⇐5—
Every agreement to divide profits does not
necessarily import partnership or joint
venture.

Every agreement to divide profits is not necessarily a partnership or joint venture agreement and does not import an agreement to divide losses as well as profits.

3. Joint adventures ⇐5(1)—Partnership ⇐
342—Where court found that plaintiff and defendant did not purchase carloads of catsup under partnership or joint venture agreement, plaintiff held not entitled to share in discount received by defendant.

In an action for accounting wherein plaintiff claimed that a transaction by which plaintiff purchased two carloads of catsup through defendant was a joint venture or partnership agreement with defendant, where the court found there was no partnership or joint venture

agreement and the evidence sustained the view that defendant sold catsup to plaintiff, plaintiff held not entitled to share in discount received by defendant from original seller.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action for partnership accounting by E. L. Heebner against Ben Senderman. Judgment for defendant, and plaintiff appeals. Affirmed.

Chickering & Gregory, of San Francisco, for appellant.

Hudson, Martin & Jorgensen, of Monterey, for respondent.

KOFORD, P. J. Plaintiff sought by this action of partnership accounting to require defendant to pay one-half of the losses sustained in the purchase and sale of two carloads of catsup. Defendant denied any partnership relation and asserted that the loss, if any, fell upon plaintiff alone. The trial resulted in a judgment for defendant. Plaintiff appeals, claiming that the testimony shows enough undisputed facts to compel a finding that the transaction was a partnership or at least a joint venture.

Defendant was the manager of a fish packing business in Monterey. Plaintiff was a New York broker dealing in foodstuffs. He made semiannual visits to the Pacific coast and frequently called on defendant at his place of business. On one such trip plaintiff had been buying large quantities of catsup on this coast. He called on defendant and asked him to secure for him more catsup at a favorable price. Defendant obtained the promise of a San Francisco firm to sell two carloads at 60 cents a gallon, although the market price was about 90 cents. Defendant was able to make this purchase on account of the friendly business relations existing between his firm and the San Francisco firm mentioned, and by defendant's representing that the catsup purchased was for himself and his own use. The plaintiff then asked the defendant to obtain this catsup and have it shipped to Monterey, because it was necessary that the seller believe that the defendant would use the catsup himself, repack the catsup, sparing no expense in this regard, and ship both carloads to the plaintiff in New York. The plaintiff agreed that he would purchase the catsup by taking up the drafts on their arrival in New York, and that, in order to repay the defendant for obtaining the catsup at so low a price, he would give the defendant one-half of the profits which should be made upon the resale of the catsup. Nothing was said by either party as to losses, such a contingency not being contemplated, in view of the condition of the market. The catsup was shipped to Monterey, where defendant repacked and reshipped it to plaintiff in New York, send-

ing bills and drafts for the amount of the purchase price and expenses. These were paid by the defendant before receiving delivery of the shipments. The resale by plaintiff of the catsup in New York extended over a considerable period of time and resulted in a net loss.

[1, 2] There was other testimony introduced at the trial, some of which was in dispute. This testimony concerned the actions and conduct of the parties in their relation to each other and to third parties. It gave many other details of the transaction. This testimony gave justification for the trial court to believe that it was not the intention of the parties to become copartners or joint venturers, but, on the contrary, that the intention was to make an agreement by which plaintiff undertook to give defendant one-half the profits simply by way of compensating him for his services in obtaining the catsup, and that that was the full extent of defendant's interest and control in the matter. The precise wording of the initial business conversation of the parties was not such as to prohibit the findings made by the trial court. The rights of third parties are not involved in this action. It concerns only the parties themselves, so the nature of the relationship they have contracted with each other is to be determined by their intention as in other contracts. *Wheeler v. Farmer*, 38 Cal. 203; *Westcott v. Gillman*, 170 Cal. 562, 150 P. 777, Ann. Cas. 1916E, 437, note; 2 Rowley, *Modern Law of Partnership*, § 880; 33 Cor. Jur. 845. It is not true that every agreement to divide profits imports a partnership or joint venture and therefore imports an agreement to divide losses as well as profits. Respondent has cited numerous cases where agreements to divide profits have been held not to import a partnership or joint venture. Among these we mention two which seem quite similar to the case at bar, *Coward v. Clanton*, 122 Cal. 451, 55 P. 147, and *Vanderhurst v. De Witt*, 95 Cal. 57, 30 P. 94, 20 L. R. A. 595. See, also, 33 Cor. Jur. 847.

[3] After receiving from plaintiff payment for the shipments to New York, defendant turned about and paid the San Francisco firm the purchase price of the same, and in so doing received a 1 per cent. cash discount. Appellant contends that the trial court in any event, regardless of partnership or like relationship, should have given him judgment for the amount of this discount. We cannot see how this point had to be considered by the trial court where no accounting was taken nor partnership found to exist. The pleadings do not present this as an issue, and without different pleadings the court was not called upon to decide it unless it came up in taking an account. Where there was no partnership or similar relationship, the evidence sustains the view that defend-

ant made an outright sale to the plaintiff at the agreed price of 60 cents, and that defendant's discount was in compensation of an immediate payment by him which he could have made or not according to his convenience.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

85 Cal. App. 156

COUTS et al. v. SPERRY FLOUR CO.★
(Civ. 5493.)

District Court of Appeal, First District, Division 1, California. Aug. 18, 1927.

Hearing Denied by Supreme Court Oct. 17, 1927.

1. Sales ⇨267—Refusal to warrant seed held to preclude implied warranty in sale thereof.

In action by purchaser of seed for damages through sale of wrong kind of seed, finding that seller expressly refused to warrant seed precluded implied warranty that seed sold was of variety desired, regardless of fact that purchase was made on understanding that seed was not of objectionable variety.

2. Sales ⇨267—Refusal of express warranty shows intention that buyer takes risk of goods.

Seller's refusal of express warranty shows intention that buyer shall take risk of goods.

3. Sales ⇨260—To recover on warranty of thing sold, there must be affirmation of fact by seller and intention that it shall constitute warranty.

In order to recover on warranty of thing sold, there must be affirmation of fact by seller with reference thereto and intention on his part that such affirmation shall constitute warranty.

4. Sales ⇨441(2)—Evidence held to support finding that seller did not intend to warrant barley seed sold was not of certain variety.

In action for breach of warranty of barley seed, evidence held to support finding that seller did not intend to warrant that seed was not of particular variety.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Cave J. Coutts and another against the Sperry Flour Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for appellant.

Louis B. Stanton, of Los Angeles, for respondents.

TYLER, P. J. Action for damages for breach of warranty. The allegations of the complaint, in so far as they are necessary for a discussion of the question here involved, recite in substance that on or about the 14th day of December, 1922, plaintiffs called upon

defendant company with the object of purchasing from it certain seed barley to be used for planting, and defendant thereupon sold the same to them. That prior to such sale defendant represented and warranted that the seed so purchased was a lot of fine San Joaquin grown barley that yielded 25 or 30 sacks to the acre, and further represented that it was not Mariout barley, a variety plaintiffs did not desire to purchase. That plaintiffs relied solely upon each of the representations so made in completing the purchase. That acting upon such reliance they planted the same, which in due course grew and matured, at which time it was revealed that the same was Mariout barley. That in consequence plaintiffs' yield was a smaller one than would have been produced with the variety ordered. Damages were prayed for in the sum of \$3,150.50. Defendant, answering, denied that the barley was sold as seed barley or that any representations or warranties of any kind were made by it with reference to its character or kind.

At the trial plaintiff Coutts testified, in substance, that he visited defendant's place of business in Los Angeles for the purpose of purchasing wheat and barley for seed purposes. That with reference to the barley he informed defendant's agent that he could not obtain good seed in the vicinity in which he lived as his neighbors had been using the Mariout variety which had proved disastrous, and that he wanted some of the Coast barley, whereupon the agent of defendant assured him the company had "some splendid Coast barley grown in the San Joaquin, that goes 25 to 30 sacks to the acre," that he thereupon informed the agent that it was the variety he wished to purchase. He further testified that he explained that his reason for calling on defendant was that he did not want Mariout barley such as had been sown in his neighborhood, whereupon the agent of defendant replied that his company had no Mariout barley, but had the San Joaquin variety. That upon receiving this information he purchased two tons of the represented variety. On the other hand, the agent of defendant, through whom the sale was made, testified that he had informed plaintiff at the outset that his company was not a seedhouse and would not quote any grain as seed, but would quote a good quality as recleaned grain, and that in his opinion it would be suitable for planting. The price quoted was \$1.90 per cwt., at Los Angeles, plus carload freight to Vista, where plaintiff desired it to be shipped. Plaintiff then informed him that he did not want a carload, but only a couple of tons, whereupon he had replied that he ought to obtain it locally. Plaintiff then explained that the local barley was foul with smut and that he did not want it; that he wanted the northern barley. The agent thereupon stated that he

was selling him barley that came from the north, meaning north of Los Angeles, but that nothing was ever said by either party about Mariout barley.

It also appeared in evidence that defendant did not buy its barley with any reference as to variety, but that all the barley defendant had in its warehouse was placed in separate bins according to quality, but without regard to variety. It further appeared that the price of the barley kept by defendant at that time was sold at \$1.90 per cwt., f. o. b. Los Angeles, and this was the regular and only price which defendant charged. It was proved that the price charged for barley seed by regular seedhouses during the same period was \$3.50 per cwt., and that the same was sold without any warranty. Other evidence was to the effect that defendant's salesmen were not permitted in selling seed grain to make any warranties, express or implied, as to quality or description, but that the same was simply sold as recleaned grain, and inventoried by the company as such. Upon this evidence the court found that at the time the sale of the barley by defendant to plaintiff was made, plaintiff especially informed defendant that he did not want Mariout barley. It further found that at this time defendant notified plaintiff that it was not a seedhouse, but had for sale northern grown barley which could be used for seed and thereby intended that plaintiff should understand that no warranty would be made as to said barley for seed purposes, but that defendant understood that the barley was not Mariout barley.

Further findings recite that defendant knew that all of the barley which it had for sale was not segregated according to variety, and defendant's agent did not know whether or not the variety which it offered plaintiff was or was not Mariout barley, and that he did not disclose such fact to plaintiff, who bought the barley in ignorance thereof, upon his understanding that it was not the objectionable variety. Upon these findings the court rendered judgment in favor of plaintiff for damages in the sum of \$1,075.20. It is appellant's contention that, the court having found that defendant had warned plaintiff of its intention not to warrant the seed, this finding, based upon the undisputed evidence to this effect, precludes a conclusion that there was a warranty, either express or implied, as to the quality or variety of the barley. The question of warranties in the sale of seed is exhaustively discussed in the recent case of *Miller v. Germain Seed & Plant Co.*, 193 Cal. 62, 222 P. 817, 32 A. L. R. 1215. It is there said that there can be no question where a purchaser asks a seed dealer for a certain variety of seed and in pursuance of that request seed is furnished, that in the absence of any additional facts the law will, from the transaction, imply a contract of warranty, and that such warranty partakes of the na-

ture of both an express and implied warranty. But in order that a sale shall be upon a warranty, there must be two factors present, first, an affirmation of a fact by the seller with reference to the thing sold, and, second, an intention on the part of the seller that his affirmation shall be a warranty to the buyer. The affirmation of the fact is shown by direct evidence, and the intent to warrant is inferred from the facts and circumstances surrounding the sale. In the case of the sale of seed for planting, the description of the seed by the seller is an affirmation of a fact concerning the thing sold. From the fact that the seed is sold for planting and the description of the seed is, therefore, a vital element in the contract, the intent on the part of the dealer to warrant that vital fact to the buyer is inferred.

[1] Here, the court having found that the seller expressly refused to warrant the seed, there is no room for any question of an implied warranty in connection with the sale. By the express declaration of the agent, and upon which the finding is based, defendant relieved itself of any implied warranty that the seed sold was of the variety desired. *Leonard Seed Co. v. Crary Canning Co.*, 147 Wis. 166, 132 N. W. 902, 37 L. R. A. (N. S.) 79, Ann. Cas. 1912D, 1077.

[2, 3] Such a refusal shows an intention that the buyer shall take the risk of the goods. 2 *Williston on Contracts*, p. 1871; 35 *Cyc.* 373. Respondent insists in support of the judgment that from the findings as a whole it is clear that there was an express warranty given by appellant to respondents that the sale was of barley seed not of the Mariout variety. While the findings do establish the fact that plaintiffs did not want the variety furnished, they also establish the further fact that defendant expressly refused to warrant the seed. As above indicated, in order to recover upon a warranty there must be two factors present, first, an affirmation of fact by the seller with reference to the thing sold, and, second, an intention on the part of the seller that his affirmation shall constitute a warranty. An express finding, as here, that the seller absolutely declined to warrant, negatives the existence of any implied warranty arising from the facts surrounding the sale, and the mere fact that plaintiffs made their purchase upon the understanding that the seed was not the objectionable variety, and that they never understood that defendant did not intend to warrant, does not alter the rule. *Miller v. Germain Seed & Plant Co.*, supra.

[4] As argued by appellant, the finding of the lower court to the effect that there was no intent to warrant on the part of the seller finds full support in the evidence, for, aside from the direct testimony of the agent of defendant upon the subject, it was disclosed that defendant did not sell any barley as

seed, but merely sold the same as cleaned grain; that its barley sold for \$1.90 per cwt., whereas at the same time seedhouses selling barley as seed charged \$3.50 per cwt., and even at that price no warranty was given. We conclude, therefore, that the facts and circumstances surrounding the sale cannot support the finding of an implied or any warranty in face of the finding that defendant's agent expressly refused to warrant. This express finding negatives any idea of warranty.

For the reasons given, the judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

85 Cal. App. 184

ASSOCIATED INDUSTRIES INS. CORPORATION v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 5874.)

District Court of Appeal, First District, Division 1, California. Aug. 20, 1927.

1. Insurance $\S$ 665(4)—Evidence in contest between insurers held to support finding that employee's disability was recurrence of previous disability occurring when former company was insurer.

Where an employee was injured while former insurer was carrying employer's compensation insurance, and almost two years after the first period of disability became again disabled while another company was carrier, evidence in contest between insurance carriers held to sustain finding that the first injury caused the new disability, so that former insurer was correctly held liable.

2. Trial $\S$ 397(5)—Where court's finding that former injury caused new disability determined case, failure to make express finding concerning new disability held immaterial.

In a contest between insurance companies to determine whether employee's disability was new, occurring while respondent was insurance carrier, or resulted from old injury occurring while petitioner was insurance carrier, where the court's finding that the original injury caused the new and further disability determined the case, failure to make an express finding that it was not due to independent injury occurring later held no error, since such an extra finding would have been useless.

Application for certiorari by the Associated Industries Insurance Corporation against the Industrial Accident Commission of the State of California, the Federal Mutual Liability Insurance Company, and Thomas J. Lee, to review an order of the Commission awarding respondent Lee compensation for injuries against petitioner, and dismissing respondent Federal Mutual Liability Insurance Company. Award affirmed.

Bronson, Bronson & Slaven, of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

TYLER, P. J. Certiorari to review an award of the Industrial Accident Commission. It appears from the petition that on or about April 20, 1926, respondent Thomas J. Lee filed application for adjustment of claim with the Industrial Accident Commission against respondents Allen Bros., Inc., and Federal Mutual Liability Insurance Company, its insurance carrier, wherein he alleged that on December 3, 1923, while employed as a rigger by Allen Bros., he sustained injuries arising out of and in the course of his employment in the following manner: "Slacking of rope, and felt my back give way," and further alleged that his injury consisted of a back strain; that the employer's insurance carrier at the time of the injury was Associated Industries Insurance Company; that in consequence of such injury he suffered disability from December 3, 1923, to March 18, 1924, and was paid disability indemnity for such period and furnished medical treatment by Associated Industries Insurance Company. It further appears that on April 17, 1926, while still employed by Allen Bros. in the same character of work, he sustained injury arising out of and in the course of his employment in the following manner: "Rolling big timbers and strained back," and that at the time of the injury on April 17, 1926, the employer's insurance carrier was Federal Mutual Liability Insurance Company; that he left his work on April 17, 1926, and was still disabled at the time of the filing of his application. The employee prayed that the respondent commission determine which insurance carrier was liable for the benefits under the Workmen's Compensation, Insurance, and Safety Act (Stat. 1917, p. 831, as amended), during the disability following April 17, 1926. Thereafter Associated Industries Insurance Corporation was joined as a defendant, and it filed its answer to said application admitting that it was the insurance carrier for the employer on December 3, 1923, and further admitting that it had paid compensation to the employee for disability from December 3, 1923, to and including March 18, 1924, but denying that the disability claimed in the application was due to injury on or about December 3, 1923.

Upon due notice, a hearing of the employee's application was had on July 1, 1926, before Referee Harris, of respondent Industrial Accident Commission, and testimony was taken upon the issues raised, medical reports were filed, and the matter submitted for decision. It is claimed that upon such hearing that the evidence established without conflict the following facts: That on Decem-

ber 3, 1923, the employee while in the course of his employment for Allen Bros. fell over a gear wheel, and that a few days thereafter, while slacking up on a guy rope, his back gave way acutely without any apparent cause. That the employee was thereafter disabled from his work up to and including March 18, 1924, and that during that period he was furnished medical treatment for his back and was paid disability indemnity by petitioner herein. That on March 18, 1924, he returned to work for Allen Bros. and was employed steadily up to April 17, 1926, with the loss of but two or three days' time shortly after he returned to work. That about a week prior to April 17, 1926, his back began bothering him again. At this time his duties required him to lift and move heavy timbers, in consequence of which he strained his back and was unable to work thereafter. That the medical testimony deduced and reports received in evidence showed that the employee was suffering from strain of the lumbar muscles and a sacroiliac arthritis.

The petition then alleges that on September 16, 1926, respondent Accident Commission issued its findings and award in which it was determined that the employee sustained injury on December 3, 1923, in the nature of a back strain, and that disability indemnity from that time to and including March 16, 1924, had been paid. It was further found that the employee sustained an injury on April 17, 1926, in the nature of a back strain, and that such employee was still partially disabled at the time of the filing of the award as a result of the back strain of April 17, 1926, and thereupon indemnity was awarded in favor of the employee and against Federal Mutual Liability Insurance Company for all disability following April 17, 1926. Thereafter this insurance carrier served and filed its petition for rehearing, and the injured employee also filed a like petition, contending that the evidence did not justify the findings of fact, and alleging that he had discovered new evidence in the nature of a report of Dr. Johnson, who had been treating him. The commission granted these petitions.

A hearing was then had before Referee Crowell of respondent commission and additional testimony was given by the employee, and also by Dr. Johnson, who testified that he believed the disability had resulted from the old condition in 1923. The commission thereafter issued its decision on rehearing by which it was found as a fact that the employee sustained injury on December 3, 1923, occurring in the course of his employment in the following manner: "While taking up slack in the rope he suffered a strained back." It further found that on April 17, 1926, said injury of December 3, 1923, caused new and further disability, and that the employee was totally disabled from and after April 17, 1926, to and including July 28, 1926, and thereafter

partially disabled up to the date of the award and continuing, and in said decision the commission issued its award against petitioner herein, Associated Industries Insurance Company, for all the disability and dismissed Federal Mutual Liability Insurance Company and Allen Bros. from the proceedings. The Associated Company filed its petition for rehearing on said decision in which it alleged that the commission acted without and in excess of its powers and that the evidence did not justify the findings. This petition was denied and the present proceeding was instituted. It is not here claimed that the employee is not entitled to the benefits he has received under the award. Petitioner admits that the employee is now very seriously disabled as the record shows that he is facing bone graft surgery on his spine. It is apparent from the facts as recited that the controversy is one between the different insurance carriers. It is petitioner's contention that the record shows beyond all question that the applicant suffered an injury on April 17, 1926, and the commission should have so determined, and, this being so, it was in error in finding that the disability suffered by the employee since April 17, 1926, was proximately caused by the injury occurring December 3, 1923, when the applicant was slacking up on a rope. It is further claimed that the commission also erred in failing to make any finding whatsoever concerning the injury of April 17, 1926, which it is contended was clearly the cause of the employee's present disability. There is no merit in either of the objections.

[1] The issue presented to the commission for its decision was whether the employee's disability subsequent to April 17, 1926, was caused by an injury happening upon that date, or was a new and further disability caused by the original injury of December 3, 1923. The commission found that the applicant "on December 3, 1923, sustained injury occurring in the course of his employment arising out of his employment. * * *". The second finding of fact is "on April 17, 1926, said injury caused new and further disability." These findings are fully supported by the evidence. The employee testified, in substance, that his back was never strong after the original injury he suffered, and that he had never felt the same as he did before he was hurt; that at times he was compelled to quit work; that about a week before the incident of April 17, 1926, he noticed his back becoming worse, and that the pains which he suffered were located in the same place as the pains he suffered in December, 1923; that the soreness was growing worse, until April 17, 1926, when he collapsed. There was medical testimony to show that the applicant had never completely recovered from his original injury, and that such injury was the proximate cause of his disability, and the second alleged injury was merely the occasion

for him to know that he had further trouble with his back. It thus appears that there is substantial evidence to support the findings of the commission that the injury of December, 1923, was the cause of and contributed to the disability suffered from and after April 17, 1926.

[2] Nor is there any merit to petitioner's contention that the commission erred in failing to make an express finding relative to the disability suffered April 17, 1926. The findings of the commission are responsive to the issue as to whether the disability suffered subsequent to April 17, 1926, was caused by an injury on that date or was a new and further disability caused by the injury of December 3, 1923. As above recited, the commission found it to be a new and further disability. An express finding that it was not due to an alleged injury suffered thereafter could add no force to the findings. The findings negative the existence of any new injury. Moreover, a finding upon this subject could in no manner alter or change the award. Where findings are made upon issues which determine the case, other issues become immaterial, and a failure to find thereon does not constitute error. 24 Cal. Jur. pp. 943, 944; Pyle Co. v. Fossler (Cal. Sup.) 252 P. 599.

From what we have said, it follows that the award should be and it is hereby affirmed.

We concur: KNIGHT, J.; CASHIN, J.

85 Cal. App. 181

GRANT v. GLADSTONE et ux. (Civ. 5822.)

District Court of Appeal, First District, Division 2, California. Aug. 19, 1927.

1. Gifts — 49(5)—Evidence held to support finding that money advanced was gift.

In action on open book account for moneys lent, evidence *held* to support court's finding in favor of defense that money was advanced as gift.

2. Evidence — 597—Inconsistencies in testimony do not necessarily mean that testimony will not support a finding.

Simply because there are inconsistencies in one's testimony does not necessarily mean that it will not support a finding.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Hudson Grant, as executor of the last will and testament of B. B. Tuttle, deceased, against H. V. Gladstone and wife, for money lent. From a judgment for defendants, plaintiff appeals. Affirmed.

A. G. Bailey, of Woodland, for appellant. Joseph Farry, of San Francisco (H. A. Vander Zee, of San Francisco, of counsel), for respondents.

KOFORD, P. J. This action was filed May 26, 1923. The complaint alleged that within four years last past defendants became indebted to Benjamin B. Tuttle, who died November 29, 1921, in the sum of \$2,000 upon an open book account for moneys loaned to defendants. Defendants denied the loan, alleged a gift, and set up the statute of frauds.

Plaintiff's proof consisted of offering in evidence a memorandum book in the form of a diary ruled horizontally into spaces with printed dates. On the page thereof headed "April, 1920," and in the space dated "16 Fri." is found the following entry in the handwriting of the plaintiff's testator:

"16 Fri. Loaned Mr. and Mrs. H. V. Gladstone 1,800.00 to pay on a new house purchased by them the amount was to draw 6 pr ct ints. 183 Del Mar St. is the no. I also loaned Mr. H. V. Gladstone 200—for the purpose buying this same house, making in all 2,000 dollars to draw 6 pr ct."

Upon proof of the handwriting of the deceased, this book was received in evidence subject to objections as to its sufficiency and as to the sufficiency of its preliminary proof.

The defendants' testimony was uncontradicted and was to the effect that the money was given and received as an absolute gift.

[1] The court found that the deceased did not lend the said defendants said sum. This is a finding in favor of the defense of gift. The court also found that the action was barred by Code of Civil Procedure, § 339, subd. 1. This means that the item in the memorandum book was not an open book account, within the meaning of Code of Civil Procedure, § 337, subd. 2. Either one of these findings alone would support the judgment, which was for the defendants.

[2] Appellant claims that the testimony of Mrs. Gladstone, the defendant, is "inconsistent with the idea of a gift in two particulars," first, that Mr. Gladstone asked the deceased if he would accept a note and stated that he could not give a mortgage, and, second, that defendants paid interest on two occasions. Simply because there are inconsistencies in one's testimony does not necessarily mean that it will not support a finding. Appellant fails to indicate how the testimony as a whole is insufficient to show a gift. However, these "inconsistencies" were explained by the defendant Mrs. Gladstone in her testimony. She testified to the effect that the deceased refused the note and mortgage, declaring at the time that he wanted to do something for her, and that that was his time to do it; that he would not "stand for" any evidence of the money; that he had previously frequently

expressed his intention of making her a gift; that at the time of the gift defendants voluntarily offered to pay interest, placing the offer upon the ground that, as the gift was made then instead of by will, he should have interest the same as though he had kept the money until his death; that the defendant refused to accept interest, but finally at a later date accepted it, "when he returned from the East." We have read but have not set forth herein all the material testimony concerning the gift.

The testimony was not insufficient to support the court's finding in favor of the defense of gift.

The judgment is affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

85 Cal. App. 149

ANDREWS v. RUSSELL et al. (Civ. 5216.)

District Court of Appeal, First District, Division 1, California. Aug. 18, 1927.

1. Quieting title §12(1)—Plaintiff need not be in possession to sue to quiet title.

It is not necessary that a plaintiff be in possession, in order to maintain an action to quiet title.

2. Quieting title §34(5)—Lessor may sue to quiet title against lessee who has forfeited rights under lease without setting forth nature of lessee's claim (Code Civ. Proc. § 738; Civ. Code, § 761).

Under Civ. Code, § 761, and Code Civ. Proc. § 738, lessor may maintain action to quiet title against his lessee who has forfeited his rights under the lease by failure to perform covenants without setting forth the nature of the lessee's claim.

3. Landlord and tenant §103(1)—Statutes concerning tenancy at will held not applicable to lease for definite period, terminable if covenants were not fulfilled (Civ. Code, §§ 789, 790; Code Civ. Proc. § 1162).

Civ. Code, § 789, providing for termination of tenancy or estate at will, and section 790, providing for method of recovery, and Code Civ. Proc. § 1162, prescribing how notice shall be served, held inapplicable to lease for definite term, containing certain provisions that if lessee did not perform covenants the lease would be forfeited.

4. Quieting title §14—Lessor may bring action to quiet title against lessee who has forfeited lease without giving notice of default and demand for possession.

A lessor may bring an action to quiet title against his lessee who has forfeited the lease by not performing covenants thereunder without giving notice of default and demand for possession.

5. Evidence §314(1)—In action to quiet title as against oil lease, letter from corporation commissioner and oral declaration concerning permit to sell oil stock held inadmissible as hearsay.

In an action to quiet title by a lessor against his lessee, who had forfeited his oil lease, letter from corporation commissioner and verbal opinion with reference to permit to sell oil stock held hearsay and inadmissible, notwithstanding rule that public official's oral declaration on matters of public interest may be received.

6. Quieting title §44(3)—Evidence held to support finding and judgment based thereon that lessee had not performed covenants of oil lease.

In an action to quiet title by a lessor against his lessee, where lessor claimed that the lessee had forfeited his rights under the lease by failure to perform covenants, evidence held to support finding and judgment based thereon that the covenants had not been performed.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action to quiet title by Alpha G. Andrews against Albert C. Russell and the Kern-Torrance Petroleum Corporation. Judgment for plaintiff, and defendant Kern-Torrance Petroleum Corporation appeals. Affirmed.

Fred W. Heath, of Los Angeles, for appellant.

Clafin & Lambert, of Bakersfield, for respondent.

CAMPBELL, Justice pro tem. The respondent brought an action to quiet his title against defendant Albert C. Russell and defendant and appellant Kern-Torrance Petroleum Corporation in and to the land and premises described in the complaint. The defendant Albert C. Russell failed to appear and answer the complaint within the time allowed, and his default was regularly entered. The appellant Kern-Torrance Petroleum Corporation answered and set up its right to the possession of the property under and by virtue of a lease which had been executed and delivered by respondent to defendant Albert C. Russell and by him assigned to appellant, and set forth that it claimed no interest in or to the premises except under a lease executed by respondent.

The court found that the plaintiff was at the time of the commencement of the action, and prior to January 10, 1923, the owner in fee simple of the real property described in the complaint; that the defendant Kern-Torrance Petroleum Corporation claims and asserts an interest in said land adverse to plaintiff by reason of a lease entered into between plaintiff and Albert C. Russell on January 10, 1923, and thereafter assigned to the defendant Kern-Torrance Petroleum Corporation;

that said lease contained a provision that the lessee was to commence actual drilling and continue diligently until the completion of a well on the described land, 60 days from this date (date of lease), which said lease was dated January 10, 1923, and was recorded in the office of the county recorder of Kern county, and also contained a provision that the lessee would drill on the described land continuously to a depth of 3,000 feet or more before completion, unless oil was found in commercial quantities before that depth. Said lease also contained a provision that, upon the failure of the lessee to comply fully and fairly with each of the conditions of the lease, all the rights under the lease would terminate and be forfeited. That said lessee did not, nor did his assignee, Kern-Torrance Petroleum Corporation, in good faith commence actual drilling and continue diligently, or drill continuously, and that said lessee and his assignee, Kern-Torrance Petroleum Corporation, have failed to fully or fairly comply with each of the conditions in said lease, and concludes from the foregoing that the rights of defendants Albert C. Russell and Kern-Torrance Petroleum Corporation in the lease have been terminated prior to the commencement of the action, and that plaintiff is entitled to judgment quieting his title against each of the defendants. Judgment was entered in accordance with the findings, and from this judgment appellant Kern-Torrance Petroleum Corporation has appealed.

Appellant urges the following points in support of his appeal: (1) That an action to quiet title without setting up the nature of the defendant's claim is not the proper method of procedure to cancel a lease where the defendant is in possession under the lease. (2) That plaintiff cannot escape the obligation to give notice of default and demand for possession as provided by law, by resorting to an action to quiet title. (3) That plaintiff cannot take advantage of the defendant's failure to perform the lease when the failure is due to plaintiff's willful violation of the covenant of quiet enjoyment implied in the lease. (4) That the court erred in refusing to permit plaintiff's witness to testify as to the act of decision of a public official, verbally made, and in refusing to admit commissioner's letter. (5) That the finding that the defendant has not in good faith, or at all, carried on drilling operations as provided in the lease, is not supported by the evidence. (6) That the judgment is not supported by the evidence and is contrary to law.

Appellant, under his first assignment, urges that "plaintiff as landlord, cannot maintain an action to quiet title against his tenants," citing us to *Van Winkle v. Hinckle*, 21 Cal. 343. That was an action to quiet title decided in 1863, when, in order to maintain an action to quiet title, it was necessary for the plaintiff to be in possession, and it was held

in that case that a landlord could not bring an action against his tenants in possession for the purpose of determining the validity of an adverse title set up by the tenants—that the plaintiff could not claim possession through the tenants, that is, that he was in possession by reason of his tenant's possession, and at the same time bring an action against the tenant to determine the title—and, in *Lyle v. Rollins*, 25 Cal. 437, the court, referring to the *Van Winkle* Case says:

That "in *Van Winkle v. Hinckle*, 21 Cal. 342, possession by tenant was held to be insufficient when the action is brought by the landlord against the tenant in possession setting up a claim adverse to his landlord."

[1, 2] It is not necessary under the rule now laid down for a plaintiff to be in possession in order to maintain an action to quiet title. *People v. Center*, 68 Cal. 551, 5 P. 263, 6 P. 481. The other cases cited by appellant deal with the principle that a tenant cannot dispute the title of his landlord and are, therefore, not analogous to the question here presented.

Appellant's chief objection under this heading seems to be that a tenant, not holding adversely to the title of the landlord, has no estate in the premises, which is adverse, and that it is necessary to quiet title to set forth the nature of the defendant's claim. In *Castro v. Barry*, 79 Cal. 443, 21 P. 946, the court uses this language:

"It is contended for the appellant, in the first place, that 'an action to quiet title or to remove a cloud upon title will not lie where the facts alleged, if true, would not legally affect the plaintiff's title.' But in this the learned counsel overlooks the distinction between actions to determine adverse claims, which are provided for by the Code of Civil Procedure, and which in this state are commonly referred to as actions to quiet title, and suits to have an instrument canceled, or adjudged to be void, which are usually called actions to remove a cloud. Suits to have an instrument canceled, or adjudged to be void, were quite common in the old chancery practice, and constituted one of the applications of the principle *quia timet*. 2 Story, Eq. Jur. § 701. This suit is preserved by the Civil Code. * * * Suits to determine adverse claims such as exist in this state were not known to the old chancery practice, but were provided for by statute. The provision of the Code of Civil Procedure is as follows: 'Sec. 738. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim' (compare section 254 of Old Practice Act, Laws 1851, pp. 92, 93). The distinction between the two kinds of action is clear. * * * It is not necessary * * * that the adverse claim should be of any particular character. As said by Baldwin, J., delivering the opinion in *Head v. Fordyce*, 17 Cal. 151, the statute 'does not confine the remedy to the case of an adverse claimant setting up a legal title or even an eq-

uitable one; but the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, * * * or its value depreciated, or whereby the plaintiff might be incommode or damaged by the assertion of an outstanding title already held or to grow out of the adverse pretention' [citing cases]; and the rule may be even more broadly stated, viz., that the action may be maintained by the owner of property to determine any adverse claim whatever. For if the defendant by his answer disclaims all interest whatever, judgment may, nevertheless, be entered against him. * * * The plaintiff, therefore, is not required to set forth the nature of the defendant's claim."

The Castro Case from which we have just quoted, was cited with approval in Hyatt v. Colkins, 174 Cal. 580, 163 P. 1007, and in Landregan v. Peppin, 94 Cal. 467, 22 P. 771, the court says:

"It will be noticed that section 738 of the Code of Civil Procedure, which provides for the determination of adverse claims to realty, is very broad in its terms, and includes all adverse interests, from a claim of title in fee to the smallest leasehold, and unquestionably it is the duty of the defendant to set out his interest, whatever it may be, when called upon, under this section of the Code."

Section 738 of the Code of Civil Procedure provides:

"An action may be brought by any person against another, who claims an estate or interest in real [or personal] property, adverse to him, for the purpose of determining such adverse claim. * * *"

[3] A lease constitutes an estate. Section 761 of the Civil Code provides that estates in real property are either estates of inheritance, estates of life, estates for years, or estates at will. Our attention is also called by appellant to sections 789 and 790 of the Civil Code and section 1162 of the Code of Civil Procedure. Section 789 of the Civil Code provides for the termination of a tenancy or estate at will; section 790 of the same Code, for the method of recovery; and section 1162 of the Code of Civil Procedure prescribes how the notice shall be served. These sections are not applicable as the leasehold here was not a tenancy or estate at will. It was a lease for a definite term of three years, with certain provisions that it would terminate if the covenants were not fulfilled.

Appellant cites us to several cases as holding that unlawful detainer is the statutory method of restoring possession from a tenant. The decisions cited, however, do not hold that unlawful detainer is the exclusive action by a landlord against a tenant. The case of Francis v. West Virginia Oil Co., 174 Cal. 168, 162 P. 394, is the nearest in point among those cited, which holds that a vendee in possession of land under a contract of sale, who had defaulted in the payment

of an installment of the purchase price, did not become a tenant at will, subject to removal by the summary method of unlawful detainer, and the action only lies where there is a relation of landlord and tenant, but the case does not hold unlawful detainer to be the exclusive remedy. It would seem that a lessee who has forfeited his rights under his lease by reason of his failure to comply with the covenants of the lease is analogous to a vendee under a contract of purchase who has defaulted in the payment of his installments, and it has been held that an action to quiet title will lie in such case (McDonald v. Kingsbury, 16 Cal. App. 248, 116 P. 380), and in Lewis v. Agoure, 8 Cal. App. 146, 96 P. 327, in which case a transfer to the Supreme Court was denied, it is held that an action to quiet title is the proper action against a lessee in whom no right remained, and here the court found that all rights of appellant in the lease had terminated prior to the commencement of the action.

[4] As to appellant's second point that plaintiff cannot escape the obligation to give notice of default and demand for possession, there is no merit. Plaintiff does not rely upon the statute permitting an action for unlawful detainer with its accompanying penalties, but upon an action to quiet title. Williams v. Edge, 192 Cal. 254, 219 P. 747.

As to appellant's third point, that plaintiff cannot take advantage of defendant's failure to perform the lease, when the failure is due to plaintiff's willful violation of the covenant of quiet enjoyment implied in the lease, it may be said that appellant has not directed us to any evidence in the record, nor have we found any, to the effect that respondent interfered with the quiet and peaceable enjoyment by appellant of its lease.

[5] We see no error in the court's ruling sustaining an objection to the introduction in evidence of a letter from the corporation commissioner and a verbal opinion given appellant with reference to a permit to sell oil stock. Such evidence was not material to the issue and is hearsay. Appellant cites us to Chamberlayne's, c. 40, § 889 et seq., and Lay v. Neville, 25 Cal. 545, as holding "The rule against hearsay is subject, also, to the exception that a public official's oral declarations on matters of public or general interest may be received if the declarant is not available." Here, however, the oral declaration of the public official did not pertain to a matter of public or general interest.

[6] As to the remaining objections urged by appellant, that the finding that defendant has not in good faith carried on drilling operations as provided in the lease, is not supported by the evidence, and that the judgment is not supported by the evidence and is contrary to law, there is no merit. The testimony of appellant and defendant Albert

C. Russell was that they had frequently visited the premises and no work was being done; that on many occasions only the watchman was at the well; that only 8 feet was drilled from January 10, 1923, the date of the lease, to March 16, the last time appellant measured the well before the suit was brought, which was on June 4, 1923, and that the day before the trial of the case the depth of the well was 193 feet. The witness Everett F. Edenberg testified that he lived within half a mile of this drill site and passed by on the road practically every day, and to be safe, on an average of four times a week. Prior to June 1st he only saw the rig going twice. That he helped drill wells within a radius of 10 miles of the place and drilled on an average of 80 feet a week. J. J. Shore, a witness called by defendant, testified on cross-examination that from his experience as a driller that he had only known of a rig such as the one on this Kern-Torrance property to go 1,200 feet. Such evidence is sufficient to support the finding complained of, and from what has been said it follows that we are of the opinion that the judgment finds support in the evidence, and that it is not contrary to law.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

84 Cal. App. 26

Ex parte VALENCIA. (Cr. 1504.)

District Court of Appeal, Second District, Division 1, California. June 16, 1927.

Habeas corpus $\Rightarrow$ 21—Giving voucher to another who indorsed it in name not payee's held on habeas corpus not sufficient to hold defendant to answer.

In habeas corpus proceeding by petitioner committed on charge of forgery, evidence that the petitioner secured a certain voucher either lost or stolen from payee and turned it over to a third party with instructions to cash it, and the third party indorsed the voucher with a name other than that of the payee, *held* not sufficient to support charge of forgery.

Application by Luis Valencia for a writ of habeas corpus to be directed to the Sheriff of Imperial County. Petitioner discharged.

Fred Thompson, of Brawley, and Frank Birkhauser, of El Centro, for petitioner.

Elmer W. Heald, of Brawley, for respondent.

CONREY, P. J. The petitioner, Valencia, is in custody pursuant to a warrant issued by the justice of the peace of El Centro township, in the county of Imperial. A complaint had been filed, charging that defendant, Valencia, had committed the crime of forgery, with intent to defraud one Luis Sanchez. After examination before the magistrate, defendant was held to answer to said charge.

Petitioner contends that the evidence produced before the magistrate was not legally sufficient to establish the fact that there was probable cause to believe him guilty of the crime charged and to which he is held to answer.

From the evidence produced before the magistrate it appears that a pay roll voucher of the Southern Pacific Company, a corporation, was issued and delivered to its employee, Luis Sanchez, payable in the sum of \$10.27 when properly indorsed by the payee. This voucher was lost by Sanchez or was stolen from him. According to some of the testimony, the voucher came into the hands of Valencia, who turned it over to one Reynosa, with instructions to cash it. Reynosa indorsed upon the voucher not the name "Luis Sanchez," but the name "Luis Gonzales." With this paper so indorsed, he succeeded in delivering it to a merchant, who paid him the face value thereof.

Omitting sundry other circumstances shown by the evidence, the one clear point appears that the act of forgery was not committed. There is no charge that the instrument itself was forged, but only that the indorsement was forged. Necessarily, this could only be accomplished by writing the name "Luis Sanchez." We may concede that a slight variation in spelling of the name might occur, and the act still remain a forgery. But when a distinctly different name is used, it is not a forgery. So here, the writing of the name "Gonzales" cannot be accepted as a forgery of the name "Sanchez." For the purposes of this proceeding, we cannot be concerned with the fact that the defendant may have committed another kind of crime, when he, together with Reynosa, obtained said sum of money in the manner described by the testimony. The record is that petitioner has been committed and held to answer to the crime of forgery without any evidence that there was a forgery.

The petitioner is discharged from custody.

We concur: HOUSER, J.; YORK, J.

$\Rightarrow$ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

85 Cal. App. 228

PEOPLE v. CASTRO. (Cr. 1311.)

District Court of Appeal, First District, Division 1, California. Aug. 25, 1927.

1. Criminal law $\S$ 742(1)—Where testimony of ravished prosecutrix was not inherently improbable, her credibility was for jury (Code Civ. Proc. $\S$ 1847).

Where, in prosecution for rape, prosecutrix's testimony was not inherently improbable, question of her credibility was for the jury, under Code Civ. Proc. $\S$ 1847, who not only had the right but the duty to determine to what extent her testimony should be believed.

2. Criminal law $\S$ 470—Examining physician's testimony that prosecutrix had indulged in sexual intercourse held properly admitted, not being opinion of ultimate facts in issue.

Testimony of physician who had examined prosecutrix that, in his opinion, she had indulged in sexual intercourse held properly admitted, since witness thereby expressed no opinion on the ultimate facts in issue and province of jury was not invaded.

3. Criminal law $\S$ 518(1)—Admission of defendant's statement held proper, although he denied he had been advised of right to remain silent.

Where defendant denied that before making incriminating statements concerning rape of a child he had been advised of his right to remain silent, but there was sufficient showing to justify conclusion that statements were freely and voluntarily made, their admission was proper.

4. Criminal law $\S$ 531(1/2), 736(2) — There must be preliminary proof that confession was voluntary and without inducement, but sufficiency of preliminary proof is for court.

Though it is essential that the preliminary proof show a confession was made voluntarily and without previous inducement or intimidation, yet the question whether such preliminary proof is sufficient is one of fact to be determined by the trial court.

5. Criminal law $\S$ 531(3)—Jury's finding that statements of crime were made freely and voluntarily by defendant held sustained by evidence.

Jury's finding that statements made by defendant relative to crime of rape were made freely and voluntarily held sustained by the evidence.

6. Rape $\S$ 59(12) — Instruction relative to ravished prosecutrix's failure to resist or complain held not erroneous or misleading on question of credibility.

In rape prosecution, instruction, that "The fact, should you so find, that the female made no outcry, complaint, or resistance in any form is immaterial where she was under age of consent," etc., held not erroneous or misleading on question of prosecutrix's credibility because of failure to complain.

Appeal from Superior Court, Monterey County; Fred A. Treat, Judge.

P. Castro was convicted of rape, and he appeals. Affirmed.

J. A. Bardin, of Salinas, and J. T. Harrington, of Santa Clara, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

CASHIN, J. Defendant was convicted of the crime of rape, alleged to have been committed on one Carmen Mancha, a female aged about 15 years. The appeal is from the judgment and from an order denying a motion for a new trial. It is contended that the evidence was insufficient to support the verdict, and that the admission of certain testimony over objection and the giving of an instruction to the jury were prejudicially erroneous.

[1] The crime was alleged to have been committed in the city of Monterey, on or about October 5, 1925, and it was shown that the defendant had been acquainted with the child and her parents for some time previous to that date. It was testified that the defendant had invited the child to visit the place where he resided, that visits were made, and that on the occasion in question she was accompanied by other girls about her age. These were called as witnesses for the prosecution, and, according to their testimony, the girl Carmen on this occasion—the date of which they fixed as October 5, 1925—went into a bedroom with the defendant, where she remained for several minutes. The testimony of Carmen Mancha as to the fact charged and the place of its commission was contradictory. At the trial, after testifying that the act was committed by the defendant and relating in detail the circumstances, she retracted the statement, but subsequently on her redirect examination repeated the charge. It further appears that before the trial the witness had also retracted the charge which she originally made. Her testimony, however, tended to show that she feared that if the charge was made it would lead to her being committed to the reform school; and it is evident that the jury believed that her testimony was influenced in a considerable degree by her fears in this respect. According to her testimony, she made no resistance or outcry and no complaint subsequently, and it is apparent from the evidence that she willingly submitted to the defendant. In view of all the circumstances shown, her testimony was not inherently improbable, and the question of her credibility was for the jury (Code Civ. Proc. $\S$ 1847), who not only had the right but the duty to determine to what extent her testimony should be believed. Estate of Gird, 157 Cal. 534, 108 P. 499, 137 Am. St. Rep. 131; Withers v. Massengill, 148 Cal. 769, 84 P. 769; People v. Kelly, 146 Cal. 119, 79 P. 846; People v. Chesney, 72 Cal. App. 570, 237 P. 793; People v. Raich, 26 Cal. App. 286, 146 P. 907.

[2] According to the testimony of a physician, a physical examination of the child was made by him on October 12, 1925, when it was found that the hymen was almost obliterated and that the external opening into the vagina was considerably enlarged, much more so than would be due to an injury. He further testified, over objection, that as the result of his examination he was of the opinion that the child had indulged in sexual intercourse, and the admission of this testimony is assigned as error.

It was held in the following cases that the opinion of a physician, based upon an examination of the sexual organs of the prosecutrix, that the condition found was caused by a rape, was incompetent: *State v. Noonan*, 55 Wis. 258, 12 N. W. 379; *State v. Bull*, 45 W. Va. 767, 32 S. E. 240; *People v. Schultz*, 260 Ill. 35, 102 N. E. 1045; *Simmons v. State*, 105 Miss. 48, 61 So. 826. In other jurisdictions, however, it is the rule that in prosecutions for statutory rape the testimony of medical experts following a physical examination that, in their opinion, the prosecutrix has indulged in sexual intercourse is admissible in corroboration of her testimony that intercourse was had with the defendant (*State v. Rash*, 27 S. D. 185, 130 N. W. 91; *Messel v. State*, 176 Ind. 214, 95 N. E. 565); and in *People v. Liggett*, 18 Cal. App. 367, 123 P. 225, the testimony of a physician, by whom an examination was made, that in his opinion intercourse had been effected was held to be competent. Whether the child had indulged in sexual intercourse involved the determination of a probative and not an ultimate fact; and the question whether the condition disclosed by the physician's examination was so caused reasonably called for expert medical opinion, without which persons of ordinary experience would be unlikely to prove capable of forming a correct judgment. The witness expressed no opinion on the ultimate facts in issue, nor did his testimony have the effect of usurping the function of the jury, and its admission was not erroneous.

[3] The defendant, who spoke English imperfectly, was interviewed by a police officer shortly after the arrest. On this occasion he made no reply to a question as to his guilt, but subsequently, according to the testimony of the officer, he expressed a willingness to talk about the case, and stated, in substance, that he had had sexual intercourse with the child. Later the statement was repeated through an interpreter in the presence of the deputy district attorney and other officers. It does not appear that previous to his statement to the police officer the defendant was advised that he need make no statement, or that his statements would be used against him, or that he was entitled to the advice of counsel. On the last occasion, however, ac-

cording to the testimony of the deputy district attorney, he was advised that it was his right to refuse to make a statement, and that any statement which he might make could be used against him. The defendant denied that he was advised as to his rights before making either of the statements, but sufficient was shown to justify the conclusion of the trial court that they were freely and voluntarily made, and their admission in evidence was proper.

[4] Though it is essential that the preliminary proof show that the confession was voluntarily made without previous inducement or intimidation, yet the question whether the preliminary proof is sufficient is one of fact addressed to, and must be determined by, the trial court. *People v. Siemsen*, 153 Cal. 387, 95 P. 863.

[5] The jury was instructed that it was for them to determine whether the statements were procured by threats or promises, or induced by hope or fear, and that if they found that they were not made freely and voluntarily to reject them. Aside from the fact that the defendant was in custody and that he was without the advice of counsel, nothing appears from the record which supports the contention that the statements were not free and voluntary, and we are satisfied that the implied finding of the jury was fully sustained by the evidence.

[6] The court, at the request of the prosecution, instructed the jury as follows:

"The court instructs you that the fact, should you so find, that the female made no outcry, complaint, or resistance in any form is immaterial where she was under the age of consent at the time the offense was committed, for under such circumstances the law resists for her."

Defendant concedes that, as respects consent, the fact that the child made no outcry, complaint, or resistance is immaterial, but contends that on the question of her credibility a failure to complain was relevant; that the instruction was not confined to the element of consent and was therefore erroneous.

It is evident, however, from a reading of the whole instruction, that the court was referring to the conduct of the prosecutrix at the time of the alleged commission of the act and not to a subsequent failure to complain. Such we think, was its plain meaning, and, so construed, it was not erroneous or misleading.

We cannot say that the jury was influenced by prejudice or passion in arriving at its verdict, which was supported by the evidence, or that the result was a miscarriage of justice.

The judgment and order are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

85 Cal. App. 165

(259 P.)

Ex parte BALDWIN. (Cr. 1529.)

District Court of Appeal, Second District, Division 1, California. Aug. 18, 1927.

1. Courts — 114—Court's nunc pro tunc entry after appeal of record of admission of former conviction held valid, and to show jurisdiction foreclosing release.

On habeas corpus by one convicted in two cases of possession of intoxicating liquor on theory that penalties were in excess of jurisdiction, in view of fact that defendant, at time of plea, admitted alleged prior conviction, municipal court's entering nunc pro tunc order amending minutes to show such admission was proper, and prevented release of defendant on habeas corpus, regardless of pendency of appeal from order amending minutes.

2. Criminal law — 1211—Sentencing one formerly convicted to 30 days' imprisonment and to pay \$750 fine or suffer 75 days' imprisonment in separate cases for possession of intoxicating liquors held within municipal court's jurisdiction.

Where defendant had been previously convicted of possession of intoxicating liquors, sentence in municipal court in one case for such possession of 30 days' imprisonment, and in another case of a fine of \$750, or, in lieu thereof, 75 days' imprisonment, was not beyond maximum lawful penalty.

3. Intoxicating liquors — 216—Complaint describing liquor alleged to have been possessed without designating it by particular name held sufficient (Wright Act, § 2; National Prohibition Act [27 USCA § 4]).

In view of Wright Act, § 2 (St. 1921, p. 79), adopting Volstead Act, complaint for possession of intoxicating liquor which described it was not defective for failure to designate by name particular kind of liquor described as intoxicating by National Prohibition Act, tit. 2, § 1 (27 USCA § 4 [U. S. Comp. St. § 10138½]), as, for example, that it was whisky or wine.

4. Intoxicating liquors — 222—Complaint for possession of intoxicating liquor need not specify possession was not within exception authorized by Volstead Act (Wright Act, § 2; 27 USCA § 12).

In view of Wright Act, § 2 (St. 1921, p. 79), adopting Volstead Act, complaint for possession of intoxicating liquor may state cause of action without specifying that possession was not within one of exceptions authorized by Volstead Act, tit. 2, § 3 (27 USCA § 12 [U. S. Comp. St. § 10138½aa]).

Original application by Mamie Baldwin for a writ of habeas corpus to be directed to the Chief of Police of the City of Los Angeles. Petitioner remanded to custody.

A. T. Folsom, of Los Angeles, for petitioner.

E. J. Lickley, City Prosecutor, and J. W. Matherly and F. W. Fellows, Deputy City Prosecutor, all of Los Angeles, for respondent.

CONREY, P. J. [1] Mamie Baldwin, in whose behalf the petition was filed, is held in custody under two judgments of the municipal court of the city of Los Angeles, in causes numbered 07879 and 08870, which by stipulation were tried jointly before a jury. Each complaint charged the commission of a misdemeanor by having in possession alcoholic intoxicating liquors, etc. Each complaint alleged that the defendant, before the commission of the stated offense, had been convicted in the same court of another offense of like character with the one for which defendant was now being prosecuted. In the original petition on which the writ was issued herein, petitioner alleged that there was no finding by court or jury in said causes of any previous conviction. For this reason petitioner claimed that the judgments were in excess of the jurisdiction of the court in this, that in cause No. 07879 the court imposed a sentence of 30 days' imprisonment, whereas the maximum penalty that could have been imposed would have been a fine of \$500; and also in this, that in cause No. 08870 the court imposed a sentence of \$750, or that, in lieu thereof, the defendant suffer imprisonment for a term of 75 days, whereas the maximum penalty that could have been imposed would have been \$500 fine.

In the return to the writ it was stated that in each of said actions the defendant, at the time of entering her plea of not guilty to the pending charge, admitted the prior conviction as alleged in the complaint.

Thereafter, by permission of this court, petitioner filed an amended petition in which she alleged:

"Each of the complaints in said causes bears a memorandum notation 'Admits prior,' which is undated, unsigned, with no indication by whom it was placed there or at what time, such notation not appearing in the memorandum of proceedings on the back of the complaint, but appearing upon the face thereof, and there is no record in the proceedings of the court to show that the defendant made any admission of prior conviction of the offense alleged in the complaint in either case in open court during any of the proceedings therein in either case, the said anonymous notations on the said complaints being the only notations or memoranda regarding such alleged prior convictions, which appeared either in the files or records of either cause at the time of the sentence of the defendant in each of said causes; and said files and records do not now show any finding either by the court or the jury that the defendant, in either of said causes, had been previously convicted of the offense alleged in the complaint as a previous conviction."

Thereafter, by permission of this court, respondent amended the return to the writ so that in each case it is stated that the court by order entered in its minutes has amended its record so as to show that at the time of making her plea of not guilty to the pending charge the defendant admitted prior conviction.

tion of unlawful possession of intoxicating liquor as charged in the complaint. Further, in support of this amendment to the return, respondent filed a certified copy of the minutes of the municipal court, duly signed by the judge and certified by the clerk of the court. In each order amending minutes it is recited that, it appearing that the proceedings referred to in the minutes as originally entered are not fully and completely set forth, it is ordered that the record of the proceedings had herein at the stated date be amended to read as stated in the amending order. The minutes as thus amended state the fact of arraignment and that defendant pleaded not guilty to the pending charge, but admitted the prior conviction.

The fact appears to be that down to and including the time when the judgments were entered there was no record of the fact that defendant admitted prior conviction. Across the face of each complaint in a blank space there had been written the words "Admits prior," but there had been no other record or attempt to make a record of admission of prior conviction, neither was there any finding by the court or jury upon a trial of that issue. But it now appears to be a fact, as shown by the corrected record of the minutes, that the defendant at the time of entering her plea did in each case admit the fact of the alleged conviction.

Counsel for petitioner contends that each one of said orders of amendment of the minutes of the municipal court was made without authority of law in this, that each of said orders was made ex parte, upon application of the prosecution, without notice to defendant or defendant's counsel, and affected the substantial rights of the defendant; that from each of said orders of amendment of the minutes the defendant has appealed to the superior court, which appeal in each instance is now pending and undecided; that by reason of these facts petitioner is entitled to have this proceeding determined without reference to said orders of amendment of minutes and without consideration thereof.

[2] We are satisfied that the municipal court had jurisdiction to enter the nunc pro tunc order amending its minutes. For the purpose of the present proceeding we are not concerned with any errors which the court may have committed in the exercise of such jurisdiction. There is definite authority that the court has power in a proper case to make such order of amendments of its minutes. *Biaggi v. Ramont*, 189 Cal. 675, 209 P. 892; *Halpern v. Superior Court*, 190 Cal. 384, 388, 212 P. 916. Upon the record as now before us, showing the fact of prior conviction, it must be held that petitioner's claim that the judgments were in excess of the jurisdiction of the court, in that each of them imposed a sentence beyond the maximum lawful penalty, is without merit.

[3] Petitioner further contends that the judgments are void because each of them was based on a complaint which failed to charge the defendant with a public offense in this, that it charged the defendant with mere possession of intoxicating liquor, "without stating that such liquor was any of the specific kinds of liquor described as intoxicating liquor by section 1 of title 2 of the National Prohibition Act (27 USCA § 4; U. S. Comp. St. § 10138½), or that it was other than those specifically defined as intoxicating liquor, containing the prohibited amount of alcohol, and further failed to set forth any facts which would render such possession unlawful."

The complaints are substantially alike. In each case it is represented that at the place and time stated, the defendant did willfully and unlawfully have in possession "certain alcoholic intoxicating liquors, which are fit for use for beverage purposes, which did then and there contain more than one-half of 1 per cent. by volume of alcohol, contrary," etc.

"All acts or omissions prohibited or declared unlawful by the Eighteenth Amendment to the Constitution of the United States or by the Volstead Act are hereby prohibited and declared unlawful; and violations thereof are subject to the penalties provided in the Volstead Act." Section 2 of the California statute commonly known as the Wright Act, Stats. 1921, p. 79; *Deering's Gen. Laws*, 1923 Ed., Act 3784.

It is provided by the Volstead Act that:

"No person shall * * * possess any intoxicating liquor except as authorized in this chapter, and all the provisions of this chapter shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." *Barnes' Federal Code*, 1919-24 Cum. Supp. p. 849 (27 USCA § 12; U. S. Comp. St. § 10138½aa).

The Volstead Act provides that the phrase "intoxicating liquor" shall be construed to include alcohol and other specified liquors, "by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes." We are of the opinion that the description of the liquor alleged to have been held in possession by the defendant, without designating by name the particular kind of liquor (as, for example, that it was whisky or that it was wine), does not prevent the complaint from stating a cause of action. *People v. Silva*, 67 Cal. App. 351, 227 P. 976.

[4] We are further of the opinion that such complaint may state a cause of action without specifying that defendant's possession of the liquor was not within one of the exceptions authorized by the Volstead Act. *People v. Cencevich*, 64 Cal. App. 39, 44, 220 P. 448.

It is ordered that the prisoner be remanded to custody.

We concur: HOUSER, J.; SHAW, Justice pro tem.

85 Cal. App. 263

PACIFIC EMPLOYERS' INS. CO. v. ARENBURST, FARAHAN & LORAN et al.
(Civ. 5861.)

District Court of Appeal, First District, Division 1, California. Aug. 27, 1927.

1. Insurance ⇨379(7)—Agent in filling out application blank is agent of company, even though policy states otherwise.

The act of an insurance agent in filling in an application blank is the act of his company, even though the policy designates the agent as the agent of the insured.

2. Insurance ⇨146(1, 3)—Construction is to determine intention; ambiguities are interpreted against insurer.

Where the language used in an insurance policy is ambiguous or uncertain, the main object in construction is to determine in what sense the words employed were intended, and uncertainties will be interpreted against the insurer, since it drew the contract.

3. Insurance ⇨379(1)—Error of agent in stating in application that relationship of coinsureds was that of copartners held to estop company from denying such relationship.

Where insureds, who were not partners, in good faith truthfully answered questions contained in an insurance application, but the agent incorrectly designated their relationship as a copartnership, the insurance company was estopped, in an action upon the policy, to assert the falsity of such statement.

4. Insurance ⇨379(1)—That not insurance company's agent but agent's employee obtained information on which agent incorrectly designated insureds as copartners held not to relieve company from liability on policy.

Fact that the information upon which an insurance agent based his erroneous statement in the policy application that persons insured were copartners was not obtained by agent, but by his employee, held immaterial and insufficient to relieve insurance company from liability to persons insured on the policy.

Certiorari by Pacific Employers' Insurance Company to annul an order of the Industrial Accident Commission awarding Emily Jane Moffett compensation for the death of her son as against Arenbrust, Farahan & Loran and another, employers. Award affirmed.

W. R. Millington, of San Francisco, for petitioner.

G. C. Faulkner and Gordon S. Keith, both of San Francisco, for respondents.

KNIGHT, J. An award was made by the Industrial Accident Commission in favor of respondent Emily Jane Moffett and against petitioner, Pacific Employers' Insurance Company, on account of the accidental death of Mrs. Moffett's son, the award being based upon a finding that on September 2, 1926,

at Stockton, Cal., "while in the employ of the defendant Dennis Loran, named herein as one of the firm of Arenbrust, Farahan & Loran, at which time the employer was insured against liability," the deceased sustained injuries arising out of and in the course of said employment which proximately caused his immediate death. Said insurance company now seeks by this proceeding in certiorari to have the award annulled, the main contention being that the contract of insurance under which its liability attaches was vitiated by false representations made by the assured as to the existence of said firm as a copartnership.

The policy was issued by the company at its San Francisco office, upon a written application prepared by or under the direction of Alan B. Hicks, the company's licensed agent at Stockton, and forwarded by him to the San Francisco office, the assured taking no part in its preparation except to give the information upon which the answers contained therein were based. When completed said application set forth the following questions and answers:

"Name of this employer, Arenbrust, Farahan & Loran. P. O. address, 712 East Jackson street, Stockton, Cal. Individual, copartnership, corporation, or estate? A copartnership."

With reference to the business relationship of the individuals named, as it existed at the time the insurance was applied for, Loran, who was the sole witness upon the subject, testified that Arenbrust, Farahan and himself had been separately engaged in the trucking business in and around Stockton, each owning and operating his own truck and hiring and paying his own men; that at a hearing of the Railroad Commission in Stockton "it was deemed advisable for men who had a single truck to form sort of a combination for the reason [that] when one truck was in operation we had to find some means of taking care of something that might turn up otherwise;" that thereafter their trucks were operated under such an agreement, whereby jobs were taken care of jointly, providing one truck could not handle the work alone, and that when so operated each owner was paid for the amount of work his truck had done, each owner taking care of his own expenses, and there being no division of income or expenses; that common headquarters were maintained at Farahan's home, 712 East Jackson street, Stockton.

Loran further testified that the foregoing working arrangement was explained when the policy was applied for, and in this respect his testimony was fully supported by that of Hicks, who testified in part as follows:

"A. The business was secured in the first place by my father out of the office. I am the

licensed agent here for the company, but the business was secured through the office.

"Q. Did you talk with any of these men about the situation? A. No. The three men, Arenbrust, Farahan, and Loran, came into the office and applied for compensation insurance as Arenbrust, Farahan and Loran, working together. My understanding was that they were working together, and that when Farahan had too much work he would call in Loran, and the same would apply to Arenbrust, when their business was greater than they could take care of individually.

"Q. That is practically the same as Mr. Loran testified to here this morning? A. I couldn't hear very much from back there. That was the working arrangement, and we drew up a policy that way, the three men. The intention of the policy was— I understood how they were working and when I sent the application that way I figured to give them protection jointly and singly.

"Q. Did this policy describe them as partners? A. Described them, I believe, as a copartnership, 'co' meaning with or together, which I thought would answer the purpose.

"Q. You say you were a licensed agent here or at that time for the company? A. Am still.

"Q. Do I understand from that you are company's agent or called a broker licensed to handle their business? A. I am a licensed agent of the company. Not a broker; no."

[1] When an insured in good faith makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy. The acts of the agent, whether he is a general agent with power to issue policies, a soliciting agent, or merely a medical examiner for the company, are in this respect the acts of the company, and he cannot be regarded as the agent of the insured, even though it is so stipulated in the application. *Layton v. New York Life Ins. Co.*, 55 Cal. App. 202, 202 P. 958; *Lyon v. United Moderns*, 148 Cal. 470, 83 P. 804; *Westphall v. Metropolitan Life Ins. Co.*, 27 Cal. App. 734, 151 P. 159; *Schmitt v. U. S. Fidelity & Guaranty Co.*, 169 Minn. 106, 210 N. W. 846.

[2] The authorities further hold that an insurance policy is a contract of indemnity for loss; and where the language used is ambiguous and may be understood in more senses than one, the main object is, as in the case of construction of contracts generally, to determine in what sense the words employed were intended; and that in the determination of such question the contract shall be construed liberally in favor of the insured, and any uncertainty or ambiguity therein be interpreted most strongly against the insurance carrier, because of the fact that the carrier draws the contract (*Meyerstein v. Great American Ins. Co.* [Cal. App.] 255 P. 220; *Victoria S. S. Co. v. Western Assur.*

Co. of Toronto, 167 Cal. 348, 139 P. 807); that under certain circumstances some flexibility of meaning must be given the standard forms of insurance, and the rigid language used therein interpreted in the light of the common understanding of the parties in order to do justice between them (*Taylor v. Northwestern Nat. Ins. Co.*, 34 Cal. App. 471, 167 P. 899).

[3] It clearly appears from the evidence above narrated that the assureds in obtaining the insurance made no misrepresentations of any kind as to their business relationship, but, on the contrary, fully, fairly, truthfully, and in good faith explained to petitioner's agent the arrangement under which they were conducting their affairs; and there is no evidence indicating a subsequent departure from the plan thus explained. The evidence also shows that the statement in the application as to the existence of a copartnership did not emanate from them, but represented the agent's legal conclusion drawn from facts correctly related to him, and was by him inserted in the application; furthermore, that the very object in applying for said policy was to cover the class of employment in question, and that the use of the term "copartnership" by the agent in describing said business relationship was intended by him and understood by the assureds as giving to the latter insurance coverage "jointly and singly." Even assuming, therefore, that the legal appellation given by the agent to said business relationship was a misnomer, it cannot be said to be due to any fraud practiced by the assureds, but at most amounted to a mistaken legal conclusion on the part of the agent, and, consequently, under the authorities hereinabove cited, the insurance carrier is estopped to assert falsity as a defense to the policy.

[4] The fact that the information relating to the working arrangement was obtained by an employee in Hicks' office rather than by Hicks personally does not affect the situation, for the reason that the transaction of the issuance of the policy was consummated through the Hicks agency, and Hicks was cognizant of all the facts before he forwarded the application to the company's office in San Francisco. Nor does it matter that at the time of applying for insurance protection the assureds were aware that the cost of the policy as issued would be less than if policies were issued to them separately, for, as shown, there was no fraud or deceit practiced, and apparently the item of expense in obtaining insurance coverage was only incidental to the main object of their business association, which was to obtain more employment for their individual trucks.

The award is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

85 Cal. App. 269

PEOPLE v. FOSS. (Crim. No. 1471.)

District Court of Appeal, Second District, Division 1, California. Aug. 29, 1927.

1. Robbery ⇨20—Conviction for "robbery" cannot be sustained where evidence did not show any taking (Pen. Code, § 211).

Where evidence in robbery prosecution failed to show any taking, a conviction cannot be sustained, since, under Pen. Code, § 211, there must be a felonious taking to constitute "robbery."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Robbery.]

2. Criminal law ⇨1130(2)—Argumentative assertions in brief cannot be considered as evidence.

Unfortified, argumentative assertions of counsel in his brief cannot be regarded as evidence.

3. Criminal law ⇨562—Hearsay statements that person was robbed held mere conclusions insufficient to sustain conviction without proof of facts constituting robbery.

Hearsay statements by one witness, that he was told some one was being robbed and by another witness that he was told by supposed victim of robbery that he had been robbed, held mere conclusions insufficient to sustain conviction without setting forth facts necessary to constitute robbery, or identify such robbery with that charged in the indictment.

4. Larceny ⇨70(3)—Where evidence was lacking to show taking of personal property, instructions as to larceny in robbery trial held unnecessary (Pen. Code, § 1159).

In robbery prosecution where there was no evidence of any taking of personal property, it was not error to refuse to instruct jury as to larceny, notwithstanding Pen. Code, § 1159, providing that jury might find defendant guilty of lesser offense included in offense charged.

5. Assault and battery ⇨91—Evidence held sufficient to warrant conviction for assault (Pen. Code, § 240).

Evidence in prosecution for robbery held sufficient to warrant conviction for simple assault, under Pen. Code, § 240.

6. Indictment and information ⇨191(9)—Simple assault is included in offense of "robbery," within statute providing that jury might find defendant guilty of lesser offense than that charged (Pen. Code, § 1159).

Simple assault is included within the offense of "robbery," within meaning of Pen. Code, § 1159, providing that the jury might find the defendant guilty of any lesser offense included in that with which he is charged.

7. Assault and battery ⇨96(1)—Where evidence in robbery prosecution warranted conviction for assault, refusal to instruct on assault held error (Pen. Code, § 1159).

Where the evidence in a prosecution for robbery warranted conviction for simple assault, refusal to give requested instructions as

to simple assault held error, in view of Pen. Code, § 1159.

Appeal from Superior Court, Los Angeles County; S. M. Marsh, Judge.

Willard H. Foss was convicted of robbery. From the judgment of conviction, and an order denying motion for new trial, he appeals. Reversed and remanded.

Cantillon & Hamilton, Thomas P. White, A. P. G. Steffes, and Vincent C. Hickson, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

SHAW, Justice pro tem. The defendant was convicted of the crime of robbery and upon this appeal makes the contention that the evidence was insufficient to show the commission of that crime by him.

At the trial Thomas N. Littlewood, charged by the information to have been the victim of the robbery, testified that in the evening of October 2, 1926, he hailed the defendant, who was a taxicab driver and previously unknown to him, and entered his taxicab; that after driving to various places in defendant's taxicab they went about midnight to a hotel, where defendant engaged a room, to which he took Littlewood and a third person; that at the time they entered the room Littlewood took from his pockets a roll of bills and paid therefrom defendant's charges, amounting to about \$3, and then put the balance of the money back in his pockets; that Littlewood then had in his possession about \$140; that previously during their ride Littlewood had exhibited some, if not all, of his money in the presence of defendant; that upon being paid his charges defendant left the room and Littlewood undressed, placing his clothes upon a chair; that in a few minutes and while said third person was still present, defendant came back into the room and began beating Littlewood with his fists, striking him on the head and making him unconscious, but that Littlewood got several good looks at him before this happened and knew that it was the defendant; that Littlewood had not given the defendant or said third person permission to take any of his money and did not turn any of it over to said third person that night; that when Littlewood came to, he found himself alone in the room, and at once rushed from the room into the street without waiting to dress and shouted for help; that one Shepard came to his assistance and went with him back to the room, where Littlewood dressed, and then got into a car and went to the San Pedro Police Station and made a report.

Mrs. Ulma Helvig testified that she was the landlady of the hotel to which Littlewood went with the defendant; that defendant

rented the room from her, and that afterwards she heard some knocks and thumps and a moan, and thinking some one was sick she sent a boy named Donald to call Shepard, who was a roomer at the hotel. She did not go out herself and did not testify that she ever saw Littlewood at all or witnessed anything occurring between him and defendant.

Stanley C. Shepard testified that he was a lodger at the hotel in question; that shortly after midnight of October 2d the boy Donald came and knocked at his door and said some one was being robbed. The statement as to what Donald said was not made in response to any question, and when the witness made it an objection was made and sustained to the conversation between him and Donald, but no formal motion to strike out the above statement was made. Shepard further testified that he then got up, dressed, and went out on the street; that he found Littlewood there and took him back into his room, where he got dressed, and Shepard then took him to the San Pedro Police Station.

Henry L. Evans, a police officer, testified that he saw Littlewood at the San Pedro Police Station about 1 a. m. of October 3d, and there were then a few scratches on his face. On cross-examination, the defendant asked this witness:

"Q. Did you examine the witness, Mr. Littlewood, to ascertain whether or not he had any money on him?"

To this question the people objected that it was wholly immaterial and not proper cross-examination, and the court sustained the objection on the latter ground, which appears to have been well taken.

Joe Williamson, also a police officer, testified that he saw Littlewood at the San Pedro Police Station about 1 a. m. of October 3d; that "he seemed to be somewhat excited in telling about the things that occurred earlier in the evening; that he had been robbed, and on his cheek was a notch or bruise on his cheekbone and another one on the edge of his jawbone just to the right of the chin."

[1-3] The foregoing is the substance of all the testimony material to the point on which we must decide this appeal. To constitute the crime of robbery, there must be a felonious taking of personal property (section 211, Pen. Code), but the evidence in this case wholly fails to show any taking. The complaining witness testified clearly and positively that he had \$140 in his possession just before he was assaulted by defendant, but he gave no testimony whatever tending to prove that any part of it was taken from him by any one. As far as this court can determine from a careful examination of all of the testimony in the record, he may still have it. In response to appellant's argument on this point, the respondent asserts in

its brief that Littlewood testified that when he came to his money was gone, but refers us to no place in the record where any such testimony appears, and a purported résumé of the whole evidence contained in another part of the same brief fails to state any such testimony. We cannot regard such unfortified argumentative assertions as evidence. The nearest approach to any testimony upon this point was the question asked of a police officer as to whether he had searched Littlewood for money, and the answer to this question was blocked by objection made by the prosecutor. The hearsay testimony of Shepard that the boy Donald told him some one was being robbed was probably excluded from the jury's consideration by the ruling of the court on the objection (*Bloomberg v. Laventhal*, 179 Cal. 620, 178 P. 496), but even if it may be regarded as remaining in the record, it is not sufficient to support a finding that Littlewood was robbed. The testimony of Officer Williamson that Littlewood complained at the police station of being robbed is also hearsay, but was given without objection. Even if these two hearsay statements can be considered at all, they are mere conclusions and do not set forth any of the facts necessary to constitute robbery or identify such robbery with that charged in the indictment. The judgment must be reversed for want of sufficient evidence to uphold the verdict.

[4-7] Appellant requested the court to instruct the jury as to the offenses of larceny and simple assault, which the court refused to do, and appellant now argues that these were lesser offenses which are necessarily included in the offense of robbery, and, therefore, under section 1159 of the Penal Code the instructions requested should have been given. In view of the total lack of evidence as to any taking of personal property, no instructions as to larceny were necessary, and the failure to give them was not error. The evidence was sufficient to warrant a conviction of simple assault. Pen. Code, § 240. It has been held that the offense of simple assault is included within the offense of assault with intent to commit robbery (*People v. Demasters*, 105 Cal. 669, 39 P. 35; *People v. Mallon*, 103 Cal. 513, 37 P. 512), and that the last-mentioned offense is included within the offense of robbery (*People v. Allen*, 32 Cal. App. 110, 162 P. 401). It follows that the offense of simple assault is also included within robbery, and the court erred in refusing to give the instructions requested on this point. In view of the lack of evidence justifying the verdict of robbery, we must hold that this error was prejudicial and resulted in a miscarriage of justice.

The judgment and the order denying a new trial are reversed, and the cause remanded to the superior court for a new trial.

We concur: CONREY, P. J.; HOUSER, J.

JACKSON v. DOLAN et al. (L. A. 9060.)★

Supreme Court of California. Aug. 29, 1927.

Rehearing Granted Sept. 26, 1927.

1. Appeal and error ~~§~~348(1)—Appeal will not be dismissed as not taken in time where record shows no service of notice of entry of judgment (Code Civ. Proc. § 660).

Motion to dismiss appeal on ground that it was not filed or taken within time provided by law will be denied where record fails to disclose whether service of notice of entry of judgment had ever been made on appellant, in view of Code Civ. Proc. § 660.

2. Appeal and error ~~§~~348(1)—Recitals in appellant's notice of motion for new trial and of appeal did not waive service of notice of entry of judgment (Code Civ. Proc. § 660).

Recitals contained in appellant's notice of motion for new trial and in his notice of appeal from judgment may not be availed of as waiver by him of required service of notice of entry of judgment so as to start running the 2 months' period within which trial court might have acted on motion for new trial, under Code Civ. Proc. § 660.

In Bank.

Appeal from Superior Court, Imperial County; Phil D. Swing, Judge.

Action by L. A. Jackson against E. J. Dolan and another. From a judgment for plaintiff, defendant Gregory Ashe appeals. On motion to dismiss. Motion denied.

Randall, Bartlett & White, Vincent C. Hickson, and A. P. G. Steffes, all of Los Angeles, for appellant.

Harry W. Horton, of El Centro, for respondent.

PER CURIAM. This is a motion to dismiss an appeal from a money judgment entered in the plaintiff's favor by the superior court in and for the county of Imperial. Subsequent to the entry of such judgment and on December 17, 1920, the defendants moved for a new trial. The minutes of the trial court, as originally recorded, showed the motion for a new trial to have been granted as to the defendant Ashe and denied as to the defendant Dolan on Friday, De-

ember 31, 1920. Within the statutory period the plaintiff served and filed his notice of appeal from the order granting a new trial to the defendant Ashe. On March 23, 1921, and pending the determination of his appeal from the order granting such new trial, the plaintiff filed in the trial court a notice of motion to direct the clerk of that court to correct its minutes so as to show that the order purporting to grant a new trial to the defendant Ashe had, in fact, been made and filed on Sunday, January 2, 1921, and not on Friday, December 31, 1920, as the minutes of the trial court then indicated. The significance of this motion lies in the fact that the term of office of the superior judge who made said order had expired on midnight of December 31, 1920. After hearing thereon, the trial court made an order denying the plaintiff's motion to correct the minutes. Upon an appeal therefrom the District Court of Appeal reversed said order (*Jackson v. Dolan*, 58 Cal. App. 372, 208 P. 315), with directions that the trial court ascertain the true date of the order granting to the defendant Ashe a new trial and correct its minutes accordingly. Thereafter the plaintiff renewed in the lower court his motion to correct the minutes whereupon said court, on May 16, 1924, made an order, in obedience to the mandate of the appellate court, correcting its minutes. As corrected, the minutes show the order granting a new trial to have been made and filed on Sunday, January 2, 1921—two days after the expiration of the term of office of the superior judge purporting to make the same. An appeal prosecuted by the defendant Ashe from the order of the trial court correcting its minutes terminated in an affirmance of the order. *Jackson v. Dolan*, 72 Cal. App. 48, 236 P. 318. Thereafter and on March 27, 1925, the District Court of Appeal filed its decision reversing the order of the trial court granting to the defendant Ashe a new trial. *Jackson v. Dolan*, 72 Cal. App. 51, 236 P. 319. In reversing said order the appellate court declared that the action of the trial judge in granting the motion after the expiration of his term of office was *functus officio* and void; that the case therefore stood, in legal contemplation, as though no order disposing of the motion for new trial had been made; and that the motion for new trial was therefore deemed to have been denied by the lapse of time provided for in section 660 of the Code of Civil Procedure. The defendant Ashe, on May 21, 1925, and within 30 days after the decision reversing the order granting to him a new trial had become final, filed his appeal herein from the judgment entered in the plaintiff's favor on December 15, 1920.

On February 26, 1927, the respondent filed in this court a notice of motion to dismiss the appeal from the judgment, it being asserted in said notice of motion that the ap-

peal had not been filed or taken within the time provided by law. The motion to dismiss was granted by this court on March 7, 1927, and an order made dismissing the appeal. A petition for rehearing was thereupon filed herein by the appellant Ashe, which petition led the court to conclude that the appellant had not been served with proper notice of the motion to dismiss his appeal. The order dismissing the said appeal was for this reason vacated and the matter ordered on the June, 1927, calendar of this court. Upon the calling of that calendar, the motion to dismiss the appeal from the judgment was argued at length by counsel, and said motion is now before us upon its merits.

The appellant asserts that the facts of this case present a novel situation and suggests that where, as here, an order granting a new trial is declared upon an appeal therefrom to be void, and for this reason reversed, the time for an appeal from the judgment should be held not to expire until 30 days have elapsed after the filing in the trial court of the remittitur issued upon such reversal of the order granting a new trial. In advancing this contention the appellant attempts to find comfort in that part of section 939 of the Code of Civil Procedure which provides for the taking of an appeal from a judgment within 30 days after entry in the trial court of the order determining a motion for new trial "or other termination in the trial court of the proceedings upon such motion." The filing in the trial court of the remittitur issued upon the reversal of the order granting a new trial is asserted by the appellant to constitute such "other termination" in the lower court of the proceedings on new trial as to warrant the taking of an appeal from the judgment within 30 days thereafter.

The respondent and moving party urges, in support of his motion to dismiss, that the only termination, contemplated by the provisions of section 939 of the Code of Civil Procedure, of proceedings on new trial, other than the trial court's order thereon, is that which results from the expiration of the 2 months' period prescribed by section 660 of the Code of Civil Procedure. Reasoning from this premise, the respondent concludes that the appeal herein was not taken within 30 days of the expiration of said 2 months' period.

[1] In the treatment by counsel of the problem presented herein a matter which we deem decisive thereof has escaped attention. In our opinion the record before us will not warrant the granting of the motion to dismiss, for said record fails to disclose whether service of notice of the entry of judgment had ever been made upon the appellant. Section 660 of the Code of Civil Procedure provides, in part, that:

"The power of the court to pass on motion for a new trial shall expire within two months

after the verdict of the jury or service on the moving party of notice of the entry of the judgment. If such motion is not determined within said two months, the effect shall be a denial of the motion without further order of the court."

The absence from the record herein of any showing of service of notice of the entry of judgment precludes, at this time, an accurate determination of the period within which the trial court might have passed upon the motion for new trial. This being so, we are unable to ascertain the exact date upon which the motion for new trial was denied by operation of law. It is true that in the case of *Jackson v. Dolan*, 72 Cal. App. 51, 236 P. 319, it is asserted that the motion for new trial is deemed to have been denied by the expiration of the 2 months' period prescribed in section 660 of the Code of Civil Procedure. That case fails to indicate, however, when such statutory denial of the motion for new trial occurred. In the absence of a showing herein of the service of notice of the entry of judgment, it is impossible for us to ascertain the exact time of the termination in the trial court of the proceedings on new trial. This, in turn, precludes a declaration that the instant appeal from the judgment was not taken within 30 days of the termination in the trial court of the new trial proceedings.

[2] From what has already been said, it is apparent that this conclusion is rendered necessary by reason of the absence from the record of any showing of service upon the appellant of notice of the entry of judgment. Our examination of the record has failed to disclose any thing tending to suggest a waiver by the appellant of such notice of the entry of judgment. The recitals contained in the appellant's notice of motion for new trial and in his notice of appeal from the judgment may not be availed of as a waiver by appellant of the required service of notice of the entry of judgment so as to start running the 2 months' period within which the trial court might have, under the provisions of section 660 of the Code of Civil Procedure, acted upon the motion for new trial. *Strehlow v. Mothorn*, 197 Cal. 112, 114-116, 239 P. 850. That case refers with approval

to the case of *Moore v. Strayer*, 175 Cal. 171, 165 P. 530, wherein it was contended upon motion to dismiss an appeal that the appellants by serving and filing their notice of intention to move for a new trial without waiting for service of notice of the decision of the court had thereby set in motion the running of the time within which the trial court had power to determine said motion, and that said motion, not having been determined by the court within said time, had been denied by operation of law upon a date more than 30 days prior to the filing of the notice of appeal. In passing upon this contention the court, in *Moore v. Strayer*, supra, declared:

"If the rights of the party appealing were alone to be considered, the giving of the notice of intention might, as to him, be construed as a waiver of service of notice of decision, but the provision relates to the power of the court, jurisdiction of which to pass upon the motion is divested only by the service of notice of decision followed by the lapse of a period of three months, during which it is empowered to act on the motion for a new trial."

The opinion in the case of *Strehlow v. Mothorn*, supra, states that:

"The Legislature of 1917 (Stats. 1917, p. 240) amended the foregoing amendment to said section by substituting the words 'notice of the entry of the judgment' in place of the words 'notice of the decision of the court,' and the Legislature of 1923 (Stats. 1923, p. 233) further amended the same by shortening the time within which the power of the trial court to pass upon motions for new trial must be exercised from 'three months' to two months. In making said latter amendment the Legislature re-enacted the section with the interpretation which this court had theretofore placed upon it."

It follows, therefore, that in the absence from the record in the instant case of any showing of service of notice of the entry of judgment the time within which the trial court might have passed upon the motion for new trial is not susceptible of definite ascertainment. In view of this fact, we are not prepared to hold that the appeal from the judgment was taken more than 30 days after the trial court might have acted upon the motion for new trial.

The motion to dismiss said appeal is therefore denied.

202 Cal. 81

PEOPLE v. GALLOWAY. (Cr. 2961.)

Supreme Court of California. Sept. 2, 1927.

1. Criminal law ☞923(2)—In murder trial, juror's concealment, on voir dire, of prejudice authorized court to grant new trial; misconduct not being known to defendant until after conviction (Pen. Code, § 1181, subd. 3).

Where, in murder trial, juror concealed her prejudiced state of mind when examined on voir dire, and entered upon her duties as juror, her misconduct not being known to accused until after trial and verdict, court was authorized, by virtue of Pen. Code, § 1181, subd. 3, to grant accused a new trial.

2. Criminal law ☞923(2)—Court may grant new trial because of juror's prejudice arising after she is sworn unless accused failed to exercise diligence, knew of misconduct before verdict, or was not injured thereby (Pen. Code, § 1181, subd. 3).

Under Pen. Code, § 1181, subd. 3, court may grant new trial because of juror's misconduct arising after she is sworn as jury member, subject to the qualification that the misconduct will not be considered sufficient, where accused has failed to exercise diligence in the premises, or has knowledge prior to the verdict of such misconduct, or has not been injured thereby.

3. Jury ☞33(2)—Juror's withholding fact of prejudice on voir dire violated defendant's constitutional right of jury trial (Const. art. 1, § 7).

Where juror had actual prejudice against the prisoner but withheld such fact on her voir dire, trial was in violation of Const. art. 1, § 7, guaranteeing that the right of trial by jury shall be secured to all and remain inviolate.

4. Criminal law ☞956(8)—Court erred in refusing to consider affidavits of prejudicial statements of juror made both before and after being sworn.

Where accused filed affidavits setting forth statements of juror showing prejudice, such statements having been made both before and after juror's being sworn, court erred in striking out and refusing to consider the affidavits on motion for new trial.

5. Criminal law ☞763, 764(17)—In murder trial, charge that evidence of drunkenness could be considered only in determining degree of crime violated defendant's constitutional right (Const. art. 6, § 19).

Court's charge, in murder trial, that "Evidence of drunkenness in murder cases can only be considered by the jury for the purpose of determining the degree of crime, and for that purpose it must be received with great caution," was a violation of Const. art. 6, § 19, forbidding court's charging juries with respect to matters of fact.

In Bank.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Frederick David Galloway, alias Fred Roland, was convicted of murder in the first degree, and he appeals. Reversed.

S. F. Holstein, of San Jose, and O'Gara & De Martini, of San Francisco, for appellant.

C. C. Coolidge and Frank J. Waterhouse, both of San Jose, U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

PRESTON, J. Appellant was convicted and sentenced to pay the death penalty for murder of one Andrew Pashuta. In support of his appeal from the order denying a new trial he urges insufficiency of the evidence to justify conviction for first degree murder, the elements of premeditation and deliberation being, so it is claimed, wholly unproved, erroneous instructions given by the trial court to the jury, and prejudicial misconduct on the part of one of the jurors.

The homicide occurred on the last of the Rose Festival at San Jose, Saturday, May 22, 1926, about midnight, on a road near the highway to Monterey, some four or five miles from San Jose. On the preceding Thursday appellant and deceased had met for the first time in St. James Park and became acquainted through their mutual fondness for the ukulele, which both had and played. They spent Thursday evening, part of Friday, and Saturday evenings together. Appellant was at that time about 24 years of age, while Pashuta was a year or so younger. Pashuta resided in San Jose at the house of Mrs. Ida M. Bunch, 353 South Fourth street, and as appellant was only in town for the festival Pashuta introduced him to Mrs. Bunch as his friend, and on the fateful evening had asked her permission for appellant to occupy his room with him that night. The boys went to Pashuta's room to dress for the evening, and Pashuta asked Mrs. Bunch to come up and hear appellant play the ukulele, saying, "He can make it talk." He also asked if he might defer payment of his rent as he and appellant wished to have a good little time that evening. The boys left the house in Pashuta's automobile, an old Chevrolet roadster, about 8 o'clock. They first purchased two bottles of "white liquor," and after drinking some of it drove on to St. James Park. There they talked with three other boys, two of whom testified that they drank with both Pashuta and appellant, and one of whom stated Pashuta and appellant were intoxicated while with him and that they left about 10:30 p. m. saying they intended to go to some other place to make some money—evidently Chick Leddy's, a roadhouse. The testimony of the various witnesses, without conflict, shows that appellant and Pashuta were apparently very good friends during this entire period, dancing

and singing together and playing their ukuleles.

As to what took place after they left for Chick Leddy's, we have only the testimony of appellant, which was, in substance, as follows: The boys left the park with the intention of driving to the above-mentioned roadhouse, which was some distance south of San Jose, but as it was too early to go there, being only about 11 o'clock, they turned up a side road, facing the machine towards the highway, and there remained until the fatal occurrence. The car belonged to Pashuta, and he drove it. They drank as they went along, Pashuta having a jug of wine in addition to the "white liquor."

When appellant was arrested in Venice, Cal., about two weeks later, he made a written confession, introduced in evidence by the prosecution, stating his subsequent actions to have been substantially as follows: While he and Pashuta were parked near the highway, as above set forth, and while both of them were intoxicated, an argument arose between them. Appellant stated that about six months previous in a fit of despondency he had enlisted in the United States army, from which he had deserted about four months later, after a night of intoxication. This he had confessed to Pashuta, and it was Pashuta's threat to expose him as a deserter which led to the final argument culminating in death.

"Q. Where were you at the time this man threatened to turn you in for desertion? A. To the best of my knowledge, we were seated in his car parked on the Los Angeles Highway south of San Jose.

"Q. How long a time elapsed between the time he made a threat of exposure and the time you killed him? A. As I remember, the act was committed immediately after the voicing of the threat.

"Q. Did you make up your mind at the time he made this threat to kill him? A. I was incapable of making up my mind, but I remember taking up the first thing that came handy and striking at him.

"Q. Did you strike more than one blow? A. I did.

"Q. How many times did you hit him with this crank? A. I have no recollection of how many times I struck him, although it was more than once."

The crank used to start the motor was the weapon used and the autopsy surgeon testified to four wounds on the head and face, two of them of a most serious and brutal character.

Appellant told substantially the same story as a witness at the trial. He there stated:

"I was terrified at the thought of exposure, what it would mean to me and to my people, and the awful disgrace to them. As far as I can remember, at the moment of the threat I lost control of myself, and picked up the first thing that came handy and struck at him. Hazily I remember dragging him from the car

into a field at the side of the road. I did not know I had killed him. I returned to the car. After some confusion, finally, I drove to his house where I packed his things with my own, to give the impression I had left."

After the homicide, appellant dragged the body of deceased into a field, a distance of about 75 feet and, placing it in an open furrow, partially covered it with two handfuls of dry grass. He then drove back to San Jose, went to the room of deceased, and took a suit of clothes, an overcoat, and blanket. His statements from the period when they left the park were partially corroborated by the physical condition of the body when found about a week after death, as well as by the blood stains upon the automobile. Mrs. Bunch testified that the next morning she found the room of deceased in great disorder, things all over the floor, dirty clothes in the middle, etc., and that a suit of his clothes was gone and a blanket.

About 2 o'clock Sunday morning a garage man in San Jose, who supplied appellant with two gallons of gas, testified that appellant was nervous and fidgety and aroused his suspicion, but when he questioned him appellant merely stated that he was sleepy. The witness could not say that appellant was not under the influence of liquor.

About 6:15 appellant drove up to the farmhouse of Ed Smith, about four miles north of Salinas on the highway, his engine having stopped for want of water. His actions there were also peculiar. Mr. Smith testified that as appellant drove in, he kind of hit the gate; that after he had tried to fill appellant's radiator for him appellant persisted in attempting to crank the machine and kept talking to it and calling it some odd name; that they finally pushed the machine over towards the barn and as Mr. Smith walked out, he heard appellant playing the ukulele and singing; that when his wife asked him to have appellant come in for breakfast, he said, "Let the boy go on, I do not think from his condition, I do not think he wants any breakfast;" that appellant later attempted to give him seven cents, saying it was all the money he had; that appellant explained the blood spots on his shirt as the result of a fight with a Mexican in San Jose over a girl during a dance; that appellant then left after having a drink of water; that later the same morning he saw appellant in Salinas in a small Greek restaurant; that he asked appellant for his address so he could notify him what the garage man would charge to fix his car; that appellant first gave him the name of "Fred Roland, New York City," and later the address of "2634 Thorpe avenue, Los Angeles"; that appellant's breath was a little loud, or it might have been his side or hip or his clothes, as he considered him sober, but that he knew he could smell "jack" on him. Appellant testified that he adopted the name

of Fred Roland while on the stage in New York and continuously thereafter used the same.

Assuming the evidence was sufficient to sustain the verdict against the attack that as a matter of law it is insufficient, still the cause must be reversed upon another ground.

In support of appellant's motion for a new trial there were offered and read in evidence four affidavits alleging misconduct on the part of Juror Ida M. Roberts, by reason of which a fair and due consideration of the case had been prevented and a verdict arrived at by means other than a fair expression of opinion on the part of impartial jurors. Before setting forth the contents of said affidavits, it should be noted that the case came on for trial September 14, 1926, on which day the entire jury was sworn. On the following day one of the twelve jurors was excused and another juror was selected to take her place, whereupon the entire jury was resworn. Some testimony was also taken on this day. On September 20th the taking of testimony was concluded and arguments for the prosecution and defense heard. On September 21st the district attorney made the closing argument for the prosecution and the jury was instructed and retired. Verdict was rendered on the same day.

The affidavit of O. B. Brott stated, in substance, that while driving his automobile in San Jose on September 12, 1926, Mrs. Finley, Mrs. Pratt, and Mrs. Roberts being with him as guests, said Mrs. Roberts stated in his presence and hearing and that of said other persons, that she would hang anybody that would get drunk.

The affidavit of Mrs. Minnie Hussey stated, in substance, that on September 15, 1926, she met Mrs. Roberts and walked with her along South First street, in San Jose; that on that occasion said Mrs. Roberts stated to her that she had been called as a juror in this case and further stated:

"Well, I have no use for any one that drinks, and I'd hang him."

The affidavit of Alice M. Pratt stated, in substance, that about September 13, 1926, after said Mrs. Roberts had been summoned as one of the jurors in this case, but before her examination, said Mrs. Roberts was present at a ranch of affiant near San Martin; that she stated in the presence of affiant that she expected to be called on the jury, and if so called she would hang him (referring to appellant); that affiant said, "Oh! Ida, I will challenge you;" that said Ida M. Roberts answered, "Just try it;" that thereafter on September 17, 1926, and while said Ida M. Roberts was a juror in the trial of said case, she held a conversation over the telephone with affiant and discussed therein the testimony of the witness Mrs. Bunch; that she related to affiant the testimony given by said witness and said, "Poor little Andrew Push-

uta was a fine boy, and it was a shame that this Galloway boy (meaning appellant) had taken him out and given him liquor and started him drinking when he never drank before;" that on Sunday evening, September 19, 1926, said Ida M. Roberts again had a telephone conversation with affiant, discussing therein appellant's testimony, and stating that he was a nice appearing young man and was a nice smooth talker and very calm, but that nevertheless he would hang; that on the evening of September 20, 1926, said Ida M. Roberts had another telephone conversation with affiant in which she stated that the argument of the deputy district attorney was "wonderful" and "masterful"; that appellant's attorney had made some weak sort of argument to try and save his client from the gallows, but she repeated and repeated that appellant would nevertheless hang; that on Sunday, September 19, 1926, affiant visited a ranch near Mountain View with said Ida M. Roberts, and while there said Ida M. Roberts told affiant of the testimony of various witnesses during the trial and, pointing to an irrigation ditch, said, "That is the kind of a ditch or furrow that the Galloway boy put little Andrew Pushuta in and put the grass over him;" that affiant remonstrated with said Ida M. Roberts on several occasions, but said Ida M. Roberts only laughed and shrugged her shoulders and expressed her determination that appellant should hang; that on the evening of September 21, 1926, said Ida M. Roberts telephoned affiant that the case was over and the verdict was hanging, of course; that she further stated three of the jurors held out for a while, but that "We whipped them into line."

The affidavit of Mrs. M. E. Finley stated that about September 15, 1926, affiant was present as a guest in the home of Mrs. Pratt in San Jose, and while there said Ida M. Roberts stated in the presence and hearing of affiant and others that she expected to be selected as a juror to try said case, and, if so, she would hang appellant.

The above affidavits were supplemented by the affidavit of S. F. Holstein stating that he was the only attorney for appellant and that he had no knowledge or information of any of the above set forth statements or conversations at any time until several days after the verdict of the jury had been returned.

In addition, there was introduced in evidence record of the voir dire examination of said Ida M. Roberts. Therein she stated that she knew nothing of the facts of the case except what she had read in the paper; that she had no opinion one way or the other as to the guilt or innocence of appellant; that she thought her mind was open and free for the reception of evidence and knew of no reason why she could not give appellant a fair and impartial trial upon all of the evidence had.

Thereupon there was filed on behalf of the prosecution counter affidavit of said juror, Ida M. Roberts, specifically denying the numerous averments contained in the above-mentioned affidavits and alleging that the conversations referred to in the affidavit of Alice M. Pratt were initiated and solicited by said affiant, Alice M. Pratt; that she, the said Ida M. Roberts, had no feeling or prejudice against appellant; that she was not influenced by any matter out of court, but was guided and governed solely by the evidence of the witnesses and instructions of the court and rendered her verdict solely on such evidence and instructions and gave appellant a fair and impartial trial in all respects. But in her said affidavit, said juror, Ida M. Roberts, did admit the following: That on September 5, 1926, at the ranch house of said Alice M. Pratt, near San Martin, and before affiant had been summoned or otherwise officially notified that her name had been drawn from the jury box to serve on any venire in the trial of any case, and with no particular defendant, case, cause, or trial in mind, and in response to a question asked her by a member of the party, she replied that she would, if acting as a juror in a proper case, vote for the death penalty. She further alleged in her said counter affidavit that said Alice M. Pratt called her on the telephone repeatedly and persistently while she was acting as a juror; that said Alice M. Pratt asked her about the testimony of Mrs. Ida Bunch, to which affiant replied that Mrs. Ida Bunch had spoken clearly and distinctly, and nothing more; that on a later date in reply to a question asked her by said Alice M. Pratt, she stated "that defendant was a nice appearing boy; that he used good English, and that affiant wondered how he got his education," and nothing more; that on the following evening, by means of the telephone, and in response to the question of said Alice M. Pratt, affiant stated that Mr. Frank Waterhouse had made a wonderful and masterful argument and that Mr. Holstein's argument was tiresome, or words to that effect.

On objection of the district attorney, the trial court struck out and refused to consider: (1) Statements set forth in said affidavits alleged to have been made by said juror prior to being sworn; and (2) statements contained therein alleged to have been made subsequent to rendition of verdict. The court refused to permit counsel for appellant to cross-examine said juror with reference to the matter set forth in her affidavit, or to permit him to present four additional affidavits, corroborating the statements contained in the affidavits previously read, in support of his motion for new trial upon the particular ground of misconduct of said juror, and denied said motion. Immediately thereafter counsel for appellant renewed his offer of said additional

affidavits, asked to put said Ida M. Roberts on the stand for cross-examination, and stated that one of the additional affidavits was the affidavit of the husband of said affiant, Alice M. Pratt, to the effect that said juror had asked him to call Mrs. Pratt to the telephone, thereby showing that said juror had initiated the conversations relative to said case; that another of said affidavits was that of the wife of said affiant, O. D. Brott, corroborating her husband's statements. The court thereupon refused to reopen the matter or to permit said juror to be cross-examined or said additional affidavits to be filed.

Some confusion appears to have crept into our previous decisions respecting the proper interpretation of subdivision 3 of section 1181 of the Penal Code when read in connection with sections 1066 and 1063 thereof. Under the two last-mentioned sections, a challenge of a juror for actual bias is allowed, but it must be taken before the juror is sworn, or, at the latest, after he is sworn but before the jury is completed. Under the first above-mentioned section, however, the language of the statute is to the effect that the court may grant a new trial when the jury has "been guilty of any misconduct by which a fair and due consideration of the case has been prevented."

In *People v. Plummer*, 9 Cal. 298, discussing section 410 of the Criminal Practice Act (Wood's Dig. 1850-58, p. 304), which is practically the same as subdivision 3 of section 1181 above mentioned, the court held that where a juror made statements previous to the trial showing actual bias, which rendered him incompetent to try the case, and where a verdict of guilty was found by such juror, a new trial should be granted. In that case it appeared that each of the two jurors in question had answered "satisfactorily" on his voir dire.

Discussing this same section of the Criminal Practice Act, this court in *People v. Fair*, 43 Cal. 137, 147, expressly overruled the case of *People v. Plummer*, supra, and held that failure to challenge for actual bias before a juror was sworn foreclosed any inquiry as to that juror's state of mind, for the reason that under said section the existence of actual bias on the part of a juror prior to the time he was actually sworn had not been enumerated as a ground of motion for new trial and, not having been specifically so enumerated, it was in effect expressly excluded and could not be invoked. Relying exclusively upon *People v. Fair*, supra, two later cases have been found, as follows: *People v. Mortimer*, 46 Cal. 114, and *People v. Samsels*, 66 Cal. 99, 4 P. 1061.

This situation remained until the case of *People v. Emmons*, 7 Cal. App. 685, 702, 95 P. 1032, 1039, where the doctrine in the case of *People v. Fair*, supra, was alluded to, but apparently weakened by reference thereto as follows:

"We must infer, of course, in support of the action of the court, that appellant knew at the time he examined the juror Johnson of what he proposed to show by the witness Kelly, and that by his failure to present the facts before the trial he waived them."

So the latest expression of the court upon this subject throws doubt upon the rule announced in *People v. Fair*, supra.

[1] We think that *People v. Fair*, supra, omits the recognition of a well-defined distinction which exists between a case where a juror was not interrogated upon the subject, or where he admitted his bias and expressed the belief that he could lay it aside, and a case where a juror concealed his prejudiced state of mind when examined on his voir dire and entered upon the discharge of his duty as such juror while in such mental condition. In the second instance, actual bias becomes, where concealed, positive misconduct and continues to be such throughout such juror's service on the case, and if such misconduct is not known to the accused until after the trial and verdict, we see no reason whatsoever why the court should not have power to grant to the accused a new trial, basing it upon said subdivision 3 of section 1181 of the Penal Code. To use as an illustration an extreme situation: Suppose a juror had been actually corrupted, had corruptly agreed to vote for a verdict of guilty regardless of the evidence, had concealed this fact on his voir dire examination, and had served as a juror, the facts respecting the situation being unknown to the accused during trial and only discovered after verdict. Can it be said for a moment that a trial court would be without power to grant a new trial?

We agree with the language of *People v. Turner*, 39 Cal. 370, 371:

"After an issue of fact is joined in a criminal case, every step thereafter taken for the purpose of a determination of that issue, in the court where the cause is pending, up to and including the verdict upon such issue, must be regarded as a step or proceeding 'arising during the course of the trial,' within the meaning of section 440 of our Criminal Practice Act; hence, any substantial error of the court upon any matter or question intervening between the joining of issue of fact and the rendition of a verdict thereon, and any misconduct of a juror, who participates in the verdict, from the time he is called in the case and sworn and examined on his voir dire up to the final act of rendering the verdict, is proper ground for a motion for a new trial under said section, and on appeal from an order of the court denying or granting such motion, based upon such grounds, the appellate court is confined to a review of the proceedings within these limits."

To the same effect see *People v. White*, 5 Cal. App. 340, 90 P. 471.

Or as said in *Green v. Duvergey*, 146 Cal. 379, 385, 80 P. 234, 236:

"The trial of a cause includes all the rulings of the court and the proceedings before it which

conduce to the decision which it makes upon the issues in the case as the basis of its judgment."

See, also, *Stow v. Superior Court of Alameda County*, 178 Cal. 140, 143, 172 P. 598.

[2] We think the proper rule is this: That under section 1181, subd. 3, it is within the power of the trial court to grant to an accused a new trial because of misconduct of a juror whether such misconduct consists of failure to disclose a prejudicial mind at the time he is sworn or whether such misconduct arises after he is sworn as a member of the trial jury, subject, of course, to the qualification that such misconduct will not be considered sufficient where the accused has failed to exercise diligence in the premises or has knowledge prior to the verdict of such misconduct; nor will it avail an accused when, from a consideration of the whole case, it can be seen that he has suffered no injury therefrom. In other words, a safe rule applicable to the situation would be that the court would not be warranted in setting aside a verdict on account of such misconduct unless from a review of the entire case it can be seen that the accused has not only been diligent but has suffered an injustice by reason of the action of such juror.

"The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the Constitution. Upon this proposition all the authorities agree." *Lombardi v. California Street Railway Co.*, 124 Cal. 311, 317, 57 P. 66, 68. See, also, *Sherwin v. Southern Pacific Co.*, 168 Cal. 722, 145 P. 92.

The holding announced above is in harmony with the declarations of practically all the text-writers. Mr. Wharton in *Criminal Pleading and Practice* (9th Ed.) p. 605, section 844, states the rule in the following language:

"When it appears after trial that a juror had beforehand prejudged the case, but had improperly withheld this fact before acceptance, or when asked as to opinion on voir dire had given false answers, and such formation of opinion was unknown to the party at the time, a new trial will be granted."

"Where a juror has prejudged defendant's guilt before hearing the sworn testimony, it cannot be said that defendant has had a fair trial before an impartial jury, and a new trial will be granted. Usually this ground is established by proof of prior statements of the juror concerning the case, bias being deemed to be established where the juror's declaration, on his voir dire, that he was not biased, is negated by proof of prior statements of such a character as to show a fixed opinion on the part of the juror, and which, if unknown to defendant until after verdict, will call for a new trial." 16 *Corpus Juris* (Criminal Law) p. 1154.

"But, if through undiscoverable and unknown wrong, the defendant has been tried and convicted by a panel containing an unfit juror the evidence of which must be very distinct where the verdict is right, a new trial will be granted." *Bishop's New Criminal Procedure*, § 949 b2.

And as far as we can ascertain, the decisions of practically all the states are to the same effect. Cases in states having statutes identical with our own and sustaining the conclusion herein announced are *State v. Mott*, 29 Mont. 292, 74 P. 728, and *State v. Morgan*, 23 Utah, 212, 64 P. 356. Under a similar statute, see *State v. Swafford*, 88 Wash. 659, 153 P. 1056.

[3] Then, too, our Constitution, section 7, art. 1, provides:

"The right of trial by jury shall be secured to all and remain inviolate."

A defendant is entitled to a speedy public trial by an impartial jury, and we think this right is denied him where there are upon the panel one or more jurors who have actual bias against the prisoner and have concealed or withheld the fact on their voir dire. In such case the jury is not *omni majores exceptione*.

In *Sherwin v. Southern Pacific Co.*, supra, a civil case, this court directly intimated that false statements made by a juror on his voir dire examination furnish a sufficient ground for granting of a new trial, saying:

"It may be conceded that the conduct of the juror Horton in giving a false answer to the questions put to him constituted misconduct or irregularity on his part sufficient to warrant the granting of a new trial therefor. See *Hayne on New Trial and Appeal* (Rev. Ed.) § 45."

1 *Hayne on New Trial and Appeal*, at page 226, states the rule as follows:

"Sec. 45. If a Juror Be Examined as to his Qualifications and He Does not Answer Truly, a New Trial Will Be Granted.—Where the party has examined the jurors concerning their qualifications, and they do not answer truly, it is manifest that he is deprived of his right of challenge for cause, and is deceived into foregoing his right of peremptory challenge. If on ascertaining the truth he were not allowed to present the matter on motion for new trial, the grossest injustice might be done. The employees or partisans of one party could, by perjury, get on the jury and decide the case for him, or prevent an agreement against him, and no relief could be obtained. This would be contrary to the first principles of justice. And accordingly in most states, the fact that a juror answered falsely as to his qualifications is a recognized ground for a new trial."

[4] Shall a new trial in a civil case be more easily obtained than in a case where life or liberty is involved? It follows that in this case the court should have considered the affidavits tendered not only as to the conduct of the juror after being sworn, but also as to her conduct prior thereto, especially her conduct after she was summoned to serve as a member of the panel.

[5] Again, the court after instructing the jury on the subject of intoxication, ended

his charge upon that subject with the following language:

"Evidence of drunkenness in murder cases can only be considered by the jury for the purpose of determining the degree of crime, and for that purpose it must be received with great caution."

Section 19 of article 6 of the Constitution provides that the courts "shall not charge juries with respect to matters of fact." The identical instruction here under consideration was before the court in *People v. Nihell*, 144 Cal. 203, 77 P. 916, where the court said:

"We know of no rule of law which, in view of our constitutional provision as to charging juries upon matters of fact, justifies the giving of such instructions, but we cannot see that the giving of the same could have affected the substantial rights of the defendant."

In the case at bar the actual intoxication of the defendant seems practically certain and up to and within an hour of the time of the tragedy is practically conceded. It rests not upon the testimony of the defendant alone, but upon the testimony of disinterested witnesses. This, too, was practically his sole claim for a reduction of the degree of crime. The above instruction therefore should not have been given.

We deem it unnecessary to discuss any of the further points made by appellant as none of them are likely to arise upon a new trial of the cause.

Judgment reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; LANGDON, J.

85 Cal. App. 313

HUGHES et al. v. BEEKLEY. (Civ. 5950.)

District Court of Appeal, First District, Division 2, California. Sept. 2, 1927.

1. Quieting title $\S$ 34(5)—Complaint alleging that judgment held by defendant was cloud on plaintiffs' title to homestead held not to state cause of action, under enumerated sections of statute (Civ. Code, §§ 3412, 3413; Code Civ. Proc. § 1050).

Complaint alleging that judgment against plaintiffs held by defendant clouds plaintiffs' title to premises designated as plaintiffs' homestead held not to state cause of action, under Civ. Code, §§ 3412, 3413, or Code Civ. Proc. § 1050, since there is nothing alleged showing that judgment constituting cloud is void or voidable.

2. Quieting title $\S$ 34(5)—Complaint alleging that defendant's judgment clouds title of plaintiffs to homestead, and that market value thereof was thereby lessened, stated cause of action to quiet title, under statute (Code Civ. Proc. § 738).

Complaint alleging that judgment against plaintiffs held by defendant clouds title of plain-

tiffs to homestead, and that market value thereof has thereby been lessened so that premises cannot be sold, *held* to state sufficient cause of action to quiet title, under Code Civ. Proc. § 738.

3. Pleading ⚡403(2)—Defects in complaint may be cured by averments of answer.

It is familiar rule of pleading that defects in complaint may be cured by averments of answer thereto.

4. Quieting title ⚡52—Judgment of dismissal held erroneous, in action to remove cloud of judgment held by defendant from plaintiffs' title to homestead (Civ. Code, §§ 1240, 1241).

In action to quiet title to homestead, in which plaintiffs alleged that judgment held by defendant constituted cloud, judgment of dismissal was erroneous where it was not shown that judgment constituting cloud fell within any of the exceptions of Civ. Code, §§ 1240, 1241, since plaintiffs were entitled to have court determine whether title to homestead property was subject to execution.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action to quiet title by Isadora D. Hughes and husband against Mary E. Beekley, also known as Mary E. Reid. From judgment of dismissal, plaintiffs appeal. Reversed.

Kenneth E. Matot, of Los Angeles, for appellants.

E. D. Martindale, of Los Angeles, for respondent.

PRESTON, Justice pro tem. This is an appeal by plaintiffs from a judgment of the superior court of Los Angeles county, dismissing the action upon the ground that the complaint does not state facts sufficient to constitute a cause of action. Defendant has not submitted any authorities or made any argument in support of the judgment of dismissal that she obtained in the trial court. The appellants state that the trial court granted the motion of defendant to dismiss the action for the reason "that, inasmuch as the complaint did not state that an execution had been issued and that appraisers had been appointed within 60 days as required by section 1475 of the Code of Civil Procedure, the complaint did not state facts sufficient to constitute a cause of action."

In this statement appellants are obviously in error, as section 1475 of the Code of Civil Procedure refers to the procedure to be taken when a homestead is selected by a person in his lifetime and is returned in the inventory and appraisal of his estate appraised at not exceeding \$5,000, the superior court must set it aside to the person entitled, and further provides for the payment of the debts of deceased and the enforcement of any liens or incumbrances on the homestead, etc. This section could not possibly have the remotest

bearing upon the case presented by the pleadings here.

Plaintiffs might have intended to refer to sections 1245, 1246, et seq. of the Civil Code, but there is nothing in the answer or anywhere in the record to show that defendant has made any application to the court for relief under the provisions of these sections. Therefore we are left entirely in the dark as to the theory or ground upon which the judgment of dismissal was entered.

The complaint after alleging the formal matters and that plaintiffs have been husband and wife since April 24, 1920, states:

"II. That on the 24th day of April, 1920, and for some time prior thereto, the plaintiffs herein were the owners of that certain parcel of land situated in the city of Los Angeles, county of Los Angeles, state of California, and more particularly described as follows, to wit: (Here follows description of real estate.)

"III. That on the 24th day of April, 1920, the plaintiff Isadora D. Hughes, for the purpose of preserving the above-described premises as a permanent home for herself and husband, Leroy H. Hughes, did make her declaration of homestead on said premises, and that said declaration of homestead was duly recorded in the office of the county recorder of Los Angeles county. * * *

"IV. That said declaration was recorded in the office of the county recorder of Los Angeles county of the 24th day of April, 1920, and that before and on said day the plaintiffs were living together as husband and wife on said premises, and that said premises have at all times since been the home and residence of plaintiff. That said premises were and now are of the value of less than \$5,000 and of the proximate value of \$4,500.

"V. That on the 24th day of January, 1921, the defendant herein, under the name of Mary E. Beekley, did secure a judgment in the superior court of Los Angeles county, in an action designated and entitled Mary E. Beekley v. Isadora D. Hughes et al., No. B82092, and that said judgment was recorded in Judgment Book No. 517, at page 32, on the 22d day of January, 1921. * * *

"VII. That said judgment is not a lien on the above said homestead premises, nor is the said premises subject to execution thereunder, as provided by statutes, and that all proceeds from said premises are exempt therefrom, but that said judgment clouds the title of plaintiffs thereto, and that the market value thereof has thereby been lessened to such an extent that said premises cannot be sold."

The complaint concludes with a prayer that plaintiffs' title be quieted, and that defendant be forever barred from any claim to the property adverse to plaintiffs, etc.

[1] There is a form of action, provided by section 3412 et seq. of the Civil Code, under which the pleader in the case at bar was evidently trying to state a cause of action. This section provides:

"A written instrument, in respect to which there is a reasonable apprehension that if left

outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled."

Actions under this section are for the purpose of having instruments canceled or adjudged to be void, and such actions are usually called actions to remove clouds, and were quite common in the old chancery practice and constituted one of the applications of the principle "Quia Timet." 2 Story's Eq. Jur. § 701; *Castro v. Barry*, 79 Cal. 443, 21 P. 946. In this kind of action the statute provides (section 3413, Civ. Code) that if the instrument is void upon its face, or when construed with another instrument with which it is necessarily connected, the relief will not be granted. This provision is the embodiment in statutory form, of an old and well-established rule of equity.

It is clear that the plaintiffs have not stated a cause of action under either of these sections. In *Hibernia Savings & Loan Society v. Ordway*, 38 Cal. 681, in an action to remove a cloud, under section 3412, the court said:

"There can be no question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its *invalidity, ought to be stated.*"

See, also, *Castro v. Barry*, supra.

There is nothing alleged in the complaint showing that the judgment against the plaintiff Isadora Hughes is void or voidable for any reason; on the contrary, the conclusion drawn from reading the complaint is that said judgment is a valid and subsisting indebtedness against said plaintiff. For practically the same reason the complaint does not state a cause of action against the defendant, under section 1050 of the Code of Civil Procedure, which authorizes an action by "one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation."

[2] There is, however, an entirely different form of action provided for under section 738 of the Code of Civil Procedure, which provides that:

"An action may be brought by any person against another who claims an estate or interest in real or personal property, adverse to him, for the purpose of determining such adverse claim. * * *

The provisions of this section are very broad. In *Castro v. Barry*, supra, the court said:

"The statutory action to determine adverse claim is an improvement upon the old bill of peace. The statute enlarges the class of cases in which equitable relief could formerly be sought in the quieting of title. It is not necessary, as formerly, that the plaintiff should

first establish his right by an action at law. He can immediately, upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined, and the question of title be thus forever quieted.' * * * Nor is it necessary that the adverse claim should be of any particular character. As said by Baldwin, J., delivering the opinion in *Head v. Fordyce*, 17 Cal. 151, the statute 'does not confine the remedy to the case of an adverse claimant setting up a legal title or even an equitable one; but the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damaged by the assertion of an outstanding title already held or to grow out of the adverse pretension.' * * * And the rule may be even more broadly stated, viz., that the action may be maintained by the owner of property to determine any adverse claim whatever. For if the defendant by his answer disclaims all interest whatever, judgment may, nevertheless, be entered against him, though in such case it must without costs."

See, also, *Hyatt v. Colkins*, 174 Cal. 580, 163 P. 1007.

In *Landregan v. Peppin*, 94 Cal. 467, 29 P. 772, the court said:

"It will be noticed that section 738 of the Code of Civil Procedure, which provides for the determination of adverse claims to realty, is very broad in its terms, and includes all adverse interests, from a claim of title in fee to the smallest leasehold, and unquestionably it is the duty of the defendant to set out his interest, whatever, it may be, when called upon, under this section of the Code. * * * The main effect of said section is to give parties the right to compel others by suit to litigate and determine controversies in cases where such right did not before exist."

While there is no direct allegation in the complaint "that defendant claims any interest or lien upon the property adverse to plaintiffs and that such claim is without right," etc., as is generally alleged in actions to quiet title, under section 738 of the Code of Civil Procedure, still the complaint does allege "that said judgment clouds the title of plaintiffs thereto, and that the market value thereof has thereby been lessened to such an extent that said premises cannot be sold." No demurrer was interposed to this complaint. This allegation together with the other allegations of the complaint stated a sufficient cause of action to quiet title, under section 738 of the Code of Civil Procedure. If, however, it be conceded that the complaint, standing alone, does not state a cause of action to quiet title, under section 738 of the Code of Civil Procedure, for a lack of averments of essential facts, such missing allegations are supplied by the answer.

[3] The defendant by her answer denies among other things, first, that plaintiffs were actually living together as husband and wife

on said premises at the time said homestead was made and recorded, thus putting in issue one of the essential elements to establish a valid homestead, for unless plaintiffs could prove these facts defendants' judgment would be a lien against said property. The answer further denies "that said judgment mentioned in paragraph 5 of the complaint is not a lien upon the above said homestead, nor are the said premises subject to execution thereunder," etc. Therefore defendant has put in issue the question whether the homestead is valid, and also the question whether the judgment is a lien against the premises described in the complaint and thereby admits that she claims a lien upon the homestead property *adverse to the plaintiffs* and admits that she claims the homestead is invalid and that the property is subject to execution in satisfaction of her judgment, thus supplying the missing allegations in plaintiffs' complaint. In *Vance v. Anderson*, 113 Cal. 536, 45 P. 817, the court said:

"It is a familiar rule of pleading that defects in a complaint may be cured by the averments of an answer thereto. *County of San Diego v. Seifert*, 97 Cal. 594 [32 P. 644]; *Harkness v. McClain*, 8 Utah, 52 [29 P. 964]; *Code Civ. Proc.* § 475; *Diefendorff v. Hopkins*, 95 Cal. 344 [28 P. 265, 30 P. 549]; *Schenck v. Hartford Ins. Co.*, 71 Cal. 28 [11 P. 807]; *Cohen v. Knox*, 90 Cal. 266 [27 P. 215, 13 L. R. A. 711].

"Pomeroy is of opinion this rule of the curative property of an answer should be confined to cases in which the answer affirmatively alleges the very fact which is omitted from the complaint, but says it has sometimes been 'enforced, although the answer simply contained a denial of the necessary facts which should have been averred by the plaintiff.' Pomeroy on Remedies, § 579. The practice in this state has been to treat express denials as sufficient to cover the defect."

See, also, 21 Cal. Jur. 290, etc., and cases there cited.

[4] The homestead is exempt from execution or forced sale, except in the following cases:

"The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

"(1) Before the declaration of homestead was filed for record, and which constitute liens upon the premises.

"(2) On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, materialmen's or vendors' liens upon the premises.

"(3) On debts secured by mortgages on the premises, executed and acknowledged by husband and wife, or by an unmarried claimant.

"(4) On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record." *Civ. Code*, §§ 1240 and 1241.

It is not shown in the record anywhere that said judgment against the plaintiff Isa-

dora Hughes falls within any of the above exceptions. Therefore, the homestead of plaintiffs, if found to be valid, is not subject to execution to satisfy said judgment of defendant and said judgment created no lien or incumbrance on said homestead property.

At most, the effect of said judgment and the claim of lien thereunder, asserted by defendant, was to create an apparent cloud upon the title to the homestead property, and plaintiffs have a right to bring an action to quiet title and have the court determine that the title to said homestead property is not subject to execution in satisfaction of said judgment and is unimpaired and unaffected thereby. *Magneson v. Pacific Mfg. Co.*, 26 Cal. App. 52, 146 P. 69; *Price v. Central Savings Bank, etc.*, 62 Cal. App. 583, 217 P. 800.

It follows, therefore, from what has been said, that we are of the opinion that plaintiffs were entitled to have their case heard and determined by the trial court on the merits.

The judgment is reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

85 Cal. App. 320

GITTELSON v. GANDOLFO. (Civ. 5121.)

District Court of Appeal, Second District, Division 1, California. Sept. 2, 1927.

Appeal and error ⇐82(3)—Order denying statutory motion to set aside judgment and enter different judgment held appealable under statute (*Code Civ. Proc.* §§ 663, 663a, 963).

Order denying motion made under *Code Civ. Proc.* §§ 663, 663a, to set aside judgment and to enter a different judgment on the findings, held appealable under section 963, providing that an appeal may be taken from any special order made after final judgment.

Appeal from Superior Court, Los Angeles County; C. W. Guerin, Judge.

Action by Max Gittelson against Josephine E. Gandolfo. Judgment for plaintiff, and defendant moved to set aside the judgment. From an order denying the motion, defendant appeals. On motion to dismiss the appeal. Motion denied.

H. A. Massey and Peyton H. Moore, both of Los Angeles, for appellant.

Shapiro & Shapiro, of Los Angeles, for respondent.

YORK, J. Respondent claims that an order refusing to set aside judgment and to enter a different judgment on the findings is not appealable.

The notice of motion to vacate judgment, an appeal from the ruling on which is the matter now before this court on appeal, is a somewhat lengthy and somewhat complicated notice of motion, and recites that it is made

under the provisions of sections 663 and 663a of the Code of Civil Procedure. The cases cited by the respondent in his motion to dismiss the appeal were apparent authority for the contention of plaintiff in his motion to dismiss. However in the later case of *Bond v. United Railroads of San Francisco*, 159 Cal. 270, 273, 113 P. 366, 367 (48 L. R. A. [N. S.] 687, Ann. Cas. 1912C, 50) the court says:

"The order made after judgment, denying the motion to vacate the judgment and render a judgment consistent, as plaintiff claimed, with the answers of the jury to the questions put to it, is clearly an appealable order. By section 963 of the Code of Civil Procedure, an appeal may be taken from any special order made after final judgment. This order is one of that kind. It is an order authorized by section 663 of the Code of Civil Procedure. Section 663a of the Code of Civil Procedure declares that an order 'granting such motion may be reviewed on appeal in the same manner as orders made on motions for a new trial.' This was intended either to authorize a review of such an order on appeal from the judgment afterward made in pursuance of it, or to authorize a direct appeal from the order itself. In either case it should not be construed so as to affect the right given by section 963 to appeal from an order denying the motion, as from an order made after judgment. Respondent's position in that behalf is untenable."

The sole question ruled on by the court in the case of *Westervelt v. McCullough*, 64 Cal. App. 362, 221 P. 661, was whether an appeal on the identical grounds stated herein would lie. As to this question they say:

"An order denying a motion made under section 663 is unquestionably a special order made after final judgment, and as such is appealable under section 963—unless there be some good reason for holding otherwise. Because in section 663a, the Legislature expressly provided that an order granting such a motion may be reviewed on appeal in the same manner as a special order made after final judgment, respondent argues that, under the familiar rule of construction, *expressio unius est exclusio alterius*, it should be held that the lawmakers did not intend that there should be a right of appeal from an order denying the motion. To support this view respondent cites *Modoc Co-operative Ass'n v. Porter*, 11 Cal. App. 270, 104 P. 710. It is true that certain dicta may be found in the opinion in that case which seem to give color to respondent's contention; but since that case was decided our supreme court has stated unequivocally that an order denying a motion made under section 663 is appealable under section 963, as a special order made after final judgment. *Bond v. United Railroads*, 159 Cal. 270, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; *Condon v. Donohue*, 160 Cal. 749, 118 P. 113. The rule thus announced is binding here."

In the amendment to the opinion in the case of *Andreoli v. Hodge*, 71 Cal. App. 762, 236 P. 333, said amendment appearing on page 766 (236 P. 335) thereof, the court says:

"Since the decision herein was filed, our attention has been called to the fact that, since the time of the decisions to which we referred as indicating that there is no right of appeal from an order denying a motion to set aside a judgment and on the findings enter another and different judgment, later decisions have determined that there is such right of appeal. *Condon v. Donohue*, 160 Cal. 749, 750, 118 P. 113; *Westervelt v. McCullough*, 64 Cal. App. 362, 221 P. 661."

The motion made in the instant case in the lower court did request, in addition to other relief, the same identical form of relief as was requested in the case of *Westervelt v. McCullough*, supra.

The motion to dismiss is denied.

We concur: CONREY, P. J.; HOUSER, J.

85 Cal. App. 273

HILLE v. JOHNSTON. (Civ. 3299.)

District Court of Appeal, Third District, California. Aug. 29, 1927.

1. Appeal and error $\S$ 690(5)—Failure to incorporate judgment roll in another case in transcript prevented consideration whether excluding it from evidence was error.

On appeal from judgment in action to recover attorney's fees, failure to incorporate in transcript judgment roll in action by present defendant against attorney to set aside compromise of case prevents consideration as to whether its exclusion from evidence constituted error.

2. Appeal and error $\S$ 1078(5)—On appellant's failure to make point in briefs as to finding against plea of limitations, such plea is presumed to be abandoned.

On appellant's failure to make point in briefs as to finding against her plea of statute of limitations, such proposition is presumed to have been abandoned.

3. Appeal and error $\S$ 671(1)—Whether briefs contain portions of record necessary to proper review or whether merits of case may be reviewed without them rests in discretion of appellate court (Code Civ. Proc. $\S$ 953c).

Whether in given case briefs of party, where attempt has been made to include portions of record necessary to proper review pursuant to Code Civ. Proc. $\S$ 953c, are sufficient, or whether, when no attempt has been made to follow such provision, merits of case may be reviewed, presents question whose decision is in discretion of appellate court.

4. Appeal and error $\S$ 1126—Appellant's failure to incorporate in brief portions of record held, under circumstances, not to require granting motion to affirm judgment (Code Civ. Proc. $\S$ 953a, 953c).

In action by assignee on contract to recover attorney's fees where evidence was not offensive and record could be examined with no

greater trouble or inconvenience than if it had been inserted in appellant's brief or supplement appended thereto pursuant to Code Civ. Proc. § 953c, failure to include record in brief on appeal on record pursuant to section 953a did not require affirmance of judgment on motion.

5. Set-off and counterclaim ⚖️28(2)—Generally, in action on contract, defendant may cross-complain for damages caused by plaintiff's breach thereof (Code Civ. Proc. § 442).

Under Code Civ. Proc. § 442, generally, in action to recover on contract, defendant may cross-complain for damages caused by plaintiff's breach thereof.

6. Set-off and counterclaim ⚖️28(2)—In action to recover attorney's fees, cross-complaint for damages for breach of attorney's contract held proper (Code Civ. Proc. § 442).

In action to recover attorney's fees, cross-complaint for breach of attorney's contract on which fees were based was germane to cause of action stated in complaint and related to or depended on contract or transaction on which action was brought, within Code Civ. Proc. § 442.

7. Set-off and counterclaim ⚖️49(2)—Defendant, sued on contract for attorney's fees, held entitled to set up set-off existing at time of, or before, notice of assignment (Code Civ. Proc. § 368).

Under Code Civ. Proc. § 368, defendant, sued on contract for attorney's fees, was entitled to interpose as defense any set-off existing at time of, or before, notice of assignment.

8. Appearance ⚖️20—Assignor of contract filing demurrer to cross-complaint held to make "general appearance," waiving personal or other service of summons (Code Civ. Proc. §§ 406, 416).

Under Code Civ. Proc. §§ 406, 416, where assignor of contract on which defendant was sued for attorney's fees filed demurrer to cross-complaint for damages because of his breach of contract, he made "general appearance," waiving personal or other service of summons.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Appearance.]

9. Pleading ⚖️147—Cross-complaint for attorney's breach of contract of employment held to state cause of action on general demurrer.

In action by assignee of contract for attorney's fees, cross-complaint for attorney's breach of contract of employment held to state cause of action on general demurrer.

10. Set-off and counterclaim ⚖️49(1)—Defendant, sued by assignee of contract for attorney's fees, held entitled to set up damages sustained through assignor's breach of contract (Code Civ. Proc. § 442).

Under Code Civ. Proc. § 442, defendant, sued by assignee of contract for attorney's fees, was entitled to set up any set-off against claim constituting basis of cause of action or cross-complaint for damages by way of recoupment for any damage sustained by her through attorney's violation of contract of employment.

11. Parties ⚖️84(5)—Failure to make assignee suing on contract for attorney's fees party defendant to cross-complaint against attorney should have been presented by demurrer or answer (Code Civ. Proc. § 430, subd. 4).

Under Code Civ. Proc. § 430, subd. 4, failure to make assignee suing on contract for attorney's fees party defendant to cross-complaint, based on attorney's breach of contract of employment, constituted nonjoinder of parties cross-defendant, which should have been presented either by demurrer or answer.

12. Attorney and client ⚖️166(1)—In action on contract for attorney's fees defended on ground of breach, excluding defendant's testimony as to conversation with attorney relating to steps to collect judgment held error.

In assignee's action on contract for attorney's fees in which answer set up breach of contract through attorney's failure to collect judgment and in compromising case without consent of defendant, excluding defendant's testimony as to conversation with attorney after obtaining judgment as to what he should do about collecting money under it held error.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by J. G. Hille against Catherine M. Johnston on a contract for legal services. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Thomas B. Leeper, of Sacramento, for appellant.

Berkeley B. Blake and Irving D. Gibson, both of Sacramento, for respondent.

HART, J. The plaintiff was awarded judgment for the sum of \$2,391.41, with interest thereon at the rate of 7 per cent. per annum from the date of said judgment, on account of and for professional services alleged to have been performed by plaintiff's assignor, as attorney for defendant, in a certain action tried and prosecuted to judgment in the superior court of Sacramento county, wherein the defendant herein was plaintiff and August De Bock, his wife, Clara E. De Bock, and Millie Fisher were defendants.

The defendant appeals from the judgment upon a record prepared in pursuance of section 953a of the Code of Civil Procedure.

On the 14th day of July, 1915, the defendant and appellant (then known as and called Catherine M. De Bock) and P. H. Johnson, an attorney and counselor at law, entered into a written contract, by the terms of which said Johnson, for a certain contingent consideration, agreed to perform for defendant certain professional services in the action, above named, in which the defendant as plaintiff sued the De Bocks and said Fisher for damages "for alienating the affections of the husband of defendant." Omitting the preamble or the explanatory language therefrom, the contract, which is made a part of the complaint, is as follows:

"Now, therefore, it is agreed on the part of said Catherine M. De Bock that in consideration of the legal services of said P. H. Johnson so rendered, in prosecuting said claim for damages against said parties hereinabove named, the said Catherine M. De Bock will defray the necessary court costs, jury fees, witness fees, and all other expenses of trial in said action, and pay to the said P. H. Johnson one-half of all money or moneys recovered or paid on account of said claim for damages, either by settlement, compromise, or pursuant to a judgment of court, or otherwise.

"That, in consideration of the foregoing promises on the part of the said Catherine M. De Bock, the said P. H. Johnson agrees to prosecute the claim of said Catherine M. De Bock for such damages against the said parties hereinabove named, through all the courts of this state, provided, however, that the said Catherine M. De Bock, in case of appeal from any court of the above-mentioned action, will pay and defray all costs and expenses of appeal of whatever nature or kind necessarily incurred.

"That it is mutually agreed that neither party to this agreement shall settle or compromise the said claim without the consent of the other party thereto."

The complaint is in two counts, but the two contain substantially the same allegations. It is alleged therein that, after the making of said agreement, said Johnson commenced said action for damages in behalf of defendant, and "thereafter duly and regularly prosecuted said action and said claim of defendant for damages against said defendants in said action named through all the courts of said state of California and to a final judgment in said action in favor of defendant herein." It is further alleged that on the 15th day of August, 1924, the sum of \$4,528.50 was paid to defendant on said judgment, and that, under and by virtue of the terms of the said (above) agreement between said Johnson and said defendant, one-half the moneys so collected upon said judgment "remains due, owing, and unpaid from defendant; that, prior to the commencement of this action, said P. H. Johnson assigned and transferred to plaintiff all his right, title, and interest in and to and all moneys paid on account of said claim for damages, and the plaintiff is now the lawful owner and holder thereof."

As to both counts of the complaint, the answer pleads the statute of limitations (Code Civ. Proc. §§ 337 and 339), admits the execution of the above agreement, but denies that the said sum of \$4,528.50 or any part thereof on account of the judgment obtained in said action was collected by said Johnson, or that plaintiff in said action (defendant here) received said sum or any part thereof through the efforts or labor of said Johnson, alleges that, before any money was recovered in said action, said Johnson abandoned said contract and refused to continue further on his part to perform the same, and that defendant thereupon employed another attorney to collect the judgment obtained in said action, and

that "said attorney other than said Johnson collected the said sum of \$4,528.50 and all thereof for the defendant herein." The answer further alleges that said Johnson did prosecute such action to judgment, which judgment amounted to \$5,800; that the defendants in said action, August De Bock and Clara De Bock, for the purpose of fraudulently preventing the defendant in this action from recovering on said judgment, filed a homestead on certain property owned by them (the De Bocks) in Sacramento county; that said De Bocks were not at the time of the filing of said homestead residing upon said property and "said homestead was void;" that P. H. Johnson caused an execution to be issued on said judgment and caused the property covered by said homestead to be sold under execution; "that upon the sale of said property under execution, this defendant bought the same in;" that the defendant herein was prevented from getting possession of said property on account of the claim of the De Bocks that the same was protected by said homestead, and that thereafter said Johnson for and on behalf of defendant commenced two actions against said De Bocks, the one to have said homestead declared invalid and void, and the other to eject said De Bocks from said premises; that after commencing said actions the same were set for trial and were about to be tried, when said Johnson, "without the knowledge or consent of this defendant, entered into an agreement to compromise said judgment and requested this defendant to ratify this agreement and to satisfy said judgment of record; that this defendant refused to accept said compromise and refused to satisfy said judgment of record; that thereupon said Johnson, without the knowledge or consent of this defendant, and without the authority of this defendant, * * * himself satisfied said judgment of record and received from said August De Bock and Clara E. De Bock the sum of \$4,500; that thereupon said P. H. Johnson retained and kept all of said sum of \$4,500, and refused to deliver or pay any part thereof to this defendant unless this defendant would ratify said agreement of compromise and satisfy said judgment of record; that said P. H. Johnson refused to further prosecute said action to set aside said homestead and eject said August De Bock and Clara De Bock; that thereafter this defendant employed one R. Platnauer, an attorney admitted to practice in all the courts of the state of California, to prosecute an action in her name to set aside said satisfaction of said judgment so entered by P. H. Johnson; that said action to set aside said satisfaction of said judgment was thereafter prosecuted in the superior court of the county of Sacramento and a judgment was entered therein vacating and annulling the satisfaction of said judgment so entered by said P. H. Johnson, as defend-

ant's attorney; that after said satisfaction of said judgment was vacated said R. Platnauer caused an execution to be levied in said action and recovered under said execution said sum of \$4,528.50; that no part of said sum of \$4,528.50 was collected or recovered by said P. H. Johnson or through his efforts, and the same was recovered long after said P. H. Johnson had refused to do anything further under said agreement set out in plaintiff's complaint."

The defendant, by permission of the court, filed an amendment to her answer, in which she attempted to set up, by way of estoppel against the right of the plaintiff here to maintain the present action, the judgment referred to in her answer as originally filed as having been obtained in the action instituted and prosecuted by Attorney Platnauer for the purpose of setting aside the satisfaction of the original judgment in favor of the defendant here against the De Bocks.

The defendant also filed a cross-complaint and, after by reference making those paragraphs of the answer setting forth the allegations last above referred to herein parts of said pleading, alleged therein that "by reason of the refusal of said P. H. Johnson to further carry out his contract with this defendant, and by reason of his breach thereof in compromising said judgment and satisfying said judgment of record, this defendant was forced to and did employ an attorney to vacate and set aside said satisfaction of judgment and to further prosecute said action to recover said sum of \$4,528.50 and was forced to expend a great deal of time in said matter and was forced to incur various expenses in said matter to the damage of this defendant in the sum of \$4,000." The prayer of the cross-complaint was that the plaintiff take nothing by his action and that the defendant recover upon her cross-complaint against said P. H. Johnson the sum of \$4,000, and that she be awarded costs against both plaintiff and said Johnson.

A demurrer was interposed to the cross-complaint upon general and special grounds. The special ground of the demurrer was that "there is a misjoinder of parties cross defendant in said action, in this, that said P. H. Johnson is not a proper party or cross-defendant in said action." The demurrer was sustained by the court without leave to amend.

[1, 2] The court found that the plaintiff's action was not barred by the statute of limitations, as alleged in the answer, and, further, that plaintiff was not estopped from maintaining this action by reason of the judgment entered in favor of defendant, as plaintiff therein, in the action brought by defendant against P. H. Johnson to set aside the compromise agreement referred to. As to the latter proposition, the record shows that the attorney for the defendant offered the judgment roll in evidence, but the court sustained the

objection of plaintiff to the admission of it in evidence. Nor is the said judgment roll in the transcript. As to that matter therefore, the record is such as to preclude a review and a determination of the point that the ruling excluding the judgment roll in said action from the record involved error. If defendant desired that that point be reviewed by this court, it was incumbent upon her to have incorporated the judgment roll in the transcript. The defendant does not in her briefs make any point as to the finding against her plea of the statute of limitations, hence it is to be presumed that she has here abandoned that proposition.

Preliminarily to a consideration of the points mainly relied on for a reversal, it is orderly at this point to consider and dispose of the motion by respondent for an affirmance of the judgment. The ground of the motion is that the briefs of defendant are legally deficient, in that there are not printed therein, or in any supplement appended thereto, such portions of the record as the "defendant desires to call to the attention of the court" (Code Civ. Proc. § 953c), or, in other language, that said briefs do not contain the portions of the record which are necessary to a proper review and determination of the points urged by defendant for a reversal. The disposition of cases on appeal on their merits is always to be preferred to a disposition thereof upon a failure, in preparing the appeal, to observe some rule of procedure, where it is clear that such course does not carry with it serious impingement upon the mode prescribed for taking and presenting appeals to courts of review. In the spirit of that wholesome policy of the appellate courts we will consider and review the motion and some of the cases having occasion to consider section 953c of the Code of Civil Procedure, or that provision thereof which furnishes the foundation of the motion here.

In denying a petition for a hearing of the case of California Savings & Commercial Bank v. Canne, 34 Cal. App. 768, 770, 169 P. 395, 396, the Supreme Court, speaking of the rule with respect to the preparation of records on appeal, as prescribed by section 953c of the Code of Civil Procedure, said that, while the law requires that "enough [of the record] must be printed [in the briefs or a supplement appended thereto] to illustrate the points made and to enable the court to determine those points," yet "just exactly what must be printed in any particular case in order to comply with this requirement necessarily depends upon the circumstances of the case." In San Joaquin & Kings River Canal & Irr. Co. v. Stevinson, 16 Cal. App. 235, 239, 116 P. 378, 380, it is said, referring to said section 953c, "that it would be difficult to lay down a 'hard-and-fast' rule as to the practice under the new sections or one that would meet the exigencies of all cases that are

brought to the appellate courts by the alternative method of taking appeals." In *Jeffords v. Young*, 197 Cal. 224, 229, 239 P. 1054, 1056, it is said:

"It has been reiterated approximately one hundred times in the decisions of this court and of the district courts of appeal that it is incumbent upon an appellant who relies upon a type-written transcript [referring to the alternative method of taking appeals], to print in his brief or in a printed supplement thereto sufficient of the record to justify a reversal of the judgment or order appealed from. 2 Cal. Jur. 643 et seq. Furthermore, as we pointed out some months ago (*Estate of Berry*, 195 Cal. 354, 233 P. 330), since the 1923 amendment to the section last cited (section 953c), an appellant who fails to do this *incurs thereby the risk* that the order or judgment appealed from may be affirmed upon motion."

In *Furlong v. Alexander*, 243 P. 887, 888, the District Court of Appeal of the Second District, held, upon the authority of *People v. Woods*, 190 Cal. 513, 519, 213 P. 951, that the provision of section 953c of the Code of Civil Procedure requiring "the parties" to "print in their briefs, or in a supplement appended thereto," certain indicated portions of the record, was "merely directory."

As accounting for the conclusions announced in some of the cases from which brief excerpts are above given, it should be explained that section 953c of the Code of Civil Procedure has been amended several times since its adoption into said Code as a part of the procedure of our appellate practice in the year 1907 (Stats. 1907, p. 751). The Legislature of 1919 (Stats. 1919, p. 261), amended the section by adding thereto the following provision:

"No appeal shall be dismissed nor shall any appeal be decided adversely to any party for failure to print in his brief the portion of the record or any part thereof in support of his points, but in such case the court hearing the appeal shall direct such party to print and serve on the adverse party and file with it a supplement to his brief in which shall be set forth in full that portion of the record relied on by such party and not printed in any former brief."

But the Legislature of 1923 (Stats. 1923, p. 748) again amended said section by eliminating therefrom the part just quoted herein and inserting in lieu of said provision the following:

"In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court. The court may in all cases, upon good cause shown, extend time to a party to print and file his brief, provided that the application is made before calling of the calendar for oral argument on the appeal or upon good cause being shown the court may extend time to a party to print and file a supplemental brief."

The case of *California Savings & Commercial Bank v. Canne*, first hereinabove referred to, was decided October 9, 1917, when the section read as it was originally passed by the Legislature of 1907. The case of *San Joaquin & Kings River Canal & Irr. Co. v. Stevinson*, supra, was also decided prior to the amendment of the section by the Legislature of 1919. The opinion in *Jeffords v. Young*, supra, was filed on October 1, 1925, at which time, as seen, section 953c had been amended by the Legislature of 1923, restoring to said section the provision thereof now under inquiry as it read prior to the amendment thereof by the Legislature of 1919 and as it now reads.

The case of *People v. Woods*, supra, was decided on March 1, 1923, but before the amendment of the section by the Legislature of that year went into effect, so that that case dealt with said section as it was amended in 1919. The case of *Furlong v. Alexander*, supra, was decided and the opinion therein filed on December 31, 1925, at which time section 953c, in the particular in which we are now considering it, read as it was originally passed in 1907 and as it now reads, except that there was added thereto the provision (above herein quoted) authorizing the court to extend the time to a party to print and file his brief, etc. It is in that case, it will be remembered, that it is held, upon the authority of *People v. Woods*, supra, that the provision of section 953c presently under review is directory only.

It is to be observed from the foregoing review of some of the many cases in which the provision in question has been considered that the construction which it has been given by the courts has been from different viewpoints created by varying conditions arising and existing by reason of the several amendments to which it has been subjected. We do not think that, as it now reads, the provision can, consistently with the mandatory nature of its language, be held to be directory. This would mean that it would be entirely in the discretion of the party taking an appeal to determine whether the briefs should contain any portions of the record.

[3] We are of the opinion, however, that whether, in a given case, the briefs of the party, generally the appellant, where an attempt has therein been made to comply with the terms of the provision, sufficiently measure up to the requirements thereof, or whether, where no attempt whatever has been made in the briefs to satisfy the commands of the provision, the merits of the case may or may not be reviewed, presents a question the decision of which rests in the discretion of the court of appeal, dependent in its exercise upon the nature and number of the points made and the conditions and the situation in general intrinsically characterizing the record. For instance, where, as here, the party

has failed to print in his brief, or in a supplement appended thereto, any part of the record, it is entirely in the discretion of the reviewing court to determine whether the record is such that it may or may not, without an extra amount of labor or great or unusual inconvenience, be examined for the purpose of determining whether the points which are to be reviewed are or are not well grounded. There are cases in which, notwithstanding the failure of the appellant to comply properly with the provision in question, the reviewing courts have, nevertheless, considered and decided the appeals upon the merits of the cases. See *Miller v. Oliver*, 174 Cal. 404, 163 P. 357. On the other hand, in *Marcucci v. Vowinkel*, 164 Cal. 693, 130 P. 430 (an action for damages for alleged injuries to one of the plaintiffs [the wife] from alleged unskillful advice and treatment by defendant in his professional capacity as a physician, and in which the appeal was from the judgment of nonsuit), the appellant having failed to print in his brief, or in a supplement thereto testimony, if any there was, "on the subject of want of care and skill on the part of the defendant," the court refused to review the evidence for the purpose of determining whether the nonsuit was or was not properly granted. The court said:

"Nor does he [counsel for appellants] in his brief point out or refer to such evidence on the part of the record where it may be found. He does not argue the question at all. We will therefore assume, for the purposes of this review, that there was no evidence of such want of care or skill."

The court stated, however, that:

"The only point worthy of mention, in his brief, is the claim that the court below improperly refused to continue the trial from the afternoon of the last day thereof until the following morning, to give the plaintiffs an opportunity to procure the attendance of three additional witnesses to testify on behalf on the plaintiffs."

The court then proceeded to consider and decide that question and for that purpose examined the transcript to ascertain what the showing was in the court below on the application for the continuance.

So it appears that, as above stated, whether a review will be allowed, where the appellant has failed, wholly or partially, to comply with the provision in question of section 953c, is to be determined by the reviewing court in the exercise of its discretion founded upon the situation of or the conditions characterizing the particular case in hand. The court's discretion in that particular should not and, of course, would not be abused. This construction would seem to be reinforced by the consideration that, where the appeal is taken in accord with the alternative method, the requirement that certain specified portions of the record are to be printed in the briefs, etc.,

is primarily for the benefit or convenience of the court to which the appeal is taken, although incidentally it is also for the benefit as well of the adverse party. The construction harmonizes with the policy of reviewing courts (above adverted to) that all appeals should be determined upon the merits rather than disposed of upon some technical rule among those established for the purpose of regulating the procedure by which appeals should be presented to such courts where it can be done without too drastic a departure from the requirements of said rules. And the construction accords with what we conceive to be the view of the provision as expressed in *Jeffords v. Young*, or as is to be implied from the language of Chief Justice Myers, author of the opinion in that case, as follows:

"An appellant who fails to do this [referring to the requirement of the provision that certain indicated portions of the record be printed in the brief], incurs thereby the risk that the order or judgment appealed from may be affirmed upon motion."

The warning, however, thus given the members of the legal profession still stands, and it may well be repeated here that, in preparing appeals according to the alternative method, the failure on the part of attorneys to follow, in a proper manner, the course prescribed by the provision in question will always be at their own risk, for cases will certainly arise where, to excuse such failure, would involve an abuse of discretion and amount, practically, to a judicial nullification of the provision.

[4] In the present case, the points are few in number, the judgment roll is not voluminous, and the evidence is comparatively brief. As to the evidence, it consists entirely of the agreement between plaintiff's assignor and the defendant, whereby the former was employed to render professional services as a lawyer for the latter in the alienation action, the judgment roll (superfluously) in the latter action and the testimony of the defendant, which is very brief. Thus the record is such that it may be and has been examined with no greater trouble or inconvenience than if the whole record had been inserted in the brief of appellant or a supplement appended thereto. To grant the motion of the plaintiff for an affirmance of the judgment upon the ground stated under such circumstances would involve an unnecessary denial of the defendant's right to have her appeal considered upon the merits. The motion to affirm the judgment is, therefore, denied.

[5-7] As to the order sustaining the demurrer to the defendant's cross-complaint, it may first be observed that it is the general rule in this state that, in an action to recover on a contract, the defendant may cross-complain for damages caused by plaintiff's breach of the same contract. Code Civ. Proc. § 442; 21 Cal. Jur. 79; *Mackenzie v. Hodgkin*, 126 Cal.

591, 59 P. 36, 77 Am. St. Rep. 209; Campbell v. Heney, 128 Cal. 109, 60 P. 532; Imperial Water Co. No. 4 v. Meserve, 62 Cal. App. 603, 217 P. 553. Of course, it will not be questioned that the subject-matter of the cross-complaint is germane to the cause of action stated in plaintiff's complaint, and "relates to or depends upon the contract or transaction upon which the action is brought," within the meaning of section 442 of the Code of Civil Procedure. Nor will it be doubted that, notwithstanding that the said agreement and any rights accruing to said P. H. Johnson thereunder were assigned to plaintiff, the defendant is entitled to interpose as a defense against the enforcement of the agreement any set-off existing at the time of, or before, notice of the assignment. Code Civ. Proc. § 368.

[8, 9] It does not appear that said P. H. Johnson was served with summons and a copy of the cross-complaint, but he, nevertheless, within due time, made a general appearance by filing a demurrer to that pleading, and thus waived personal or other service of summons. Code Civ. Proc. §§ 406 and 416; 3 Cal. Jur. p. 14 et seq.; 21 Cal. Jur. p. 477, § 4. The demurrer, as seen, was sustained, without leave to amend. The specific ground upon which it was sustained is not stated by the court, or, at least, is not disclosed by the record. There can be no doubt, however, that the cross-complaint, as against a general demurrer, states a cause of action for damages. Under the agreement between the defendant and said Johnson, the latter was entitled to be compensated for his professional services for instituting and prosecuting to final judgment, on behalf of the defendant, the "alienation action" (as for brevity that action may hereinafter be described), only in the event that any judgment which might be secured for defendant therein was satisfied or paid. In other words, under a fair or reasonable construction of said agreement, it was the duty of said Johnson, before he would be entitled to compensation for the professional services required of and rendered by him in said action, not only to obtain a judgment but to secure the satisfaction or execution thereof. If, therefore, having obtained a judgment for defendant in said action for damages, said Johnson refused to proceed to take the necessary legal steps to secure satisfaction thereof, such conduct would amount to an abandonment of the agreement on his part before its terms had been fulfilled; or, if, without the consent of the defendant, Johnson, upon an agreement of compromise between him and the judgment debtors, accepted, as in full satisfaction of the judgment, a sum less than that for which the judgment called, he (said Johnson), by reason thereof, would be guilty of a breach of the agreement for which breach defendant would be entitled to such compensation by way of damages as she might have suffered therefrom. There can be conceived no just ground for doubting that thus

the agreement is correctly construed. Indeed, the very fact that whether said Johnson was to receive any compensation at all for his professional services in said action was by the agreement made contingent upon the securing of the fruits of any judgment which might be obtained for defendant therein, constitutes indubitable evidence that it was intended by the parties that Johnson's obligations under the agreement would not terminate until such judgment was satisfied in whole or in part. Moreover, the language of the agreement is, as will be noted, that "said P. H. Johnson agrees to prosecute the *claim* of said Catherine De Bock (defendant) for such damages against the said parties hereinabove named through all the courts of the state." In other words, said Johnson would prosecute any claim of damages which the defendant here had against the defendants in the alienation action to its fructification, or until such claim was judicially established and satisfied. That the said Johnson was without authority to compromise the claim for damages or a judgment establishing such claim, without the consent or acquiescence of the defendant, is plainly spoken in the agreement, and equally clear is it that any compromise of such claim or judgment agreed to or effected by Johnson without the defendant's consent would constitute a breach of the agreement by Johnson for which she would be entitled to be reimbursed by way of damages, if any actual damage to her resulted therefrom.

Referring now to the cross-complaint more specifically than the averments thereof are above referred to, it will be observed that therein it is alleged that said Johnson, after prosecuting to judgment defendant's claim for damages in the alienation action, "abandoned said contract and refused to continue further; that, upon the abandonment of said contract and said refusal of said P. H. Johnson to further continue under said contract, this defendant hired another lawyer to prosecute said action and to collect said money; * * * that said Johnson, without the knowledge or consent of this defendant, entered into an agreement to compromise said judgment and requested this defendant to ratify this agreement and to satisfy said judgment of record; that this defendant refused to accept said compromise and refused to satisfy said judgment of record; that thereupon said P. H. Johnson, without the knowledge or consent of this defendant, and contrary to this defendant's wishes, himself satisfied said judgment of record and received from said De Bocks the sum of \$4,500;" that said Johnson refused to deliver said sum or any part thereof to defendant, and that the latter was compelled to and did employ another attorney to commence and prosecute an action to set aside said satisfaction of said judgment and obtained judgment annulling said satisfaction of judgment; that thereafter

said attorney other than said Johnson recovered under an execution issued on the judgment in the alienation action the sum of \$4,528.50; "that no part of said sum was collected by said Johnson or through his efforts and the same was recovered long after said P. H. Johnson had refused to do anything further under said agreement set out in plaintiff's complaint;" that as a result of the said alleged breach of the said agreement by said Johnson and his refusal "to carry out his contract with this defendant," the latter "was forced to expend a great deal of time in said matter, and was forced to incur various expenses in said matter, to the damage of this defendant in the sum of \$4,000." Thus it is clear that, as against a general demurrer, the cross-complaint sufficiently stated a cause of action for damages against said Johnson for a breach of the agreement. But it seems to be the view of counsel for plaintiff (and possibly it was the view of the trial court) that the demurrer was good on the special ground, to wit, "that there is a misjoinder of parties cross-defendant in the action, in this, that said P. H. Johnson is not a proper party or cross-defendant in said action."

[10, 11] Under our code system of practice and procedure and the authorities above named, the defendant was, notwithstanding the assignment by said Johnson of his claim to plaintiff and that the action to recover thereon is by said assignee, entitled to set up in her answer any set-off she might have against the claim constituting the basis of plaintiff's cause of action or cross-complaint for damages by way of recoupment for any damage she might have sustained by reason of the alleged violation by said Johnson of the terms of their agreement. *Campbell v. Heney*, supra. Of course, the plaintiff should be made a party cross-defendant with Johnson, for, while he is in no way responsible or liable for any damage defendant might have sustained by the alleged wrongful acts of said Johnson with reference to his agreement with defendant, he, nevertheless, is interested in the cause of action stated in the cross-complaint, since he has the right to defend against the claims of that pleading and thereby prevent, if he can, any diminution, by way of the counterclaim practically so pleaded, in the amount of any judgment to which the court might find him to be entitled by reason of his action. The situation then is that, in the place of a misjoinder of parties cross-defendant, there is a defect or nonjoinder of parties cross-defendant, and this should have been the objection interposed to the cross-complaint either by demurrer or answer. Code Civ. Proc. § 430, subd. 4; *Work v. Campbell*, 164 Cal. 343, 349, 128 P. 943, 43 L. R. A. (N. S.) 581. That the cross-complaint is proper in this case, we have no doubt. Indeed, it would violate the very spirit or central object of the reformed procedure, which was adopted and has long existed as a more en-

lightened system for administering the substantive law of rights and wrongs than the archaic system which it superseded, to hold that all matters growing out of precisely the same transaction between virtually the same parties should be required to be litigated by piecemeal in different and independent actions. This statement is peculiarly applicable to the instant case. As seen, our Code provides that an action by an assignee of a claim is subject to any defenses or offsets that might have been set up as against the assignor or the original owner of the claim sued on, had he himself brought the action. There is no good reason why, in such case, where the defendant has good cause for affirmative relief growing out of or directly connected with the transaction upon which the plaintiff's action is grounded, the defendant may not cross-complain against both the assignor and the assignee.

[12] The next and last assignments to be considered pertain to rulings excluding testimony purporting to be addressed to the proof of the allegations of the answer charging Johnson with a breach of the agreement. Counsel for defendant asked the defendant, as a witness, a number of questions as to said P. H. Johnson's conduct with regard to the alienation judgment after the same had been obtained. The court sustained objections to some of those questions on the ground that they were improperly framed, in that they called for answers which would have involved conclusions of the witness and also, in some instances, legal conclusions. Those rulings were, in the main, technically sound. But counsel for defendant, proceeding along the lines of his special or affirmative defense, asked defendant these questions:

"Well, Mrs. Johnston, do you recall the time of a conversation with Mr. P. H. Johnson, after the obtaining of the judgment (the alienation judgment), relating to what he should do about collecting the money under it? * * * What, if any, conversation did you have with Mr. Johnson relative to him proceeding with your action prior to employing other attorneys?"

To both questions objection was interposed that they were "incompetent, irrelevant, and immaterial," and the objection sustained. The rulings were erroneous. The obvious purpose of the questions was to show that P. H. Johnson had, without the consent of defendant, compromised the judgment in favor of the latter against the De Bocks, and refused to proceed further in the matter after he had secured such compromise. The defendant, under her answer, was entitled to show by her testimony every act of Johnson and every conversation she had had with him tending to prove the charge in her answer that the latter refused to take steps looking to the satisfaction of the De Bock judgment, or that he violated the terms of the agreement by accepting a compromise arrangement with the De Bocks whereby he reduced,

said judgment to an amount less than it called for. The questions were neither irrelevant, nor immaterial, nor incompetent. They, in proper form, called for proper testimony. The testimony, if given, might not have carried with it much, if any, force, or might wholly have failed to throw any light upon the allegations of defendant's answer to the proof of which it was addressed, but, obviously, for that reason testimony relevant and material to the issues of a case and in legal form sought to be brought out may not legally be excluded.

The judgment is reversed, with directions to the trial court to overrule the demurrer to the cross-complaint and thereupon grant leave to defendant to amend said complaint by making the plaintiff a party defendant thereto with said P. H. Johnson, and in any other respect that may be deemed necessary, and to amend her answer to plaintiff's complaint with respect to the special defense therein set up, if, in either or both instances, she be so advised.

We concur: FINCH, P. J.; PLUMMER, J.

WARD v. SAN DIEGO SCHOOL DIST. et al.
(Civ. 5067.)★

District Court of Appeal, Second District, Division 1, California. Aug. 19, 1927.

Hearing Granted by Supreme Court Oct. 17, 1927.

1. Schools and school districts ⇨79—As regards right to employ private counsel, board of education members held not "city officers," within charter requiring assistance of city attorney (Pol. Code, § 1576; San Diego Charter art. 3, c. 5, § 2).

As regards right of school district to employ counsel to defend litigation, Pol. Code, § 1576, providing that each city forms a school district, creates a school district as a public corporation separate from the city, so that board of education members are not "city officers" within San Diego Charter (St. 1889, p. 664) art. 3, c. 5, § 2, requiring city attorney to assist city officers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, City Officer.]

2. Schools and school districts ⇨78—As regards right to employ private counsel, city held not "legally interested" in district's litigation requiring city attorney to assist (Pol. Code, § 1576; San Diego Charter, art. 3, c. 5, § 2).

As regards right of school district to employ counsel to defend litigation, Pol. Code, § 1576, making every incorporated city a school district, creates a school district as a separate entity, so that city of San Diego was not "legally interested" in district's litigation within charter (St. 1899, p. 664) art. 3, c. 5, § 2, requiring

city attorney to assist in suits and matters in which the city might be "legally interested."

3. Corporations ⇨499—Corporation has implied power to sue and be sued.

It is one of the implied powers of a corporation that it may sue and be sued.

4. Schools and school districts ⇨78—School district has implied power to employ counsel in defending litigation.

In defending litigation, a school district has the implied right to have the assistance of, and the power to employ, counsel.

5. Schools and school districts ⇨78—Where counsel who should defend litigation for school district refuses to act, district may employ other counsel.

If the counsel, to whom by statute a school district is legally entitled to have to defend litigation, refuses to act, the district has the power to employ other counsel.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by M. L. Ward against the San Diego School District in San Diego County, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

S. J. Higgins, City Atty., and Arthur F. H. Wright, Deputy City Atty., both of San Diego, for appellants.

Ward, Ward & Ward, of San Diego, for respondent.

HOUSER, J. The appeal herein was taken from a judgment rendered in favor of the plaintiff and against the defendants in an action brought to recover the sum of \$2,250, which was the unpaid balance due on a contract for legal services rendered by plaintiff to the defendants in connection with the defense of certain litigation which arose from the construction of a school building by the defendant school district.

It is contended by the appellants that neither the San Diego school district nor its representatives had any authority, either express or implied, to employ the plaintiff or any other attorney to represent it in any litigation, but that, in any litigation which might arise concerning either the rights or the liabilities of said school district, either the city attorney of the city of San Diego, or the district attorney of the county of San Diego, was the proper attorney to represent the San Diego school district and the members of its board of education.

The record discloses that the district attorney of the county of San Diego refused to represent the defendants in the litigation in question; and, because it was generally understood that it was no part of the duty of the city attorney to represent the defendants in any way, no request was made that he do so in the litigation which forms the basis for

the judgment in the action upon which the appeal herein is predicated.

The decision of the questions here involved primarily depends upon the statutes relating thereto, together with such charter provisions of the city of San Diego as may be applicable. For the purpose of this decision only, it may be conceded that, while no statute expressly authorizes or directs either the city attorney of said city, or the district attorney of the county of San Diego, to assume charge of litigation in which a board of education is directly interested, certain statutes, as distinguished from charter provisions, at least indicate that the duty rested with such district attorney, rather than with said city attorney. On the other hand, it is contended that by certain provisions of the charter of the city of San Diego (Stats. 1889, p. 664), the city attorney is impliedly charged with the duty of such representation. Article 3, c. 5, § 2, of the San Diego charter is as follows:

"It shall be the duty of the city attorney to prosecute, in behalf of the people, all criminal cases arising upon violations of the provisions of this charter and city ordinances, and to attend to all suits, matters, and things in which the city may be legally interested; provided, that the common council shall have control of all litigation of the city, and may employ other attorneys to take charge of any such litigation, or to assist the city attorney therein. He shall give his advice or opinion in writing whenever required by the common council, mayor, or other city officers, and shall do and perform all such things touching his office as by the common council may be required of him."

On the part of appellants, it is urged that, in accordance with the language of such charter provision requiring the city attorney to give his advice or opinion to "the common council, mayor, or other city officers, * * *" the duty of the city attorney in the litigation in question was clearly indicated. Partly in answer thereto, the respondent points to the language of such charter provision which in effect limits the duty of the city attorney to those "suits, matters, and things in which the city may be legally interested."

In order, perhaps the first thing which requires consideration, is the question of whether members of a board of education are "other city officers."

[1] Although as a matter of first impression it might appear that all officers elected by the electors of a city were necessarily "city officers," upon reflection, and possibly more mature consideration of the legal aspects involved, together with the authorities handed down by the Supreme and Appellate Courts of this state, it will become apparent that the election of the several members of the board of education is merely a preliminary means of inducting such members into their respective offices, and that, when seated therein,

they become, and thenceforward are, officers of a political subdivision of the state, separate and distinct from the municipality within the boundaries of which the school district is located.

In the case of *Kennedy v. Miller*, 97 Cal. 429, 32 P. 558, it is held that, under the provisions of section 1576 of the Political Code, every incorporated city constitutes a school district, having the powers of a public corporation wholly distinct from the municipality in which it is situated. In considering the question of whether, in accordance with a charter provision of the city of San Diego, the funds of the school district should be deposited in the city treasury of the city of San Diego, the court said in part:

"Section 1576 of the Political Code declares that 'each county, city, or incorporated town, unless subdivided by the legislative authority thereof, forms a school district.' By virtue of this legislative authority, each school district becomes a public corporation (*Estate of Bulmer*, 59 Cal. 131; *Hughes v. Ewing*, 93 Cal. 414 [28 P. 1067]), and its functions and powers as such corporation are those which are given to it by the act under which it is created. The legislative declaration that every incorporated city is a school district does not import into the organization of the school district any of the provisions of the city charter, or limit the powers and functions which, as a school district, it has by virtue of the Political Code. The city is a corporation distinct from that of the school district, even though both are designated by the same name, and embrace the same territory. The one derives its authority directly from the Legislature, through the general law providing for the establishment of schools throughout the state, while the authority of the other is found in the charter under which it is organized; and, even though the charter may purport to define the powers and duties of its municipal officers in reference to the public schools in the same language as has the Legislature in the Political Code, yet these powers and duties are referable to the legislative authority, and not to the charter."

To the same effect are *City of San Diego v. Dauer*, 97 Cal. 442, 32 P. 561; *Hancock v. Board of Education of the City of Santa Barbara*, 140 Cal. 554, 74 P. 44; *Los Angeles City School Dist. v. Longden*, 148 Cal. 380, 83 P. 246; *Malaley v. City of Marysville*, 37 Cal. App. 638, 174 P. 367; *People ex rel. Williamson v. Rinner*, 52 Cal. App. 747, 199 P. 1066.

In the case of *Hancock v. Board of Education of the City of Santa Barbara*, 140 Cal. 554, 83 P. 246, the principal of a high school brought an action on contract against the board of education. Among other things, the court said:

"The defendant further contends that the plaintiff should have begun the action against the city of Santa Barbara, and not against the board of education. This claim is not tenable. Every city constitutes a separate school district, including such outlying territory as may be le-

gally attached to it. Pol. Code, § 1576. * * *

A city charter adopted under the provisions of the Constitution has no effect whatever upon the existence or legal character of a school district formed under the general law. The school system is a matter of general concern, and not a municipal affair. *Kennedy v. Miller*, 97 Cal. 434 [32 P. 558]. The function of the city under the charter is simply to furnish the officers who compose the governing body of the district, and, when the new charter was adopted, the former board of school trustees was superseded as the governing body by the city board of education. * * *

[2] The only authority which might be interpreted as being in any manner opposed to the views of the appellate courts as expressed in the cases hereinbefore cited, is that of *Ackerman v. Moody*, 38 Cal. App. 461, 176 P. 696, which case ultimately involved solely the question of whether a recall of members of the board of education was a municipal affair. It was there held that under the charter of the city of San Diego the right vested in said city not only to elect the members of the board of education, but to recall them as well. While in the course of the opinion some language may be found which in its tenor may be construed as out of harmony with that heretofore quoted herein as affecting the question of whether members of a board of education are "other city officers," upon consideration of the several cases to which reference has been had it will appear that, because of the unanimity of the several opinions to the effect that a school district is a corporate entity separate and distinct from the municipal corporation, it would necessarily follow that the officers of the San Diego school district were not "other city officers" of the city of San Diego, and, consequently, not within the purview of the provisions of the city charter which prescribes the duties of the city attorney with reference to the persons or officials whom he shall counsel and advise. Those cases, especially the cases of *Kennedy v. Miller*, 97 Cal. 429, 32 P. 558, *City of San Diego v. Dauer*, 97 Cal. 442, 32 P. 561, and *Hancock v. Board of Education of the City of Santa Barbara*, 140 Cal. 554, 74 P. 44, are likewise convincing, if not conclusive, authority to the effect that in the circumstances surrounding the instant case the city of San Diego was in no wise "legally interested"—which fact, according to the charter provision of the city of San Diego, was a prerequisite to the proper assumption by the city attorney of the duty of defending the litigation which was the basis of the employment of the respondent.

To revert to the case of *Kennedy v. Miller*, 97 Cal. 429, 32 P. 558, a reading thereof discloses the fact that therein the city of San Diego was seeking to compel the county treasurer of the county of San Diego to deposit with the city treasurer of the city of San Diego certain moneys then in the custody

of such county treasurer, which had been derived in part from the public school fund and apportioned to the San Diego school district. Although the city charter expressly provided for the eventual custody of such funds in the city treasury, the ruling by the Supreme Court was to the effect that such provision did not supersede the requirements of the Political Code that all moneys belonging to the school fund should be paid into the county treasury.

In the *Dauer* Case, supra, 97 Cal. 442, 32 P. 561, the city of San Diego sought to enjoin the county treasurer of the county of San Diego from paying out of school funds a warrant for the salary of the superintendent of public schools of the city of San Diego. In the course of the opinion it is said:

"These moneys are in the treasury [of the county] to the credit of the school district, and the city of San Diego, as a municipal corporation, has no interest therein."

It therefore becomes manifest that, as to each of the two requirements specified in the charter provision of the city of San Diego to which reference has been had, no duty was enjoined upon the city attorney to represent the school district in the litigation in question. If the city of San Diego was in no wise "legally interested" in the funds belonging to the school district, the injection by the city of its attorney into the litigation, while in no sense a gratuitous act, could be of no other or different effect than would legally result from a like attempted interference upon the part of a private individual, similarly situated so far as lack of legal interest in the litigation was concerned.

[3-5] The question of whether it was the duty of the district attorney of the county of San Diego to defend in the action brought against the board of education is not involved in this controversy; but, if it were here involved, it need only be said that the record discloses the admitted fact that such district attorney "refused to represent the school district in such litigation and advised the representatives of the school district to employ private counsel therein." In such circumstances the only recourse left to the board of education was either to permit judgment to be entered against it, or to follow the suggestion of the district attorney and engage an attorney to care for its interest in the action in question. Faced by such a situation, the only concern of the school district in the premises was whether it possessed the corporate power to employ counsel. With reference thereto, in the absence of express authority, it is conceded, alike by judicial authority and by text-writers, that one of the implied powers of a corporation is to sue and to be sued. While every man is presumed to know the law and authorized to represent himself in legal proceedings, as a matter of common knowledge it is almost universally accepted that such a presumption is nothing

less than legal fiction, and that as a matter of fact the trained lawyer who assumes to appear for himself in litigation to which he is a party is but poorly represented. If the corporation had the implied power to become a party to the action, the incidental power therewith connected is the right to have advice of counsel. If the counsel to which by statute it is legally entitled refuse to act, its plainly authorized remedy is to employ other counsel.

The case of *Denman v. Webster*, 139 Cal. 452, 73 P. 139, is cited by appellants herein as an authority to the effect that no implied power to employ counsel exists in a corporation of the character of that here considered. A reading of that case, however, discloses the fact, that, in terms, but one justice of the Supreme Court insisted that such was the rule, and even he admitted the existence of such power "under certain circumstances." Without writing an opinion thereon, a second justice of the Supreme Court concurred in the view expressed in the opinion by the first justice. In a concurring opinion by a third justice of the court, it is said that—

"It [the school board] cannot in such a case employ other counsel until it has exhausted every means available to it to procure the services of the attorney provided by public authority to act for it without expense."

A fourth justice in effect concurred in such opinion. In a dissenting opinion, which was written by a fifth justice and concurred in by two other justices, it is said:

"* * * It is quite apparent that in performing many of these duties [thereinbefore enumerated] the board may not be able to escape litigation. It may be sued on a contract for supplies where the contractor had violated the contract, and where it is the plain duty of the board to refuse payment; it may be sued to recover a school lot or other property under its control; it may be compelled itself to institute an action for the protection of such property, or to remove obstructions in the way of performance of its duties. The records of this court show numerous instances of litigation into which boards of education have been forced, and the right of such boards to sue and be sued has been universally recognized. See cases cited in the opinion of the court in *Mitchell v. Board of Education*, 137 Cal. 375 [70 P. 180]. From the nature of the duties imposed upon the board, as above stated, and its right to sue and its subjection to the burden of being sued, it has the clearly implied power, in certain cases at least, to employ an attorney to prosecute or defend an action or proceeding to which it is a party. And we think that the ac-

tion described in the complaint was a proper case for the exercise of that power. * * *

The implied power of a school board, at least "under certain circumstances," to employ counsel, thus becomes the unanimous opinion of the members of the court. As is expressly stated therein, the controversy before the court did not involve the school board, as a corporation, but concerned only certain members of the board in opposition to another person claiming to be a member thereof. The language of the prevailing opinion with reference thereto is as follows:

"The contest here was in reality one between certain individuals claiming to be the only members of the board and another individual claiming to be also a member."

In the instant case the school board, as a corporation, was the only party interested in the litigation. Other than the statement in the concurring opinion that "it (the school board) cannot in such a case employ other counsel until it has exhausted every means available to it to procure the services of the attorney provided by public authority to act for it without expense," what circumstances could be more potent than the refusal to act by the attorney whose legally specified duty it was to do so is not pointed out in the *Denman Case*. It is manifest that, by a proper request that the district attorney perform his assumed duty and by his refusal to do so, everything that was practicable had been done which might have been done in the premises to procure the assistance and advice of such counsel as was presumably provided by statute. The only possible recourse remaining to the school board was that of some sort of a legal proceeding to compel the district attorney to perform his duty. But clearly such a course likewise would have involved the necessity of employing an attorney, which fact, with the element of certain and disastrous delay and in the end, uncertainty of successful outcome, presented obstacles which we think fairly brought the case within the situation denominated by the writer of the prevailing opinion in the *Denman Case*, namely, "certain circumstances," which warranted and justified the exercise by the corporation of its implied and incidental power of employing counsel.

This court is therefore of the opinion that the judgment should be affirmed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

83 Cal. App. 301

(259 P.)

PEOPLE v. HRJAK. (Cr. 1514.)

District Court of Appeal, Second District,
Division 2, California. Sept. 1, 1927.

As Amended Oct. 13, 1927.

1. Criminal law $\S$ 176—Prior discharge by justice, for insufficiency of evidence to hold for trial party arrested and examined, is not available as "former jeopardy."

Where one arrested was merely examined by a justice and discharged for insufficiency of evidence to hold him for trial, this is not a bar as "former jeopardy" to further arrest and examination and trial for the same offense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jeopardy (In Criminal Law.).]

2. Criminal law $\S$ 178—It is only dismissal for delay beyond statutory period in finding indictment, filing information, or bringing on trial that is "bar to other prosecution" (Pen. Code, $\S$ 1382, 1387).

Pen. Code, $\S$ 1387, providing that an order for dismissal of action, "as provided in this chapter," is a bar to other prosecution, applies only to those orders for dismissal enumerated in section 1382, part of such chapter, namely, for failure to find indictment or file information, within 30 days after defendant has been held to trial, or to bring him to trial within 60 days after finding of indictment or filing of information, unless trial had been postponed on his application.

3. Criminal law $\S$ 1166(1)—Forfeiting bail, if improper, could not have affected substantial rights so as to require reversal of conviction.

Conviction will not be reversed for forfeiting of defendant's bail, even if it was improper; it being impossible to see how it could have affected his substantial rights.

4. Bail $\S$ 79(2)—Relief from any illegal forfeiture of bail cannot be had on appeal from conviction.

The method for relief provided by the statute for illegal forfeiture of bail must be followed; it cannot be had by appeal from the judgment of conviction.

5. Criminal law $\S$ 511(1)—Rule against conviction on corroborated testimony of accomplice held inapplicable, in view of other evidence alone warranting conviction.

Rule against conviction on uncorroborated testimony of accomplice has no application where the corpus delicti was abundantly established and the jury were warranted from the facts and circumstances before them, without accomplice's testimony, in finding defendant guilty.

6. Criminal law $\S$ 741(2)—Identification of defendant as the criminal need not be positively proved, but substantial facts and circumstances tending to connect him makes question for jury.

Identification of defendant as the one guilty of the crime charged need not be positively proved, but weight and sufficiency of evidence is entirely within the province of the jury where

there are substantial facts and circumstances tending to connect him with the offense.

7. Criminal law $\S$ 394—Court will not inquire as to source of competent evidence produced or means by which it was obtained.

Where competent evidence is produced on a trial, the courts will not inquire into its source or means by which it was obtained.

Appeal from Superior Court, Riverside County; Wm. H. Ellis, Judge.

George Hrkak was prosecuted for unlawful manufacture of intoxicating liquor. From a judgment of conviction, and an order denying motion for new trial, he appeals. Affirmed.

Joseph Seymour, of Riverside, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIG, J. On February 10, 1927, a complaint was filed with the justice of the peace of Temescal township, in the county of Riverside, charging the appellant with having committed "the crime of misdemeanor, to wit, the unlawful manufacture of intoxicating liquor," in the city of Corona, Riverside county, on or about February 9, 1927. The justice of the peace thereupon issued a warrant for appellant's arrest, and on the same date he was apprehended, brought into the justice's court, pleaded not guilty, and his preliminary examination was had on February 15, 1927. After hearing the evidence the justice of the peace of Temescal township found "that there is not sufficient evidence upon which to hold the defendant, George Hrkak, and it is ordered that the defendant be discharged," and appellant was released. On February 16, 1927, another complaint was filed with the justice of the peace of Riverside township, in said county, wherein appellant was charged with having manufactured intoxicating liquor in the county of Riverside on or about February 10, 1927. He was arrested, posted cash bail in the sum of \$500, and on March 10, 1927, a preliminary examination was held, and the last-mentioned justice of the peace made and entered an order reciting, in part, "that from the evidence presented it appears that the offense charged has been committed, and there is probable cause to believe that the defendant committed it. He will therefore be held for trial in the superior court of this county." Thereafter the case was tried before a jury in the superior court. The defendant's personal appearance was waived, evidence was introduced, a verdict of guilty was returned, and judgment was entered accordingly. Appellant failing to appear, his bail was forfeited, and a bench warrant was issued, during the deliberations of the jury. The defendant appealed from the verdict and judgment, and attacks various steps taken by

Both the justice's court of Riverside township and the superior court, but the principal ground requiring attention here, and which was strenuously urged at the second preliminary and during the trial, is that of alleged former jeopardy. Stating the proposition in the appellant's own language as presented in his briefs, it is insisted "that the defendant had a hearing of the same identical charge, and was discharged, for insufficient evidence and subsequently was rearrested, tried, and convicted of said identical charge," and that the superior court "denied the defendant's offer to prove that he had been once in jeopardy and that he had been acquitted."

[1] We think to state the ground here urged for reversal is to furnish the obvious answer to it. To argue that one justice of the peace deemed the evidence insufficient to warrant holding appellant for trial, and that another justice, upon the evidence before him, decided that appellant should be held for trial, amounts to no more and no less than an admission that he had not yet been tried, and consequently had not been once in jeopardy. This question was decided in *Ex parte Fenton*, 77 Cal. 183, 19 P. 267, wherein the Supreme Court said:

"The fact that defendant had been previously arrested on the same charge, examined before a magistrate, and discharged, is not a bar to a second arrest and examination.

"A person cannot be said to have been *once in jeopardy* until he is put upon trial before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance." (Italics as quoted.)

[2] Appellant refers to section 1387 of the Penal Code, and upon it bases a claim that because the justice of the peace of Temescal township made the order above quoted, no further prosecution for the same offense can be maintained. This section has no application to the instant case. It reads:

"An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor," etc.

The language is too plain to be mistaken. It limits the application of the section to those orders for dismissal provided in chapter 8, tit. 10, of the Penal Code. Such orders are those enumerated in section 1382 of that Code, and both subdivisions 1 and 2 thereof refer to cases where a person has been held for a public offense. In subdivision 1 it is provided that an action must be dismissed if an indictment is not found or information filed within 30 days after the defendant has been held to answer; and in subdivision 2 it is provided that where a defendant is not brought to trial within 60 days after the finding of an indictment or filing of an information, and a trial has not been

postponed upon his own application, the prosecution must be dismissed. These are the only orders for dismissal to which section 1387 applies.

[3, 4] Concerning appellant's complaint that his bail was forfeited improperly, it is sufficient to say that inasmuch as he has made no attempt to point out any way in which error in that behalf, if committed, could have affected his substantial rights and we are unable to perceive how such a result could follow, it is unnecessary and inexpedient to pass upon that question. If his bail was illegally forfeited, the law provides a method by which he might seek its recovery, but he cannot do so through an appeal from the judgment. Where no other or different judgment than that rendered would result even though the action complained of was erroneous, the judgment will not be reversed. *People v. Scott*, 24 Cal. App. 440, 141 P. 945; *People v. Gibson*, 106 Cal. 458, 39 P. 864; *People v. Grider*, 13 Cal. App. 703, 110 P. 586.

[5, 6] It appears that appellant owned a large still for the manufacture of whisky, which he and one Hoffman operated on the second floor of the premises where Hrbak was arrested; that Hoffman was not present at the time of the search and arrest of appellant, but that appellant was apprehended as he came down the stairs; he admitted to the officers that it was his home, but when asked as to his true name he gave a fictitious one. Hoffman's wife testified as to the ownership of the still and admitted that at times she may have watched it for the two men; that she assisted in bottling the product. A large quantity of the whisky was also found on the same floor, together with mash, sugar, etc. It is argued that if it be held that the evidence is sufficient to sustain the verdict and judgment, Mrs. Hoffman was shown to have been an accomplice, and that a conviction based upon her uncorroborated evidence would have to be reversed. This point requires but brief attention, since the rule contended for is not applicable to this case. The corpus delicti was abundantly established, and the jury may well have been warranted from the facts and circumstances before them, even in the absence of Mrs. Hoffman's testimony, in finding the defendant guilty. Identification of a defendant as the criminal need not be positively proved, and the weight and sufficiency of the evidence is entirely within the province of the jury, where, as here, there are substantial facts and circumstances tending to connect him with the offense. *People v. Rolfe*, 61 Cal. 540; *People v. Franklin*, 46 Cal. App. 1, 188 P. 607.

[7] The only other contention worthy of discussion is the asserted error of the trial court in declining to instruct the jury as to the law governing the issuance of search warrants, their service, etc. None of these matters was relevant or proper to be con-

sidered by the jury. Where competent evidence is produced on a trial, the courts will not inquire into its source or the means by which it was obtained. *People v. Mayen*, 188 Cal. 237, 205 P. 435, 24 A. L. R. 1383.

Other alleged errors are assigned for reversal, but they consist of rulings of the court and the giving or refusing to give instructions based upon erroneous theories which have already been disposed of.

The judgment and order denying motion for new trial are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

85 Cal. App. 291

ENGLISH v. CULLEY et al. (Civ. 5302.)★

District Court of Appeal, First District, Division 1, California. Sept. 1, 1927.

Hearing Denied by Supreme Court Oct. 31, 1927.

1. Pledges ⇨30(3)—Pledgee holding trust fund as security has responsibility similar to trustee's, and though he may buy at sale transaction must be bona fide.

Relation between parties to transaction, where collateral security is placed with pledgee with power of sale in case of default, is in nature of a trust, and, although the pledgee may himself become the purchaser of the pledged property, under the Code, the purchase must be made in the utmost good faith.

2. Pledges ⇨30(3)—Pledgee's buying property at forced sale for inadequate price and profiting by prearranged subsequent sale would be fraud on pledgor.

Pledgee's buying property covered by trust deed, which was pledged to secure note, at a forced sale for an inadequate price, and profiting by a prearranged subsequent sale, would be fraud on pledgor.

3. Pledges ⇨30(3)—Pledgee selling property has duty of collecting as much as possible to apply on debt.

Where a trust deed covering certain property was pledged to secure a debt, the pledgee selling the property covered by the trust deed has the duty of collecting as much as possible for application on the principal debt.

4. Pledges ⇨30(3)—Very slight additional evidence will impeach sale of pledged property to pledgee, where price is grossly inadequate.

While mere inadequacy of price may not be sufficient ground for refusing to give effect to a sale caused by the pledgee where the property was bought by the pledgee himself, where such inadequacy is great very slight additional evidence is sufficient to impeach it.

5. Pledges ⇨30(3)—Profit made by pledgee from buying property at forced sale held to inure to pledgors' profit.

Profit made by pledgee of trust deed covering property which he caused to be sold at a forced sale and bought himself, later selling according to prearranged plan, held to inure to pledgors' benefit.

6. Pledges ⇨30(5)—Rejecting evidence that pledgee of trust deed bought property covered at forced sale to sell at profit held error.

Rejecting evidence to the effect that the pledgee of a trust deed bought the property covered at a forced sale which he had caused and had subsequently sold the property according to a prearranged plan at a great profit held error, such evidence being admissible to show fraud on the pledgors.

7. Pledges ⇨30(3)—Pledgee of trust deed purchasing property covered cannot deduct accrued interest on debt secured before crediting price paid on pledgors' indebtedness.

Pledgee of trust deed purchasing property covered by the trust deed cannot deduct accrued interest on the debt which the trust deed secured before crediting the price which he paid for the property on the pledgors' principal indebtedness.

8. Pledges ⇨30(3)—Pledgee in possession of lands under trust deed held not entitled to credit for cattle feed, where feed was produced on land at pledgors' expense.

Where a pledgee had possession of land under a trust deed and grew cattle feed thereon at defendants' expense, which he fed to the cattle, held, that in accounting with pledgors pledgee was not entitled to credit for cattle feed, since the feed was a profit arising from the land for which pledgee was bound to account to pledgors.

9. Usury ⇨11(2)—Usury need not be pleaded where contract shows on its face its usurious character.

Where a contract is on its face usurious it is not necessary to plead usury, and it is the court's duty on its own motion to deny interest.

10. Usury ⇨47—Note providing that 12 per cent. interest be compounded semiannually held to violate usury law providing that maximum rate should be 12 per cent. per annum (Usury Law, § 2).

Note providing for interest payments at 12 per cent. per annum, interest payable semiannually, and if not paid to be compounded, held usurious, under Usury Law, § 2 (St. 1919, p. lxxxiii), providing that interest shall not exceed \$12 upon \$100 for 1 year.

11. Usury ⇨88—Where note was usurious, judgment providing for legal interest payments did not free note from illegal taint and was erroneous.

Where note was usurious because providing for maximum interest rate compounded semiannually, a judgment providing that interest should be compounded annually held not to free the note from the taint of usury and to be erroneous.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action for an accounting by P. A. English against Fern Hays Culley and others. Judgment for plaintiff, and defendants appeal. Reversed.

Lucien Gray, of Los Angeles, for appellants.

Emmet H. Wilson, of Los Angeles, for respondent.

TYLER, P. J. This action was commenced by plaintiff for the purpose of obtaining a decree declaring a certain trust deed made by the defendant Smith to the plaintiff to be a mortgage to secure a note executed by the defendants Culley to the plaintiff and foreclosing the same. The defendants filed an answer claiming certain credits in addition to those admitted by the plaintiff in his amended and supplemental complaint, and the action developed into one for an accounting between the parties. The amended and supplemental complaint alleged, in substance, that on the 24th day of June, 1920, the defendants Fern Hays Culley and B. F. Culley were indebted to plaintiff in the sum of \$49,892, and on the 31st day of July, 1920, they executed and delivered to plaintiff their promissory note for said amount. The note is then set forth in *hæc verba*. It provides for interest at the rate of 12 per cent. per annum from date until paid, interest payable semiannually, and if not so paid to be compounded and bear interest at the same rate as the principal. The complaint further alleged that on the 24th day of June, 1920, the defendant M. B. Smith, a widow, for the purpose of securing the aforesaid indebtedness and promissory note, executed and delivered to plaintiff a deed in fee simple of certain described property situated in the city of Long Beach, county of Los Angeles. That notwithstanding its form, the same was intended to operate as a mortgage as security for the debt. That as and for additional security said Smith, as a part of the same transaction made and delivered to plaintiff an assignment and transfer of all her right in and to a certain promissory note for the sum of \$15,000, executed by her in favor of one Dora B. Morris, dated June 23, 1920. The assignment recited, among other things, that this note was due twenty-five years from date and was being held in escrow for the benefit of the payee during her lifetime and upon her death was to become the property of M. B. Smith or her heirs, or assigns, and it was secured by deed of trust on the property in Long Beach, which had been conveyed by M. B. Smith to plaintiff as hereinabove recited. Other allegations then allege the interest of M. B. Smith and Dora B. Morris in the property, but a recital of such interest is not necessary for a discussion of the case.

The complaint proceeding alleges that defendants Fern Hays Culley and B. F. Culley have or claim to have an interest in the said lands which it is alleged is subsequent and subject to the lien of plaintiff's mortgage. Then follows an allegation as to certain payments made by defendants upon the note sued

upon and the prayer for judgment foreclosing defendants' rights in the property. Defendants, by an amended and supplemental answer, alleged, in substance, that plaintiff had been receiving since March 1, 1921, a rent of \$160 per month from the Long Beach property, and on January 1, 1921, received \$2,245.71, and on May 1, 1921, \$1,000, to apply on the note, and had received other items of interest from collateral security held by plaintiff as additional security for said note; that on or about October 15, 1921, plaintiff had received \$25,500 on said note, and on or about January 6, 1922, a further sum of \$15,000. For a second defense and counter claim they allege that on said last-named date defendants Culley delivered to plaintiff a certain note in the sum of \$15,000, known as the Delano note, made by one D. M. Alexander to order of plaintiff secured by a deed of trust on real property situated in Kern county, and on July 10, 1922, plaintiff received the sum of \$15,940 in payments thereon and had refused to credit said sum or any part thereof on the note sued upon. As a third separate defense defendants alleged that on July 31, 1920, defendants Culley delivered to plaintiff a note for \$32,500, dated June 15, 1920, executed by Kate and John Haering and indorsed by J. R. Milligan in favor of defendant Fern Hays Culley and secured by a trust deed by the makers on certain real estate in San Diego county, and that said Fern Hays Culley assigned said \$32,500 to plaintiff as collateral security; that plaintiff received \$1,500 on the principal of said note, and also received interest thereon amounting to the sum of \$745.71; that said note was on January 1, 1921, surrendered and a new note for \$31,000 dated December 13, 1920, executed by the Haerings and Milligan in favor of Fern Hays Culley, secured by a like trust deed, and also assigned to plaintiff as collateral security, and that plaintiff received on said note on May 1, 1921, a payment of \$1,000 and interest in the sum of \$1,695; that plaintiff declared a forfeit on said \$31,000 note and trust deed and caused said premises to be sold; that prior to such sale plaintiff agreed with defendants that if they would not appear and bid at such sale plaintiff would take the \$31,000 note as his own at a valuation of \$25,500 and would credit such amount on their indebtedness and that by reason of such promise they did not attend or interfere with the sale. For a fourth separate defense and counterclaim defendants alleged all the facts set up in the third defense, and also that prior to the date of sale plaintiff agreed with one Connor to sell to him the real estate described in the trust deed for the sum of \$30,000, in addition to all charges and expenses incurred or paid by reason of the sale, and that Connor at that time agreed to purchase the same for such amount; that at the date of the sale the property was reasonably worth the sum

of \$50,000. That plaintiff acquired the property at the sale for the sum of \$20,000 and received a conveyance thereof, and immediately thereafter conveyed the same to one Ober at the request of Connor, who thereupon paid plaintiff the sum of \$38,303.41 for said conveyance to Ober; that if defendants had not understood from plaintiff that he would, upon acquiring the property under the sale, credit them with the sum of \$25,500 upon their note, they would have attended the sale and bid the sum of \$55,000 for the property; that plaintiff refused to credit them with the \$25,500 as agreed, or to account to them for any part of the proceeds realized from said sale to Connor, or to credit their note with any sum whatsoever derived from the sale except the sum of \$11,520.24. For a fifth and separate defense and by way of counterclaim defendants alleged that the \$31,000 note was further secured by a chattel mortgage upon certain farming utensils, which mortgage was also transferred to plaintiff as security for the indebtedness sued upon; that said personal property was of the value of \$7,000; that plaintiff converted a large amount thereof to his own personal use and has refused to account to defendants for the same. They prayed that plaintiff be compelled to credit them with the various amounts claimed to be due them, and an accounting was asked for to ascertain this amount.

Among other facts, the trial court found that plaintiff did not agree to take the \$31,000 Haering trust deed note for \$25,500 as his own, and credit the note sued on with said amount as alleged by defendants, but that such agreement was upon condition that defendants pay the balance of their indebtedness in cash, which they failed to do. It found that plaintiff bid in the property at the trust deed sale for \$20,000; that plaintiff's bid was the only one received at such sale, but that the property was worth \$40,000; that plaintiff credited the note sued on with the sum of \$13,592.31, the net proceeds of said sale. At the trial plaintiff offered and there was received in evidence an itemized statement of all expenses incurred by him in the care of the property sold under the trust deed and the expenses of sale, which amounts were deducted from his bid of \$20,000. The trial court disallowed several of these items, thereby increasing the amount of the credit on defendants' indebtedness, but allowed an item of \$855.39 as interest, which defendants claim to be an improper charge. The court further found that plaintiff did not receive the \$15,000 Delano trust deed note to apply on the note sued on, but found that said \$15,000 was given to secure other claims of plaintiff and that only a balance of \$6,330.41 received by plaintiff from the \$15,000 note was to be credited on account of the note sued upon. It was also found that plaintiff and Connor did not agree to sell and purchase the

property in the \$31,000 Haering trust deed, and that Connor did not pay to plaintiff \$38,303.41 as alleged by defendants or any other sum. With reference to the claim that plaintiff had permitted the farming utensils subject to chattel mortgage to be removed or lost, the finding was against defendants. The court rendered judgment for plaintiff in the sum of \$38,120.55 as of February 5, 1923, with attorney's fees and costs. Defendants have specified numerous errors as grounds for reversal. It is first claimed that error was committed by the trial court in rejecting all evidence to sustain the allegations of the defense and counterclaim that plaintiff had agreed to sell, and did sell to Connor for \$38,303.41, the property included in the Haering and Milligan trust deed, and that such agreement was made prior to the date that plaintiff bid in the property for \$20,000. The findings of the trial court that no such agreement was made or that Connor ever purchased the property exists solely for the reason that the court rejected all evidence upon this subject, and then found negatively that there was no evidence to support defendants' allegations with reference thereto. In this connection it is appellants' contention that the trial court erred in the rejection of this evidence for the reason that, as plaintiff held the Haering and Milligan note and trust deed as collateral security for the payment of the note given by the defendants Culley to the plaintiff, he was a pledgee, and his position was, therefore, that of a trustee, and, consequently that any profit made by him out of the transaction while such pledgee inured to the benefit of the pledgors, the defendants Culley. Plaintiff, on the other hand, claims that he exercised his lawful right in making the sale in a lawful way. That as a pledgee holding a mortgage as collateral security for a loan, he had the right to foreclose the same when due and purchase at his own foreclosure sale, and it is no concern of the defendants whether or not he subsequently sold the property and made a profit.

[1] While this may generally be true, still the relation existing between parties to a transaction, where collateral security is placed in the hands of a pledgee as security for the payment of a debt with power of sale in case of default, is in the nature of a trust. The responsibility of the pledgee to the pledgor is similar to that of a trustee; he holds the stock for specific purposes—namely, to return it to the pledgor in the event of payment of the indebtedness, or if sold by him either at public or private sale to so act that the sale will be fair and bona fide. The fact that the pledgee himself may become the purchaser, by reason of the Code provision, which was not permitted at common law, affords an additional reason why the pledgee is held to the utmost good faith in dealing with the

pledged property. *Hudgens v. Chamberlain*, 161 Cal. 710, 120 P. 422.

[2, 3] Defendants charged and sought to prove that plaintiff, prior to the sale, had entered into negotiations for a private sale of the land, and in fact had actually sold the same. That the price he received under this arrangement was \$38,303.41 and the price he paid was only \$20,000, a profit of \$18,303.41. By his act in negotiating the sale, assuming the rejected evidence to be true, he certainly practiced an imposition amounting to fraud upon the defendants. It is reasonable to suppose that but for the arrangement with Connor the latter would have himself bid at least the amount he agreed to pay to plaintiff. It was the duty of plaintiff to collect all that he could from the security pledged to him for application on the principal debt. Assuming the arrangement with Connor to be a fact, such arrangement on his part certainly tended to prevent the accomplishment of this result. Here there is an express finding that the interest in the property was worth \$40,000.

[4] While mere inadequacy of price may not be sufficient ground for refusing to give full effect to a sale of this character, still where such inadequacy is apparent and great, very slight additional evidence is sufficient to impeach it. *Winbigler v. Sherman*, 175 Cal. 270, 165 P. 943. It is a circumstance therefore to be considered with the claim that plaintiff had arranged for a private sale of the lands at a price approximating the value found by the court. The private arrangement would certainly tend at least in some degree to create a weak market, thus preventing the obtaining of a fair price. It certainly shows a lack of good faith and fair dealing with the pledged property and places plaintiff in an attitude antagonistic to his trust, and such interference with the sale tends to impeach the fairness of the transaction. *Odell v. Cox*, 151 Cal. 70, 90 P. 194.

[5, 6] Here no right of redemption existed, and a profit made under the claimed circumstances should inure to the benefit of defendants. Nor can the plaintiff avoid his duty to account for a profit made under such circumstances by claiming that he did not purchase pledged property, which was the note and trust deed, the real property being mere security. Plaintiff cannot by such a claim change the nature of the transaction. Plaintiff sold the security which he held as pledgee as evidenced by the note and trust deed, and if, as claimed, he interfered with the sale so as to acquire the property for less than it was worth, and did so acquire it, he should be made to answer for the profits realized. Upon this subject, therefore, we conclude that the trial court erred in rejecting the offered evidence.

[7] Appellants further object to an allowance to plaintiff of certain items of expense

claimed by him to have been incurred in the care of the property sold under the trust deed, and which was deducted from his bid of \$20,000 before crediting the amount to defendants. The first of these items has reference to a charge of accrued interest for \$855.39. We are of the opinion that there is no evidence in the record to support the allowance of this claim. Plaintiff testified with reference thereto that he thought it was expended by him for interest on a prior mortgage existing on the property sold, but he expressed a doubt upon the subject. On cross-examination, he admitted that the amount was computed by an officer of a bank. The evidence, however, conclusively shows that the amount was computed by such officer as accrued interest on the \$30,000 trust deed note under which the sale was made. The interest on this note has been paid up to October 1, 1921. The officer computed the interest due up to the date of sale which took place February 25, 1922. This collateral note bore interest at the rate of 7 per cent. per annum, and at simple interest the amount of accrued interest totaled \$845.80. Plaintiff revised these figures by compounding the interest, which then totaled the sum of \$855.39, the exact amount charged and allowed. It is manifest that defendants should not be charged with the amount of this item. It was part and parcel of the security purchased by plaintiff for which he paid \$20,000. He never expended this or any other sum as accrued interest on this note or any other obligation to any one, so as to entitle him to a credit. It was a part of the security which he held and subsequently purchased. As counsel for appellant suggests, if the property had been sold to a stranger the full amount of the purchase price would have to be paid by him, and plaintiff is in no different position. It is true, the interest was due on the collateral note which he held, but so was the principal. He purchased the property secured by the note for this indebtedness, and he paid \$20,000 for the same. He could not then credit himself with the accrued interest any more than he could with a part of all of the principal. He was therefore not entitled to a credit of this amount, and the court erred in allowing it to him.

[8] The same may be said with reference to the credit allowed plaintiff for cattle feed, and which was deducted by him from the amount received under the Delano trust deed. The evidence upon the subject shows that plaintiff, while in possession of the lands under the trust deed, produced feed amounting to the sum of \$2,352. This feed was by him fed to certain cattle upon the lands. It was produced upon the land and the expense of its production was charged to defendants. It was therefore a profit arising from the land for which he was bound to account to defendants. The allowance to plaintiff of this

amount as a credit was therefore unauthorized. And, finally, appellant contends that the interest provided for in the note sued upon is usurious and void by reason of the provisions of section 2 of the Usury Law (Stats. 1919, p. lxxxiii). As hereinabove recited, the note provides for the payment of the principal sum of \$49,892, "with interest at the rate of 12 per cent. per annum from date until paid, interest payable semiannually and if not so paid to be compounded, * * * and bear the same rate of interest as the principal; and should the interest not be paid semiannually, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note." The Usury Law provides, in substance, that no greater sum for the loan or forbearance of money shall exceed the rate of \$12 upon \$100 for 1 year; and in the computation of interest it shall not be compounded nor shall the interest be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith. It also provides that any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest, and no action at law to recover interest shall be maintained, and the debt cannot be declared due until the full period of time it was contracted for has elapsed.

[9-11] Counsel for respondent urgently insists that a contract for the payment of interest semiannually at the maximum legal rate, and compounded if not so paid, is not usurious, but merely states a penalty for failure to pay interest when due. He also insists that the defense of usury was not pleaded, and therefore cannot now be raised. In addition, he argues that the Usury Law violates the Constitution of the state and the Constitution of the United States, all of which, it is pointed out, are designed to prevent arbitrary and unwarranted discriminations and classifications. A discussion of these questions would answer no useful purpose. The note here sued on does, in express terms, provide for interest at the maximum rate per annum, payable semiannually, and if not so paid, to be compounded, and bear the same rate of interest as the principal. Since the submission of this cause our Supreme Court has handed down three opinions which discuss the Usury Law invoked by appellants. In *Haines v. Com. Mtg. Co.* (Cal. Sup.) 255 P. 805, it is held that a contention that as long as the limit of the rate of interest is maintained at 12 per cent. per annum, the compounding of the interest, if not paid at the time provided for, should be allowed, is in the teeth of the statute itself and cannot be maintained. It has also been held that it is not necessary to plead usury where the contract

shows on its face its usurious character. Under such circumstances, it is the duty of the court sua sponte to deny any interest. *Wallace v. Zinman* (Cal. Sup.) 254 P. 946. The constitutionality of the act has likewise been passed upon and upheld. In *re Washer* (Cal. Sup.) 254 P. 951; *Wallace v. Zinman*, supra. Other questions, considering our conclusions become unimportant.

The trial court found that plaintiff was entitled to judgment on the note sued on, together with interest at the rate of 12 per cent. per annum, compounded annually. The note provided in unambiguous terms for compounding the interest semiannually. The Usury Law declares such a note to be null and void as to the agreement to pay interest. The mere fact that the judgment, contrary to the terms of the note, provides for compounding the interest annually, does not free the note from its illegal taint. 39 Cyc. 1003. The usurious transaction having been completed, the penalty attaches. A large amount of the judgment is made up of interest charges, and to that extent it is unauthorized.

For the reasons given, the judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

85 Cal. App. 355

MACK v. GAVELLO et al. (Civ. 5826.)★

District Court of Appeal, First District, Division 2, California. Sept. 7, 1927.

Hearing Denied by Supreme Court Nov. 2, 1927.

1. Brokers ⇨57(2)—That terms of purchase varied from terms specified in broker's contract authorizing purchase held no defense to broker's action for compensation, where modifications were readily accepted.

That contract between prospective purchasers and broker authorized purchase of hotel for \$115,000 with a trust deed for \$15,000 to be given to the owner, whereas the terms of the purchase were the same price with \$7,500 cash and a trust deed for \$7,500 to be given to the owner, was no defense to the broker's action for compensation, where the modifications were readily accepted by the purchasers.

2. Brokers ⇨44—Broker's contract authorizing purchase of hotel might be canceled at any time before owner agreed to sell, where it did not specify time limit.

Where broker's contract authorizing purchase of hotel did not specify a time limit within which the owner's agreement to sell should be obtained, contract might be canceled at any time before owner signed agreement to sell.

3. Appeal and error ⇨1011(1)—Court's findings may not be ignored on appeal, where based on conflicting evidence.

Where the trial court's findings are based on conflicting evidence, they may not be ignored on appeal.

4. **Brokers** ⇨56(2)—Broker did not lose any rights to compensation under contract authorizing him to purchase hotel because purchasers participated in consummation of deal.

Where prospective purchasers authorized broker to consummate purchase of hotel for them, that they themselves thereafter came forward and had interviews with owner and her agent and thereby expedited the purchase was no defense to action by broker for compensation under contract.

5. **Appeal and error** ⇨1010(1)—That evidence did not sustain trial court's findings on immaterial matters held not to require reversal.

Fact that evidence did not sustain certain of trial court's findings on immaterial matters, as, for example, on matters of evidence, held not to require reversal.

6. **Brokers** ⇨63(4)—Where purchasers' acts prevented their broker from obtaining release of claim, existence of claim was no defense to broker's action for compensation.

Broker held entitled to compensation under contract authorizing purchase of hotel as against purchasers' contention that he failed to furnish marketable title because of existence of certain claim, where purchasers' own acts prevented broker from putting into effect a tentative contract for release of claim.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action for compensation for negotiating the purchase of a hotel brought by W. H. Mack against P. Gavello and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Hearing denied by Supreme Court; WASTE, C. J., and RICHARDS, J., voting for transfer.

C. F. Humphrey and Grant & Zimdars, all of San Francisco, for appellants.

Herman Weinberger and Walter C. Fox, Jr., both of San Francisco, for respondent.

STURTEVANT, J. The plaintiff sued to recover compensation alleged to have become due and payable through a real estate transaction. The trial court made findings in favor of the plaintiff, and the defendants have appealed under section 953a of the Code of Civil Procedure.

The plaintiff pleaded his case in two separate counts. The defendants did not interpose a demurrer, but appeared and answered. Some uncontroverted facts are that prior to the beginning of these transactions the defendants were attempting to locate a property which would be suitable for their business location, and which they could purchase; that the Hotel Woodrow, located at 364 O'Farrell street, in San Francisco, was such a property; that the plaintiff took the defendants to that hotel and showed it to them; that the hotel was owned by Mrs. S. R. Spotts; that it was heavily incumbered, and that foreclosure pro-

ceedings were then being instituted; that the hotel was satisfactory and the estimated cost was satisfactory to the defendants; that on the 11th day of August, 1921, the defendants executed and delivered to the plaintiff what the parties call "the second offer" to purchase the Hotel Woodrow, and that on the same day they delivered to the plaintiff a written authorization of employment to purchase for them the said hotel, and that, on the same day, the plaintiff placed the offer before the owner of the Hotel Woodrow; that the offer was never rejected, but that the exact terms of the sale were not assented to by the parties thereto until August 16, 1921. The record discloses no attack as to the sufficiency of the writings. The plaintiff's contract contained no statement as to the length of time in which the plaintiff would be required to perform his contract. The parties do not controvert but what under these circumstances the plaintiff would have a reasonable length of time, and it is not asserted that he was dilatory; and, indeed, under the facts, it could not well be claimed that the plaintiff did not act with all due speed. Under the terms of his written employment, the plaintiff was to receive as his compensation the difference between \$122,500 and the amount paid as the purchase price.

[1] The consummation of the transaction involved numerous disagreements between the plaintiff and the owner and her agent, and between the plaintiff and his employers. Among other things, the defendants claim that the plaintiff abandoned the contract. On that issue the evidence was distinctly conflicting, and the trial court made a finding thereon in favor of the plaintiff. The defendants asserted that they discharged the plaintiff. The same comment applies. It is not controverted but what an executory contract to buy and sell was executed August 16, 1921, and that the transaction was finally completed, and that the defendants obtained title to the property. During the progress of the proceedings the defendants came forward and had interviews with the owner and her agent, and there is evidence to the effect that in so doing they expedited the consummation of the contract. In doing what they did they acted within their rights, but such acts did not so operate as to release them from their obligations to the plaintiff. In finally closing the transaction, the terms of the sale were slightly modified by the vendor and vendee. The total cost remained at \$115,000, but the amount actually paid the owner consisted of \$7,500 cash and a trust deed in the sum of \$7,500 instead of a trust deed in the sum of \$15,000 as provided in the second offer. The undisputed facts are that it was readily accepted by the defendants. The modification therefore constituted no defense in this case. *Twogood v. Monnette*, 191 Cal. 103, 215 P. 542; 9 C. J. 601, § 89.

[2, 3] The defendants contend that as there

was no time limit in the so-called obligation of August 11, 1921, within which the consent of the owner to a sale should be obtained, the defendants had the power to cancel the obligation at any time before the owner signed the obligation agreeing to sell. That contention may be conceded, but the trial court made a finding that these defendants did not cancel the obligation. The evidence was conflicting—so conflicting that the trial court intimated, at times, that witnesses for the defendants were reckless in their statements, and that the trial court did not believe them. Such findings may not be ignored.

[4] The defendants also contend that before the plaintiff could recover it was essential that he secure an owner, who was able to transfer a good and marketable title, an agreement in writing whereby the owner would agree to sell upon the terms stated in the written authorization. The vice in this contention is that according to the findings of the court the plaintiff did all these things. Of course, we realize that the defendants are taking the position that they did some of them, but to that the plaintiff may properly reply that conceding the defendants did assist the fact is no defense. They need not have given assistance. Having employed the plaintiff to consummate the contract, they need not have further concerned themselves. But having come forward and participated in the consummation of the contract, the defendants did not thereby preclude the plaintiff from any of his rights under the contract. *Blumenthal v. Goodall*, 89 Cal. 251, 26 P. 906; *Quist v. Goodfellow*, 99 Minn. 509, 110 N. W. 65, 8 L. R. A. (N. S.) 153, 9 Ann. Cas. 431, note on page 434.

[5] The trial court made a vast number of findings. The defendants attack some twenty of the findings as being unsustained by the evidence. We have carefully examined all of those attacks and find no merit in them. Within the mass of irrelevant matter in the record, we have indicated there were material facts on which the plaintiff had a clear right to recover. On each and every element that was material to that right the findings are supported by the evidence. As to some immaterial matters, it may be conceded that the findings are not supported. For example, both parties pleaded some of their evidence instead of facts. Findings in response to those matters were immaterial, and it may not be said that there was a miscarriage of justice because those immaterial findings are not supported by the evidence.

[6] On the argument the defendants contended that the plaintiff did not obtain a marketable title by reason of the existence of the Gross claim. It was even intimated that the Gross claim was a concoction of and was put of record on the instigation of this plaintiff. The title which was delivered was the sher-

iff's deed made pursuant to the foreclosure proceedings. It is not even suggested that the deed did not have the effect of conveying the title free and clear of the Gross claim. There was evidence that the plaintiff had nothing to do with the creation or recordation of the Gross claim. There was also evidence that when he heard of its existence he at once entered into negotiations with its owner to obtain a release, and that he succeeded in making a tentative contract to that effect, but the acts of the defendants operated to prevent the plaintiff from putting into effect his tentative contract with Gross.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

85 Cal. App. 306

PEOPLE v. VALENCIA. (Cr. 1437.)★

District Court of Appeal, Second District, Division 2, California. Sept. 1, 1927.

Hearing Denied by Supreme Court Oct. 31, 1927.

1. Criminal law §517(4)—Where all elements of rape were established by other witnesses, defendant's confession held admissible.

In prosecution for rape where prosecutrix and doctors gave evidence covering all elements of the offense, corpus delicti held sufficiently established to permit introduction in evidence of defendant's confession.

2. Rape §43(2)—Where prosecutrix testified she had had intercourse only with defendant, evidence of birth of child less than seven months after act charged held admissible.

Where prosecutrix in prosecution for statutory rape testified that she had never had sexual relations with any one except defendant, evidence of the birth of a child about six and a half months after the act charged held admissible.

3. Rape §57(1)—Weight of testimony in prosecution for rape held for jury.

Weight of doctors' testimony of pregnancy and birth of child and testimony of prosecutrix as to age, act of intercourse, and that she had never had sexual relations with any one except defendant held for jury.

4. Criminal law §1159(5)—Evidence held sufficient to show corpus delicti for purposes of considering appeal.

For purposes of considering an appeal from a conviction of statutory rape, evidence held sufficient to establish the corpus delicti.

5. Criminal law §1130(5)—Point not supported by argument or authority will not be considered.

Point asserted without argument or authority held not sufficient presentation of alleged error to demand consideration.

6. Witnesses $\S$ 37(1)—Prosecutrix held to have sufficient knowledge to justify admitting her testimony of statutory rape, notwithstanding lack of ability to express herself.

Prosecutrix held to have sufficient knowledge to justify admitting her testimony of statutory rape, notwithstanding that she appeared to be at a loss as to the manner of expressing herself.

7. Witnesses $\S$ 37(1)—Whether prosecutrix had knowledge concerning nature of rape sufficient for basis of discrimination held to concern weight of testimony, and not admissibility.

Whether the knowledge of the prosecutrix concerning the nature of the act of rape was sufficient for her to have a basis of discrimination held a matter effecting the weight of her testimony, and not its admissibility.

8. Criminal law $\S$ 119(4)—In absence of record showing that 30-minute limitation for argument prejudiced defendant convicted of rape, limitation held no error.

On appeal from a conviction for statutory rape, where it was not shown in the record how defendant's rights were prejudiced by the court's limiting the time for argument to 30 minutes, limitation held no error.

9. Criminal law $\S$ 772(4)—Refusal to charge that rape committed on any other day than that charged would not sustain conviction held no error, where only one offense was proved.

Where only the act of statutory rape charged in the information was proved, it was not error to refuse to charge that defendant must have committed offense on date charged, and that commission of act on any other day would not sustain a conviction.

10. Rape $\S$ 52(1)—Evidence held to support conviction for statutory rape.

Evidence held sufficient to justify verdict that defendant was guilty of statutory rape as charged.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Armando Valencia was convicted of rape, and he appeals. Affirmed.

Joe R. Marquette, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

THOMPSON, J. The defendant was charged by an information in two counts with the offense of statutory rape. At the time of the trial the prosecutrix testified that she did not have sexual intercourse with the defendant on the day of June 13, 1926, as alleged in the second count, and for that reason it was dismissed. She did, however, testify that the offense charged in the first count was committed on June 6, 1926. The jury returned a verdict of guilty on this count, and the defendant appeals from the judgment pro-

nounced thereon and also from the order denying his motion for a new trial.

While put by appellant in several different forms, his attack upon the judgment amounts to this: (1) That the corpus delicti was not proved and the confession of defendant was improperly admitted; (2) that the court erred in permitting the prosecutrix to testify concerning the act, because she demonstrated a lack of knowledge sufficient for a basis of discrimination; (3) that counsel's argument at the time of trial was erroneously curtailed; (4) that the court refused to give a requested instruction; and (5) that the evidence is so incredible, improbable, and far from being clear and convincing that it is insufficient to justify the verdict.

[1-4] Assuming for the moment that the testimony of the prosecutrix was admissible, and that the objections which counsel has to it run to the weight rather than to its admissibility, then the testimony related by her and two doctors furnishes evidence covering every element of the offense and establishes the corpus delicti sufficiently for the introduction of the confession of the defendant. She testified to her age of 15 years and to the act of sexual intercourse. Dr. Beatty examined the witness on November 18, 1926, and found that she had been pregnant seven or eight months. Dr. Polesky testified to the birth of a child to the complaining witness on December 25, 1926. While the defendant argues that the testimony of the doctors should have been stricken, and that instead of proving the act it tended to disprove it by reason of the fact that the normal period of human gestation is nine months, nevertheless it must be borne in mind that the prosecutrix testified that she had never had intercourse with any other person. And in this connection, it was decided in the case of *People v. Johnson*, 51 Cal. App. 464, 197 P. 135, that testimony as to the birth of a child to the prosecuting witness within approximately one month after the act charged, "where it was the consistent claim of the prosecutrix that she had had no relations with any other man," was proper. The weight to be given this evidence was, of course, a matter properly left to the jury. For the purposes of considering this appeal, however, the corpus delicti was amply established.

[5] Counsel for appellant also asserts without argument or authority that it was error to permit the police officer to testify that the answers made by the defendant to the questions which were propounded to him and constituting a confession, were "free and voluntary." Such presentation of alleged error is not sufficient to demand our consideration of the points involved. *People v. Zarate*, 54 Cal. App. 372, 201 P. 955. Regardless of that, however, we have carefully scanned the record, and we find that counsel searchingly ex-

amined all of the witnesses present at the time the answers were given without eliciting a trace of force, coercion, or threats. The confession was properly admitted.

[6, 7] Appellant's argument that it was error to permit the prosecutrix to testify because she demonstrated a knowledge insufficient for a basis of discrimination is likewise untenable. In testifying to the act of intercourse she expressed it by saying that the defendant, while she was lying upon the ground, took out his "private parts" and put them in hers. She also testified that she did not know what the "private parts" of man were. Later, on cross-examination, when asked if she knew what was meant by the expression when applied to herself, she said, "I do not know how to say it." This statement, together with the context of the remainder of her examination, discloses that she was not so much in ignorance concerning what was meant by the expression as she was at a loss to express herself. We are satisfied that if there be any objection it concerns the weight of the testimony, and not its admissibility.

[8] After the evidence was taken, the court announced that it would give each side 30 minutes for argument, to which appellant's counsel replied that he doubted whether he could cover the ground in 30 minutes; that possibly the court was possessed of the ability, but that he was not. He now assigns the limitation as error without attempting in any manner to show wherein the defendant's rights were prejudiced. For aught that appears in the record, counsel underestimated his ability and was able to present all the argument necessary or desirable. There is nothing to indicate that it was not a reasonable limitation of time.

[9] The court refused to give an instruction requested by defendant in words:

"That the jury must find that the defendant did have sexual intercourse with the complaining witness on the date charged. Evidence of the commission of the act on any other day would not sustain a judgment of conviction."

He now assigns the refusal as error and points to the case of *People v. Williams*, 133 Cal. 165, 65 P. 323, as his authority. The distinction between the instant case, where only one act was alleged and proved, and the *Williams* Case is pointed out in the cases of *People v. Singh*, 62 Cal. App. 450, 217 P. 121, and *People v. Britt*, 62 Cal. App. 674, 217 P. 767. In both of the cases last mentioned it was specifically stated that where many acts are committed and proved it is necessary that the prosecution select the one upon which it is intended to rely, but that the rule can have no application in a case where no offense is proved other than the one alleged.

[10] We have recited sufficient of the testimony heretofore that it is unnecessary for

us, in considering whether the evidence is sufficient, to detail more, except to point out that in the statement signed by the defendant and introduced in evidence he admitted having had sexual intercourse with the complaining witness on or about the time charged. Under the testimony of the physicians and defendant's admission, this case does not fall in the category of such cases as *People v. Hamilton*, 46 Cal. 540, wherein the prosecutrix was uncorroborated, but rather it is controlled by the principle of *People v. Johnson*, 131 Cal. 511, 63 P. 842, *People v. Moore*, 155 Cal. 241, 100 P. 688, and *People v. Porter*, 48 Cal. App. 237, 191 P. 951. To quote the language of *People v. Porter*, supra, "We cannot say that it is an irrational conclusion from the" testimony "that the defendant is guilty as charged."

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

REINHART LUMBER & PLANING MILL CO.
et al. v. HLADIK et al. (Civ. 5828.)★

District Court of Appeal, First District, Division 2, California. Sept. 3, 1927.

Rehearing Granted Oct. 3, 1927.

1. Mechanics' Liens ⇨132(4)—Filing notice of completion of building held to start time running for filing notice of mechanics' liens.

Filing of notice of completion of building starts time running for filing notice of mechanics' liens.

2. Mechanics' Liens ⇨290(5)—Findings as to time of completion of building held not contradiction.

In actions to foreclose mechanics' liens, general finding that allegations of complaints were true, some of which alleged building was completed January 22, and others February 22, did not contradict finding that notice of completion was recorded January 22, so as to render it ineffective.

3. Mechanics' Liens ⇨132(4)—Materialman's lien on building completed January 22, filed March 20, held too late (Code Civ. Proc. § 1187).

Under Code Civ. Proc. § 1187, materialman's lien, filed March 20, where notice of completion of building was recorded January 22, was too late.

4. Mechanics' Liens ⇨281(1)—Evidence of signing release and accepting check held to show waiver of mechanics' liens (Civ. Code, §§ 1643, 1653).

In suit to foreclose mechanics' liens, evidence that certain lienors executed release and accepted check held to show waiver of liens, under Civ. Code, §§ 1643, 1653.

5. Mechanics' Liens ⇨208—Mechanic's lien may be waived by written contract.

Mechanic's lien may be waived by written contract.

9. Mechanics' Liens —208—Giving mechanics' lien claimants checks held sufficient consideration for releasing liens on property, mortgage of which was to secure funds paying checks (Civ. Code, § 1605).

Where mechanics' liens claimants received checks, funds to pay which were to be secured by deed of trust on property subject to liens, release of liens was supported by sufficient consideration, under Civ. Code, § 1605.

7. Mortgages —186(5)—Evidence held to support finding of failure to post notice of sale as required by trust deed (Code Civ. Proc. § 692).

Where trust deed authorized sale only after giving notice required by law for sales of land on execution, under Code Civ. Proc. § 692, requiring both posting and publication of notice of sales of land under execution where deed executed by trustees recited that notice of sale was published but was silent regarding posting, finding by court that before executing deed trustees had not posted notice of sale was sufficiently supported by evidence.

8. Usury —76, 80—Violation of Usury Act does not affect principal so as to avoid trust deed.

Violation of Usury Act (St. 1919, p. lxxxiii) strikes at item concerning interest, but does not strike at principal so as to avoid entire deed of trust executed in violation thereof.

9. Usury —100(1)—On charge of usury in trust deed, on new trial accounting as to amount paid out by mortgagee and amount mortgagee received from mortgagors may be taken.

In suit to enforce mechanics' liens where usury in trust deed was set up, on new trial accounting may be had as to exact amount paid out by mortgagees and amount which mortgagee received from mortgagors or for their account.

10. Usury —100(1)—In taking account to determine whether trust deed is usurious, rentals after date of trustee's deed should be considered.

In suit to foreclose mechanics' lien where trust deed on property was claimed to be usurious, in taking account to find exact amount of lien represented by the trust deed, rentals collected after date of trustee's deed to mortgagee should be considered.

11. Mechanics' Liens —161(4)—Interest, if allowed on mechanics' lien, should be from date of action to foreclose lien, not from date of completion of contract.

In action to foreclose mechanics' lien, interest should not be allowed lien claimants from date of completion of contract, but, if at all, only from date of action to foreclose liens.

12. Appearance —9(1)—Answering some of mechanics' lien claims which had been consolidated, filing notice of motion to set for trial, making motion, obtaining order, and filing notice that trial had been set, held to constitute general appearance binding as to actions by all lien claimants.

Where several actions to foreclose mechanics' liens were consolidated, and defendants, ig-

norning order of consolidation, answered some and did not answer others, and later severed and filed notice of motion to set for trial, made motion, obtained order, and served and filed notice that trial had been set, and attorney, representing all but two defendants, did not object to proceeding with trial, nor ask for time to plead nor for continuance, and took part in questioning witnesses, defendants made general appearance and could not object that they were not served and did not appear in actions by certain lien claimants.

13. Mortgages —151(3)—Mechanics' lien claimants, not executing release, held entitled to preference to deed of trust subsequently executed.

Mechanics' lien claimants who did not execute release of claim were, in suit to foreclose liens, entitled to preference to deed of trust subsequently executed in favor of one supplying money to pay other claims.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Separate actions by the Reinhart Lumber & Planing Mill Company and others against J. C. Hladik and others to foreclose mechanics' liens, consolidated for trial and on appeal. From a judgment for plaintiffs, defendants appeal. Modified and affirmed in part, and reversed in part and remanded.

Keyes & Erskine, of San Francisco, for appellants.

B. S. Gregory, of San Francisco, for respondent Reinhart Lumber & Planing Mill Co.

Adams & Adams, of San Francisco, for respondent W. P. Fuller & Co.

Erwin E. Richter, of San Francisco, for respondent Gibbs.

Aitken & Aitken, of San Francisco, for respondents S. Ginsberg and H. Ginsberg.

Edgar C. Levey, of San Francisco, for respondent Severin.

F. L. Hatch, of San Francisco, for respondent Killian.

Daniel A. Ryan, of San Francisco, for respondent Klimm.

Ernest J. Torregano, of San Francisco, for respondent Jas. H. Hardy, Inc.

STURTEVANT, J. The plaintiffs, severally, commenced actions to foreclose mechanics' liens on a building located near Union and Steiner streets, in San Francisco. They named the contracting owners and certain fictitious individuals as defendants. Thereafter certain individuals claiming to be the present owners of the fee or of other interests, or representing, as trustees, other interests in said property, appeared and answered. They interposed certain denials and set forth certain new matter. A trial was had, and the trial court made findings in favor of the plaintiffs and against the persons so appearing and answering as defendants, and caused a decree to

be entered in accordance with said findings. The defendants have appealed and present several points which they claim are reversible error. We will take up the points in the order presented by the defendants and state such facts as may be necessary to a consideration of each point as it is taken up.

[1, 2] 1. The defendants contend that the findings are contradictory and are therefore against law. In this connection the defendants call to our attention that in some of the complaints it is alleged that the building was completed and accepted on January 22, 1920; that in some of the complaints the date is alleged as February 22, 1920; that the court made a finding that all the allegations of the complaint of the plaintiffs are true. The plaintiffs call to our attention that the trial court also made a finding that the building was fully completed and notice of completion was recorded January 22, 1920. The record discloses similar conflicts as to some of the other claimants. The filing of that notice started the time running as to when each claimant should file his notice of lien if any. *Olson-Mahoney Lumber Co. v. Dunne Inv. Co.*, 30 Cal. App. 332, 341, 159 P. 178. The finding as to when that notice was filed was in accordance with the allegations of several of the complaints and the admissions contained in the answers. Moreover, the notice, together with the date and place of recordation, were admitted in evidence and were in entire accord with the admissions contained in the pleadings. The pleadings contained no admission regarding any other date, and no evidence was introduced in the entire record establishing or purporting to establish any other date. Conceding, for the purpose of this decision and solely for that purpose, that the general finding is susceptible of the construction claimed by the defendants, to wit, that the trial court made findings that the building was completed on February 22, 1920, it is clear that such finding was not supported by any evidence.

[3] 2. The second point made by the defendants is closely akin to the first one. The defendants claim that the lien of the Hardy Lumber Company was not filed within the time prescribed by law, and therefore has no validity as a lien. The evidence shows and the trial court found that company filed its lien on March 20, 1920. The trial court found the building was actually completed and notice of completion was recorded January 22, 1920; the notice filed by the Hardy Lumber Company was filed too late as a materialman's lien. Code Civ. Proc. § 1187. The court did not find and the evidence does not show whether the Hardy Lumber Company was an original contractor as those words are used in the statute cited.

[4, 5] 3, 4, 5, 6, 7. The trial court made findings against the defendants' claim that the plaintiffs waived their liens and are es-

topped from claiming that they hold liens prior to October 6, 1919. The defendants claim the findings are not supported by the evidence. On September 17, 1919, the construction of the building had so far proceeded that it was nearly completed. On that date the owners had exhausted their funds and were unable to pay the several contractors on the building. They entered into negotiations with Gustave O. Heine to obtain the moneys necessary to pay the claims against the owners. They were advised that they would be furnished with the moneys upon the execution of a trust deed, but that arrangement must be made with the claimants whereby the trust deed would be and become a lien prior to any mechanic's lien. Under date of September 30, 1919, W. Olschewski, Esq., an attorney at law representing G. O. Heine, prepared certain papers in couplets. A couplet was to be delivered to each claimant. The couplet consisted of two instruments. The first instrument read:

"The undersigned hereby consents to upon the receipt of \$1,545 to execute a release, a copy of which is hereto attached and marked Exhibit A. Dated, San Francisco, Cal., September 30, 1919. Frank J. Klimm."

The second instrument, Exhibit A, was as follows:

"The undersigned defendants hereby release, and declare as satisfied to the date of these presents, all liens or claims he has acquired by virtue of any work or labor performed, material furnished, or money expended for concrete foundation or inside plastering in, to, or for the construction of the building now in course of construction (describing it). And that said liens are fully paid and discharged to date. Dated October 4, 1919. Frank J. Klimm."

Such instruments were not signed by W. P. Fuller & Co., Ginsberg Tile Company, and M. P. Killian. All of the other plaintiffs signed instruments identical in form with the first, differing only as to the amount, on September 30, 1919. They also signed instruments identical in form with the second instrument which we have just copied, but some signed on October 4, and some signed on October 6, 1919. At the same time and place that the second instrument was signed, a check was delivered to the signer for the amount of his claim. Each check was dated October 4, 1919. Each check was drawn on the Union Trust Company of San Francisco in favor of the claimant and for the amount due him. Each check was signed "Heine Piano Co., Inc. W. W. Reed, per G. O. Heine." On the face of each check appeared "Acct. J. C. Hladik." The deed of trust Hladik to Heine was recorded at 9 a. m. on October 4, 1919. Counsel has not called to our attention any conflict in the evidence which we have just recited. The evidence introduced in the case ran far afield. There was a very great deal of wholly immaterial evidence intro-

duced. On that immaterial evidence there is some conflict. It is entirely unnecessary to recite such conflicts or to comment thereon. There is no conflict in the evidence to the effect that each of the purported releases was signed and delivered, and that each of the checks was delivered after the Heine trust deed was filed for record.

B. Milano had the contract for concrete foundations and inside plastering. He signed a release prior to September 27, 1919. It will be noted that every other release, whether signed by the plumber, lumberman, or otherwise, contained the phrase "for concrete foundations and inside plastering. * * *" Putting a finger on that phrase, the plaintiffs contend that it is manifest that they were not releasing anything because no one of them had done "concrete work or inside plastering." That the execution of the instruments was not a mere idle act is evidenced by the fact that each corporation was required to attach, and did attach, its corporate seal. Moreover, each claimant was asked to sign on the dotted line before he got his check. He did so. The phrase relied on by the plaintiffs is wholly unnecessary to the meaning of any one of the releases. Although the record contains upwards of 500 pages, there is not an intimation that in October, 1919, any one of the plaintiffs held anything purporting to be a claim against the property except the identical lien claims which are the subject of this controversy. But there is evidence that no one of the plaintiffs installed concrete foundations and inside plastering. To sustain the contention of the plaintiffs is to give the alleged releases no force or effect. That a mechanic's lien may be waived by a written contract is settled law. 4 C. J. 314, § 415. That we have before us such a waiver cannot be disputed. But, the question to be decided is, "Does this written waiver include this particular lien?" Under the facts above stated and following the fundamental rules for the interpretation of contracts, the question propounded must be answered in the affirmative. Civ. Code, §§ 1643, 1653; *E. Aigeltinger, Inc., v. Burke*, 176 Cal. 621, 628, 169 P. 373; *Ames v. Southern Pacific Co.*, 141 Cal. 728, 731, 75 P. 310, 99 Am. St. Rep. 98; *Ponder et al. v. Safety Building & Loan Co. (Ky.)* 59 S. W. 858; *Hughes v. Lansing*, 34 Or. 118, 55 P. 95, 75 Am. St. Rep. 574, 579.

[6] No claim is made that G. O. Heine did not cause the checks to be delivered or that they were delivered by the Hladiks. The evidence to the effect that Heine furnished the moneys and that those funds were to be secured by a trust deed is not disputed. Therefore there is no question but what the releases were supported by a sufficient consideration. Civ. Code, § 1605. As we are not now discussing the estoppel theory, the conflict in the evidence (as to when, where, and

pursuant to what conversations the releases were executed and who conducted those conversations and what was said) becomes immaterial.

[7] 8. After the deed of trust had been executed and at a time when the terms of the promissory note, which it was given to secure, had not been performed, the trust deed was foreclosed, and a deed was made by the trustees to the Heine Piano Company. The trial court made a finding that before executing said deed the trustees did not comply with the provisions of said trust deed because no notice of the sale of said property was posted. The defendants contend that said finding is not supported by the evidence. The contention cannot be sustained. The power granted by the trust deed authorized the trustees to make the sales therein provided for only after giving notice " * * * in the manner and for a time not less than that required by law for sales of real property upon execution. * * *" The statute concerning notice of sales upon execution against real property required both a posting and a publication of the notice. Code Civ. Proc. § 692. The deed executed by the trustees recited that a notice was published. It was silent regarding a posting. That silence was some evidence that there was no posting of the notices. *Savings & Loan Society v. Deering*, 66 Cal. 281, 5 P. 353. On the latter subject there was a discussion in the trial court, but no other or additional evidence was introduced. We may not say the evidence did not support the finding.

[8, 9] In reference to the Heine trust deed the plaintiffs call to our attention the fact that the record contains considerable evidence to the effect that the note executed by the Hladiks and secured by the trust deed Hladik to Heine, for \$7,500, was executed in violation of the Usury Act. Thereupon they make the contention that the entire transaction was void. That claim is too broad. The violation of the Usury Act (St. 1919, p. lxxxiii) strikes at the item concerning interest, but does not strike at the principal. *Haines et al. v. Commercial Mortgage Co. et al. (Cal. Sup.)* 254 P. 956. Upon a new trial an accounting may be had as to the exact amount that was paid out by Heine to the Hladiks and the amount which Heine received from them or for their account. In this manner the true value of the Heine trust deed can be ascertained and determined, both in favor of and against all of the parties interested in the fund, a portion of which all are claiming.

[10] 9. After April 25, 1921, the date of the trustee's deed to the Heine Piano Company, that company collected rentals, and as a part of its decree the trial court directed that such rentals be applied in satisfaction of any deficiency judgment that might be docketed against the Hladiks. The defendants contend

that the provision referred to was not supported by the facts. The plaintiffs cite no authorities which support that portion of the judgment under attack. In taking accounts for the purpose of ascertaining the exact amount of the lien represented by the Heine trust deed, the rentals collected by Heine should be considered, but we see no merit in the claim that these plaintiffs are entitled to the rentals.

10. The defendants contend that the trial court should have made a finding that the plaintiffs' liens, if any, were subsequent to a deed of trust theretofore made to Applegarth and a deed of trust theretofore made to Brickell. Findings 8 and 9 are on that subject. So are finding 13 and the conclusions of law. However, the defendants assert such findings are not sufficiently clear and complete. We think they are. They sufficiently protect the rights of the holders of those deeds of trust and the interests thereunder.

[11] 11. The trial court allowed interest on the claim of each plaintiff as from the date each plaintiff completed his contract. The particular contracts did not prescribe the date of payment. The defendants contend therefore that interest, if allowed at all, should have been provided as from the date the action to foreclose the lien was commenced. *Hubbard v. Jurian*, 35 Cal. App. 757, 766, 170 P. 1093. We think the contention is clearly correct.

[12] 12. The defendants say they were not served and did not appear in the actions brought by W. P. Fuller & Co., Ginsberg Tile Company, C. C. Severin, and M. P. Killian, and, therefore, that relief should not have been given against the defendants in favor of those plaintiffs. The error in this contention rests in a misconception of the record. Eight different actions were commenced to foreclose liens. All of them were commenced in May or June, 1920. Before any answer was filed by an order of court, they were consolidated on November 12, 1920. Thereafter, ignoring the order of consolidation, the defendants interposed, severally or jointly, three separate answers in each of two of the actions which had been consolidated, and one answer in each of two other actions which had been consolidated, and apparently no answer in the other actions which had been consolidated. Later the defendants served and filed a notice of motion to set for trial, made the motion, obtained the order, and then served and filed a notice that the trial had been set. When the cause was called for trial Mr. Erskine, representing all of the defendants except Mr. and Mrs. Hladik, immediately arose and called to the attention of the trial court the condition of the record. However, he did not object to proceeding with the trial, neither did he ask for time to plead, nor did he ask for a continuance. Mr. Hladik was called as a witness by the plaintiffs. He was

asked some questions by counsel for the Reinhart Company and then Mr. Adams, attorney for the Fuller Company, commenced to propound some questions in behalf of the latter company. Mr. Erskine objected in behalf of the defendants to any evidence being offered by that company. We do not find that the objection was ruled upon, but Mr. Adams proceeded with the examination. Mr. Erskine did not ask for a ruling that the evidence be confined to the case as made by the plaintiffs against Mr. and Mrs. Hladik. After Mr. Adams finished his examination, Mr. Hatch, as attorney for the plaintiff Killian, proceeded to introduce his proof by examining Mr. Hladik. Then Mr. Ryan proceeded to examine the same witness regarding the claim of the plaintiff Klimm. Thereafter Mr. Aitken proceeded to examine the same witness regarding the claim of the Ginsberg Company. During the foregoing proceedings Mr. Erskine asked some questions, made many objections, and made many suggestions. If, as he contended, his clients had not been served and had not appeared, Mr. Erskine had no right to be heard. These various acts of the defendants constituted a general appearance. *Martin v. Howe*, 190 Cal. 187, 211 P. 453. Later in the case Mr. Severin was called and was examined as a witness in his own behalf by his attorney, Mr. O'Donnell. From what we have stated, it will thus appear that the defendants took the position that the trial was proceeding piecemeal; that is, as to four of the plaintiffs the trial was proceeding as against the defendants represented by Mr. Erskine, and as to the remaining plaintiffs the trial was not proceeding even against the Hladiks. The statute does not authorize such procedure.

13. What we have just said in disposing of the former point renders it unnecessary to discuss the claim that there was no appearance in the Ginsberg Case. That action had been merged in the consolidated action in which the defendants made a general appearance as shown by what we have said in discussing the last point.

[13] M. P. Killian did not execute a release and as to his claim the judgment is affirmed. W. P. Fuller & Co. and Ginsberg Tile Company did not execute any releases. The Fuller Company was allowed interest from February 20, 1920, whereas it was entitled to interest from May 18, 1920. The Ginsberg Company was allowed interest from January 22, 1920, whereas it was entitled to interest from May 20, 1920. The judgment is modified accordingly as to each of those claims, and as so modified it is affirmed. As to each of the other claims the judgment is reversed and the action is remanded for further proceedings not inconsistent with what has been said above, and the trial court is directed to allow the Hladiks to plead and to allow any of the other parties to amend their pleadings in

such manner as such party may be advised. The plaintiffs M. P. Killian, W. P. Fuller & Co., and Ginsberg Tile Company are allowed their costs against the defendants, but as against the other plaintiffs the defendants are allowed their costs.

We concur: KOFORD, P. J.; NOURSE, J.

85 Cal. App. 377

DOWD v. JOYCE et al. (Civ. 5938.)

District Court of Appeal, First District, Division 2, California. Sept. 10, 1927.

1. Appeal and error ⇨994(3)—Where oral testimony of witness and his letters were conflicting, question of weight of statements in letters held for trial court.

Where the oral testimony of a witness relative to a deed to certain property conflicted with statements made by him in letters to plaintiff and introduced as evidence, the weight to be attached to the statements contained in the letters was a question for the trial court.

2. Appeal and error ⇨1011(1)—Court's finding relative to conflicting evidence as to giving of deed was not reviewable where there was evidence to sustain conclusions reached.

Where evidence on giving of deed was conflicting, but it was substantial to sustain trial court in arriving at the conclusions reached, the finding was not open to review on appeal.

3. Appeal and error ⇨1052(8)—Whether deed was erroneously admitted in evidence held immaterial since not prejudicial, where evidence without it was sufficient to sustain finding.

Whether admitting in evidence, over plaintiff's objection, a certain deed was error, held immaterial, since it was not prejudicial, there being ample evidence without it to sustain court's finding.

4. Appeal and error ⇨1079—Where appellant, urged error in failure to find upon material issue, but failed to point out specific error, point held abandoned as without merit.

Where appellant contended that the court failed to find upon a material issue, but he did not point out wherein the court erred, held, that he had abandoned this point as without merit.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action in ejectment by Daisy M. Dowd against A. J. Joyce and others, wherein defendant Immel interposed a cross-complaint. From the judgment plaintiff appeals. Affirmed.

John E. Biby and Harry C. Biby, both of Los Angeles, and Drapeau, Orr & Gardner, of Ventura, for appellant.

Durley & Downes, of Oxnard, for respondents.

WARNE, Justice pro tem. The plaintiff and appellant commenced an action in ejectment alleging ownership in lot 9, block 20, in the city of Oxnard, and seeks to oust the defendants from possession thereof. Defendants, by answer, denied plaintiff's ownership, and by cross-complaint defendant Immel alleged that he and plaintiff are father and daughter; that confidential relations existed between them; that in November, 1914, he was in poor health, and, at that time, had great confidence in the integrity of plaintiff and in her love and affection and devotion and fidelity to him; that at the time he was desirous of avoiding the costs and delays of probate proceedings in the settlement of his estate in the event of his death, and at that time made and delivered to plaintiff a deed to said lot upon express oral promise of plaintiff that he, defendant, should have the right to the possession of said premises during his lifetime. It was also alleged by defendant Immel that during his lifetime he was to have the right to manage and control the property, to lease or sell the same, and to receive all the proceeds thereof, and that in the event he should make a sale of said property, plaintiff would execute and deliver a deed thereof to such purchaser as defendant might designate; and that in the event no sale was made, then upon his death plaintiff would convey the lot to Harvey Immel, a son of defendant; or, in the event plaintiff should desire to retain and have said lot, then the said plaintiff was to pay to said Harvey Immel the value of said lot. Defendant Immel also alleged that no consideration was paid for the deed, and that he would not have made the deed and delivered it to plaintiff if the alleged promise had not been made. The cross-complaint was denied by plaintiff. The defendant A. J. Joyce and his wife by answer alleged that they had no interest in the property excepting as lessees under lease from defendant Immel.

The court made findings according to the allegation of defendants, and rendered judgment in accordance with the prayer of defendants, and decreed that plaintiff had no right, title or interest, or estate whatsoever in or to the property, but held the bare legal title thereto, subject to the uses and trusts alleged by defendant Immel.

Plaintiff appeals from the judgment.

It is the principal contention of the appellant that the evidence is not sufficient to support the findings or to justify the decision, and that the judgment should be reversed for that reason. The answer is (as was said in the case of *Byrne v. Reed*, 75 Cal. 277, 17 P. 201), that as to all of the disputed facts there was a clear conflict in evidence, that given in behalf of the respondent being quite sufficient to justify each of the findings. The well-settled rule in regard to conflicting testi-

mony must therefore control the action of this court.

Defendant Immel testified, in reference to the making of the deed, as follows:

"Well, I had symptoms of paralysis very bad and I was afraid I might take a stroke of paralysis and wanted to give my son the property * * * that is 9 * * * and made a deed to Mrs. Dowd with the understanding that I was to have the use of it as long as I lived, and if I wanted to dispose of it, she was to sign it back to whoever I wanted to have it, and if I died and didn't dispose of it she was to convey it to her brother."

He further testified that he made the arrangement and talked the matter over with Mrs. Dowd prior to the time of making the deed; that she had agreed to it; that he made the deed and had it recorded, but did not deliver it to plaintiff until two or three years afterwards; that at the time he delivered the deed to her he talked the matter over with her again, and that he said to her that if he died without disposing of the place she was to give it to Harvey (his son), and if he wanted to sell it or dispose of it she was to make a deed to whoever he wanted it made out to; that "she said she would all right." Mrs. Hamilton, another daughter and a sister of the appellant, testified that she had a conversation with Mrs. Dowd concerning this deed, and that appellant said "that papa had made out the deed to what we call the 'Green House'—the deed to that property,—and he was to retain the use of it his lifetime;" that "he had made out a straight deed to save court expenses in having it probated or anything like that, as the other place a life estate was retained in the deed."

[1] The plaintiff contradicted this testimony, and she also contended that Immel's testimony is contradicted by statements contained in two letters which he wrote to plaintiff concerning the property. In a letter dated October 16, 1923, and addressed to plaintiff, he made this statement, "I built buildings on it with your permission to have the use of them as long as I lived, then they were to go to you when I was dead." And in a letter dated October 30, 1923, also addressed to plaintiff, he said, "You were to get it when I was done with it or when I was dead." While these statements tend to contradict Immel's testimony that he made the deed to his daughter with the understanding that he was to have the use of the property as long as he lived, "and if he wanted to dispose of it she was to sign it back to whoever I wanted to have it, and if I died and didn't dispose of it she was to convey it to her brother," the weight to be attached to the statements contained in the letters was a question for the trial court to determine. *Fagan v. Lentz*, 156 Cal. 681, 105 P. 951, 20 Ann. Cas. 221.

[2] We have examined the entire record in the case and are of the opinion that there is substantial evidence to sustain the trial court in arriving at the conclusions reached. In *Howard v. Stephens*, 38 Cal. App. 296, 176 P. 65, the court says:

"Whether the evidence in a given case is clear and convincing is a question in the first instance to be determined by the trial court, and its conclusion is not to be disturbed unless the reviewing court can say, after an examination of the entire record and all the circumstances surrounding the transaction as there disclosed, that such conclusion is clearly unwarranted by the evidence. 'If there is substantial evidence to support the conclusion reached below, the finding is not open to review on appeal,' even where the law requires proof of the fact to be clear and convincing. *Ward v. Waterman*, 85 Cal. 502 (24 P. 930); *Steinberger v. Young*, 175 Cal. 81 (165 P. 432)."

[3] It is next contended that the trial court erred in admitting in evidence, over plaintiff's objection, a deed made by defendant Immel conveying certain of his property to another daughter at about the same time the deed in question was made. The deed was offered in evidence to prove a general scheme of distribution by defendant of his property. Even if the admission of this evidence was error (a question which we do not deem it necessary to decide), it would not be sufficiently prejudicial to warrant a reversal. There was ample evidence to sustain the court in arriving at its findings without reference to this deed and the evidence concerning the conditions under which it was made.

[4] Lastly, the appellant contends that the court failed to find upon a material issue. Appellant has not pointed out to us wherein the court erred in this particular, and we conclude that she has abandoned this point for the reason that she has concluded there is no merit in it.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

LOS ANGELES COUNTY v. INDUSTRIAL
ACC. COMMISSION OF CALIFORNIA
et al. (Civ. 5649.)★

District Court of Appeal, Second District, Division 1, California. Sept. 1, 1927.

Hearing Granted by Supreme Court Oct. 31, 1927.

1. Master and servant ☞ 416—Where employee was able to do light work, Industrial Accident Commission had no authority to find total temporary disability.

Where employee was able to do light work, finding by the Industrial Accident Commission that total temporary disability had not terminated held error and in excess of commission's power.

2. Master and servant **☞416**—Ordering payment for surgical operations on employee's face, mainly for cosmetic purposes, held with authority of Industrial Accident Commission (Workmen's Compensation, Insurance and Safety Act, § 9, subd. [a], as amended).

Under Workmen's Compensation, Insurance, and Safety Act, § 9, subd. (a), being St. 1917, p. 836, as amended, the Industrial Accident Commission has power to order employer to pay for surgical operations on employee's face, notwithstanding that the major object of the proposed operations is for cosmetic purposes only.

3. Master and servant **☞416**—Finding under statute that employer's hospital facilities were inadequate held unnecessary, where order to pay for private treatment was conditioned on employer's failure to furnish it (Workmen's Compensation, Insurance and Safety Act, § 10).

Finding of inadequate facilities under Workmen's Compensation, Insurance, and Safety Act, § 10 (St. 1917, p. 840), providing that the Industrial Accident Commission might, after notice and opportunity to be heard, declare employer's hospital facilities inadequate, and thereafter employee might procure treatment elsewhere, held unnecessary, where an order to pay for private treatment was expressly made conditional on employer's failure to furnish treatment ordered.

4. Master and servant **☞416**—Order requiring employer to furnish surgical treatment, or, on its neglect or refusal, to pay expenses for such treatment, held proper.

Order requiring employer to furnish to injured employee within a reasonable time certain surgical treatment, recommended in the doctor's report, and that, if the defendant should neglect or refuse to furnish such treatment within reasonable time the employee might secure treatment from his own physician at the employer's expense, held proper, where employer, after twenty-two operations, admitted inability to furnish further relief.

5. Master and servant **☞417(5)**—Whether Industrial Accident Commission exceeded powers in refusing to furnish employer transcript of hearing cannot be considered in petition for certiorari.

Whether, upon payment by employer of fees prescribed by statute, the Industrial Accident Commission exceeded its powers by refusing to furnish him with a transcript of the hearing before the commission, cannot be considered in a petition for writ of review.

Application by County of Los Angeles, employer, to the Industrial Accident Commission, for the termination of a continuing award to Philip Nelson, employee, with request that the percentage of the employee's permanent disability be fixed and determined. Order denying application, continuing compensation, and ordering further medical and surgical treatment. Employer petitions for certiorari to review the order. Award annulled in part, and affirmed in part.

Everett W. Mattoon, County Counsel, and W. Sumner Holbrook, Jr., Deputy County Counsel, both of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

HOUSER, J. The purpose of this proceeding is to review certain findings, orders, and the award made in pursuance of an application to the respondent commission by an employee for adjustment of compensation as a result of injuries sustained by him while acting within the scope of his employment with the petitioner herein.

From the record it appears that the employee, who was engaged as a "spudder" on a pile driver operated by the petitioner, suffered an injury by reason of a large splinter which "flew off a pile, striking him, proximately causing injury to the right eye and cheek"; that in due course, on findings of temporary total disability, an award of continuing compensation and an order for future medical and surgical treatment of the employee were made by the Industrial Accident Commission, the respondent herein; that approximately twenty months thereafter, on the ground that the disability of the employee had become permanent, the employer (petitioner herein) filed an application with respondent commission for the termination of the continuing award to the employee, together with a request that the percentage of such permanent disability be fixed and determined by said commission, which petition finally resulted in an order by said commission denying the employer's application that the award as theretofore made and then in force as to continuing compensation to said employee be terminated, at the same time ordering further medical and surgical treatment of the employee.

The findings made by the commission, together with its order last mentioned, were as follows:

"That the temporary total disability, resulting from the injury sustained by the employee on February 7, 1923, has not yet terminated.

"That further operative treatment as recommended in the report of Dr. George W. Pierce, dated April 21, 1926, should be furnished to the employee at the expense of the defendant county of Los Angeles. * * *

"It is ordered that the defendant's (petitioner's) said petition to terminate indemnity, be, and it hereby is, denied.

"It is further ordered that the said defendant shall furnish to the applicant, within a reasonable time, the further operative treatment recommended in the report of Dr. George W. Pierce dated April 21, 1926.

"It is further ordered that, should said defendant neglect or refuse to furnish such treatment within a reasonable time from date hereof, the applicant shall be entitled to secure such treatment from his own physician, and said defendant county of Los Angeles will be liable for the reasonable expense thereof, to be determin-

ed upon the filing of itemized bills, in duplicate, and the approval of the medical department of this commission."

[1] The first point presented by petitioner is that the commission acted in excess of its powers in making its finding in effect that total temporary disability of the employee had not terminated. The contention of petitioner is based upon its assertion that "not one shred of testimony" was introduced before the commission which showed total temporary disability. No claim is made on the part of respondent that the record discloses any direct evidence to the effect that total disability existed. Apparently it was conceded that the employee was unable to resume his regular employment. On the other hand, although the employee testified at the hearing that he was suffering from a weak back, nevertheless, before that time he had performed certain light work, to wit, farm chores, and that he was then able and willing to perform such work. The attending physician, who had performed various operations on the employee, testified at the hearing that, so far as he knew, the condition of the employee's disability was "nothing more" than that of a "man losing his eye." As shown by the following conversation which took place between the referee and counsel representing the employer, the ability of the employee to perform some sort of work was indicated, to wit:

"The Referee: Is the county of Los Angeles in a position to give this man work, light work, or otherwise?"

"Attorney Holbrook (representing the petitioner herein): I think it could be arranged, Mr. Crowell; I am not certain as to that. I was talking to Mr. Nelson (the employee) informally, and I think possibly some such thing may be arranged."

It therefore is manifest that the ability of the employee to perform manual labor, if not that of the average man who had lost an eye, was limited by the fact only that he had a weak back, and that in any event he was able and willing to perform "light work"—for which service he would be entitled to receive compensation, however small. This court is therefore of the opinion that a conclusion on the part of the commission to the effect that the condition of the employee would entirely bar him from obtaining such light work as doing chores, or some employment of a similar character, was not justified by the evidence. It follows that, so far as the finding in question is concerned, the contention that it was in excess of the power of the respondent commission must be sustained.

The next finding and order of the commission to which petitioner directs attention is that wherein in effect it was found and ordered that the employer furnish to the employee "the further operative treatment recommended in the report of Dr. George W.

Pierce"; furthermore that, should the employer neglect or refuse to furnish such treatment within a reasonable time after the date of the order, at the expense of the employer, the employee should be entitled to secure such treatment from his own physician.

At the time the report of Dr. Pierce was made, it appears therefrom that the condition of the employee was as follows:

"Present condition: Numerous scars over the entire right cheek; lower border of orbit sunken, apparently fracture. There is a paresia of the upper lid. The palpebral fissure is one-half inch lower than on other side. There is some voluntary contraction in the orbicularis palpebrarum. The upper lid overlaps the lower at the outer canthus and is distorted at this point by adhesions. There is some loss of tissue of the lower lid with irregularity.

"Examination of the mouth shows sinus opening above the right upper first molar, apparently from antrum. No sulcus behind the lower lid to hold artificial eye. There is a purulent discharge from the orbit. There is also a continuous purulent discharge into the mouth. There is some loss of periorbital fat."

The operative treatment recommended by Dr. Pierce, to which reference was made in the order by the commission, was indicated in the following language:

"There are two different stages of repair necessary in this case. First is the deepening of the socket, which could be done in one operation by the method of epithelial inlay, and which would not require over one week to ten days, and then the lower lid would require some plastic operation to complete the borders, while the upper lid could be freed and raised up. These operations would not require any great length of time. The second stage would be the cleaning out of the antrum and closure of the sinus. I cannot state just how long this would take. By plastic operation, however, the appearance of the patient could be markedly improved, and he would wear an artificial eye."

It is the contention of petitioner that the proposed operations and treatment recommended by Dr. Pierce were for cosmetic effect only, and that the commission was without jurisdiction to make the order of which complaint is made. But an inspection of the report discloses the fact that in part at least the purpose of the recommended treatment was to relieve the patient from the condition arising primarily from the two "purulent discharges" referred to in the report, together with the added feature of "cleaning out the antrum and closure of the sinus." To that extent, therefore, it is clear that the commission was acting within its statutory powers. The principal attack of petitioner, however, is directed toward that part of the recommendation with reference to the other steps leading to the conclusion that "the appearance of the patient could be markedly improved and he would wear an artificial eye."

[2] To put the position assumed by petitioner perhaps more plainly, it is that peti-

tioner objects to any operation, the expense of which must be borne by it, for the ultimate purpose of so building up the tissues and bony structure surrounding the orbital cavity that the employee may be provided with and wear an artificial eye.

Section 9 (a) of the Workmen's Compensation, Insurance, and Safety Act (Stats. 1917, p. 831, as variously amended), provides that:

"Where liability for compensation under this act exists, such compensation shall be furnished or paid by the employer and be as provided in the following schedule:

"(a) Such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches and apparatus, including artificial members, as may reasonably be required to cure and relieve from the effects of the injury. * * *

Respondent directs particular attention to the words, "as may reasonably be required to cure and relieve from the effects of the injury." The photographs of the employee, presented at the time of the hearing before the referee, together with the report made by Dr. Pierce (hereinbefore set forth), regarding the condition of the employee shortly preceding the time of the hearing, indicate a deplorable situation so far as the probability of the employee being able to secure employment was concerned.

On the part of the employer, the purpose of any surgical attempt in connection with an injury received by an employee is to restore him to as nearly a natural and normal condition as may be possible or practicable, to the end that his earning power by reason of his injury may be diminished to the least possible extent. To illustrate: If by accident arising from his employment the foot of a day laborer should be so crushed that by no known surgical skill could it be made useful as a member of his body, the probable medical course and practice would indicate the amputation of the foot. In due course thereafter it is clear that an artificial foot would greatly aid the employee in bringing about a restoration to a considerable extent of his earning power. Could it be doubted that the language of the statute which requires the furnishing by the employer of such surgical treatment, "including artificial members," as may be required to "cure and relieve from the effects of the injury," would be applicable? In the instant case, that the present appearance of the employee would be a decided handicap to his obtaining employment "in an open labor market" is obvious. The evident purpose of some of the proposed surgical operations on the employee is to give him a more presentable personal appearance. In his present condition, by reason of his limitations and the natural competition in securing employment, it might, and in all probability would, be extremely difficult for the employee to secure even such work as he

is capable of doing. If successful, the result of the proposed surgical operations would place the employee, not only in a position where he could secure better and more remunerative employment than at this time he may command, but his improved personal appearance would assist in enabling him to retain such position. The probabilities are that the morale of the employee would be bettered, and his self-respect and appreciation of his good workmanship qualities be increased—all tending toward a rehabilitation and restoration of the earning powers of the employee as of the date of the injury which he sustained. The principle of the question here under consideration is treated to some extent in the case of *New York Central R. Co. v. Bianc*, 250 U. S. 596, 40 S. Ct. 44, 63 L. Ed. 1161, where, among other things, it is said:

"Even were impairment of earning power the sole justification for imposing compulsory payment of workmen's compensation upon the employer in such cases, it would be sufficient answer to the present contention to say that a serious disfigurement of the face or head reasonably may be regarded as having a direct relation to the injured person's earning power, irrespective of its affect upon his mere capacity for work. Under ordinary conditions of life, a serious and unnatural disfigurement of the face or head very probably may have a harmful effect upon the ability of the injured person to obtain or retain employment. Laying aside exceptional cases, which we must assume will be fairly dealt with in the proper and equitable administration of the act, such a disfigurement may render one repulsive or offensive to the sight, displeasing, or at least less pleasing, to employer, to fellow employees, and to patrons or customers. See *Ball v. William Hunt & Sons*, A. C. 496, 81 L. J. K. B. N. S. 782, 106 L. T. N. S. 911, 28 Times L. R. 428, 56 Sol. Jo. 550, 5 B. W. C. C. 459."

This court is therefore led to the conclusion that, even though conceding that the major object of the proposed surgical operations on the employee may be for "cosmetic purposes" only, the respondent commission, in making its order therefore, was not acting in excess of its statutory powers.

[3, 4] It is also objected by petitioner that—

"The Industrial Accident Commission acted without, or in excess of, its powers in ordering petitioner to pay bills covering operative treatment rendered Philip Nelson by private parties prior to a finding upon notice as provided in section 10 of the Workmen's Compensation, Insurance, and Safety Act, that petitioner's approved hospital was inadequate."

From an examination of the order by the commission (hereinbefore set forth) relating to petitioner's objection, it will be noted, not that the commission has arbitrarily ordered the employer to pay bills covering operative treatment rendered to the employee prior to a finding that the hospital of petitioner was inadequate, but that, in fact, the order was to the effect that the employer furnish the pro-

posed operative treatment within a reasonable time, or on its neglect or refusal so to do the employee "be entitled to secure such treatment from his own physician" at the expense of the employer. The point made by petitioner, therefore, is without application to the facts herein. It may, however, be said that the record herein clearly discloses the fact that, after twenty-two surgical operations on the employee, the employer admitted its inability to further relieve the employee from the effect of his injuries. Dr. Pierce, the evidence of whose surgical skill was admitted, promised the desired relief. In such circumstances, assuming the successful outcome of the proposed surgical operations, the case of *Union Iron Works v. Industrial Accident Commission*, 190 Cal. 33, 210 P. 410, is authority for the principle that the employer may be made liable for the necessary expense connected therewith.

[5] Finally, it is urged by petitioner that the respondent commission acted in excess of its powers in refusing to furnish petitioner with a transcript of the hearing before the commission. Without deciding whether in ordinary circumstances, upon payment by the petitioner of the fees prescribed by statute therefor, it becomes the duty of the commission to furnish such transcript, this court is of the opinion that the relief sought is one that cannot be considered in a petition for writ of review.

It is ordered that that portion of the order of the commission based upon the finding of total disability of the employee be and it is annulled. In all other respects the award is affirmed.

We concur: CONREY, P. J.; YORK, J.

85 Cal. App. 381

McKEEVER v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR SAN MATEO COUNTY, et al. (Civ. 5890.)

District Court of Appeal, First District, Division 1, California. Sept. 12, 1927.

1. Divorce ⚭165(4)—Court had inherent power to set aside interlocutory decree of divorce, obtained by fraud more than six months after entry (Code Civ. Proc. § 473).

Court of general jurisdiction *held* to have inherent power to set aside an interlocutory decree of divorce more than six months after entry where it was obtained through fraud upon the court, notwithstanding Code Civ. Proc. § 473, providing that application to set aside a judgment obtained through mistake, inadvertence, surprise, or excusable neglect could in no case be made more than six months after such judgment.

2. Judgment ⚭386(2)—Whether motion to set aside decree for fraud is made within reasonable time is matter within court's discretion.

Whether a motion to set aside a decree for fraud is made within a reasonable time after its entry is a matter within the sound legal discretion of the court in which the motion is made.

3. Divorce ⚭165(3)—Trial court held warranted in setting aside divorce decree alleged to have been obtained by both intrinsic and extrinsic fraud.

Trial court was warranted in setting aside divorce decree where it was alleged that it had been obtained through intrinsic fraud in giving false testimony, and through extrinsic fraud whereby defendant was kept away from court upon a false promise which prevented fair hearing of the case.

4. Certiorari ⚭41—Certiorari held not to lie to review order vacating interlocutory divorce decree, where petitioner, without appealing, delayed 19 months after order was made.

Certiorari *held* not to lie to review an order setting aside a divorce decree, where the petitioner took no appeal from the order and delayed 19 months after the order was made and after she had acquiesced in it by filing pleadings.

Application for writ of certiorari by Mabel Lillian McKeever against the Superior Court of the State of California, in and for the County of San Mateo, and others, to review an order setting aside and vacating an interlocutory decree of divorce. Writ denied.

William Schreider, of Los Angeles, for petitioner.

Entenza & Gramer, of San Francisco, for respondents.

TYLER, P. J. Certiorari to review an order setting aside and vacating an interlocutory decree of divorce. So much of the facts as is necessary for a discussion of the case shows, in substance, that petitioner herein filed an action for divorce in San Mateo county against Myron L. McKeever, charging him with cruelty and praying that the community property be awarded to her. Defendant was personally served with summons, but failed to plead, and an interlocutory decree of divorce was granted plaintiff, the decree being entered October 3, 1924. Among other things, the decree awarded plaintiff all of the property owned by defendant, consisting in part of equities in two houses in Redwood City and certain valuable oil-producing land in Orange county, Cal. Thereafter, on September 22, 1925, defendant moved to vacate and set aside the decree, charging that it had been obtained through the fraud and conspiracy of the plaintiff and one Charles L. Muney. The several affidavits in support of the motion alleged the practice of both intrinsic and

extrinsic fraud on the part of plaintiff and Munev. They recited that defendant was never legally married to the plaintiff; that she and one Charles L. Munev, with whom she was carrying on illicit relations, knew this to be true, and for the purpose of obtaining defendant's property they conspired to institute the divorce suit, and during defendant's absence to obtain a decree awarding Mabel McKeever his property, by representing to the court that the parties were legally married and that said property was community in character, which scheme they successfully carried out in the procurement of the divorce. Further recitals were to effect that when plaintiff became aware of the divorce action he discussed the matter with both plaintiff and Munev and accused them of knowing that there was no existing marriage between himself and plaintiff; he also informed them that the suit had jeopardized his property in Orange county, to which place he would have to immediately repair to refinance a loan which existed against it.

His affidavit further recites that both Munev and the plaintiff then told him to return to Orange county and attend to his affairs, and that no steps would be taken in the action by them until after his return. That, relying upon this agreement, he left to attend to his business and shortly after his departure the case was brought to trial and plaintiff and Munev, as her corroborating witness, testified that plaintiff and defendant were legally married; that all of the property owned by defendant was community property, which was of little or no value; that upon this false evidence they procured and caused to be entered the decree complained of. Upon the showing made by defendant, the court, on November 12, 1925, vacated and set aside the decree. Thereafter certain proceedings were had in the case. An answer and cross-complaint were filed by defendant, and a demurrer was interposed by plaintiff to the cross-complaint, and hearings were had on certain applications, but the action itself was never set for trial. No steps were ever taken by plaintiff to appeal from the order setting aside the decree, made and entered on November 12, 1925, nor was any attempt ever made by her to review such action until some nineteen months thereafter, when, on June 6, 1927, the present proceeding was instituted. Under these circumstances, it is the claim of respondent that plaintiff acquiesced in the order setting aside the decree and therefore impliedly waived her right to have the order reviewed by the appellate courts. It is also claimed that plaintiff should have appealed from the order if she was dissatisfied with the same, failing in which, she has lost her right to have the action of the lower court reviewed by certiorari, citing *Postal Telegraph Co. v. Superior Court*, 22 Cal. App. 774, 136 P. 538, and *Snyder v. Plummer*, 174 Cal. 204, 162 P. 1040.

Petitioner contends that by reason of section 473, Code of Civil Procedure, the court was without jurisdiction to interfere with the decree after six months from its entry. There is no merit in this contention.

[1, 2] A court of general jurisdiction has inherent power to set aside a judgment obtained through a fraud upon the court, and its right to do so is not derived from section 473 of the Code of Civil Procedure, and the same may be exercised after the lapse of the statutory time, which limits the entertainment of applications based upon surprise, inadvertence, etc., provided that such motions are made within a reasonable time. What is a reasonable time is a matter of sound legal discretion in the court in which the motion is made. *McGuinness v. Superior Court*, 196 Cal. 222, 237 P. 42, 40 A. L. R. 1110, where the cases upon the subject are reviewed and exhaustively discussed. See, also, *Estate of Seamen*, 51 Cal. App. 411, 196 P. 928.

[3, 4] Here not only intrinsic but extrinsic fraud was charged, whereby defendant was kept away from court upon a false promise, which prevented a real contest on the trial or hearing of the case, and the trial court was warranted in setting aside the decree. Moreover, plaintiff is guilty of laches. The present application was filed some nineteen months after the order was made, and after petitioner had acquiesced in it as above indicated and no appeal was ever taken by her from the order. Under such circumstances certiorari will not lie. *Snyder v. Plummer*, 174 Cal. 204, 162 P. 1040.

The writ is denied.

We concur: CASHIN, J.; KNIGHT, J.

85 Cal. App. 323

HUDSON v. VON HAMM. (Civ. 5831.)★

District Court of Appeal, First District, Division 2, California. Sept. 3, 1927.

Hearing Denied by Supreme Court Oct. 31, 1927.

1. Statutes ⇨281—Statutes of foreign state must be pleaded and proved.

Where the statutes of a foreign state are relied on, they must be pleaded and proved as any other fact.

2. Evidence ⇨80(1)—Where foreign statutes are not pleaded, they will be presumed identical with California statute.

On failure to plead foreign statutes relied on, it will be presumed that they are the same as the statute of California on the particular subject involved.

3. Statutes ⇨281—States and territories are foreign, within meaning of rule requiring foreign statutes to be pleaded and proved.

United States territories and the states are foreign to each other, within the meaning of the rule which requires foreign statutes to be pleaded and proved.

4. Courts ⇨7—Action for personal injuries inflicted in foreign jurisdiction held transitory.

Action against father for personal injuries inflicted in foreign jurisdiction by minor child held transitory in its nature.

5. Courts ⇨12(2)—That defendant resides in foreign territory will not preclude court from assuming jurisdiction.

The fact that a defendant is a resident of a foreign territory will not preclude the assumption of jurisdiction by the courts of the forum.

6. Courts ⇨12(4)—That both litigants are nonresidents will not prevent application of doctrine of comity.

Application of the doctrine of comity will not be prevented by the fact that both the litigants are nonresidents.

7. Pleading ⇨46—Complaint, alleging plaintiff "is and has been" resident of California, held not to allege residence in California when tort was committed in Hawaii.

Complaint in action for personal injuries, alleging that plaintiff "is and has been a resident of the state of California," held not to allege that the plaintiff was a resident of California at the time the tort was committed in Hawaii.

8. Domicile ⇨8—Governess leaving California for employment in Hawaii held presumed resident of Hawaii while at employer's home.

Where governess left California for employment in Hawaii, held that, in action for personal injuries, where she was injured in the performance of her employment at the residence of her employer, it might be assumed she was then a resident of Hawaii.

9. Constitutional law ⇨207(3) — Courts ⇨511—Court may, without violating doctrine of comity or Constitution, refuse to take jurisdiction of case arising under foreign statute conflicting with law of forum (Const. U. S. art. 4, § 2).

Court may, without violating the doctrine of comity or Const. U. S. art. 4, § 2, providing that citizens of each state shall be entitled to privileges and immunities of citizens in the several states, refuse to take jurisdiction of a cause of action given by a foreign statute which is in direct conflict with the statute or policy of the law of the forum.

10. Constitutional law ⇨207(3) — Citizen of foreign state or country may maintain action at forum, where under similar circumstances citizen of own jurisdiction could maintain action (Const. U. S. art. 4, § 2).

Under Const. U. S. art. 4, § 2, a citizen of any foreign state or country may maintain an action at the forum, where under similar circumstances a citizen of its own jurisdiction could maintain such an action.

11. Courts ⇨39—In determining whether court will take jurisdiction of case arising under foreign statute, policy of forum may be indicated by decisions, as well as Constitution and statutes.

The policy of the forum may be indicated by its current decisions, as well as by its statutory or constitutional law, in determining whether

the court will take jurisdiction of a cause of action arising under a foreign statute.

12. Courts ⇨8—Where action arising under foreign statute giving cause against father for children's torts conflicted with law of forum, court refused to take jurisdiction (Rev. Laws Hawaii 1915, § 2375; Civ. Code, § 3520).

Where an action was brought under Rev. Laws Hawaii 1915, § 2375, giving a cause of action against a father for the torts of his minor children, which foreign statute conflicted with Civ. Code, § 3520, and the general policy of the law of the forum, the court refused to take jurisdiction, and complaint held subject to demurrer.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Hilda Hudson against C. C. Von Hamm. Judgment for defendant, and plaintiff appeals. Affirmed.

James Walter Scott, of San Francisco, for appellant.

A. B. Dunne, Dunne, Dunne & Cook, and Dunne, Brobeck, Phleger & Harrison, all of San Francisco, for respondent.

THOMPSON, Presiding Justice pro tem. This is an appeal from a judgment entered upon an order sustaining a demurrer to a fourth amended complaint, without leave to amend. The action was brought in California against a father for injuries resulting from an alleged tort of his minor child, which occurred at the residence of the father in the territory of Hawaii.

The complaint was filed April 26, 1924, and alleges that plaintiff "is, and * * * has been a resident of the state of California," and that the defendant is a resident of the territory of Hawaii, and is the father of two minor children named Constance and Rosalie Von Hamm, aged 14 and 10 years, respectively; that in October, 1919, defendant employed plaintiff as a governess to train, educate, and discipline said children; that, pursuant to said employment, she went to defendant's home in Honolulu and entered upon the performance of her duties; that the said Rosalie was an active, strong, healthy child, disposed to climb about the furniture, all of which was known and unrestrained by the defendant; that on January 5, 1920, without the knowledge or consent of plaintiff, the child Rosalie entered the bedroom of plaintiff and "carelessly and negligently in violation of repeated prior warnings * * * climbed upon a rocking-chair * * * behind the back of plaintiff, and * * * fell therefrom, striking plaintiff upon her right shoulder with great force and violence," causing serious injuries, impairing her earning ability, and that she has never recovered from said injuries. Damages aggregating the

sum of \$30,212 are claimed by plaintiff as a result of said injuries.

The plaintiff pleads the provisions of section 2375 of the Revised Laws of Hawaii in the following language:

"In section 2375 of the 'Revised Laws of Hawaii, 1915,' it is provided as follows, to wit: 'Sec. 2375, *Torts, Who May Sue, and for What.*—Except as otherwise provided, all persons residing or being in this territory shall be personally responsible in damages for trespass or injury, whether direct or consequential, to the person or property of others, or to their wives, children under majority, or wards, by such offending party, or his wife, or his child under majority, or by his command, or by his animals domital or *feræ naturæ*; and the party aggrieved may prosecute therefor in the proper courts.' C. C. 1859, § 1125; Cp. L. § 1125; C. L. § 1241; R. L. § 1742."

Two questions are presented on this appeal: (1) Can this action for the tort of a minor child which was committed in the jurisdiction of a foreign territory be maintained in California against the father of the child while the law of the respective jurisdictions, as to the subject-matter, is in absolute conflict? (2) Has the Hawaiian statute which is relied upon by appellant been sufficiently pleaded to show the existence and validity of the statute at the time of the commission of the tort?

[1-3] The statutes of a foreign state must be pleaded and proved as any other fact relied upon. *Ryan v. North Alaska Salmon Co.*, 153 Cal. 438, 95 P. 862; 23 Cal. Jur. 665, § 58; 5 Cal. Jur. 427, § 9; 25 R. C. L. 949, § 202; 24 Standard Ency. of Proc. 97. Upon failure to plead such foreign statutes, it will be presumed they are the same as the statute of California on the particular subject involved. 5 Cal. Jur. 484, § 52; *Ryan v. North Alaska Salmon Co.*, supra; *Norris v. Harris*, 15 Cal. 226; 5 Cal. Jur. 427, § 9, 12. The states and territories of the American Union are foreign to each other within the meaning of the rule which requires foreign statutes to be pleaded and proved. 20 Ency. of Pl. and Proc. 600; *Hempstead v. Reed*, 6 Conn. 490; *Brackets v. Norton*, 4 Conn. 517, 10 Am. Dec. 179.

With respect to the liability of a father for the torts of his minor children, where the father is entirely free from participation in the wrong, the statutes (Civ. Code, § 3520) and the general policy of the law in California are in absolute conflict with the statute of Hawaii. California follows the common law in that respect, which has been the rule in England since 1302 (Y. B. 30, 31, Edw. I, 203, Rolls Ed.; 7 Harvard Law Rev. 384), while, upon the contrary, the territory of Hawaii follows the civil law, which is totally at variance with the common law (Day v. Day, 8 Haw. 715; *Rathburn v. Kaio*, 23 Haw. 541).

The application of these conflicting rules

is well expressed by the able author of *Ruling Case Law* in volume 20, at page 627, where it is said:

"Parents are not liable for torts committed by thier minor children without participation in the fault by the parent." *Hagerty v. Powers*, 66 Cal. 369, 5 P. 622, 56 Am. Rep. 101; *Figone v. Guisti*, 43 Cal. App. 606, 611, 185 P. 694; *Perry v. Simeone*, 197 Cal. 132, 239 P. 1056; *Paul v. Hummel*, 43 Mo. 119, 122, 97 Am. Dec. 381; *Sherman and Redfield on Neg.* (6th Ed.) § 144. "There are several jurisdictions in which the common law has been changed by statutes based on the civil law, which makes the parent liable for all torts committed by his minor children under his control. * * * It is not enough to make the father liable that he knew his child was heedless or vicious. But the father is liable if he was himself guilty of negligence, as by allowing a young child to have a loaded gun or pistol, etc. He is liable, however, only for his own fault, and not for that of the child."

[4] The action in the instant case, which is based upon an extraterritorial tort, is transitory in its nature, and if the statutes, or established law of California and Hawaii, concurred in holding a father liable for the torts of his minor child, or in the absence of established law in California conflicting with that of the foreign territory, under proper pleadings, our state courts would assume jurisdiction, and try the cause. 5 Cal. Jur. 483, § 52; *Ryan v. North Alaska Salmon Co.*, supra; *McManus v. Red Salmon Canning Co.*, 37 Cal. App. 133, 173 P. 1112. But where the statute of the foreign state or territory is in absolute conflict with the statute or the policy of the law of the forum, there is no violation of the doctrine of comity in refusing to accept jurisdiction to try the cause at the *lex fori*.

[5-8] The fact that the defendant is a resident of a foreign territory will not preclude the assumption of jurisdiction by the courts of the forum, nor will the fact that both litigants are nonresidents prevent the application of the doctrine of comity. Strictly construed, the complaint fails to allege that the plaintiff was a resident of California at the time her injuries were received. Since she was injured in the performance of her employment at the residence of her employer in Honolulu, it may be assumed that she was then a resident of Hawaii and not a resident of California. The defendant was also a resident of Hawaii. In the state of New York it is said:

"The courts have repeatedly refused in their discretion to entertain jurisdiction over causes of action arising out of a tort committed in a foreign state, where both the plaintiff and the defendant were nonresidents." *Gregonis v. Philadelphia & Reading Coal & Iron Co.*, 235 N. Y. 160, 139 N. E. 226, 32 A. L. R. 1.

But probably the weight of authority is not in accord with the New York rule in this

respect. In 2 Wharton on Conflict of Laws, 1093, § 478, it is said:

"In the United States it is generally conceded that such suits lie, even though the parties be foreigners, and the tort complained of was committed in the land to which they in common belong, * * * and the prevalent rule is that, to sustain an action for a tort committed abroad, the *lex fori* and the *lex loci delicti* must concur in holding that the act complained of is the subject of legal redress."

The mere fact that litigants are nonresidents should not suffice to deny them access to the courts of the forum, for valuable property rights might thus be lost.

[9, 10] There is no violation of the inhibition of the federal Constitution against special privileges and immunities in refusing to accept jurisdiction where the law of the forum is in direct conflict with the foreign law relied upon. Article 4, § 2, of the United States Constitution provides that:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Pursuant to this federal guaranty, a citizen of any foreign state or country may maintain an action at the forum, where under similar circumstances a citizen of its own jurisdiction could maintain such an action. In the case of *Chambers v. B. & O. Ry. Co.*, 207 U. S. 142, 28 S. Ct. 34, 52 L. Ed. 143, Mr. Justice Moody says:

"The state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different states may have different policies, and the same state may have different policies at different times. But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land."

And in the famous *Slaughter House Cases* reported in 16 Wall. 36, 21 L. Ed. 394, Mr. Justice Miller said:

"Its sole purpose [of this constitutional provision] was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

But there is no California law in conflict with the foregoing federal constitutional provision. A nonresident is denied no privilege which is conferred upon a citizen or resident

of the forum. Upon the contrary, it is asserted that, because it is the settled policy of the law of California that a parent is exempt from liability for the torts of his minor children where he does not participate in the wrong, therefore, a nonresident may not maintain such an action at the forum, even though a foreign statute may authorize it, for the reason that the policies of the law of the respective jurisdictions are in irreconcilable conflict. In 5 *Ruling Case Law*, 911, § 5, it is said:

"In the recognition and enforcement of foreign laws the courts are slow to overrule the positive law of the forum, and they will never give effect to a foreign law when to do so would prejudice the state's own rights or the rights of its citizens, or when the enforcement of the foreign law would contravene the positive policy of the law of the forum whether that policy be referred in statutory enactments or not."

Of course, "the existence of a statute of the forum substantially like the foreign statute under which the cause of action arises is the best and most conclusive indication that it is not contrary to the policy of the forum to entertain the action." 1 *Wharton on Conflict of Laws*, 280b.

[11] But the policy of the forum may be indicated by its current decisions, as well as by its statutory or constitutional law. *U. R. C. L.* 499, § 301, *Id.* 1039; 12 *C. J.* 439, § 16; *Spead v. Tomlinson*, 73 N. H. 46, 59 A. 376, 68 L. R. A. 433; *Zeigler v. Ill. T. & S. Bank*, 245 Ill. 180, 91 N. E. 1041, 1045, 28 L. R. A. (N. S.) 1112, 19 *Ann. Cas.* 127; *Glover v. Baker*, 76 N. H. 393, 83 A. 916, 932. It is the rule in a majority of the states that, when the cause of action depends upon a foreign statute, as it does in the instant case, there must be a statute in the forum similar to the one relied upon, in order to confer jurisdiction upon the courts of the forum. 5 *R. C. L.* 1040, § 131. In 12 *C. J.* 438, § 14, the author says:

"The doctrine of comity must yield to the positive law of the land. Hence the foreign law must give way when in conflict with the statutes of the forum, or the settled current of its judicial decisions."

Likewise in *Studebaker v. Mau*, 14 Wyo. 68, 82 P. 2, the court says:

"Comity will not intervene to enforce the laws of a foreign state or country, if such enforcement would contravene the well-settled policy of the forum, or be prejudicial to the interest of its citizens, or when it comes in conflict with a positive law. Comity will only be adopted by courts of justice in the *silence of a particular rule* affirming, denying, or restraining the operation of foreign laws."

So, also, in 2 *Wharton on Conflict of Laws*, § 478a, it is asserted that:

"The question of assuming jurisdiction is a matter of comity; that is, the courts, paying due deference to the precedents at the forum,

may decline jurisdiction upon the ground that it is contrary to the public policy of the forum to entertain the action. * * * The court will undoubtedly decline the jurisdiction if there is a fundamental difference of policy between the laws of the two states or countries, but a slight variance of views with respect to common-law principles does not defeat the jurisdiction." 5 R. C. L. p. 915, § 9, page 1040, § 131; Walsh v. N. Y. & N. E. R. Co., 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514; Eingartner v. Ill. Steel Co., 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. Rep. 859.

With relation to the application of the doctrine of comity, Mr. Joseph Story, in his Conflict of Laws, § 38, declared that:

"It is inadmissible when it is contrary to its (the forum's) known policy, or prejudicial to its interests. In the silence of any positive rule affirming, denying, or restraining the operation of the foreign laws, courts of justice presume the tacit adoption of them, * * * unless they are repugnant to its policy, or prejudicial to its interests."

There is good reason for declining to accept jurisdiction of a cause which would require the enforcement of foreign laws in conflict with the avowed policy of the law of the forum, for otherwise the forum might be called upon to enforce principles of law inimical to the welfare of its citizens, and subversive of plain justice. The law of the land is deemed to be a declaration of principles best adapted to the peace, order, and welfare of its subjects, and it would be abhorrent to justice to require the enforcement of principles in conflict with the established law of the forum.

The English rule is aptly stated in Carr v. Francis, A. C. 176, 182, 71 L. J. K. B. (N. S.) 361, 85 L. T. (N. S.) 144, 50 Week. Rep. 257, to the effect that there are two concurring conditions essential in order to confer jurisdiction of an extraterritorial tort upon a local court: (1) The wrong must be of such a character that it would have been actionable if committed in the forum; (2) the act must not have been justifiable by the law of the place where it was committed. Dicey on Conflict of Laws, 697. However, this well-established English rule appears to have been limited in its application to American court. In Huntington v. Attrill, 146 U. S. 657, 13 S. Ct. 224, 36 L. Ed. 1129, Mr. Justice Gray says:

"Some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done. * * * But such is not the law of this court. By our law, a private action may be maintained in one state, *if not contrary to its own policy*, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the state where the suit was brought." Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198.

It must be conceded that the doctrine of comity has been applied in this country and jurisdiction assumed, even in the absence of a statute of the forum corresponding to the statute of the lex loci which is relied upon. Dickinson Farm Mortgage Co. v. Harry, 273 U. S. 119, 47 S. Ct. 308, 71 L. Ed. 569. This case involved an action brought in the state of Illinois for damages for fraud committed in Texas, in violation of its statute. But the court there said:

"The Texas statute as applied in this case does not add any extraordinary feature to the common-law liability for fraudulent representations."

It therefore appears that the enforcement of the Texas statute did not conflict with the policy of the law of Illinois, but, upon the contrary, was in consonance with it.

While there may appear to be some confusion of authorities due to a natural difficulty in construing laws or statutes, and in applying the doctrine of the law of comity, the decisions of the courts of America seem to be in harmony to the effect that, when the positive law of the forum, represented by its Constitution, statutes or current decisions, is in substantial conflict with the law of the foreign state, country, or territory, upon the subject-matter in controversy, the courts of the forum will decline to accept jurisdiction without violation of the doctrine of the comity of nations.

[12] It is contended that the language of the complaint to the effect that in "section 2375 of 'Revised Laws of Hawaii, 1915,' it is provided," etc., is not a sufficient affirmative statement that the particular act of the Hawaiian Legislature was actually in force January 5, 1920, when the tort complained of was committed. Respondent suggests that the compilation of laws termed "Revised Laws of Hawaii" may have contained the specific statute referred to in the year 1915, as alleged, but that the act might have been actually repealed after that date and prior to the date upon which the tort is alleged to have occurred; in other words, that there is no definite allegation of the existence of a statute in Hawaii on January 5, 1920, holding a parent liable for the torts of his minor children independent of participation in the wrong, on the part of the parent. But in view of the fact that the policy of the law in California is in direct conflict with such a statute, even if it were properly alleged to have existed, it becomes unnecessary to determine this matter.

We are of the opinion that the demurrer to the fourth amended complaint was properly sustained on account of the conflict of law which exists between the forum and the foreign territory.

The judgment is therefore affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

202 Cal. 138

In re PARKER'S ESTATE.

McFARLAND v. BRYSON.

(L. A. 9523.)

Supreme Court of California. Sept. 14, 1927.

1. Wills ⌘206—Deceased's letter describing property and directing payment of funeral expenses with words, "My will to S. McFarland and family," held subject to probate.

Deceased's letter describing property with direction for funeral and payment of expenses of illness with the words, "My will to S. McFarland and family," held to indicate a testamentary intent, though most informal, and subject to probate.

2. Executors and administrators ⌘14—Executor need not be designated by that particular name.

No particular form of appointing an executor is prescribed, nor is it necessary that one be designated by that particular name.

3. Executors and administrators ⌘14—Person shown by terms of will to have been intended by testator to commit execution thereof held entitled to letters (Civ. Code, § 1371).

Under Civ. Code, § 1371, where it appears by terms of will that it was intention of testator to commit execution thereof and administration of his estate to any person as executor, such person, though not named executor, is entitled to letters testamentary as though named therein.

In Bank.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Petition by S. B. McFarland for the probate of a document as the last will and testament of Robert S. Parker, deceased, and by Frank Bryson, as Public Administrator of the County of Los Angeles, for the probate of the same document, and application for letters of administration by Frank Bryson, Public Administrator of the County of Los Angeles, of the estate of Robert S. Parker, deceased. From an order denying the probate, and an order appointing Frank Bryson as administrator of said estate, S. B. McFarland appeals. Reversed.

Walter F. Keen and Alfred T. Hutchins, both of Los Angeles, for appellant.

Everett W. Mattoon, County Counsel, W. Sumner Holbrook, Jr., Deputy County Counsel, and Frank Bryson, all of Los Angeles, for respondent.

LANGDON, J. The appellant, S. B. McFarland, filed a petition in the superior court in and for the county of Los Angeles for the probate of a document which he alleged to be the last will and testament of Robert S. Parker, deceased. The petition alleged that the value of the estate was approximately \$3,900;

that testator left no heirs at law; that at the time the document in question was executed testator was of the age of 76 years and in every respect competent to make a will; that the document is entirely in the handwriting of testator and dated and signed by him, and reads as follows:

"Los Angeles Feb 4 1922
624 W 49 Pl

"To S. B. McFarland and Family

"There is 2200 In Bonds In A Larje Envelop They Belong to R. F. Frazie I Loned Him 1500 Fifteen Hundred Dollars on Them now Sam All I want is To Be Put away Decent Not Expensive and if I Should Be Sick and Eny Bills I wished you would Pay them There is 500 In Bonds Them are mine Gold and Paper I Will Tell you all When I see you

"my Will To S. McFarland and Family

"I Remain your Friend

"Robert S. Parker."

Petitioner asked to have the foregoing document admitted to probate as the last will of decedent, and that petitioner be appointed executor according to the tenor of said will, or administrator with the will annexed, as the court should see fit. While this petition was pending and undetermined, the respondent, as public administrator, petitioned for the probate of the same document as the last will of decedent, and asked that he be appointed administrator with the will annexed, upon the theory that no appointment was made in the will of an executor.

The trial court, however, refused the petition of both parties to admit the said document to probate as the last will of decedent, and, later, the public administrator filed his petition for letters of administration, alleging that the document in question is an ambiguous writing. This petition was granted, and from the order denying probate to the document and refusing to appoint appellant executor thereof, and from the order appointing respondent as administrator of said estate, an appeal has been taken.

[1] The only question presented upon the appeal is the sufficiency of the said document as a testamentary disposition of property. In determining this matter, we must read the document in the light of the circumstances under which it was written. Counsel states that, unfortunately, no stenographic record was made of the evidence introduced at the hearing. However, some pertinent facts appear from the record presented in the clerk's transcript, first, that decedent was a man of the age of 76 years; that he was illiterate and wrote the will himself, evidently with no legal assistance; that he had no heirs at law; that he regarded himself as a friend of S. B. McFarland and family. With these facts in mind, it seems that the document in question, although it is most informal, indicates a testamentary intent. The property of the testator is described, a

direction is given that moderate funeral expenses be incurred and paid and that expenses of illness be paid, and there is a clear implication that the residue of the estate should go to S. B. McFarland and family.

The words, "My will to S. McFarland and Family," is a characteristic expression of persons of little education and no familiarity with technical legal phraseology. Any one who has heard many such persons discuss a matter of this kind has heard expressions such as "I made my will to my mother," etc. Respondent contends that the words "My will to S. McFarland and Family" should be interpreted as though they read "My good will to S. McFarland and Family," a general courteous expression in closing the communication. Such a formal intention is inconsistent with the general informality of the document and the language used therein. No addition seems necessary to the language used. "My will to S. McFarland and Family" seems to us a precise expression of the testator's intent. He was "making his will" to S. McFarland, and by that he understood that he was leaving all his property to him. Common human experience seems to support such an interpretation, and the entire document, considered in connection with the surrounding circumstances, leads to the conclusion that the testator had testamentary intent in making the writing offered for probate. Indeed, it so impressed the respondent in the first instance, for he, too, petitioned for the probate of the same as a will.

We think no useful purpose would be served by a discussion of the cases cited upon both sides in which writings have been held to be or not to be wills. Each case is a law unto itself, for there are no two of the documents presented for our consideration, which bear sufficient resemblance to be comparable.

[2, 3] The only other question to be decided is whether or not appellant is appointed executor by said writing. The document impliedly directs McFarland to collect the debt owing to testator and expressly directs him to pay bills of decedent and to "put (testator) away decent not expensive," and then leaves one with the thought that any balance is to go to McFarland and family. No particular form of appointing an executor is prescribed, nor is it necessary that one be designated by that particular name. It is sufficient if the will uses expressions pointing at the essential functions of an executor, functions which exist in consistent combination. Schouler on Wills (6th Ed.) § 1509. Where it appears by the terms of a will that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been named executor. Section 1371, Civ. Code.

The judgment and orders appealed from are reversed.

We concur: WASTE, C. J.; PRESTON, J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.; SHENK, J.

202 Cal. 98

NOLL v. BAIDA. (L. A. 7900.)★

Supreme Court of California. Sept. 12, 1927.

Rehearing Denied Oct. 10, 1927.

1. Appeal and error ⇐1008(1)—Trial court's decision on issue of fraud is final.

In civil cases involving an issue of fraud and tried without jury, weight of evidence is for trial court, whose decision is final even though appellate court may be of a contrary opinion.

2. Sales ⇐52(7)—Trial court's finding of fraud in sale of oriental rugs held sustained by evidence.

Evidence held to sustain trial court's finding on issue of fraud in sale of oriental rugs.

3. Sales ⇐121—Buyer of oriental rugs held not to have waived right to rescind for fraud of seller.

Buyer of oriental rugs, by using them after discovery that they were not as represented and after notice of his election to rescind sale, held not to have waived right to rescind in view of facts.

4. Sales ⇐397—Buyer of oriental rugs held to have rescinded promptly on discovery of falsity of seller's representations (Civ. Code, § 1691).

Evidence held to warrant trial court's finding that buyer of oriental rugs rescinded sale promptly on discovery of falsity of representations made by seller as required by Civ. Code, § 1691.

In Bank.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by G. E. Noll against Nich G. Baida to recover purchase price of oriental rugs. From judgment for plaintiff, defendant appeals. Affirmed.

Superseding former opinion in 254 P. 623.

U. T. Clotfelter, Richard Hartley, and Charles Cassat Davis, all of Los Angeles, for appellant.

Neil S. McCarthy, Earl L. Banta, and McCarthy, Nolan & Freston, all of Los Angeles, for respondent.

CURTIS, J. This action was instituted to recover the purchase price of eight oriental rugs purchased by plaintiff of defendant. The ground upon which said recovery is sought is that defendant falsely and fraudulently represented the quality and character

of said rugs at the time of their purchase. The case was tried by the court without a jury, and judgment rendered in favor of the plaintiff for the full amount of said purchase price. The defendant has appealed from said judgment, and the matter is now before us upon a record prepared under the provisions of section 953a of the Code of Civil Procedure. The court found as true the allegations of the complaint that the statements and representations made by the defendant at the time of and immediately prior to said purchase were false and fraudulent. The appellant contends that the evidence was not sufficient to justify this finding. Appellant admits that the evidence as to the falsity of these representations was conflicting, but claims that as the allegations of the complaint charged that appellant was guilty of fraud such allegations must not only be proven by a preponderance of evidence, but that an appellate court is authorized to weigh such evidence for the purpose of determining whether it meets this requirement. Appellant's position is stated in his brief as follows:

"The mere fact that there may be some conflict in the testimony does not preclude this court from passing upon the sufficiency of the evidence in the record on the subject of fraud, including that for and against the allegations of the complaint."

Among the cases cited by appellant in support of this contention are *Truett v. Onderdonk*, 120 Cal. 581, 53 P. 26; *Abrams v. Daugherty*, 60 Cal. App. 297, 212 P. 942; *Everett v. Standard Acc. Ins. Co.*, 45 Cal. App. 332, 338, 187 P. 996. These cases hold, quoting from *Abrams v. Daugherty*, *supra*:

"The presumption is always against fraud. This presumption approximates in strength that of innocence of crime. *Truett v. Onderdonk*, 120 Cal. 581, 53 P. 26. One who seeks relief from fraud must allege it and prove it by clear and satisfactory evidence. A mere suspicion of fraud is not sufficient. *Everett v. Standard Acc. Ins. Co.*, 45 Cal. App. 332, 338, 187 P. 996, 998."

[1] It may be conceded that the presumption against fraud approximates that of innocence of crime, yet in criminal cases where the defendant must be proven guilty to a moral certainty and beyond all reasonable doubt, the sole right to weigh the evidence is in the jury, and after the jury has exercised this right, the appellate court is without authority to set aside the findings of the jury if there is any substantial evidence to support it. The appellate court may upon appeal from a judgment of conviction in reviewing the evidence be of the opinion that the evidence against the defendant is weak, and that it preponderates in his favor, yet the verdict must stand because it is the exclusive right of the

jury to weigh the evidence and its determination as to the weight to be given such evidence is final. So in civil cases tried without a jury where fraud is an issue, it is for the trial court to determine the weight of the evidence, and, while it cannot find fraud upon a mere suspicion, yet if there is any substantial evidence tending to prove fraud, it is for the trial court to determine whether such evidence outweighs or preponderates over that adduced in opposition thereto, and when the trial court has found that such evidence does so preponderate, its decision thereon is final, and an appellate court has no right or authority to disturb such a finding, even though the appellate court may be of a contrary opinion as to the weight of such evidence. *Tucker v. Beneke*, 180 Cal. 588, 182 P. 299; *Mead v. Mead*, 41 Cal. App. 280, 182 P. 761. The appellant also cites *Ryder v. Bamberger*, 172 Cal. 791, 799, 158 P. 753, and quotes the following from the decision:

"For if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of court or jury to draw the inference favorable to fair dealing. *Levy v. Scott*, 115 Cal. 41, 46 P. 892; *Thomas v. Visalia Electric Co.*, 169 Cal. 658, 147 P. 972; *Casey v. Leggett*, 125 Cal. 664, 59 P. 264; note to *Burch v. Smith* (Tex.) 65 Am. Dec. 154. For fraud must always be proved, so that when the plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not be reasonably drawn, he has failed to establish his charge by a preponderance of the evidence, and it becomes the duty of court or jury, as has been said, to find in favor of innocence and uprightness."

Had appellant quoted the balance of the paragraph in which the foregoing excerpt is found, we think he would have found an answer to his argument. The balance of said paragraph reads as follows:

"This does not, of course, mean that the fraud must be proved by direct evidence. This is not always nor even often possible, but it does mean that the indirect evidence and the inference to be drawn from the proved facts must be so convincing as to satisfy trial court or trial jury that fraud was designed and accomplished. If, therefore, we should accept appellant's statement as above quoted, that the sole proposition is whether fraud can be inferred from the admitted facts, the complete answer is that, conceding that fraud might be inferred, the trial court upon substantial evidence has declined to infer it, and its action in so doing is not here open to question."

The question of inference to be drawn from proven or admitted facts is not involved in the present inquiry. But the question raised by the present contention of appellant is whether we shall sustain the finding of fact by the trial court, or whether we shall in view of all the evidence in the case set it

aside for the reason that in our opinion the preponderance of the evidence is against said finding. Appellant states in his brief his position as follows:

"The testimony offered by respondent in support of the fraud charged was given by two witnesses, neither one of which had made any special study of the subject to which their testimony related, and particularly of dyes, dye processes, or the methods used in coloring oriental rugs. Neither had made any study of the processes of the manufacture of such rugs. On the other hand the evidence offered by the defendant to refute the fraud charged in the amended complaint consists of the testimony of seven witnesses, one of whom had taken a special university course upon the subject of dyes and dye processes; and most, if not all, of these witnesses were thoroughly familiar with the processes and manufacture and treatment of such rugs."

[2] Yet the trial court accepted the testimony of respondent's two witnesses, with all its alleged infirmities, and discarded that of appellant's seven witnesses. This determination of the trial court upon the evidence before it was final and conclusive, and this court is without the power to disturb it.

[3] The evidence shows that the rugs were purchased in June and July, 1921. Some time in the latter part of that year or in the first part of the following year the respondent noticed that the rugs were fading, and he called in an expert, who informed him that the rugs were not what they were represented to be by the appellant. Thereupon respondent went to appellant and told him that the rugs were fading or getting lighter. Appellant offered to take the rugs back, but assured respondent that he was mistaken in his belief that they were of inferior quality and further assured him that the rugs were as represented. As a result of this conversation the respondent testified that he was "reconvinced" of appellant's honesty, and nothing was done in regard to rescinding the sale at that time, respondent stating, "I will let it go, but if I find they are wrong, then I will call on you again, for I believe that I am right about the rugs fading." Thereafter respondent called in another expert, who examined the rugs and reported to respondent the following June, which would be in June, 1922, that the rugs were not as represented by appellant. Thereupon respondent immediately notified appellant of the result of his investigations and demanded that he take back the rugs and return to respondent the purchase money. The rugs were purchased to be used by respondent in his home, and upon their purchase they were delivered to the home of respondent and there laid upon the floors of said home by appellant. They remained there from this time up to the time of respondent's demand that appellant take them back and refund the purchase money. Appellant refused to take the rugs

back and they continued to remain where they were placed by appellant upon the floor of respondent's home up to about April, 1923, shortly before the trial of said action. It is contended by appellant that respondent waived his right to rescind by thus using the rugs after his discovery that they were not as represented by appellant, and after his notice of election to rescind said sale. He cites as authorities supporting this contention the following cases: *Hogan v. Anthony*, 52 Cal. App. 158, 198 P. 47; *United Motor S. F. Co. v. Callendar*, 30 Cal. App. 41, 157 P. 561; and *Knight v. Bentel*, 39 Cal. App. 502, 179 P. 406. These cases all involved the right of a purchaser of an automobile to rescind a purchase thereof, and in each case the claim was made that the purchaser had, after the discovery of the defects in the automobile, upon which he based his right to rescind, used the automobile to such an extent and in such a manner that he waived any right to rescind he may have originally had on account of such defects. In *Hogan v. Anthony*, supra, the court said:

"If, after the discovery of the misrepresentation, he conducts himself with reference to the transaction as though it still were subsisting and binding, he will not thereafter be permitted to impeach the validity of the contract by seeking to rescind it or to escape performance of his covenants."

The claim that respondent has waived his right to rescind the sale by reason of his use of the rugs was not raised at the trial, and there is authority for holding that it cannot be raised for the first time on appeal. *Bell v. Anderson*, 74 Wis. 638, 43 N. W. 666. It was further held in that case, where it was sought to rescind a sale of a piano on account of the false and fraudulent representations made by the vendor at the time of the sale, and where it was shown that the piano had been taken by the vendor to the home of purchaser, and that after notice of rescission the vendor had left the piano in the home of the purchaser, and that the latter and members of her family had used said piano, but not to such an extent as to injure it, that such use was not inconsistent with the rescission of the contract. Further, the court said:

"But the most that can be successfully claimed by the defendant is that it was for the jury, under proper instructions, to say whether the use was such an assertion of ownership by the plaintiff as would render nugatory the offer to return the instrument."

In this connection the following language from the case of *White v. Miller*, 43 Pa. Super. Ct. 572, is apposite:

"It is practically conceded that the place of delivery was the defendant's residence, and it would follow that that would be the place of rejection. The defendant was not bound to return them to any other place, and if his con-

tention be the correct one, as soon as proper notice was received by the plaintiff of the rescission of the contract, it was then his duty to remove the goods."

In the present action it is not claimed that respondent used the rugs, or in any manner exercised ownership over them, except to leave them where they were placed by appellant, and where appellant permitted them to remain after respondent had served upon him the notice of rescission of the sale. Neither can it be claimed that the rugs were materially damaged by said use after the discovery by respondent of the false representations of the appellant. The evidence shows that the life of oriental rugs under ordinary use is many years, some witnesses testifying that they last 100 years or more. In the case of machinery or an automobile it is different. Practically all use of such articles tends to cause the same to wear out or deteriorate. At best their life is but for a few years. In the cases relied upon by appellant it also appears that the purchasers, after the discovery of the false representations, did not permit the property purchased to remain where it was at the time of its delivery to them by the vendor, but removed the same and used it in their business or pleasure, thus exercising dominion of it, inconsistent with their claim that they had rejected it by rescission of the sales. Under these circumstances we do not think these cases can be regarded as authorities conclusive of the rights of the parties in the present action. On the other hand, we regard the question whether respondent, by the use of the rugs subsequent to his discovery of the falsity of appellant's representations, waived his right to rescind, one properly for the determination of the trial court from the evidence before it. There was no express finding upon this question for the reason possibly that it was not made an issue by defendant in his answer. The findings as a whole, being in favor of the respondent, are at least impliedly against any waiver of this right to rescind. Taking into consideration the character of the property and the manner and extent of its use by respondent, the fact that no material damage was occasioned by such use, and that in using it respondent only permitted it to remain at the place where it was delivered and left by appellant after notice of rescission, we are of the opinion that such acts by respondent were not inconsistent with his claim that he had rejected the rugs and rescinded the sale thereof.

[4] The court found "that promptly upon the discovery of the falsity of said representations which, as aforesaid had induced plaintiff to make the purchase of said eight oriental rugs, plaintiff rescinded said contract of purchase of said eight rugs, and on or about June 23, 1922, notified the defendant that plaintiff had rescinded the same." It is contended by appellant that the evidence

is not sufficient to support this finding. Appellant's version of the evidence is that respondent, in November, 1921, was informed by an expert of his own choosing that the rugs were not as represented by appellant, and that he took no action to rescind the sale until June 23, 1922, seven months thereafter. If this were all of the evidence in the case there might be no question of the soundness of this contention of appellant. But appellant leaves out of consideration entirely the undisputed evidence that respondent, immediately on having his fears that the rugs were fading confirmed by an expert, reported to appellant the information he had received and asked appellant to take back the rugs and return to him his money; that appellant agreed to do so, but, to use respondent's words, "He cajoled me along until he got me believing he was honest about it," and "reconvinced me of his honesty." This conversation took place some time between the first part of November, 1921, and the first part of March, 1922. Respondent was not certain as to its date, but said it was either the last of the year 1921 or the first part of the year 1922, and that "it might have been January, February or March, I am not sure—it was early in the year." It is true respondent stated that Mr. Baida would know the date, as it was at the time when they were negotiating an exchange of rugs. Mr. Baida on being called fixed the date as around the first part of November, 1921. The trial court, of course, could have rejected Mr. Baida's evidence and accepted the statement of respondent. After this conversation respondent consulted another expert, who examined the rugs, and about the 1st of June, 1923, reported to respondent that they were not as represented by appellant. Immediately thereafter respondent served notice of rescission and a demand for a return of the money paid by him for the rugs. The trial court in finding that respondent had promptly upon the discovery of the fraud rescinded the sale, evidently placed some reliance upon the evidence of respondent of this conversation between the parties, in which the respondent was "reconvinced" of appellant's honesty and therefore did not press at that time a rescission of the sale. It might be stated here that the evidence shows that respondent had no experience with oriental rugs, and that his knowledge regarding them was extremely limited. He so informed appellant at the time he was negotiating for the purchase of the rugs he subsequently bought, and that he would have to rely upon the advice of some one familiar with rugs of that character, before he would purchase any. On the other hand, appellant was a dealer in oriental rugs and informed respondent that he had been in business in the same spot in the same town for 30 years. When, therefore, respondent reported to appellant his suspicions that

the rugs were not as they had been represented to him and that these suspicions had been confirmed by the opinion of an expert, and demanded that appellant take back the rugs and return the purchase price, he no doubt would have enforced this demand by proper action in order to make the same effective had it not been for the assurance of the appellant which caused respondent to allay his suspicions and to make further investigation before taking definite action. That appellant under such circumstances should not be permitted to take advantage of the delay caused by his fraudulent and false statements, we think is both obvious and just. To suffer him to do so would be to permit him to reap an advantage from his own wrong. The dictates of common honesty are opposed to any such untoward transaction. It would seem unnecessary to cite any authority in support of a proposition so fair and just. A case with facts in some respects similar is the case of *Wegenaar v. Dechow*, 33 App. Div. 12, 53 N. Y. S. 240, where the court said:

"It is true that there is no claim that the vendor in this case was guilty of actual fraud, but the learned referee has found, upon evidence which is quite convincing, that he did induce the defendant to defer action by representations which turned out to be false in fact; and, even if such representations were made in good faith, the defendant was lulled into inaction by them; and this circumstance, we think, brings the case within the operation of the familiar rule that a party is relieved from the consequences of a failure to perform any obligation where such nonperformance is caused or induced by the acts of the other party. *Stewart v. Keteltas*, 36 N. Y. 388; *Leslie v. Insurance Co.*, 63 N. Y. 27; *Winch v. Insurance Co.*, 86 N. Y. 618. The plaintiff, it seems, was a dealer in, and manufacturer of, tombstones. Presumably he had had considerable experience in constructing them out of Quincy granite, and knew something of the peculiarities of that species of stone; while, upon the other hand, the defendant had little or no knowledge upon the subject. When, therefore, the plaintiff assured the defendant that the spots he discovered were not rust, and that they would disappear with proper treatment, or as soon as subjected to the influence of a heavy rain, the defendant had a right to believe him, and if, in reliance upon this assurance, he did not act as promptly as he otherwise would have done, and if, in the belief that the rain would have the effect claimed for it, he made a payment or did some other act which in different circumstances would be regarded as a waiver of his right to reject, we think that, within the principle of the cases cited, the plaintiff is estopped from invoking the same rigid rule as would be applied if the defendant had been uninfluenced in his actions by the plaintiff's declarations. * * *

In that case it appears that the statements of the plaintiff therein, which caused the defendant to delay rescission, were found by the court not to have been fraudulently made.

Nevertheless, the court held that plaintiff was estopped from invoking the rigid rule usually applicable in such cases. The present case is much stronger, as the evidence shows that the statements made by appellant which caused respondent to delay action were false and fraudulent. After this conversation, in which respondent says that he was reassured of appellant's honesty, respondent consulted another rug expert. Whether he did so at once or whether he waited until the following June is not clear from the evidence. From respondent's evidence it appears that he did so immediately after his conversation with appellant. But whenever it was that respondent consulted this last-named expert the evidence is uncontradicted that the expert did not report to respondent his opinion regarding the rugs until the month of June, and that immediately on receipt of said report respondent served upon appellant notice of rescission of said sale, and a demand for the return of the purchase prices of the rugs. Under these circumstances we are unable to hold that the trial court was not warranted in finding that respondent rescinded the sale promptly. As to whether the rugs were as represented by appellant was not a question easy of determination, and it was not one that could be determined definitely at any precise time. The process of fading was an exceedingly slow one, and it took time to determine whether the rugs were really fading or not. The art of manufacturing oriental rugs is one more or less shrouded in mystery, and whether those purchased by respondent were the kind and character which appellant represented them to be at the time of their purchase was a question upon which, it seems, even those who are supposed to be familiar with such articles are not agreed. While the witnesses for respondent testified that the rugs in question were not as represented, the seven witnesses for appellant gave contrary testimony. In the light of these facts, therefore, to have required the respondent to fix a definite date when he could say that he had positive knowledge of the fraud practiced upon him, and to require that this date be fixed at the earliest point of time when he began to suspect that the rugs were defective, but without any real knowledge that they were so, would be an unreasonable requirement and would not be justified by any rule of law or principle of justice. The trial court refused to adopt such a course, and in doing so we think acted in accordance with the law governing the matter. The trial court might have held that respondent, after suspecting that the rugs were fading and after consulting the first expert and receiving his report, thereby acquired knowledge of the falsity of appellant's representations, or knowledge of facts sufficient to put him on

inquiry as to the truth of such representations, notwithstanding the positive statements made to respondent by appellant, who was himself an expert, that the rugs were not fading and that they were as represented by appellant. On the other hand, the trial court, as it evidently did, may not have considered such evidence sufficient to require respondent to rescind at that time, but that he was entitled to make further investigations as to the quality of the rugs before taking any definite action. Such matters are peculiarly and solely in the province of the trial judge to decide and one not reviewable by an appellate court. "Section 1691 of the Civil Code requires the party entitled to rescind, 'to rescind promptly, upon discovering the facts which entitle him to rescind.' Whether or not the defrauded party has rescinded 'promptly' will depend upon all the circumstances of the particular case, and is, of course, a question primarily for the trial court." French v. Freeman, 191 Cal. 579, 589, 217 P. 515, 519.

From the foregoing it is our opinion that there was sufficient evidence to justify the finding that respondent promptly upon the discovery of the false representations regarding the rugs rescinded the sale thereof and demanded a return of their purchase price.

The other questions raised by appellant in his brief are without merit. The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

202 Cal. 124

IN RE KELLEHER'S ESTATE.

WALSH v. POMEROY et al.

(S. F. 12279.)

Supreme Court of California. Sept. 13, 1927.

1. Wills §184(2)—Substitution of devisee or legatee may be accomplished by holographic instrument, testamentary in character, but in nature of letter (Civ. Code, § 1343).

Substitution of devisee or legatee in accordance with Civ. Code, § 1343, may be accomplished by a holographic instrument, testamentary in character, but in nature of a letter, and its scope and effect is governed by showing of testator's intention as ascertained from consideration of language of writing, interpreted in light of circumstances attending execution.

2. Wills §186—Testator's letter to devisee relative to intention to give what he had promised held not to affect substitution of devisees (Civ. Code, § 1343).

Letter of deceased to devisee relative to assisting him and his intention to give what he promised held insufficient to accomplish sub-

stitution, within meaning of Civ. Code, § 1343, of devisee capable of taking by reason of former devisee's death before testator, in that such writing did not declare a testamentary disposition of property and, at most, was ambiguous.

3. Wills —488—Court is not authorized to create new will, though extrinsic evidence is admissible to explain uncertain or ambiguous terms.

While extrinsic evidence is admissible to explain uncertain or ambiguous terms, yet the court, even if certain that the wish of the testator would have been to adopt its interpretation, is not authorized to create a new and valid will.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Application by Helen H. Walsh for admission to probate of an alleged codicil to the will of Mathew Kelleher, deceased, opposed by Richard T. Pomeroy, executor, and others. From an order granting the executor's motion for nonsuit and denying the probate of the alleged codicil, petitioner appeals. Affirmed.

Ford, Johnson & Bourquin, of San Francisco, for appellant.

George E. Stoker and McNair & Stoker, all of San Francisco, for respondent Pomeroy individually and as executor.

Livingston & Livingston and John C. Quinlan, all of San Francisco, for respondents Heirs at Law.

PRESTON, J. This is an appeal from an order granting motion of respondents for nonsuit and denying the petition of appellant for admission to probate of an alleged codicil to the will of Mathew Kelleher, deceased.

Decedent, on February 9, 1914, while visiting in Ireland, made a will in which he named respondent Richard T. Pomeroy as one of the executors and Daniel Kelleher of Boston, his cousin, as one of the legatees. The legacy to Daniel, in the sum of 6,000 pounds sterling, about \$30,000, was conditioned upon the legatee surviving the testator. The legatee died March 6, 1921, and the testator June 18, 1921, some three months later. At the time of his death the testator was a resident of the city and county of San Francisco and left an estate therein valued at about \$90,000. On September 26, 1921, his will was duly admitted to probate in the superior court for said city and county, and said Richard T. Pomeroy was appointed by the court as executor thereof.

On July 2, 1925, almost four years later, appellant Helen H. Walsh, a niece of Daniel's wife, petitioned the court to admit to probate as a holographic codicil to said will, the letter partially quoted below, claiming that by said letter, and especially by the clause in italics, decedent intended to and did substi-

tute her as legatee in place of said Daniel Kelleher:

"2020 Howard St., San Francisco, Feb. 5, 1920. Dear Daniel & Helan: * * * Now I thought I would write to you about a remark you made concerning a miseral hand reach I sent you and you in return want to pay me back. No sir if you want any more assistance write to me and don't be bashful because it had been my intention to give you what I promised when I say you I accept Helan as is your wish she shall have that when I shall straighten out for the long journey and I think the public administrator won't get a cent out of it either. * * * [Signed] Mathew Kelleher. * * *

The other portions of the letter, which is lengthy, are devoted entirely to gossip and news of a general character.

Appellant offered in evidence another long letter from Mathew to Daniel, undated, but inclosed in an envelope postmarked December 18, 1919, the relevant part of which is as follows:

"Dear Daniel: * * * Now about your niece will send me her name and if there is any change in conditions let me know because what I promised the other girl Helan she is going to get. * * * Now I want you to have a Christmas dinner. \$100 [Signed] Mathew Kelleher. * * *

It is conceded that both letters are wholly written and signed in the handwriting of decedent.

Endeavoring to throw light upon the intent of the decedent and the surrounding circumstances, appellant testified that she was intimately acquainted with Daniel Kelleher during her entire lifetime and kept house for him for the last 28 years of his life; that his wife was her aunt, being her mother's sister, and he was second cousin to her father; that her sister Anna Walsh died December 21, 1918; that Daniel wrote Mathew Kelleher acquainting him that she had passed away; that Mathew and Daniel had corresponded for many years; that in the spring of 1918 Daniel received a letter from Mathew stating that inasmuch as he, Mathew, had named Daniel as a substantial beneficiary of his estate, he thought it would be advisable for Daniel to suggest to him the name of the one nearest and dearest to him, to be his, Daniel's, substitute and to take the place of Daniel as beneficiary, whereupon on March 29, 1918, Daniel replied suggesting appellant's name as his substitute, mentioned that he had already made provision for her sister, Anna Walsh, who was then fatally ill.

Respondents objected to the admission in evidence of the foregoing letters and testimony and moved for a nonsuit on the ground, first, that the bequest was uncertain and the evidence offered did not supply the deficiency; and, second, that the letter was not testamentary in character, nor did the evidence offered tend to prove that it was intended as a codicil

to defendant's will. These objections were sustained and motion for nonsuit granted. The purpose of this appeal is to determine the correctness of such ruling.

[1] Section 1343 of the Civil Code provides:

"If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place. * * *

Such a substitution could be accomplished by a holographic instrument, testamentary in character, but in the nature of a letter, and its scope and effect would be governed by the showing as to the testator's intention as ascertained from a consideration of the language of the writing, interpreted in the light of the circumstances which attended its execution. *Clarke v. Ransom*, 50 Cal. 595; *Estate of Spitzer*, 196 Cal. 301, 237 P. 739; 26 Cal. Jur. § 258, pp. 934, 935; section 190, p. 873.

[2] However, in this case, even if we assume that the writing is testamentary in character, is it possible to ascertain from it the intention of the testator in view of the patent uncertainty of the language? We think that it is not. The clause, "No sir if you want any more assistance write to me and don't be washful because it had been my intention to give you what I promised when I say you I accept Helan as is your wish she shall have that when I shall straighten out, * * *" might mean that decedent, upon his death, wished Helen to have the amount which he had bequeathed to Daniel or it might as well mean that he wished her to have some other or different amount or thing which had been suggested to him by Daniel. The other portions of the letter do not assist us in interpreting this language, and a consideration of the letter postmarked December 18, 1919, only serves to complicate the situation, for it is there said, not that Helen is to get what the decedent promised Daniel, but " * * * what I promised the other girl Helan she is going to get." Even assuming in the light of appellant's testimony that the "other girl" refers to Anna Walsh, her sister, who was fatally ill and for whom Daniel had already made provision, and that decedent had first planned to provide for Anna in place of Daniel and later intended to substitute Helen for Anna, still the writing utterly fails to identify the property promised as the 6,000 pounds sterling bequeathed to Daniel by the will of 1914.

[3] While extrinsic evidence is admissible to explain uncertain or ambiguous terms, yet the court, even if certain that the wish of the testator would have been to adopt its interpretation, is not authorized to create a new and valid will. As said in *Estate of Lynch*, 142 Cal. 373, 376, 75 P. 1086, 1088:

"But where * * * the will is absolutely devoid of any general description * * * the

court cannot insert words in the will to express that intention and thereby make the will certain. The will must be wholly in writing, and the written words, with the aid of the extrinsic facts to which they may be held to apply, must be sufficient to identify the property. * * *

To the same effect see *Estate of Young*, 123 Cal. 337, 342, 55 P. 1011.

Furthermore, under the authorities hereinafter set forth, it is our opinion that the writing in question does not declare a testamentary disposition of property, but rather implies that it was the intention of the writer, after further consideration, to make provision in the future for both Daniel and Helen as he had promised. It will be noted that the first sentence of the paragraph refers back to the gift of \$100 sent in the previous letter and that the next clause offers future assistance, "because it had been my intention to give you what I promised when I say you I accept Helan as is your wish. * * *

In the case of *In re Richardson*, 94 Cal. 63, 29 P. 484, 15 L. R. A. 635, a letter from a brother to his sister, containing the following clause, was offered as a will:

"My health is probably ruined, and I want to anticipate possibilities. You and your children get everything."

The court held that the document was not testamentary in character, saying:

"There is nothing in the circumstances and surroundings of the writer which unmistakably evince that it was his intention that the letter in question should be a testamentary disposition of his estate to his sister Nina and her children. It may be that he wished to be informed of some fact or facts before he made a will; for in this letter he shows a desire to hear from his sister at once. * * * He was not in extremis, nor is there anything to show that he contemplated immediate or very proximate dissolution, which might necessitate a final disposition of his estate. * * * It is not for courts to declare that to be a testamentary disposition of his estate when it does not clearly appear that such was the intention of the individual executing it."

The above language is directly applicable to the facts of the instant case. *Estate of Spitzer*, supra, cited by appellant, is not in point, as there the testator was in extremis and the letter addressed to his brother, a lawyer, indicated plainly his desire to make testamentary disposition of the property listed therein.

In *Estate of Branick*, 172 Cal. 482, 157 P. 238, the alleged will consisted of a letter, one of a series of about 30 written by decedent to his brother, which closed with the following expression:

"Of course these both propertys goes to you and Charley if I should pass in before yous do only I wish Mary would be taken care of. * * *

Two months afterwards decedent undertook to make a holographic will, but it was invalid. In affirming the order refusing to admit said letter to probate, the court said:

"It is quite clear that the testator understood the nature and requirements of a will. It was a fair inference from all the evidence that he fully understood the character of the document that he should execute as a will. The letter in question as a whole does not disclose any purpose or intent to dispose of his estate. The remarks claimed to be testamentary were apparently casual statements intended as information merely. Under the decisions in *Estate of Richardson*, 94 Cal. 63, 29 P. 484, 15 L. R. A. 635, and *Estate of Meade*, 118 Cal. 428, 50 P. 541, 62 Am. St. Rep. 244, we think he had no testamentary intent in writing this letter to his brother."

Likewise decedent in the instant case was thoroughly familiar with the formalities of a will.

See, also, *Estate of Anthony*, 21 Cal. App. 157, 131 P. 96, where, citing with approval *In re Richardson*, supra, it is said:

"The rule of law that favors testacy as against intestacy only operates where the existence of the testamentary intent is ascertained and the subject-matter of the doubt is one of construction. Where there is a doubt as to the existence of the animus testandi the rule in favor of testacy is not applicable. [Citing *Estate of Meade*, 118 Cal. 428, 50 P. 541, 62 Am. St. Rep. 244.] * * * Carrying this idea a little further we find this language in the case of *McBride v. McBride*, 26 Gratt. [67 Va.] 476: 'It must satisfactorily appear that he intended the very paper to be his will. Unless it so appear the paper must be rejected.' * * * With these principles of law in mind can it be said that the deceased, at the time of writing the Lavin letter entertained the slightest suggestion that he was writing a will? The very idea, as it appears to us, is inconsistent with anything contained in the letter, and certainly inconsistent with the previous conduct and acts of the deceased. * * *"

Judgment affirmed.

We concur: WASTE, C. J.; LANGDON, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; SHENK, J.

202 Cal. 130

In re EDWARDS' ESTATE. (L. A. 9231.)

Supreme Court of California. Sept. 13, 1927.

1. Descent and distribution — 14—Statute relating to inheritance by kindred of half blood held inapplicable, where childless widow died possessing property inherited from deceased husband and leaving surviving brothers and sisters and children of deceased half-brother (Civ. Code, § 1394, and § 1386, subds. 3, 8).

Where widow without children died possessed of property inherited from her deceased husband and left surviving her brothers and

sisters and children of deceased brother and children of deceased half-brother, held Civ. Code, § 1394, relating to right of kindred of the half blood to inherit where inheritance comes to intestate by descent, was inapplicable, distribution under section 1386, subds. 3 or 8, being proper, dependent on whether property involved was common property of spouses or separate property of predeceased husband.

2. Descent and distribution — 14—Under statute, heirs of half blood are excluded from taking only when full blood heirs are also of blood of intestate's ancestor from which inheritance came (Civ. Code, § 1394).

Under Civ. Code, § 1394, providing that kindred of the half blood shall inherit equally with those of the whole blood, unless the inheritance comes to intestate by descent, devise, or gift of some one of his ancestors, in which case all those not of the blood of such ancestors must be excluded from such inheritance, heirs of the half blood are to be excluded when and only when those of the full blood are also of the blood of the ancestors.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

In the matter of the estate of Anna Edwards, deceased. From a decree directing partial distribution, certain kindred of the half blood appeal. Reversed.

J. W. Havens, of Oakland, for appellants.

L. N. Turrentine and Turrentine & Wright, all of San Diego, for respondent.

Hamilton & Lindley, of San Diego, for Reed.

PER CURIAM. [1] This is an appeal from a decree of partial distribution entered by the superior court in and for the county of San Diego. The decedent, Anna Edwards, died intestate, leaving as her estate property which she had inherited from her deceased husband. From the record it appears that the decedent left surviving her certain brothers and sisters, and also certain children of a deceased brother, who were related to her in full blood. She also left surviving her certain children of a deceased half-brother, who were kindred of the half blood. The trial court found, after hearing upon the petition for partial distribution, that the kindred of the half blood were not entitled to inherit any part of the property or estate of the decedent. Thereupon the decree of partial distribution appealed from was entered distributing to the heirs of the full blood certain property belonging to the decedent's estate. The conclusion of the trial court was based upon its interpretation of section 1394 of the Civil Code, which reads as follows:

"Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise or gift of some one

of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance."

Upon this appeal the appellants contend that the term "ancestors" as used in that section means one who is related by blood to an heir, and that since ordinarily a wife is not related by blood to her husband, her deceased husband does not come within the meaning of the term "ancestors" as used in said section of the Code. This being so, the appellants urge that the exception provided for in section 1394 of the Civil Code is without application to the instant case, and that they are therefore entitled to share equally with the heirs of the whole blood. The respondents, on the other hand, contend that, "as used in the statutes of descent and succession in California, an 'ancestor' is the person from whom property is inherited, and that if a wife inherits property from her husband, as is admitted in this case, the husband is her statutory ancestor, and that upon the death of the wife the half blood not related to the ancestor is wholly excluded from inheriting any part of the estate by the express terms of Civil Code, § 1394."

[2] We have concluded that it is of little moment herein whether or not a deceased husband is, or may be, under our statutes of descent and succession, the "ancestor" of his surviving wife. In other words, the question as to whether a deceased husband may be the "ancestor" of his surviving wife need not here be decided, for, in our opinion, the provisions of section 1394 of the Civil Code are inapplicable to the facts as shown by the record before us. The language of the exception found in said section 1394 is such as to plainly indicate that heirs of the half blood are to be excluded in favor of heirs of the whole blood when, and only when, those of the whole blood are also of the blood of the "ancestor." *Estate of Smith*, 131 Cal. 433, 436, 63 P. 729, 82 Am. St. Rep. 358; *Estate of Belshaw*, 190 Cal. 278, 284, 212 P. 13. Section 1394 of the Civil Code is therefore without application to this case for the very obvious reason that none of the parties hereto is of the blood of the decedent's predeceased husband.

As stated at the commencement of this opinion, the decedent at the time of her death was a widow and without issue. Under these circumstances, subdivision 8 of section 1386 of the Civil Code is pertinent, and the provisions thereof offer a solution to the problem herein presented. That section reads:

"If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one-half

of such common property goes to the father and mother of such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation.

"If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation."

The decree of partial distribution appealed from indicates that the decedent inherited the property and estate here in dispute as the "heir" of her deceased husband. This declaration of the trial court leaves us in doubt as to whether the estate and property involved herein was, during the joint lives of the spouses, common property or the separate property of the predeceased husband. If, upon a further hearing, the trial court should determine that said estate and property was during his lifetime the separate property of the decedent's predeceased husband, it would devolve in entirety upon his heirs in the manner provided for in the second paragraph of subdivision 8 of section 1386 of the Civil Code. This would, of necessity, operate to the complete exclusion of all the parties herein named. However, should the trial court find upon such further hearing that the estate and property now in dispute had been the common property of the decedent and her deceased spouse during their joint lives, then, and only in such event, would the heirs of the decedent be in a position to advance and support any claim thereto or interest therein. Under the express language of the first paragraph of subdivision 8 of section 1386, such interest of the decedent's heirs would be as to one-half thereof only. If the trial court should find that the estate and property here involved had been the common property of the decedent and her deceased spouse, so as to entitle the decedent's heirs to inherit one-half thereof, then the question would be squarely presented as to the respective rights of those of the whole blood and those of the half blood. In view of the fact that we have held herein that the exception found in section 1394 of the Civil Code may not be availed

of in favor of the respondents for the reason that they are not of the blood of the decedent's predeceased spouse, the appellants, decedent's heirs of the half blood, would share said one-half interest equally with the respondents, decedent's heirs of the whole blood, under the provisions of subdivision 3 of section 1386 of the Civil Code. Estate of Lynch, 132 Cal. 214, 216, 217, 64 P. 284.

For the foregoing reasons, the decree of partial distribution appealed from is reversed.

202 Cal. 154

PEOPLE v. WATTERS. (Cr. 2955.)

Supreme Court of California. Sept. 22, 1927.

1. Homicide — 253(1)—Conviction of murder in first degree held sustained by evidence.

In a prosecution for murder in the first degree, evidence held sufficient to sustain conviction.

2. Homicide — 228(1)—"Corpus delicti" means not body of deceased, but essential elements of crime.

Term "corpus delicti" does not mean body of the deceased, but rather the body, the substance, the essential elements of the crime.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corpus Delicti.]

3. Homicide — 228(1)—Testimony of eyewitness to murder was sufficient proof of corpus delicti.

Proof of the corpus delicti in a murder case does not require production of the body of deceased, and testimony to murder by an eyewitness was sufficient.

4. Criminal law — 680(1)—Order of proof rests in discretion of trial court.

In a criminal case, the order of proof is a matter within the discretion of the trial court.

5. Criminal law — 680(2)—Permitting introduction of evidence of defendant's admissions before corpus delicti was established held not reversible error, in absence of clear proof of abuse of discretion.

Order of proof in criminal case rests in discretion of trial court, and fact that court permitted state to introduce evidence of admissions of defendant before corpus delicti was sufficiently established held not reversible error, in absence of clear proof of abuse of discretion.

6. Criminal law — 1037(1)—Prosecuting attorney's frequent insistence during counsel's argument that he was misstating evidence held not prejudicial error, in absence of assignment of misconduct at the time.

Alleged misconduct of prosecuting attorney arising out of rather frequent interruptions of defendant's counsel while latter was making his argument to the jury, consisting in insistence that counsel was misstating the evidence and resulting in a series of heated controversies,

held not prejudicial error, in view of absence of assignment of misconduct at the time.

In Bank.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

George Watters was convicted of murder in the first degree, and he appeals. Affirmed.

George E. Foote, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

RICHARDS, J. [1] This is an appeal from a judgment of conviction of the defendant upon the charge of murder and from the order denying the defendant a new trial. The homicide, if committed as charged in the information, occurred on the 27th day of January, 1926, in the city of Sacramento, where at the time the defendant resided with his wife and their three minor children, the eldest of which was a girl at that time of the age of 10 years, who was the main witness for the prosecution, and the only witness who testified to the direct act of killing. Immediately after the date of the alleged homicide the defendant, taking his three children, removed to San Diego, where some four months later he was arrested and charged with the murder of his wife, upon information imparted to the arresting officers by his said daughter. He was brought to trial in Sacramento, where his daughter testified to the direct fact of having witnessed him shoot her mother and also to certain other facts having to do with his disposition of her body. The prosecution also produced at the trial a considerable amount of circumstantial evidence strongly pointing to the defendant's commission of the crime. The defendant did not take the witness stand in his own behalf, but rested his defense upon a statement given by him to the arresting officers shortly after his detention, in which he asserted his innocence of the crime. The jury returned a verdict finding the defendant guilty of murder of the first degree without recommendation. The defendant moved for a new trial upon several of the statutory grounds, which motion was upon the hearing thereon denied.

The appellant's first contention is that the evidence was insufficient to justify the verdict of conviction, and in support thereof he presents certain criticisms of the testimony of the 10-year old daughter of the defendant, who was the only direct witness to the homicide, and which he insists would render her evidence unworthy of credence. He insists, for example, that the fact that this child, who, according to her testimony, had seen her mother murdered, did not reveal her dreadful secret until about four months after the date of its occurrence, and then only after she had witnessed a serious quarrel between her

father and her still older sister, who at the time of the homicide was living in San Diego, renders most improbable the truth of the story which she then told her sister and later repeated upon the witness stand. The evidence, however, of the child discloses that the defendant, her father, directly after he had committed the crime had warned her not to tell of it or he would cut her throat. This, if believed by the jury, would supply an ample excuse for her silence, at least while living daily with her father and up to the time when the terrified child first saw a ray of hope through the rift occasioned by the quarrel between the murderer and her elder sister. The story which the child told of the homicide and of the actions and conduct of the defendant in disposing of his wife's dead body was consistent in its every detail, and coupled, as it was, with the other circumstances educed by the prosecution at the trial and which showed the sudden and entirely unexplained disappearance of the defendant's wife on the very night of the alleged crime, and taken in connection with the defendant's several lying statements regarding the whereabouts of his wife, supplies ample evidence justifying the verdict of conviction.

[2] The appellant further, and in this same connection, contends that there was not sufficient evidence of the corpus delicti. There seems to be an impression on the part of some that the term "corpus delicti" means "the body of the deceased," which it is insisted must be found and produced before a conviction of murder can be had. The rightful meaning of this term is "the body, the substance, the essential elements of the crime." *People v. Simonsen*, 107 Cal. 346, 347, 40 P. 440; 3 *Rice on Evidence*, 465-467.

[3] While it is true that the production and identification of the body of the deceased person, especially with the marks upon it indicating death by violence or by other unlawful means, would furnish a most direct and convincing form of evidence of the corpus delicti, it is not by any means an indispensable one, since, were it otherwise, the murderer by destroying or successfully concealing the body of his victim would render difficult, if not impossible, his conviction of the crime. Hence it is that proof of the corpus delicti is not confined to the production of the body of the alleged victim of the crime, but may consist in the direct evidence of eyewitnesses of the homicide, or even of circumstantial evidence sufficiently compelling to fix upon the defendant his complicity in the crime of murder. 3 *Rice on Evidence*, supra; *Wharton on Homicide*, § 637. The rule is well stated by the last author above cited wherein he relates instances of the human body being disposed of by fire, or boiled in potash or dissolved by acids, rendering it impossible that it should ever be produced, and concludes, "It is clear that in such cases the corpus delicti may be proved circumstantially or inferentially." If

this be true, it follows that it may be proved by a direct eyewitness to the homicide; and this the prosecution in this case produced in the quite convincing testimony of the defendant's own child.

[4, 5] The appellant's next contention is that the trial court committed reversible error in relation to the order of proof, in that it permitted the introduction in evidence of certain alleged admissions of the defendant before the corpus delicti had been sufficiently established by other proof. This objection goes only, however, to the order of proof, and it has been a long established rule of criminal procedure in this state that the order of proof is a matter within the discretion of the trial court, and that its rulings thereon will not be disturbed except upon clear proof of an abuse of that discretion. *People v. Jones*, 31 Cal. 567; *People v. Daniels*, 105 Cal. 262, 38 P. 720; *People v. Jones*, 123 Cal. 65, 55 P. 698; *People v. Rodley*, 131 Cal. 240, 253, 63 P. 351; *People v. Donnolly*, 143 Cal. 398, 77 P. 177.

[6] The next contention of the appellant is that the district attorney was guilty of willful misconduct during the argument of the case, and that such misconduct constituted prejudicial error. An examination of the record discloses that these alleged acts of misconduct on the part of the prosecuting officer arose out of the latter's quite frequent interruptions of the defendant's counsel while the latter was engaged in making his argument before the jury, and consisted in the insistence of the former that the latter was misstating the evidence, resulting in a series of heated controversies between counsel as to the state of the evidence, wherein the forensic victory lay now on the one side and again on the other, during which the court had frequent occasion to remind counsel to confine their discussions to the facts of the case. During the entire course of this rather unseemly controversy between counsel, no assignment of misconduct was made, and it is clear that under such a state of the record prejudicial error cannot be predicated upon the conduct of either counsel in the premises. Each must console himself with whatever his victories were in the verbal encounter.

The final contention of the appellant consists in his assertion, unsupported by either argument or authority, that the trial court committed reversible error in the giving of certain specified instructions. We are not directed, however, to the particular respect wherein it is claimed these instructions are erroneous, nor are we advised as to whether, even if so, they have not been corrected or rendered harmless by the other instructions given by the trial court. We do not discover any manifest error in these instructions. The instructions as given appear in each instance, save one, to be based upon a decision of this court or a section of the Penal Code supporting its correctness as a matter of law, and up-

on an examination of these we are satisfied that no prejudicial error was committed by the court in giving them and each of them to the jury. Upon the entire record herein it sufficiently appears that the defendant was guilty of the foul and brutal and unprovoked murder of his wife and of a most fiendish and apparently successful effort to destroy and dispose of her body. This being so, the verdict of the jury in this cause meets with the full approval of this court.

The judgment and order are affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

202 Cal. 56

FALL RIVER VALLEY IRR. DIST. v. MT. SHASTA POWER CORPORATION.
(Sac. 3846.)★

Supreme Court of California. Sept. 1, 1927.

Rehearing Denied with Modification Oct. 1, 1927.

1. Waters and water courses ☞42—"Riparian right" entitles owner, subject to rights of other riparian owners, to use entire natural flow of stream, undiminished save by upper riparians or others having superior claim.

The "riparian right" is a vested property right entitled to same protection as any other right, and inhering in and a part and parcel of abutting lands, rather than gained by use or lost by disuse, and entitles the owner, subject to the correlative rights of other riparian owners, to use the entire ordinary and natural flow of the stream for all lawful riparian uses and to have the natural flow come to the land undiminished save by lawful uses of upper riparian owners or others who have obtained a superior claim to the water.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Riparian Right.]

2. Common law ☞11—Legislature can modify or abrogate rule of common law.

It is within the power of the Legislature to modify or abrogate a rule of common law.

3. Constitutional law ☞92—Legislature may not take vested property right from one person and invest it in another (Const. Cal. art. 1, §§ 13, 14; Const. U. S. Amend. 14).

Legislature may not take any portion of a vested property right from one person and invest it in another, in view of Const. Cal. art. 1, §§ 13, 14, and Const. U. S. Amend. 14.

4. Constitutional law ☞81—Particular use of private property cannot be prohibited under police power unless use reasonably threatens public health, safety, comfort, or welfare.

The police power will not justify the prohibition of a particular use of private property unless such use reasonably endangers or threatens the public health, safety, comfort, or welfare.

5. Constitutional law ☞93(1)—Waters and water courses ☞128—Statute authorizing appropriation of waters held invalid as concerns vested rights (Water Commission Act, § 11).

Water Commission Act (St. 1913, p. 1012) § 11, declaring that all waters flowing in any natural channel excepting so far as they are used or may be reasonably needed for useful and beneficial purposes on land riparian thereto or otherwise appropriated are public waters and subject to appropriation, held invalid as concerns riparian rights vested before enactment of Act of April 8, 1911 (St. 1911, p. 821), amending Civ. Code, § 1410.

6. Waters and water courses ☞130—Statute authorizing appropriation of waters held not to authorize permits to appropriate waters, where there was no surplus (Water Commission Act, § 11).

Water Commission Act (St. 1913, p. 1012) § 11, providing that all waters flowing in any natural channel excepting so far as they are used or may be reasonably needed, for useful or beneficial purposes on lands riparian thereto or otherwise appropriated are public waters subject to appropriation, held not to authorize permits to appropriate waters, where the court failed to find that the waters were not needed for power purposes and in fact found that there was no surplus of water.

7. Waters and water courses ☞139—Until mere appropriator obtains title by prescription, he is trespasser as against riparian owner.

As against a riparian owner, a mere appropriator of water is a trespasser until he obtains title by prescription.

8. Waters and water courses ☞80—Power company diverting stream through conduit over nonriparian land and through hydroelectric plant and returning water at lower point held within riparian rights.

Electric power corporation owning riparian land and rights which diverted the entire stream through a conduit through nonriparian lands to its hydroelectric plant and there used the water in the operation of the plant, and thereafter returned it to the stream at a lower point, held to be making a legitimate riparian use of the stream.

9. Eminent domain ☞317(1)—Condemnation of landowners' riparian rights was equivalent to consent to diversion of water at point above land conveyance through nonriparian land and return at point below land.

Where riparian rights of two landowners had been obliterated by condemnation, there was the equivalent of consent on their part to the diversion of water at a point above their lands through a conduit through nonriparian land to a hydroelectric plant and return to the stream at a point below their lands.

10. Waters and water courses ☞78—That power company by diverting stream through conduit to hydroelectric plant and returning it at lower point on stream could develop much electric power did not invalidate use.

Mere fact that riparian owner by diverting water from stream through conduit to hy-

droelectric plant and there using water in operation of plant and returning water to stream at lower point secured a 450-foot head of water and was enabled to develop a large amount of electric power held not to invalidate the use.

11. Waters and water courses ⚡78—Riparian owners might not prevent taking of water from stream above their land for use in hydroelectric plant and return below their land, where process had ripened into public use.

Where diversion of water through conduit to hydroelectric plant and use of water there and its return to the stream at a lower point had ripened into public use, riparian owners below the point of diversion and above the point of return might not enjoin or otherwise prevent the process.

12. Waters and water courses ⚡139—Intending appropriator of water might not attack right of lower riparian to use water for hydroelectric plant on grounds affecting still lower riparians.

Where plaintiff claimed as an upper intending appropriator of water, he might not attack right of lower riparian to divert water from the stream through a hydroelectric plant and return it at a lower point on objections which affected riparian owners below the point of diversion and above the point of return.

In Bank.

Appeal from Superior Court, Shasta County; C. J. Luttrell, Judge.

Action to determine water rights, brought by John F. Sheehan, Jr., for whom was substituted the Fall River Valley Irrigation District, against the Mount Shasta Power Corporation. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. D. Tillotson, of Redding (Jesse W. Carter, of Redding, and Barry S. Ulrich, of San Francisco, of counsel), for appellant.

Wm. B. Bosley and Thos. J. Straub, both of San Francisco, and Chenoweth & Leininger, of Redding, for respondent.

Samuel C. Wiel, of San Francisco, amicus curiæ.

PRESTON, J. The purpose of this action is to settle and determine the respective claims of plaintiff and defendant to the waters of Fall river in Shasta county. By its second amended and supplemental complaint plaintiff claims a right to the first continuous flow of said stream as against defendant to the extent of 240 cubic feet per second, basing said claim upon the provisions of two permits issued by the division of water rights of the state department of public works and hereinafter more fully described. Defendant by its amended answer denied the validity of both said permits; denied that on the 27th day of September, 1919, or thereafter, there was any water subject to appropriation flowing in said stream; and alleged its ownership of riparian rights and lands riparian to Fall

river and Pit river below the points of diversion specified in said permits, its construction, ownership and operation of a hydroelectric power plant located upon said riparian lands, and its ownership of the right, qualified only by the correlative rights of other riparian owners, to divert and use, for the operation of its said power plant, all water naturally flowing in said Fall river.

The following is a brief outline of the facts, which are virtually undisputed, as found by the court:

Fall river, a nonnavigable natural stream or water course, whose sources are in the northwesterly part of Fall river valley in Shasta county, Cal., flows in a general southeasterly direction to its junction with Pit river at the village of Fall River Mills. Its natural flow is nearly constant, varying but little throughout the year, the average flow being approximately 1,400 cubic feet per second and the maximum flow approximately 1,800 cubic feet per second. No evidence was offered tending to show it has ever overflowed its banks. Its principal tributary is Tule river, whose main sources are in the northerly part of Fall river valley. Pit river rises in the northeasterly part of the state and flows in a general southwesterly direction past defendant's power plant to its junction with the Sacramento river.

On the said 27th day of September, 1919, Guy T. Wayman applied to the state water commission of the state of California for a permit to divert water from said Fall river at a point on the southerly or right bank thereof for the purpose of irrigating 4,320 acres of nonriparian agricultural land situated in Fall river valley. On the 19th day of June, 1920, he applied for a similar permit to divert water at a point on the easterly or left bank of said river for the purpose of irrigating 15,680 acres of nonriparian agricultural land situated in said valley.

On August 10, 1921, two permits, numbered 898 and 899, respectively, granting said applications, "subject to vested rights," were issued to him "as trustee for an irrigation district, mutual water company, or other legal entity authorized by law to carry on the work of diversion and distribution of water, such legal entity to be composed of the owners of land to be served under this permit as issued or as modified hereafter * * * said trustee to transfer and assign all rights under this permit to said legal entity as soon as possible after its organization." Said permits provided that actual construction work should begin on or before November 1, 1921; that it should be completed on or before November 1, 1923, and complete application of the water to the proposed use should be made on or before July 1, 1924. The said permits were thereafter duly recorded. The times specified therein within which to commence

construction work and apply said waters to the beneficial use of irrigating said lands were extended by the division of water rights from time to time up to the 1st day of January, 1926.

On November 29, 1921, said Guy T. Wayman duly assigned all his right, title, and interest in and to said permits to John F. Sheehan, Jr., the original plaintiff in this action. Complaint was filed by him on June 21, 1922. On July 10, 1922, the Fall River Valley irrigation district was duly organized under the laws of the state of California as an irrigation district. On August 9, 1922, said John F. Sheehan, Jr., duly assigned all his right, title and interest in and to said permits to said Fall River Valley irrigation district, and said district was duly substituted as plaintiff herein on October 20, 1922.

The court found that the said Fall River Valley irrigation district was formed by the owners of the lands for whose benefit said permits were issued, and in order to carry out the conditions set forth therein; that it had acquired by grant from Scott McArthur, in October, 1922, and was at all times thereafter the owner of the right to use said lands at the points on said Fall river specified in the aforesaid permits for purposes of appropriation, and also for construction, maintenance and operation of diversion works; that said district consisted of two separate divisions or parcels of land totaling in area 13,000 acres, all of which were susceptible of reasonable and economical irrigation; that 130 cubic feet of water per second flowing continuously was the maximum amount of water reasonably required for such irrigation; that said lands were of no value except for agricultural purposes; that neither said district nor either of its predecessors, Wayman and Sheehan, had ever commenced or caused to be commenced actual construction work for the purpose of diverting or appropriating any part of the waters of said Fall river under the authority of either of the aforesaid permits or otherwise.

The court further found that all lands upon which the points of diversion specified in said permits were located and practically all lands riparian to Fall river, from a place several miles above the uppermost point of diversion to the junction of Fall and Pit rivers, also, all lands riparian to Pit river from its junction with Fall river down to a point below defendant's power house, were held in private ownership and were not public lands of the state or the United States; that plaintiff had never owned any part of the lands riparian to Fall or Tule rivers and did not own any riparian right to the waters of Fall river.

On the contrary, the court found defendant to be the owner and in possession of the bed and banks of Fall river and of all lands ripa-

rian thereto between a point some distance above its diversion dam hereinafter mentioned and the junction of Fall river with Pit river, and also to be the owner of the bed and banks of Pit river and all lands riparian thereto between a point some distance above the junction of said river with Fall river and a point some distance below defendant's power plant, with the exception of two tracts, from the owners of which defendant had acquired by condemnation proceedings their riparian rights to the use of the waters of said Fall river.

It further found that defendant, being the owner of the riparian lands and riparian rights aforesaid, had constructed a diversion dam and all necessary works in the bed and banks of said Fall river on said riparian lands for the purpose of diverting into an aqueduct all of the water naturally flowing in said river; that it had also constructed said aqueduct, extending from said dam to and through its power house and thence to the channel of Pit river; also, that it had constructed said power house, by means of which substantially all of the water naturally flowing in Fall river is used for the generation of electric power; that the greater part of said aqueduct is on lands of respondent which are not riparian to either Fall river or Pit river, but said power house is on lands riparian to Pit river; that the construction of said plant was commenced about June 1, 1920, completed in September, 1922, and has been in operation continuously since November 1, 1922, using substantially all of the water naturally flowing in Fall river at the site of its said dam and discharging all of said water so used into Pit river before it leaves defendant's land.

The court found that defendant acquired part of its aforesaid riparian lands and riparian rights prior to September 27, 1919, and the remainder between that date and November 1, 1922, said lands having previously been owned in severalty by approximately 40 different proprietors; that at no time either before or after September 27, 1919, had any of the water of said Fall river been appropriated, diverted, or used by any persons except owners of lands riparian thereto, but that it had been diverted and used by such riparian owners, a small hydroelectric power plant having been in operation near the junction of Pit and Fall rivers prior to the above date, which plant was acquired by defendant on June 30, 1920.

The court also found that no appropriations had ever been made, under sections 1410 to 1422 of the Civil Code, or under the Water Commission Act (St. 1913, p. 1012), of any of the waters of said stream. The court also found that:

"For a long time prior to and on the 27th day of September, 1919, and at all times thereafter until on or about the 30th day of September,

1922, when the defendant herein began its diversion of water from said Fall river for the operation of its said power plant, the water flowing in Fall river, at each of the points of diversion specified in the aforesaid applications and permits and thence in the channel of said Fall river to its junction with Pit river and thence in the channel of Pit river to and beyond the place where the tailrace of defendant's said power plant discharges into said Pit river, exceeded by more than 240 cubic feet per second, not only all amounts then being actually diverted or used by riparian owners and appropriators for beneficial purposes, but also the total amount of water reasonably required by all riparian owners and appropriators for irrigation, watering live stock, and domestic use upon all lands riparian either to said Fall river or to said Pit river between the upper of the two points of diversion specified in the aforesaid applications and permits and the place where defendant's tailrace discharges into said Pit river."

Lastly, it found that all of the waters naturally flowing in Fall river and its tributaries were and had been since January 1, 1919, reasonably needed for useful and beneficial purposes upon lands riparian thereto, and more particularly upon the aforesaid lands owned by defendant riparian to Fall and Pit rivers; that after commencement of operation of defendant's said power plant in 1922 substantially all of such waters were actually used for a useful and beneficial purpose, to wit, generation of electric power.

From its findings the court concluded that said permits were not void because issued to a trustee for an irrigation district thereafter to be organized, or because plaintiff and its predecessors failed to commence construction work within the time specified therein, but that they were both void and of no force or effect by reason of the fact that no part of the water naturally flowing in Fall river below a point several miles upstream from the upper point of diversion specified in said permits or of the water naturally flowing in Pit river between its junction with Fall river and a point below the outlet of defendant's said aqueduct was or at any time since January 1, 1919, had been public water of the state of California subject to appropriation under the provisions of the "Water Commission Act"; that plaintiff did not own any vested or inchoate right to take or divert water from Fall river, but that defendant was the owner and in possession of the vested right, qualified only by correlative rights of other riparian owners to use all water naturally flowing in said Fall river upon its lands riparian thereto and to Pit river for all lawful purposes, including the production of electric energy by means of its said hydroelectric plant.

With findings such as appear above and the act of June 16, 1913, to apply thereto, appellant claims to have secured from the natural flow of Fall river a definite and inte-

gral portion thereof to the extent of 130 cubic feet per second. The consequence of the doctrine thus contended for would, in our opinion, be a limitation upon the riparian right by fixing a definite amount of the natural and usual flow of the river which may be sequestered therefrom and given to non-riparian proprietors under a system of permits operated under state authority. The quality of the riparian right would thus be changed by taking from it elasticity and relativity and substituting therefor an inflexible limitation beyond which the right may not extend. Variable factors, such as yield of the stream, variation in the relative and correlative needs of the proprietors, would no longer be controlling. After a definite amount of water has been taken, the right to regain it would be lost to the riparian owner. The title in the appropriator or permittee would be good and valid, subject only to forfeiture by failure for a given period to use the water, as is now the case of any other prescriptive right. No errors as to needs or potential needs of the riparian proprietor may be corrected under this system. This change it is claimed may be legally effected by defining the riparian right to be a mere rule of property and not a vested estate.

It is only fair to counsel to say that since the filing of the briefs in this action we have given the subject of riparian rights our serious consideration in the case of *Herminghaus v. Southern California Edison Co. et al.* (Cal. Sup.) 252 P. 607. In fact, at varying intervals during the past 77 years in the history of this state, the doctrine of riparian rights, as we conceive it to be, has withstood determined assaults, similar to if not identical with the one here made. At no time has there been any uncertainty as to the ingredients, quality, or strength of the right. On the faith of the doctrine practically all valuable land titles in this state have passed into private ownership. In *Herminghaus v. Southern California Edison Co. et al.*, supra, we re-examined the question and pronounced the riparian right a vested one.

The facts presented in the case at bar give perhaps as clear a picture as could possibly be found of the exterior limitations of the right. Fall river is a constant stream. It is but little influenced by either rainfall or melting snows. It has an underground source, which is practically constant. There is no overflow of its banks during any period of the year. There are, therefore, no "storm," "freshet," "flood," "vagrant," or "enemy" waters in it, and hence no waters in which the riparian right does not inhere.

Appellant in this case has neither the right of a riparian proprietor nor that of an appropriator of the stream. It claims merely an inchoate right derived from permits issued by the state of California to appropriate waters of the stream "subject to vested

rights." It has so far reduced no water or water right to its possession.

As against this claim, we have respondent, a large power company, espousing the cause of the riparian owner. It claims no more for itself than it concedes to the smallest and humblest proprietor on the stream. Within less than 10 years after the passage of said statute, it has constructed a hydroelectric plant upon its riparian lands, and since November 1, 1922, it has actually used the entire yield of the stream by passing it through its said generating plant and producing thereby electric energy which has been and is now being consumed in various portions of the state by the public generally. No effort has been made by it to reservoir or otherwise unreasonably or illegally detain the waters nor to divert them to nonriparian land or to otherwise use them for nonriparian purposes. Here, indeed, there is no question as to the relative rights to the underflow or overflow of the stream. No complaint can be made that the riparian owner is greedy or selfish in wanting the entire hydraulic effect of the stream to "boost" to its own lands the small amount of water required for irrigation or domestic purposes. In short, respondent has upon its own riparian land put the whole of said stream to a recognized beneficial use. Upon what logical basis can we defend our position should we declare the right to take away the whole or any part of this riparian right, or, if our power to do so be conceded, where shall we begin and to what extent may we go?

[1] To curtail the right by a fixation of rigid and inelastic boundaries is to destroy the right altogether, for in such case it would become a mere right of priority, or, in other words, it would be tantamount to the substitution of the doctrine of appropriation for the doctrine of riparian rights. A re-examination of the nature of the riparian right in the light of the facts of this case leaves us entirely satisfied with our previous pronouncements upon this subject. We therefore here reassert the riparian right to be a vested property right inhering in and a part and parcel of the abutting lands—a right not gained by use or lost by disuse—a right (qualified only by the correlative rights of other riparian proprietors) to use the entire ordinary and natural flow of the stream for all lawful riparian uses and also to have all such flow come down to the land undiminished other than by the lawful uses by upper riparian proprietors or by the rights of those who have otherwise obtained a superior claim to the use of a portion of the stream. This right to use the water of the stream we hold to be entitled to the same respect and protection at the hands of the law as any other vested property right.

Admittedly there has been a persistent policy on the part of the legislative department

of this state to curtail in some way this riparian right in favor of nonriparian proprietors. In fact, an extra session of the Legislature of the state was called in the summer of 1886, following the decision in *Lux v. Haggin*, 69 Cal. 255, 4 P. 919, 10 P. 674, on April 26, 1886. The object of this extra session was to consider what should be done in the promotion of the common weal to offset the declarations of this court made in said case, upholding the doctrine of riparian rights in practically the same form as we now have it. Nothing resulted from the deliberations of the Legislature on that occasion. Agitation of the same character was unsuccessfully urged upon the court in 1909, when this court, in *Miller & Lux v. Madera Canal & Irrigation Co.*, 155 Cal. 59, 65, 99 P. 502, 512, met the contention that the riparian right was but a mere rule of policy by saying:

"But the riparian owners have a right to have the stream flow past their land in its usual course, and this right, so far as it is of regular occurrence and beneficial to their land is, as we have frequently said, a right of property, 'a parcel of the land itself.' Neither a court nor the Legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain."

An assault equally vigorous was made upon said doctrine in the case of *Herminghaus v. Southern California Edison Company*, supra, and, as above stated, we again re-examined the question and gave the response above noted.

We have no means of ascertaining which of the two systems, appropriation or riparian rights, would have been the wiser for California to have adopted in the beginning. Certainly, a comparison of the progress of this state with the progress of other western states, which have applied the doctrine of appropriation, does not furnish proof of a lack of wisdom on the part of the first Legislature of California which, after the closest and most earnest investigation, adopted the rule of the American common law in this state, which had as one of its tenets the riparian right essentially as we now declare it to be (*Appendix*, 1 Cal. pp. 588-604).

It must here be observed that all the riparian lands between respondent's point of diversion and point of return passed into private ownership prior to April 8, 1911. This statement is also true as to the riparian lands between appellant's uppermost point of intended diversion and the diversion dam of respondent, except one 40-acre tract. The

riparian right of respondent vested, therefore, before any of the legislation beginning with the amendment of April 8, 1911 (St. 1911, p. 821) to section 1410 of the Civil Code and ending with the Act of June 16, 1913 (Stats. 1913, p. 1012), which act was held up by referendum and did not go into effect until December, 1914. Section 11 of said act, in so far as here involved, reads:

"* * * And all waters flowing in any river, stream, canyon, ravine or other natural channel, excepting so far as such waters have been or are being applied to useful and beneficial purpose upon, or in so far as such waters are or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby declared to be public waters of the state of California and subject to appropriation in accordance with the provisions of this act. If any portion of the waters of any stream shall not be put to a useful or beneficial purpose to or upon lands riparian to such stream for any continuous period of ten consecutive years after the passage of this act, such nonapplication shall be deemed to be conclusive presumption that the use of such portions of the waters of such stream is not needed upon said riparian lands for any useful or beneficial purpose; and such portion of the waters of any stream so nonapplied, unless otherwise appropriated for a useful and beneficial purpose, is hereby declared to be in the use of the state and subject to appropriation in accordance with the provisions of this act."

[2, 3] As an exercise of the police power of the state it is claimed that this act may operate upon the riparian rights of proprietors on Fall river so as to transfer to appellant at least 130 cubic feet per second constant flow from the usual and natural flow of the stream. The total invalidity of this provision of the statute as such is really not contended for by respondent. It is a misconception of the case of *Herminghaus v. Southern California Edison Company*, supra, to say that it was there held that said provision was in complete conflict with the state or federal Constitutions in any particular. The holding was that under the facts of that case the stream carried during the season in question no waters in which the riparian right did not inhere and also that respondents were making a beneficial use of the entire ordinary and natural flow of said stream as it flowed along, across and over their said lands. No question can arise as to the power of the Legislature to modify or abrogate a rule of the common law. The question is: Can any such change affect the previously vested rights of property owners? We need here only say that the legislative department of the state may not take any portion of a vested property right from one person and invest another with it and be justified in so doing in view of the provisions of sections 13 and 14 of article I of the state Constitution and the Fourteenth Amendment to the Constitution of the United States.

[4] In *Stone v. Kendall* (Tex. Civ. App.) 268 S. W. 759, the court said:

"Since the right of a citizen to use his property as he chooses, so long as he harms nobody, is an inherent and constitutional right, the police power cannot be invoked to prohibit a particular use of private property, unless such use reasonably endangers or threatens the public health, safety, comfort, or welfare."

In the case of *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 399, 14 S. Ct. 1047, 1055 (38 L. Ed. 1031), the court said:

"In every Constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

To the same effect, see *Coal & Coke Ry. Co. v. Conley and Avis*, 67 W. Va. 129, 188, 67 S. E. 613; *Barbier v. Connolly*, 113 U. S. 27, 31, 5 S. Ct. 357, 23 L. Ed. 923; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559, 22 S. Ct. 431, 46 L. Ed. 679; and *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 87, 22 S. Ct. 30, 46 L. Ed. 92, in which latter case the above quotation is cited with approval. This was our view when considering section 1410 of the Civil Code, as amended, which section is much akin to section 11 of the Act of June 16, 1913. See *Palmer v. Railroad Commission of California*, 167 Cal. 163, 175, 138 P. 997, and *City of San Bernardino v. City of Riverside*, 186 Cal. 7, 198 P. 784.

[5] We are by no means intending to say that riparian rights may not under proper circumstances yield to the police power in the interest of public health, safety, comfort, or welfare, but the Act of June 16, 1913, does not purport to be an exercise of such power for any purpose nor do the facts in the present case give rise to a situation where the police power may operate. See *Herminghaus v. Southern California Edison Company*, supra, where we said:

"If the state were here essaying to uphold an effort on its part to work out impartially, unselfishly and in the interests of the whole people some general plan or system for the equitable adjustment of rights and uses in its flowing streams with a view to the conservation, development, and distribution of the dynamic forces

and generative and fertilizing fructibilities of their waters, it might well be argued that public policy, public interest, and a most liberal interpretation of the police powers of the state might rightfully be invoked in support of such an effort. But can the same be properly said or claimed in a case wherein one or many privately owned and operated institutions, organized primarily for personal and private gain, and only incidentally and secondarily assuming to act in the public interest and welfare, are engaged in controversies in the courts with other private individuals or associations over the asserted and disputed property rights and interests of each of the respective parties to such controversies? We do not feel called upon in this case to so declare."

See, also, dissenting opinion of Mr. Justice Burnett in the case of *In re Hood River*, 119 Or. 312, 227 P. 1065.

[6] We, therefore, hold the said provision of the Act of June 16, 1913, to be inoperative to the aid of appellant or the injury of respondent. Moreover, assuming the said statute, and every portion thereof, to be valid and at the same time to be applicable to water rights which vested prior to its passage, it does not and cannot avail appellant to infuse life into the permits here under consideration in view of the particular facts found by the court in this case. For it must be carefully noted that the court here did not find the existence of surplus water to any extent in this stream. It found only that the amount used and the amount reasonably required by all riparian owners and appropriators "for irrigation, watering live stock, and domestic use" was less than the product of the stream by more than 240 cubic feet per second. This finding, it will be noted, ignores absolutely the use of the ordinary flow of the stream for power purposes, an ancient and well-known riparian use. This use is declared in *Mentone Irr. Co. v. Redlands Electric Light & Power Co.*, 155 Cal. 323, 327, 100 P. 1082, 1083, as follows:

"The use of the water in its passage through his land to operate a power plant thereon is as clearly within his rights as is his right to operate a mill thereon with which to grind grain or to operate any other machinery, than which there is no more ancient or well-established feature of riparian rights."

Indeed, the court not only did not find a general surplus of water in said stream, but specifically found that:

"All of the waters naturally flowing in said Fall river and in the tributaries thereof are, and ever since January 1, 1919, have been, reasonably needed for useful and beneficial purposes upon lands riparian thereto, and, more particularly, upon the aforesaid lands owned by the defendant as aforesaid, which are riparian to said Fall river and to said Pit river; and, ever since the construction and completion of defendant's said dam, aqueduct and power plant and the commencement of the operation thereof by the

defendant in the autumn of 1922, substantially all of such waters, except only such parts thereof as have actually been diverted or used by the owners of lands riparian to said Fall river and its said tributaries above or upstream from the site of defendant's aforesaid dam, have actually been used by the defendant for a useful and beneficial purpose, to wit, the generation of electric power, as hereinbefore stated."

[7] We have proceeded thus far upon the assumption that respondent was making a lawful riparian use of the stream. We have not overlooked the contention of appellant that such is not the case. We have thus ignored the claim because respondent is admittedly the owner of large areas of riparian land below the places of intended diversion by appellant under its permits for appropriation. Conceding to respondent no greater rights than could be enjoyed by the smallest riparian proprietor on the stream, we have reached the conclusion announced above for it is possible that any number of riparian owners upon said stream could and might want to use the normal flow of said stream for mill power or other purposes. Then, too, we must give effect to our own decisions pronouncing that a mere appropriator, until he obtains title by prescription, is, as against the right of a riparian owner, a trespasser. The case of *Pabst v. Finmand*, 190 Cal. 124, 132, 211 P. 11, 14, involved a controversy over an alleged claim by appropriation as against a claim by virtue of ownership of riparian lands situated below the point of diversion. The court said:

"As to a nonriparian owner the riparian owner is under no duty to share the waters of the creek and the slightest use by such nonriparian owner diminishes to some extent the flow of the stream."

In the case of *Duckworth v. Watsonville Water & Light Co.*, 150 Cal. 520, 89 P. 338, we held that every owner of land upon a stream had the right to insist that the water as it passed his land should not be "diminished from use by other riparian owners above so as to deprive him of his just portion, and perhaps, as to other than riparian owners, the right to prevent any substantial diminution of the amount of water which would naturally flow to his land."

In the case of *Anaheim Union Water Co. v. Fuller*, 150 Cal. 327, 88 P. 978, plaintiffs, as riparian owners, sued to enjoin defendants from diverting water from the Santa Ana River at a point above their riparian lands. The court said:

"Here the defendants were not, with respect to the land irrigated, riparian owners, but were trespassers on plaintiffs' property rights from the beginning. * * *"

In the case of *Huffner v. Sawday*, 153 Cal. 86, 91, 94 P. 424, 426, the court said:

"Even if these plaintiffs (riparian landowners) had never made any use of the water flowing past their land, they had the right to have it continue in its customary flow, subject to such diminution as might result from reasonable use by other riparian proprietors. This is a right of property, a 'part and parcel' of the land itself [citing the Duckworth Case, supra]. * * *

In the case of *Davis v. Martin*, 157 Cal. 657, 108 P. 866, 867, it was held that "the riparian rights attaching to said lands by reason of this contiguity were paramount to the rights of any appropriator," and in *Title Ins. & Trust Co. v. Miller & Lux, Inc.*, 183 Cal. 71, 85, 190 P. 433, 439, that the "right of each riparian proprietor as against appropriators, extends to the entire stream."

[8] But under the doctrine of the cases of *Turner v. James Canal Co.*, 155 Cal. 82, 99 P. 520, and *Mentone Irr. Co. v. Redlands Electric Light & Power Co.*, supra, it must be held that respondent is making a legitimate riparian use of the stream by the construction and operation of its hydroelectric plant in the manner set forth in the findings herein, and the fact that the tunnel or conduits may be through or across nonriparian lands is immaterial. In *Turner v. James Canal Co.*, supra, defendant, as a riparian owner of lands on Fresno slough, claimed the right to take for irrigation of said lands a reasonable quantity of the water of San Joaquin river at the head of its canal on the river, and to carry said water through the canal over the intervening nonriparian land to the land on the slough. The court said:

"The fact that it must carry the water from the river over intervening nonriparian lands, belonging to other persons, is of no consequence. The person over whose land it is carried could object, of course, but other riparian owners have no privity with such third person, and cannot avail themselves of his rights. So long as the riparian owner takes no more than his reasonable share and uses it upon his riparian land, without unreasonable waste, other riparian owners below have no right to inquire, how, or by what means, or at what place, he manages to divert his share from the stream, whether at a point on his land, or at some point far above, where the elevation of the stream will be sufficient to carry it by gravity to the surface of his land, or whether by a dam and headgate, or by pumps and buckets. This principle was practically decided in *Charnock v. Higuerra*, 111 Cal. 479, 44 P. 171, 32 L. R. A. 190; 52 Am. St. Rep. 195, and *Rose v. Mesmer*, 142 Cal. 329, 75 P. 905."

In *Mentone Irr. Co. v. Redlands Electric Light & Power Co.*, supra, the court held:

"The power company, being the owner of the riparian land, has the full right to use the water in its natural course on its land for that purpose. It has also the right, if it is more convenient and effective so to do, to turn it out of its natural channel at the upper end of its possessions, carry it in an artificial channel over

the land, use it for generating power thereon, and turn it back into the stream within its lands below, provided such interference with natural conditions does not unduly injure others who have rights in the water. *Gould on Waters*, § 213; *Farnham on Waters*, § 495, p. 1645."

[9-11] The fact that the riparian rights of the two landowners intervening between the point of diversion and point of return have been obliterated by condemnation is certainly the equivalent of consent within the meaning of the doctrine in *Turner v. James Canal Co.*, supra, and the case is as though all landowners below had consented to the upper diversion. The fact that thereby the respondent has secured a 450-foot head and been enabled to develop a large amount of electric energy in no way detracts from the legality of the process. Then, too, as against all riparian owners between the point of diversion and point of return of the waters to the stream, a public use has intervened and a cause of action would not lie in them to enjoin or prevent respondent from making the use it now makes of the stream. See *Miller & Lux v. Enterprise Canal & Land Co.*, 169 Cal. 415, 147 P. 567, and other cases.

[12] It is hard to conceive, therefore, that appellant, claiming as an upper intending appropriator, can have any standing to urge the objections which have not been made and, indeed, which have been lost by the riparian owners, if any there be, who are affected by this diversion above them. We therefore hold that appellant is without legal standing to urge a claim as to the use of these waters on the part of respondent.

These views compel affirmation of the judgment, and it is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

SHENK, J. (concurring). I concur in the judgment for the reason that the evidence showed and the court found (1) that all of the waters naturally flowing in Fall river and its tributaries are and ever since January 1, 1919 (a point of time antedating the applications of the plaintiff's predecessors in interest), have been reasonably needed for useful and beneficial purposes upon the lands riparian thereto, and more particularly upon the lands owned by the defendant which constitute all of the riparian lands between the defendant's point of diversion and its power plant and which riparian lands or rights the defendant had acquired by purchase or condemnation; and (2) that substantially all of said waters, except only such parts thereof as have been diverted or used by the owners of lands riparian to Fall river above the defendant's diversion dam, have, since the autumn of 1922, actually been put to a reasonably useful and beneficial purpose. The court was therefore justified in concluding that

no portions of such waters were "public waters of the state of California" at the time the applications for said permits were made. No question of the validity of section 11 of the Water Commission Act may properly arise in this case for the obvious reason that under the express provisions of that section, waters flowing in any river or stream which "are or may be reasonably needed for useful and beneficiary purposes upon lands riparian thereto," are excepted from the waters which are declared by the act to be "public waters of the state" and subject to appropriation under provisions of the act. Nor had the ten-year period after the effective date of the act, also prescribed by section 11, expired when the defendant commenced the construction of its works.

It is apparently conceded in the main opinion that the riparian right may yield to the proper exercise of the police power in the interests of the people of the state, but it is asserted that the Water Commission Act does not purport to be an exercise of such power for any purpose. To this assertion I cannot accede. It was the obvious purpose of section 11 of the act to subject the exercise of the riparian right to the reasonable use of the waters of the stream and to declare in the interests of the people of the state that the use of all waters shall be restricted to that which is reasonable and useful for a beneficial purpose, whether the user be a riparian owner or an appropriator. The right of the riparian owner to the full use of the waters of the stream in so far as the same may be put to a reasonably useful and beneficial purpose, may not be abridged. The result of the main opinion, however, is to further entrench such owner in what may be entirely unreasonable demands—a result which the Water Commission Act was plainly and properly designed to avoid.

A situation is presented in this case which was not intended to be affected or disturbed by the Water Commission Act in the exercise of the police power. Such being the fact, it would seem to require no argument or citation of authority to support the right of the defendant as riparian owner to the full enjoyment of the reasonably beneficial use to which the waters of the stream are put. The said permits were in fact issued "subject to vested rights." All discussion in the main opinion in defense of riparian rights and as to the scope of the police power applicable to the exercise of such rights, is, therefore, under present law, in my opinion, entirely outside of the issues necessary to be determined in this case on the record presented and is uncalled for except, perhaps, in justification of the opinion of a majority of the court in the *Herminghaus Case*, concerning which I have had occasion to express my views.

MECHLER v. SUPERIOR COURT OF CALIFORNIA IN AND FOR ALAMEDA COUNTY et al. (Civ. 5943.)★

District Court of Appeal, First District, Division 1, California. Sept. 7, 1927.

Rehearing Denied Oct. 6, 1927. Hearing Denied by Supreme Court Nov. 2, 1927.

1. Appeal and error ⇨106—Trial court's determination as to jury trial is appealable.

Determination of trial court as to whether or not the parties to an action are entitled to a trial by jury can be reviewed on direct appeal from the judgment.

2. Mandamus ⇨4(3)—Mandamus will not lie to require court to allow jury trial, remedy being by appeal.

Whether or not parties are entitled to a jury trial is a question within the jurisdiction of the trial court, for error in the determination of which there is a remedy by appeal, and a writ of mandate will not be issued to compel trial court to grant a jury trial.

3. Jury ⇨28(10)—Party does not waive right to jury trial by going to trial without one after objection.

A party does not waive a right to a trial by jury by going to trial without one after objection, since the matter can be reviewed upon a direct appeal from the judgment.

Application for writ of mandate by Berneita Mechler, a minor, by Nora Mechler, her guardian ad litem, prayed to be directed to the Superior Court of the State of California in and for the County of Alameda, and Hon. Warren V. Tryon, Acting and Presiding Judge of Department 2 thereof, to require respondents to proceed with the trial of a certain cause. Writ denied.

Dunn, White & Aiken, Henry C. Reynolds, and W. M. Nold, all of Oakland, for petitioner.

J. E. Reardon and Benj. F. Curtaz, both of San Francisco, and Enid Childs, of Berkeley, for respondent.

TYLER, P. J. Application for peremptory writ of mandate, directing respondent court and the honorable judge thereof to proceed with the hearing and determination of a certain cause. The petition is filed on behalf of Berneita Mechler, a minor, by Nora Mechler, her guardian ad litem, and it recites in substance that on or about the 30th day of March, 1927, the said minor, through her guardian, instituted an action against one Grace R. Luther and others seeking to recover alleged damages for personal injuries sustained by plaintiff through the alleged negligent operation by defendant Grace R. Luther of a certain automobile in the city of Oakland, on or about October 16, 1926. Upon issue being joined, notice of motion to set the cause for trial was duly made, served, and

filed. The parties appeared in court by counsel when the case called to be set, at which time, according to the answer here filed on behalf of respondents, plaintiff's counsel waived a jury trial, and defendant, both orally and in writing, demanded one. Thereupon, on the same day, the court hearing the motion made an order transferring the case to the jury department of said court for trial where it was placed upon the calendar. Thereafter, the attorneys for defendant filed a written waiver of jury trial and subsequently served notice of this fact upon plaintiff.

The case having been reached upon the jury calendar, plaintiff appeared and demanded that trial proceed before a jury. The court, being of the opinion that plaintiff had, by his acts, waived a jury trial, denied the application and retransferred the cause to the nonjury department. Petitioner thereupon filed the present application in this court which is one for a writ of mandate directing the respondent superior court and the judge thereof to set aside the order retransferring the cause from the jury department to the nonjury department, and to proceed to trial before a jury. We are of the opinion that mandate is not the appropriate remedy to test plaintiff's alleged right.

[1-3] The question as to whether or not the parties to an action are entitled to a trial jury is a question of law which the trial court has jurisdiction to hear and determine, for error in the determination of which the party aggrieved has a sufficient remedy by appeal, and a writ of mandate will not be issued to compel the trial court to grant a jury trial. *Donohue v. Superior Court*, 93 Cal. 252, 28 P. 1043; *Widney v. Superior Court* (Cal. App.) 258 P. 416. A party does not waive a right to a trial by jury by going to trial without one after objection, as the question can be reviewed upon a direct appeal from the judgment. In *re Robinson*, 106 Cal. 493, 39 P. 862.

The petition is denied.

We concur: KNIGHT, J.; CASHIN, J.

85 Cal. App. 372

KEEFER v. KEEFER. (Civ. 5812.)★

District Court of Appeal, First District, Division 2, California. Sept. 8, 1927.

Hearing Denied by Supreme Court Nov. 7, 1927.

1. Divorce ⇐68—Whether separation was desertion was immaterial, since barred as ground for divorce by statute of limitations (Civ. Code, §§ 98, 124).

On cross-complaint for divorce in support and maintenance proceeding, whether a separation 12 years before was a desertion within Civ. Code, § 98, was immaterial, since the lapse of time had barred it as a cause of divorce, under section 124.

2. Appeal and error ⇐837(4)—Plaintiff's request that court note scope of denials and admissions of pleadings should be made in trial court, not in reviewing court.

Where, in a wife's support and maintenance action, she requested the reviewing court to note carefully the scope of denials and the admissions of pleadings, *held*, that such request should have been made in the trial court, not in the reviewing court.

3. Divorce ⇐127(3)—Statute does not require each specification of extreme cruelty to be corroborated.

On the hearing of defendant's cross-complaint for divorce on ground of extreme cruelty, *held*, that the statute does not require each specification of cruelty to be corroborated.

4. Divorce ⇐184(12)—Finding for defendant on cross-complaint for divorce for cruelty, makes immaterial court's finding in his favor on other ground barred by statute of limitations.

Where defendant in his cross-complaint for divorce, in wife's suit for separate maintenance, pleaded a cause of action based on cruelty, and findings were made in his favor, *held* immaterial that findings also were made in his favor on a cause of action for desertion which had become barred by the statute of limitations.

5. Divorce ⇐152—In wife's action for support, determination of property rights in interlocutory decree did not render decree void.

In wife's action for support and maintenance wherein husband cross-complained for divorce, the fact that the court determined the property rights of the parties in the interlocutory decree did not render the decree void.

6. Divorce ⇐184(12)—In support and maintenance action by wife, trial court's determination of property rights in interlocutory decree was not ground for reversal, not being prejudicial.

In action by a wife for support and maintenance wherein husband cross-complained for divorce, the fact that the trial court in its interlocutory decree determined property rights of parties was not ground for reversal, not being prejudicial.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Katherine Keefer against Adolph C. Keefer for support and maintenance, in which defendant interposed a cross-complaint for divorce. Judgment for defendant, and plaintiff appeals. Affirmed.

Samuel H. Jones, of Sacramento, for appellant.

Walter H. Linforth, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to obtain a decree for permanent support and maintenance. She pleaded in the first cause of action the extreme cruelty of the defendant. In the second cause of action she plead-

ed his desertion of her on the 15th day of May, 1922. Thereupon she prayed for a division of the community property and for \$150 per month for her permanent maintenance. The defendant appeared and filed an answer, in which he denied the charges of the plaintiff, and, in addition to his answer, he interposed a cross-complaint for divorce based on (1) the extreme cruelty of the plaintiff, and (2) her desertion of him in the year 1908. The plaintiff answered the cross-complaint and a trial was had before the trial court sitting without a jury. The trial court made findings in favor of the defendant and from a judgment entered thereon the plaintiff has appealed under section 953a of the Code of Civil Procedure.

From evidence introduced and not controverted it appears that the plaintiff and defendant intermarried in 1897; that there was born as the issue of the marriage a daughter who is now an adult of the age of 26 years or more. The husband and wife quarreled from time to time. The husband's business was that of a furrier and as such he was employed by different employers in the East. It was his contention that his wife was jealous of him and his attentions to the ladies who patronized the stores in which he was employed and that she so conducted herself that he lost his employment or was compelled to change his employment from time to time until the year 1910, when he was about to engage in business for himself. At that time the plaintiff stated to her husband's business associates that, if the business arrangement were made, she would cause the business to be disrupted. Fearing that result the associates withdrew from the proposed business arrangement and when the facts were brought to the attention of the defendant he separated from the plaintiff and came to California. That separation was so hostile that thereafter they never communicated with each other except through their daughter or the attorneys of the respective parties. When he arrived in California he took employment under Louis Gassner, a furrier doing business in San Francisco. From time to time he made remittances to his wife and daughter, who remained in the East. Such remittances continued until 1921, when the plaintiff came to California. She arrived here July 19, 1921, without previously notifying the defendant that she was coming. The next day the daughter called on the defendant and some time during the same day the defendant and the plaintiff met as strangers in the lobby of one of the hotels in San Francisco. The details of that meeting are not in evidence. That the meeting was in no sense agreeable would appear from the fact that on the 25th of August, 1921, the plaintiff commenced an action against the defendant to obtain a decree of separate maintenance. The defendant continued to make certain payments for the support of his wife and

daughter, but they continued to live separate and apart. Conversations were held between their respective representatives looking toward a property settlement between the husband and wife. Those conversations led to no results. Finally, on the 9th day of July, 1923, this action was commenced.

[1] From the foregoing facts it is clear that the second cause of action pleaded in the plaintiff's complaint and in which she alleged desertion on the part of the defendant on the 15th day of May, 1922, has no particle of evidence to support it, but desertion, if it occurred at all, took place as early as the year 1910. The defendant, among other things, contends that the separation in the East showed a desertion on the part of the plaintiff as desertion is defined in section 98 of the Civil Code. However, the defendant admits that as a ground for divorce the act of the plaintiff is barred by the statute of limitations. Civ. Code, § 124.

[2] The first count pleaded in the plaintiff's complaint alleged cruelty on the part of the defendant and contained four specifications. On the trial of the case the plaintiff introduced some evidence to support each one of the specifications. The trial court made findings in favor of the defendant and against the plaintiff on each one of the specifications. It will serve no purpose to quote the specifications as the evidence was distinctly conflicting on all of the material averments and there was support for each finding so made by the trial court. The plaintiff asks us to note carefully the scope of the denials and the admissions of the pleadings. That request should have been made in the trial court instead of to this court. However, in the trial court, both parties treated the pleadings as presenting the purported charges by the one party and a complete denial thereof by the other party.

[3, 4] In his cross-complaint the defendant alleged the extreme cruelty of the plaintiff and inserted five specifications. Later, by a supplemental pleading, he added two other specifications. In its findings the trial court found against the plaintiff and in favor of the defendant on all of those specifications. As to some of them it may be claimed that the evidence was conflicting. However, it must be conceded that as to some of them there was no conflict in the evidence. The plaintiff earnestly contends that there was no corroboration. In making this claim we understand her to assert that each one of the specifications was not corroborated. Our statute does not require that each one be corroborated. Some of the specifications as to which the evidence was not seriously conflicting and which were corroborated by written documents were of such a nature that it is difficult to understand why the plaintiff even contends that the proof of the defendant was insufficient. As the defendant pleaded a cause of action based on cruelty, sustained

it by proof, and the trial court made findings in his favor thereon, it is immaterial that findings were also made in his favor on a cause of action for desertion which had become barred by the statute of limitations.

[5, 6] At the time of the trial the pleadings of both parties put their property rights in issue. Among other things the plaintiff testified that the object of her litigation was to obtain her property rights. The trial court heard the evidence regarding those property rights and made an award thereof. On this appeal neither party contends that the award so made by the trial court was otherwise than just and fair to both parties. However, the plaintiff does contend that the trial court should not have made a determination, in an interlocutory decree, of the issues concerning the property rights. She cites *Remley v. Remley*, 49 Cal. App. 489, 193 P. 604. In making this contention we do not understand her to claim that the decree in the instant case was, for the reason assigned, a void decree. Most certainly we are not inclined to hold that it is a void decree. *Grannis v. Superior Court*, 146 Cal. 245, 79 P. 891, 106 Am. St. Rep. 23. From the facts which we have recited above it is perfectly clear that the plaintiff was not in any respect prejudiced by those portions of the decree which settled the property rights.

During the pendency of the litigation the plaintiff has frequently changed attorneys. There have been eight or nine substitutions. It is not surprising, therefore, that the record on appeal, and in particular the briefing on appeal has been compiled irregularly. However, the earnestness of the litigants is patent. We have therefore read the record from beginning to end for the purpose of ascertaining if either party has, in any respect, been deprived of any right or rights, but we find no error in the record.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

85 Cal. App. 455

GOSS v. PACIFIC MOTOR CO. et al.★
(Civ. 5813.)

District Court of Appeal, First District, Division 2, California. Sept. 15, 1927.

Hearing Denied by Supreme Court Nov. 14, 1927.

4. Municipal corporations ☞706(5)—*Prima facie* case held made against auto driver upon undisputed evidence that automobile went upon sidewalk and struck down lamp post, injuring plaintiff.

Prima facie case of negligence against an automobile driver held made, where in personal injury action evidence that the truck driven by him went upon the sidewalk and struck down a lamp post, injuring plaintiff, was undisputed.

2. Evidence ☞595—That automobile injuring plaintiff had been struck and forced upon sidewalk held not inferable from evidence of dent in car.

That an automobile going upon sidewalk and injuring plaintiff had been struck by another automobile and forced onto the walk held not inferable from evidence of a dent in the rear of the car injuring plaintiff.

3. Trial ☞296(3)—Instruction implying one of defendants in personal injury action was responsible as principal for automobile driver's negligence held not misleading, in view of other instructions.

In automobile personal injury action, instruction implying that one of two defendants was responsible as principal for the driver's negligence resulting in plaintiff's injury held not misleading, in view of other instructions given.

4. Municipal corporations ☞706(8)—Refusal of instruction upon presumption of responsibility arising from automobile ownership, where automobile driven by garage employee injured plaintiff, held not error.

Where plaintiff was injured by an automobile driven by a garage employee who was returning it to the owner after repairing it, refusal of the court to instruct upon the presumption of responsibility arising from the ownership of the automobile held proper.

5. Appeal and error ☞1170(9)—Instruction in automobile personal injury action relative to one's refusal to produce evidence to overcome that adduced by his adversary held not reversible error (Const. art. 6, § 4½).

In view of Const. art. 6, § 4½, relative to setting aside judgments or granting new trials, instruction in an automobile personal injury action relative to party's refusal to produce evidence, if in his power, to overcome the evidence adduced by his adversary held not reversible error.

6. Municipal corporations ☞122(1)—In automobile personal injury action, held not error to admit ordinance, though not pleaded, relative to driving upon walks.

In action for injuries when automobile went upon sidewalk and struck down lamp post, injuring plaintiff, court held not to have erred in receiving in evidence a city ordinance prohibiting driving upon sidewalks, even though the ordinance was not pleaded.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Jack Goss, a minor, by Fred Goss, his guardian ad litem, against the Pacific Motor Company, Perry T. Fujii, and others. From the judgment, defendant Perry T. Fujii and others appeal. Affirmed.

Cooley & Gallagher, of San Francisco, for appellants.

Barry J. Colding and Theodore Hale, both of San Francisco, for respondent.

KOFORD, P. J. This is an action for damages for personal injuries sustained by the plaintiff, caused by the negligent operation of a truck driven by the defendant Kadowaki. The truck ran into a large iron post standing embedded in the sidewalk at a street corner in San Francisco. The iron post broke off and fell upon the plaintiff, injuring him. The defendant operating the truck at the time was an apprentice mechanic in the employ of the defendant and appellant Pacific Motor Company, which conducted a general garage and repair shop. The other defendant, Murai, was the owner of the truck. He had left it at the garage to be repaired. Judgment was against the driver of the truck, defendant Kadowaki, and also against the defendants operating the garage under the name of Pacific Motor Company. No judgment was given against the other defendant, Murai, the owner of the truck. The garage owners, Pacific Motor Company, are the only appellants.

[1, 2] The trial was by a jury, and the assignments of error relate in the main to the instructions given, and these in turn relate to the nature and effect of the testimony given at the trial. At the conclusion of the testimony offered by plaintiff, appellant's motion for a nonsuit was denied. Defendants offered no testimony in their own behalf. There was no direct testimony to show the cause or excuse for the truck running into the post on the sidewalk. The driver was not a witness at the trial. He had returned to Japan on account of the Tokyo earthquake. The testimony related to the conditions existing immediately after the collision. The witness Colen testified that one wheel of the truck rested on the remaining stump of the lamp post of the sidewalk. Witness Fujimori testified that the truck was facing against the sidewalk, but not on it. But there was no dispute that the truck came onto the sidewalk and struck down the lamp post against the plaintiff. This made a prima facie case against Kadowaki. Berry on Automobiles (4th Ed.) § 405; Huddy on Automobiles (7th Ed.) 512. Appellants point to testimony that a dent found on the rear of the truck indicated that it had been struck by another automobile immediately before this accident, but this testimony was not sufficient to infer that such an occurrence, if it happened, had anything to do with this accident. There was, therefore, no other inference for the jury to draw except that Kadowaki's negligence caused plaintiff's injuries.

In view of the testimony, it was not error for the court to say, in instruction 15:

"So far as the question of negligence is concerned, I instruct you that the plaintiff has made out a prima facie case of negligence against the defendant Kadowaki for which he is liable, and the questions, therefore, remaining for your determination are which of the other

defendants, viz., the copartnership sued here as Pacific Motor Company and K. Murai, doing business under the name of Sako Fish Company, is responsible with defendant Kadowaki for the injury suffered by plaintiff, and the amount of damages to be awarded him."

This instruction is also attacked in that it tells the jury to determine which of the other two defendants is responsible with defendant Kadowaki, thereby implying (1) that at least one must be responsible, and (2) that only one, but not both, could be responsible, in addition to implying that in any event (3) Kadowaki must be held liable.

Theoretically, the driver could be acting for both the other defendants and both of these defendants could be liable, but not so under the testimony. Either Kadowaki was delivering the truck for the owner or for his employer, but not for both.

[3] In the expression "Which of the other defendants is responsible," there is grammatically an assumption that at least one is responsible, but the instruction is general and introductory in its nature, and this implied or indirect assumption of fact is overcome by other direct and circumstantial instructions following it. Instructions Nos. 16 to 22, inclusive, defined the relation of employee and employer in general and instructions Nos. 23 to 28, inclusive, specified in detail the circumstances under which alone a verdict could be returned against each one of the defendants, respectively. Read together, the instructions could not mislead the jury into thinking that they must find against at least one of these defendants as claimed by appellant.

It is claimed that the evidence shows defendant Kadowaki was delivering the truck to its owner for his own convenience in that it was parked in the garage in such a way as to block or help block, together with other cars, the exit of his own car in which he wished to go to lunch, it being the lunch hour. His employer, one of the defendants, testified:

"He asked me if he could take the truck out of the shop to the Fish Company and I said he could do so if he pleased."

The testimony established that the service performed for the owner of the truck in returning it, was performed by the garage, and not by its employee, Kadowaki, as a private matter of his own. Obviously it was not necessary for Kadowaki to move the car a number of city blocks in order to clear the entrance to the garage.

The use of the word "permitted," in instruction No. 28, did not have the effect of stating that appellants were responsible for the negligence of Kadowaki if they permitted him to use the truck for his own private purposes. The expression can fairly mean only that, if his employers permitted him to perform this service for them, they would be

liable for his negligent performance of that service. Whether the Pacific Motor Company undertook voluntarily to return the truck to the owner, or did so at the owner's request, would not, under the facts of this case, affect the liability of the Pacific Motor Company, for, if this company undertook to drive the truck to any place, it was bound to do so without negligence. The instruction is therefore not misleading in this respect. Other instructions deal specifically and properly with the issue of whether Kadowaki, in driving the truck, was the agent and employee of the truck owner defendant or of the garage defendants in so doing.

Instruction No. 26 does not have the effect of stating that Kadowaki was in any event the servant of the Pacific Motor Company, in stating:

"If you find * * * said Pacific Motor Company * * * undertook * * * to deliver * * * the said motor truck, * * * and if you further find that the servant and employee of said Pacific Motor Company was guilty of negligence, * * * etc."

[4] It was proper for the court to refuse to instruct upon the presumption of responsibility arising from the ownership of the truck. The evidence was undisputed that the truck owner had left it in charge of the garage for repairs, and the only issue as to the owner's liability was whether he had expressly engaged the employee of the garage, Kadowaki, as and for his own agent and employee to bring back his truck.

[5] Appellant assigns as error the giving of instruction No. 5, which reads as follows:

"It is a well-settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him, if it is not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice and support the case of his adversary."

This instruction is copied from a quotation of law found in *Bone v. Hayes*, 154 Cal. 759, 99 P. 172, which gives, among other citations, Code of Civil Procedure, § 2061, subdivision 7, as supporting authority, but the language is not approved as an instruction to a jury.

Appellants do not indicate in what way this instruction was injurious to them but simply cite *Estate of Moore*, 180 Cal. 570, 182 P. 285. There it was held that an instruction upon the presumption arising from the willful suppression of evidence, based on Code of Civil Procedure, § 1963, subd. 5, was error, because there was no evidence to indicate that any such suppression had occurred. The instruction here does not intimate the willful suppression of evidence, but refers to the

refusal of a party to produce evidence, if in his power, to overcome the evidence adduced by his adversary. The instruction may be based upon the failure of all of the three groups of defendants to offer testimony in their own behalf, although the instruction was offered by the defendant Murai and not by the plaintiff. What evidence any of these defendants had the power to produce is not apparent from the record. The real issue before the jury, however, was whether either the defendant Murai or Pacific Motor Company was responsible for the negligence of Kadowaki. If the instruction intimates the willful suppression of evidence, it is equally inapplicable to each of these defendants, and for that reason it is not at all probable that its effect was to prejudice the rights of either against the claims of his codefendant. We hold, therefore, that the giving of this instruction was not reversible error, under the provisions of article 6, § 4½, of the state Constitution.

[6] The court did not err in receiving into evidence the city ordinance prohibiting driving upon the sidewalk, even though the ordinance was not pleaded. *Szopieray v. West Berkeley, etc., Co.*, 194 Cal. 106, 227 P. 720. The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

Ex parte ALPINE. (Cr. 1530.)★

District Court of Appeal, Second District,
Division 1, California. Sept. 3, 1927.

Hearing Granted by Supreme Court Sept. 30, 1927.

Criminal law — 576(3) — Without showing district attorney knew appeal had terminated, defendant held not entitled to release because not tried within 60 days after remittitur (Const. art. 1, § 13; Pen. Code, § 1382).

Defendant convicted of murder who had obtained reversal on appeal held not entitled to release on habeas corpus proceeding on the grounds that he had not been retried within 60 days after the remittitur was filed, Const. art. 1, § 13, and Pen. Code, § 1382, being inapplicable where it was not shown that the district attorney had knowledge or notice that the cause had been returned to the superior court.

Houser, J., dissenting.

Application by Harry Alpine for a writ of habeas corpus prayed to be directed to the Sheriff of Los Angeles County to secure the release of petitioner awaiting second trial for murder, on the ground that he had not been brought to trial within the statutory period. Petitioner remanded.

Morris Abraham and Charles I. Rosin, both of Los Angeles, for petitioner.

Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

CONREY, P. J. On petition filed, the writ was issued, to which return has been duly made. It appears that after trial and conviction of the defendant on a charge of murder, he appealed from the judgment, which appeal resulted in a reversal. The remittitur from the District Court of Appeal was filed in the office of the clerk of the superior court on the 26th day of April, 1927. Thereafter, on June 30, 1927, the cause was set down to be tried on August 3, 1927. The defendant objected to the order of June 30, 1927, and moved to dismiss the action on the ground that he had not been brought to trial within 60 days after filing the remittitur, as required by section 1382 of the Penal Code, and that he had been denied a speedy trial as guaranteed to him by the Constitution of the state of California (article 1, § 13). This motion to dismiss was denied upon the ground that said section 1382 has no application to the facts of this case, it appearing by the record that the defendant had been brought to trial within 60 days after the filing of the information.

It is provided by section 1382 as follows:

"The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * *

"2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after * * * filing of the information."

In the earlier cases, under section 1382, Penal Code, it was held that failure to bring a criminal action to trial within 60 days after the filing of a remittitur following upon a successful appeal did not present a case within the terms of said section. *People v. Glesea*, 63 Cal. 345; *People v. Lundin*, 120 Cal. 308, 52 P. 807. On the other hand, in later cases, it seems to have been held that the filing of the remittitur marks the beginning of a new period of 60 days within which a case must be brought to trial, and that section 1382 applies where that limited period has elapsed. *In re Begerow*, 133 Cal. 349, 65 P. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178; *People v. Walker*, 76 Cal. App. 195, 244 P. 94.

Assuming for the purposes of this decision that section 1382 of the Penal Code, and the 60-day rule therein stated, applies to a criminal prosecution after the decision of an appeal which has terminated by the filing of the remittitur in the superior court, it should be observed first that this application has been so made by judicial decision, bringing the stated case within the principle of that section, although literally it is not there. The effect of the clause, "unless good cause to the contrary is shown," should not be ignored.

We may concede that upon a showing of notice to the district attorney, or of actual knowledge by him, that the remittitur has been filed, it becomes his duty to see that the case is brought to trial within the statutory period of 60 days. We may further concede that where a defendant has brought to the attention of the district attorney or of the court the fact of the successful termination of his appeal (a proceeding in which he was the actor), and there has been a neglect or refusal of the prosecution to bring the case to trial, the defendant is entitled to the benefit of the rule that under such circumstances the prosecution should be dismissed. But in the absence of such notice to the district attorney or knowledge on his part that the appeal has been terminated, it would be unreasonable to permit a defendant to take advantage of mere inadvertence and so escape prosecution on a criminal charge. In the case at bar so far as appears, the failure to bring the action before the court to be set for trial until 3 days later than the expiration of 60 days from the filing of the remittitur may have been nothing more than the result of inadvertence in not immediately discovering that the remittitur had been filed.

We think that, there being no direct statutory provision to the contrary, the absence of any showing of knowledge by the district attorney, or notice to him, that the cause has been returned to the superior court should in and of itself be held to constitute good cause for refusal to dismiss the action. Upon this ground we hold that petitioner was not entitled to the dismissal demanded by him.

The prisoner is remanded to custody.

I concur: YORK, J.

I dissent: HOUSER, J.

85 Cal. App. 402

PEOPLE v. LITLE. (Cr. 1505.)★

District Court of Appeal, Second District, Division 2, California. Sept. 13, 1927.

Hearing Denied by Supreme Court Nov. 10, 1927.

1. Criminal law §369(1)—In prosecution for selling narcotics, admitting evidence of sales other than those charged held error (Poison Act).

In prosecution for selling morphine and cocaine, admitting evidence of sales other than those charged in the information held error; there being nothing in the Poison Act (St. 1907, p. 124, as amended) permitting such evidence.

2. Criminal law §1169(11)—Error in prosecution for selling narcotics in admitting evidence of other sales held prejudicial, where evidence of sales charged was not conclusive and prosecuting attorney discussed other sales in argument (Const. art. 6, § 4½).

Error in prosecution for selling narcotics in admitting evidence of other sales than those

charged, where evidence of sales charged in the information was not conclusive, and the jury may have doubted the veracity of the prosecuting witness who was a morphine addict, and the other sales were mentioned several times by the prosecuting attorney in argument, *held* not to come within the terms of Const. art. 6, § 4½, providing that there should be no reversal where error was not prejudicial.

3. Criminal law ⚖️757(3)—Instruction that evidence of informers, narcotic users, should be received with caution, *held* improper, trenching on jury's province.

Instruction that the evidence of narcotic users, when used as informers, should always be received with a large degree of caution and distrust, and that their testimony was of little reliability unless corroborated, *held* improper, since determining the weight of such evidence was for the jury.

4. Criminal law ⚖️757(3)—Instruction that testimony of those employed to cause others to commit offenses must be weighed with greater care *held* improper; weight being for jury.

Instruction that the testimony of those employed to hunt up evidence and to cause others to commit offenses must be weighed with greater care than that of disinterested witnesses *held* improper, since it would trench upon jury's province.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Elmer W. Litle was convicted of illegal sale of narcotics, and he appeals. Reversed.

Frank S. Hutton and W. I. Gilbert, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

CRAIG, J. The defendant was charged by an information containing two counts with the commission of two felonies. In the first count it was alleged that he illegally gave and furnished to one Madge Serber a preparation of cocaine on September 22, 1926, and the second count charged that he illegally sold a preparation of morphine to the same person on September 26, 1926. At the trial he was convicted upon both counts, and appeals from the judgment pronounced by the court, and from its order denying his motion for a new trial.

[1] The prosecution, over the objections of counsel for the defendant, introduced evidence tending to show that the defendant had committed a number of other acts similar to those named in the information. The prosecuting witness, in response to questions of counsel for the people, related that she had purchased cocaine from the defendant upon a number of occasions other than September 22, 1926. To permit this was error. No rule of evidence is more fully recognized than that, upon a trial under an indictment or

information charging the commission of one offense, proof that the defendant has committed another crime is irrelevant and inadmissible. *People v. Avila* (Cal. App.) 218 P. 693, *People v. Smith*, 64 Cal. App. 344, 221 P. 405, *People v. Morales*, 45 Cal. App. 553, 188 P. 58, *People v. Amort*, 60 Cal. App. 29, 212 P. 50, and *People v. Clark*, 28 Cal. App. 670, 153 P. 719, are among the decisions which might be cited to this effect. The general rule was adhered to in *People v. Santagata*, 130 App. Div. 225, 114 N. Y. S. 321, where the charge was unlawful sale of cocaine.

[2] While there are well-defined exceptions to this rule, there is nothing in the nature of the charge of a violation of the Poison Act (St. 1907, p. 124, as amended) which brings it within any of them. Because of this error the judgment must be reversed. Considering the record presented for our review, it cannot be said that the defendant's substantial rights were not prejudiced. He denied having at any time sold drugs to the prosecuting witness. There was no direct evidence corroborating her testimony. The only evidence tending to do so was circumstantial, and not at all conclusive in its character. Two officers testified that they found a marked \$20 bill in possession of the defendant; this, they said, had been given to the prosecuting witness shortly before she went to the defendant's office. These witnesses also testified to having received a bottle of cocaine and a bottle of morphine from her immediately after her return. But taking into account her apparent poor memory and the low order of the prosecuting witness, she having admitted that she had been a morphine addict for many years, from which fact the jury may have doubted her veracity, we cannot conclude that the conviction in the instant case is one where the saving grace of section 4½ of article 6 of the Constitution will warrant an affirmance, in spite of the error previously pointed out.

The prejudice was doubtless exaggerated by the fact that during the argument to the jury the prosecuting attorney several times referred to and discussed the evidence of sales other than those charged in the information.

[3, 4] In view of the fact that the case may be tried again, it is necessary that we pass upon one other alleged error. The defendant requested the court to give the following instruction:

"The evidence of narcotic users, when used as informers in matters relating to their addiction, should always be received with a large degree of caution and distrust. From the nature of their addiction and the business in which such informers are engaged and the associations which such addicts usually seek, they and their testimony are rendered of little reliability unless corroborated.

"The testimony of those employed to hunt up

evidence and to create situations causing or tending to cause others to commit offenses must be weighed with greater care than that given by disinterested witnesses."

No authority is cited requiring that such an instruction be given in any case. It would clearly touch upon the province of the jury, who alone are charged with the duty and are given the right of weighing evidence.

No other point need be mentioned.

The judgment is reversed.

We concur: WORKS, P. J.; THOMPSON, J.

85 Cal. App. 360

SIMON NEWMAN CO. v. WOODS et ux.
(Civ. 3296.)

District Court of Appeal, Third District, California. Sept. 7, 1927.

1. Trial $\hookrightarrow$ 374(2)—Jury's verdict in equity case is advisory only.

Where a case is in equity, the verdict of the jury is merely advisory to the court.

2. Chattel mortgages $\hookrightarrow$ 282—Jury's verdict held merely advisory in proceeding for foreclosing chattel mortgage.

The foreclosure of a chattel mortgage being an equity proceeding, jury's verdict held merely advisory.

3. Appeal and error $\hookrightarrow$ 1014—Trial court's findings in equity case will not be disturbed, where supported by substantial evidence, notwithstanding contrary advisory verdict of jury.

In an equity case the verdict of the jury being merely advisory, the appellate court will not disturb the contrary findings of the trial court, if there is substantial evidence supporting them.

4. Trial $\hookrightarrow$ 374(2)—Equity court cannot arbitrarily set aside jury's verdict.

Notwithstanding that the verdict of a jury in an equity case is advisory merely, the court cannot arbitrarily set it aside.

5. Chattel mortgages $\hookrightarrow$ 289—Contention that court abused discretionary power in setting aside jury's verdict in chattel mortgage foreclosure case held equivalent to statement that evidence did not support findings.

The action of an equity court in disregarding a jury's verdict is not arbitrary, if the findings are substantially supported by the evidence, and hence the appellant's contention in an appeal from a chattel mortgage foreclosure judgment that the court abused its discretion in setting aside the jury's verdict was merely tantamount to a contention that the findings were not supported by the evidence.

6. Appeal and error $\hookrightarrow$ 1009(3)—In equity case trial court determines facts on conflicting evidence.

In an equity case it is the province of the trial court in the exercise of a sound discre-

tion to determine the facts where a conflict in the evidence exists.

7. Evidence $\hookrightarrow$ 589—Trial court was not bound to accept defendant's testimony merely because it was not directly contradicted, but could consider its verity in light of all other evidence.

Trial court, in chattel mortgage foreclosure proceeding, was not bound to accept defendant's testimony as true merely because it was not directly contradicted by other witnesses, but the court had a right, and it was its duty, to examine and consider the verity of the evidence in the light of all the facts and circumstances of the case.

8. Bills and notes $\hookrightarrow$ 104—Chattel mortgages $\hookrightarrow$ 72, 73—Contracts $\hookrightarrow$ 128(1)—Mortgages $\hookrightarrow$ 79, 81—Note or mortgage given on promise to refrain from prosecuting for felony or under threats of arrest or prosecution is void.

A note or mortgage given on a promise to refrain from the prosecution of a person for a felony or under threats of arrest or prosecution would be void, as against public policy.

9. Appeal and error $\hookrightarrow$ 1008(1)—Whether note or chattel mortgage was given on promise to refrain from prosecution or on threat of prosecution held question for trial court.

In an action to foreclose a chattel mortgage, whether a note and chattel mortgage was given on a promise to refrain from the prosecution of a person for a felony or under threats of arrest or prosecution held a question for the trial court to determine.

10. Chattel mortgages $\hookrightarrow$ 278—By introducing note and chattel mortgage in mortgage foreclosure action, plaintiff made out prima facie case (Code Civ. Proc. $\S$ 1963, subd. 39).

By the introduction in evidence of a note and chattel mortgage, plaintiff made out prima facie case for foreclosure, in view of Code Civ. Proc. $\S$ 1963, subd. 39, to the effect that a good and sufficient consideration for a written contract will be presumed.

11. Chattel mortgages $\hookrightarrow$ 278—Burden of overcoming presumption of consideration for chattel mortgage held on defendant (Code Civ. Proc. $\S$ 1963, subd. 39; Civ. Code, $\S$ 1615).

Under Civ. Code, $\S$ 1615, after the introduction in evidence of a note and chattel mortgage, the burden of overcoming the presumption of consideration which was thereby raised under Code Civ. Proc. $\S$ 1963, subd. 39, held on defendant.

12. Appeal and error $\hookrightarrow$ 1008(1)—Where plaintiff raised presumption of consideration by introducing note and chattel mortgage, evidence by defendants to show no consideration merely raised fact issue for trial court (Code Civ. Proc. $\S\S$ 1957, 1963, 2061, subd. 21).

In view of Code Civ. Proc. $\S\S$ 1957, 1963, 2061, subd. 2, where the plaintiff made a prima facie case and raised a presumption of consideration by introducing note and chattel mortgage, evidence by the defendants to show that there had been no valid consideration given merely raised an issue of fact for the trial court to determine.

13. Evidence ⚡87—Fact raised by presumption remains one for court or jury until presumption is dispelled.

Where the introduction of evidence raises a presumption, the fact remains one to be determined by the court or jury until the presumption has been clearly dispelled.

14. Bills and notes ⚡493(4)—Chattel mortgages ⚡32—Where evidence concerning consideration for note and chattel mortgage was capable of two interpretations, presumption of consideration held not dispelled.

Where evidence concerning consideration for a note and chattel mortgage was vague and uncertain, and capable of two interpretations, *held*, that it was not sufficiently definite and conclusive to dispel the presumption that valid consideration had been given for the note and mortgage.

15. Appeal and error ⚡1068(5)—Appellants cannot complain of refusal to charge, where jury's verdict favored them, notwithstanding verdict was disregarded by equity court.

Where the verdict of the jury favored appellants, though it was subsequently disregarded by the court and a contrary judgment entered, the appellants cannot complain of the action of the trial court in refusing an instruction.

16. Bills and notes ⚡520—Chattel mortgages ⚡79—Contracts ⚡141(3)—Trial court's findings that note and chattel mortgage were not given because of threats, or to prevent prosecution for felony, *held* supported by evidence.

In action to foreclose chattel mortgage, trial court's finding that the note and mortgage were given for valid consideration, and not because of threats to prosecute or arrest mortgagor's brother, or to prevent his prosecution for a felony, *held* supported by the evidence.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action to foreclose a chattel mortgage by the Simon Newman Company against Frank P. Woods and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Thos. M. Anaya, of Modesto, for appellants.

C. W. Croop, of Merced, and Goldman & Altman, of San Francisco, for respondent.

GLENN, Justice pro tem. This is an action brought to foreclose a chattel mortgage dated October 31, 1923, executed by defendants to plaintiff, and covering certain cattle, horses, and farming implements. The chattel mortgage was given to secure the payment of a promissory note of even date therewith, for the sum of \$1,900, also executed by defendants. The answer of defendants admits the execution of the note and mortgage, as well as the fact that nothing has been paid thereon, either by way of principal or interest, but denies that there is due or owing or

unpaid to plaintiff thereon the said sum of \$1,900, or any other sum. This denial is based upon the alleged facts, pleaded as a special defense and also by way of cross-complaint, the substance of which is to the effect that one Tom Woods, brother of defendant Frank P. Woods, had been falsely accused by the plaintiff and its agents and employees of the crime of embezzlement, and that the note and mortgage were executed by defendants by reason of such threatened arrest and prosecution and on the understanding that he would not be so prosecuted, and that the whole transaction was therefore void as contrary to public policy.

Two questions were presented to the jury, called at the request of defendants, as follows: (1) Was there any consideration received by the defendants, or either of them, for the note and mortgage executed by defendants to plaintiff? (2) Was the consent of defendants, or either of them, to the execution of the note and mortgage to plaintiff obtained by threats to arrest, imprison, and prosecute Tom Woods, brother of Frank P. Woods, for embezzling or stealing goods belonging to the Simon Newman Company? The answer of the jury to each question was favorable to defendants; the first being answered in the negative and the second in the affirmative.

The court refused to adopt the verdict of the jury, but made its findings in favor of the plaintiff on all issues. Appellants present their contention as follows:

"There is just one issue in this case. Was there an abuse of trial court's conceded discretionary power of setting aside the verdict of the jury—this being a case in equity? We answer in the affirmative and in support thereof quote the following: In chronological order, we shall present the facts and testimony recorded at the trial which we deem sufficient to establish one thing, namely, that said note and mortgage were executed under extortion, duress, and undue influence and that the entire transaction is against public policy, and therefore the court did abuse its discretionary power in rejecting the verdict."

[1, 2] The rule, as conceded by appellants, is well settled that, where the case is in equity, the verdict of the jury is merely advisory to the court. *Sweetzer v. Dobbins*, 65 Cal. 529, 4 P. 540; *Sullivan v. Royer*, 72 Cal. 246, 13 P. 655, 1 Am. St. Rep. 51. The foreclosure of a mortgage is a proceeding in equity, and therefore the verdict of the jury was merely advisory. *Downing v. Le Du*, 82 Cal. 471, 23 P. 202; *Van Valkenburg v. Oldham*, 12 Cal. App. 572, 108 P. 42; *Coghlin v. Quartararo*, 15 Cal. App. 662, 115 P. 664.

[3-5] The verdict of the jury being advisory, this court will not disturb the findings of the trial court, if there is substantial evidence supporting the same. It is true,

as stated by appellants, that the court cannot *arbitrarily* set aside the verdict of the jury; but the action of the court in disregarding the verdict cannot be characterized as "arbitrary," if its findings are substantially supported by the evidence. In its last analysis, therefore, the contention of appellants to the effect that the court abused its discretionary power in setting aside the verdict of the jury is merely tantamount to a statement that the findings are not supported by the evidence.

The main contention is that the note and mortgage were given as a result of threats of prosecution against Tom Woods, and we shall take up this proposition first, discussing later the subject of want of consideration, incidentally adverted to in appellants' closing brief.

The assertion that the trial court abused its discretionary power in disregarding the verdict of the jury is attempted to be substantiated by a reference to various parts of the testimony of witnesses called in defendants' behalf, but the testimony of witnesses called on the other side, contradicting and conflicting with that offered by the defense, is but slightly referred to.

[6] It is the province of the trial court, in the exercise of a sound discretion, to determine the facts, where such conflict exists; hence we shall give in substance and effect an outline of some of the testimony which, doubtless, influenced the court in the conclusion it reached, treating them as established facts in the case, as we must in view of the findings being favorable to plaintiff.

The plaintiff conducted a mercantile business, and Tom Woods, brother of defendant Frank P. Woods, was, on the 31st day of October, 1923 (the date of the execution of the note and mortgage), and for approximately four years prior thereto had been, a clerk in one of the departments thereof. R. E. La Posea and his wife were employed by said plaintiff to conduct an investigation as to the running of the business of said firm and to "test" the honesty of the various employees thereof. With this in view, certain purchases were made by them from Tom Woods, in payment for which they had tendered him certain marked money. Although a cash register had been provided by the firm on which he was to "ring up" sales so made, he had not done so, but had placed the money in his pocket. When confronted the next day with these facts, he admitted he had taken the money tendered in payment for the goods and had been so doing for a period of several years. The marked money was voluntarily returned by him to the firm, and a written confession was freely signed by him to the effect that he had stolen from the firm at the rate of \$4 per day for 600 days, making a total of \$2,400. He admitted, at first, that the amount taken was \$10 per day, and then stated it was \$6 per day, but

later said it would be impossible to raise the full amount he had taken, so, at his suggestion, the amount was lowered to \$4 per day. After the confession had been signed and witnessed, Tom Woods, accompanied by Mr. and Mrs. La Posea, went to the former's home, where he gathered up a quantity of merchandise which had been taken from the plaintiff corporation. This was likewise returned to the owner. After the confession was signed, Tom Woods stated that he did not desire to tell his wife about the matter, but upon being urged to do so he stated, "Well, I think I had better, because she has money, she has some diamonds, and I am sure that we can realize money on and pay this up," and, at his suggestion, his wife was sent for. When Mrs. Woods arrived, she was informed that her husband had been embezzling from the plaintiff. She stated that she thought she would be able to straighten the matter up, but, when her husband stated that she had her diamonds with which to make restitution, she said she did not think she could raise \$2,400 on them, and then said:

"In a little place like this, if I start to ask about my diamonds, I don't know, they will certainly know something is wrong; I have no one to go to get this money."

Mrs. Woods then asked Mrs. La Posea if the latter knew of any one to whom she could take the diamonds, and was informed that, while she (Mrs. La Posea) knew of no one in Newman, she did know a business man in Modesto. After some conversation between these parties, the diamonds were given by Mrs. Woods to Mrs. La Posea to be taken to Modesto for appraisal. An appointment was then made for Mr. and Mrs. Tom Woods to go to Modesto on the following Sunday—the conversation above referred to having taken place on Friday—to ascertain the value of the diamonds and what amount they might be able to realize thereon. Although neither Mr. nor Mrs. La Posea had met the defendant Frank P. Woods, nor mentioned his name in the conversation on Friday, yet when Tom Woods and his wife called at the hotel in Modesto, pursuant to the previous understanding, they were accompanied by said defendant. When the parties met in Modesto, they were informed by Mrs. La Posea that the diamonds were worth \$750 for a loan, and for a sale about \$850. The jewelry was then returned to Mrs. Tom Woods. Frank P. Woods then spoke up and said:

"I am not going to have Tom in the store; it is not a man's business."

He also said:

"I am going to take him on the ranch; that is where he belongs. * * * I am going to settle all this trouble with a chattel mortgage on my stock."

Mrs. La Posea attempted to dissuade said defendant from mortgaging his stock. Neither Mr. La Posea nor his wife brought up the subject of Frank P. Woods's executing a note and mortgage to make good for the brother, nor made any threats of any kind; likewise nothing was said by either of those parties to the effect that, if the indebtedness due to the plaintiff was paid, Tom Woods would not be arrested or prosecuted. On the following Monday defendant Frank P. Woods called upon E. J. Morehead, manager of a branch bank at Gustine, and asked the latter for a loan of \$1,900, and, in reply to a question from Mr. Morehead as to what use he desired the loan for, defendant replied that it was "to help his brother out of difficulties that he was having with the Simon Newman Company." He was counseled by Mr. Morehead to the effect that it was an unwise undertaking, but the defendant stated that "he had been helping his family for a good many years, and that he supposed he had it to do again this time." He was told that the matter of the loan would be submitted on Tuesday to the finance board of the bank. On the following Wednesday the said defendant again called on Mr. Morehead, for the purpose of ascertaining if the loan had been allowed, and was informed that it had not been allowed. Defendant Frank P. Woods then called upon C. P. Price, office manager of plaintiff. The visit was unsolicited, so far as the latter gentleman was concerned. Defendant inquired as to the probability of securing a loan from Mr. Wagenheim, general manager of plaintiff, and was informed by Mr. Price that the matter would be taken up with the general manager. It was understood that Mrs. Tom Woods was to come to the office of the plaintiff to ascertain for defendant Frank P. Woods the conclusion reached by Mr. Wagenheim. Upon calling at the office she was informed that the plaintiff would accept a mortgage for \$1,900 and take Frank P. Woods' note to arrange the loan. In the afternoon of Wednesday, October 31st, Frank P. Woods appeared at the office, and the note and chattel were prepared and signed by him, and a notary public was called in, before whom the mortgage was acknowledged. No threats were made, either by Mr. Price, or in his presence, to either of the defendants, to the effect that, unless they signed the note and mortgage, Tom Woods would be arrested and prosecuted for embezzlement, by the Simon Newman Company.

After the defendant Frank P. Woods had executed the note and mortgage, he was told to have his wife call, for the purpose of executing the same. On the Saturday following, defendant Mrs. Woods called and signed the note and mortgage, acknowledging the mortgage before a notary.

Without detailing the testimony offered on behalf of defendant, it may be said, general-

ly, that Tom Woods denied his guilt; claimed that the confession was secured by means of threats made to him; that his home was ransacked by Mr. and Mrs. La Posea, but that only articles belonging to him, and not to the firm, were found. Frank P. Woods testified that, while he had gone to Modesto at the request of his brother, he was told while there that unless the money was put up Tom would be prosecuted; that Mrs. Woods had asked the detectives (Mr. and Mrs. La Posea) if the money was put up if they would prosecute Tom, and that Mr. La Posea shouted out, "No." He testified also, in substance, that Mr. Morehead at the bank had told him that he was wanted at the Simon Newman store, and that he had no sooner arrived when Mr. Price was there to meet him, who told him that his brother, Tom, had stolen goods and money amounting to \$2,400, and that in reply he had said to Mr. Price that, if that would save him from being prosecuted, he would sign a mortgage, and Price replied, "That is all right; that they would take it up." He further testified that at the time he had signed the mortgage Mr. Price asked him if he knew what he was signing the mortgage for, and he replied, "Yes, I was signing it to keep Tom from being prosecuted;" and he (Price) said, "It was right."

Testimony was also given on behalf of defendants as to certain conversations had between them at their home during the interval between the time the husband signed the note and mortgage and the time Mrs. Woods signed the same, to the effect that Frank P. Woods had informed his wife that, unless the note and mortgage were given, his brother would be prosecuted. No mention was made by Mrs. Woods of these purported conversations with her husband, either to the notary public at the time she acknowledged the mortgage, or to any person connected with, or in the employ of, the plaintiff corporation. While this line of testimony went in under objection, the findings being in favor of the plaintiff, the question as to the correctness of the ruling of the trial court thereon has not been presented on appeal, and no discussion thereof is deemed necessary.

[7] The trial court was not bound to accept as true this part of the testimony of defendants, merely for the reason that it was not directly contradicted by other witnesses; but the court had the right, and it was its duty, to examine and consider and determine its verity in the light of all the facts and circumstances in the case.

[8, 9] It is conceded that a note or mortgage given on promise to refrain from the prosecution of a person for a felony, or under threats of arrest or prosecution, would be void as against public policy; but whether or not the note and mortgage were so given was a question presented to the trial court

for determination. The evidence on the subject was highly conflicting, and the court resolved the conflict in favor of the plaintiff. There is substantial evidence to support its findings in this regard, and hence it is not the province of this court to disturb the same.

The question of whether the findings of the court with reference to the consideration for the note and mortgage finds support in the evidence remains to be considered. In this connection, the court found that the note and mortgage were executed in order to liquidate the obligation of Tom Woods to plaintiff, and further found that there was a good and valuable consideration for the execution of said documents, to wit, the forbearance on the part of plaintiff to sue Tom Woods upon his indebtedness to plaintiff.

Plaintiff offered in evidence the note and mortgage, the execution of which were admitted, together with proof that nothing had been paid thereon, either for principal or interest, and rested.

The defense put in their case along the lines we have before stated, for the purpose of showing that the note and mortgage were given as a result of threats of prosecution directed towards Tom Woods and on the understanding that such threats would not be carried out. There was testimony by the defendants that they had received no consideration for the execution of note and mortgage.

The testimony for the witnesses for the plaintiff in rebuttal was along the lines already indicated, denying the threats and giving a different version of the transaction and of the various conversations attributed by the defense to them.

[10, 11] A good and sufficient consideration for a written contract will be presumed. Section 1963, subd. 39, Code Civ. Proc. Hence, by the introduction in evidence of the note and mortgage, plaintiff made out a prima facie case. Section 1615 of the Civil Code provides:

"The burden of showing the want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it."

The burden was therefore cast upon the defense of overcoming the presumption of consideration.

[12] Under this state of the case, the testimony offered on the part of the defense merely raised an issue of fact which was for the tribunal trying the cause to determine. Sections 1957, 1963, 2061, subd. 2, Code Civ. Proc.; *Mar Shee v. Maryland Assur. Corp.*, 190 Cal. 1, 210 P. 269; *Keating v. Morrissey*, 6 Cal. App. 163, 91 P. 677.

[13] The fact in dispute raised by the presumption still remains one to be determined by the court or jury trying the cause, until the presumption is dispelled. *Mar Shee v. Maryland Assur. Corp.*, supra. Appellants'

position seems to be that it was established or proved as a fact in the case by a witness called on the part of the plaintiff itself, that there was no valid consideration, and in this connection they rely upon an answer on cross-examination given by the witness Price, called in rebuttal by plaintiff. As some matters explanatory of the answer of the witness so relied upon do not appear in appellants' brief, we quote from the record:

"Q. Well, will you state to the jury, Mr. Price, what was the occasion by you, or the Simon Newman Company, of having this mortgage \$1,900 and having \$500 received from Mrs. Tom Woods?

"Mr. Goldman: I think that is about seven times that we have stipulated as to what consideration we claim was given, and we don't claim any other consideration.

"Mr. Anaya: He may have a new one.

"Mr. Goldman: We don't claim any other consideration, so why waste time on it.

"The Court: Well, you can state whether or not there was a consideration.

"The witness: May I ask your honor just what is meant by 'consideration'?

"Mr. Goldman: We will object to the question as calling for a conclusion.

"The Court: The consideration for the \$1,900 note. The consideration moving to the Simon Newman Company. A. What is meant by consideration?

"The Court: Well, that is the issue in this case; what the court has to decide and what the jury has to decide; but the consideration for a note is usually money received by a person, or it might be property, or it might be anything.

"Mr. Anaya: Provided it is a legal, valid consideration.

"The Court: Well, he asked him if he knew of any other consideration; do you know of any other thing they received? A. I don't know of anything else."

Concerning the above, appellants state:

"Mr. Price, as manager of the plaintiff corporation, admits he knew of no consideration except that mentioned by the defendants, namely, to save Tom Woods' arrest and compound a felony."

The testimony relied upon is not susceptible of such an interpretation, as the witness had not referred to any fact or circumstance from which such an inference even might be drawn; in fact, his testimony, elsewhere given, was to the opposite effect. The answer of the witness, "I don't know of anything else," was in response to the question:

"Well he asked him if he knew of any other consideration; do you know of any other consideration they received?"

[14] The first sentence appears, by the use of the pronoun "he," to have reference to Mr. Goldman, counsel for plaintiff; the second sentence, which in fact composed the question, was addressed to the witness; but an analysis of the preceding discussion between court and counsel leads to the conclusion that the remark of the court was addressed

to Mr. Anaya, counsel for defendants, the pronoun "he" being either a typographical error or having been used inadvertently and the question being framed to meet a suggestion made by him. As the witness was under cross-examination by Mr. Anaya, and as Mr. Goldman was asking no questions, it is apparent that the remark of the court did not refer to the latter. While the initial question asked by Mr. Anaya did not refer to, or mention directly, the subject of "consideration," seemingly it was so understood by Mr. Goldman, for, immediately following, a remark was interpolated by him to the effect that they had several times stipulated as to what consideration they claimed was given, and they did not claim *any other consideration*, to which Mr. Anaya replied: "He (the witness) may have a *new one*." This remark of Mr. Anaya, considered in connection with what immediately preceded it, carried the suggestion that the latter desired the witness to state the consideration *other than the one referred to by Mr. Goldman*. The reply of the witness is responsive to the question asked and seems to indicate that he had in mind *some* consideration, but knew of nothing "else." The form of the question presupposed the prior mention of a specific consideration, and he was asked, in fact, to state the consideration "other" than that previously mentioned; but as no specific consideration had been previously mentioned, and as the witness was not further interrogated on the subject, the meaning of his answer is left to conjecture. It may be well here to note that the record, notwithstanding the statement of Mr. Goldman to the contrary, as noted above, does not disclose any stipulation with reference to consideration, and neither counsel has so claimed. Under these facts we are left in the dark as to the specific consideration intended to be referred to by the witness, or by the court or counsel. The subject of forbearance of suit on the indebtedness of Tom Woods had not been mentioned to the witness, and it is doubtful if he had knowledge of the fact that such a detriment, suffered by plaintiff, in consideration of the execution of the note and mortgage by defendants, would furnish a sufficient consideration to support the same. The answer of the witness, as we have analyzed it, appears to be favorable to the respondent, but even if considered otherwise, it falls far short of establishing the fact of want of consideration as against the presumption of a valid consideration, for the rule is well settled that a presumption is not dispelled and does not disappear from the case by testimony of such vague and uncertain meaning.

In the case of *Mar Shee v. Maryland Assurance Corp.*, supra, the court, speaking to the point as to when a fact is "proved" contrary to a presumption, says:

"From the foregoing we deduce that a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence, and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case."

The case of *Keating v. Morrissey*, supra, is analogous to the instant case, and many of the questions involved herein will be found fully discussed in that case.

[15] Appellants complain of the action of the trial court in refusing an instruction proposed by them; but as the verdict of the jury was favorable to them, although subsequently disregarded by the court, no useful purpose would be subserved by a discussion of the matter.

[16] The findings of the court are amply sustained by facts and circumstances of the case, and the judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

85 Cal. App. 413

PEOPLE v. TITUS. (Cr. 1491.)

District Court of Appeal, Second District, Division 2, California. Sept. 13, 1927.

1. Criminal law § 207(4)—Justice of peace sitting as magistrate in preliminary examination of defendant charged with selling liquor held not to have jurisdiction to convict for possession on plea of guilty (Pen. Code, § 1426).

A justice of the peace sitting as a committing magistrate in a preliminary examination of defendant charged with selling intoxicating liquor held not to have jurisdiction to convict for the possession of intoxicating liquor on defendant's plea of guilty without the filing of a formal complaint as required by Pen. Code, § 1426.

2. Criminal law § 895—Defendant may not waive formalities which are the essence of valid judgment of conviction.

While a defendant in a criminal case may waive formalities established for his protection, he cannot waive any which are of the essence of a valid judgment of conviction.

3. Criminal law § 105—Where justice of peace exceeded jurisdiction in convicting defendant charged with selling liquor on plea of guilty of possession, conviction held void notwithstanding defendant offered plea.

Where justice of the peace exceeded his jurisdiction in convicting a defendant charged with selling intoxicating liquor on his plea of guilty of the possession of intoxicating liquor, conviction held void, notwithstanding that the defendant had initiated the void proceeding by offering to plead guilty to the offense of possession.

4. Judgment $\hookrightarrow$ 476—Conviction of possessing intoxicating liquor by de facto city recorder held not subject to collateral attack.

Where defendant was convicted of possessing intoxicating liquor by a de facto city recorder, such conviction was not subject to collateral attack in a subsequent prosecution for possessing intoxicating liquor for the purpose of showing prior conviction.

5. Judges $\hookrightarrow$ 6—City clerk held de facto recorder where, though ordinance providing city clerk should be recorder became effective after election, his authority was generally accepted without inquiry (Deering's Gen. Laws 1915, Act 2348, § 751).

City clerk held de facto city recorder, where he exercised the duties of the office under such circumstances that people were induced, without inquiry, to submit to his action, notwithstanding ordinance passed under Deering's Gen. Laws 1915, Act 2348, § 751, providing that the office of city clerk and city recorder should be consolidated, had not become effective until after his election to the office of city clerk.

6. Criminal law $\hookrightarrow$ 1202(4)—Where defendant, convicted of possessing intoxicating liquor, refused to plead as to prior conviction, court was justified in entering not guilty plea.

Where defendant, convicted of the possession of intoxicating liquor for beverage purposes, was asked to plead as to prior convictions and refused, the court was justified in entering a plea of not guilty, provided the plea was not called for too late.

7. Criminal law $\hookrightarrow$ 1202(7)—Defendant having opportunity to plead to prior convictions, failure to ask for plea when he pleaded to information, if error, held harmless.

Where defendant had ample opportunity to plead as to prior convictions of possession of intoxicating liquor and had offered a plea of guilty of possession with one prior conviction only and was asked to enter pleas during time jury was being selected, failure to ask for his plea as to prior convictions when he pleaded to the information, if error, held harmless.

8. Criminal law $\hookrightarrow$ 1130(5) — Assignments stated without argument or authority will not be considered.

Assignments stated without authority or argument to support them will not be considered by the appellate court.

9. Intoxicating liquors $\hookrightarrow$ 236(6½)—Evidence held sufficient to support conviction for possessing intoxicating liquor.

Evidence held sufficient to support defendant's conviction of having in his possession intoxicating liquor for beverage purposes.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Frank Titus was convicted of having in his possession intoxicating liquor for beverage purposes, and he appeals. Reversed, with directions.

Scott McReynolds, of Ventura, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

THOMPSON, J. The defendant was charged by information with the offense of having in his possession intoxicating liquor containing alcohol in excess of one-half of 1 per cent. by volume, for beverage purposes. The information further charged a prior conviction of the offense of possession on February 19, 1926, and a second prior conviction of the same offense on October 30, 1926. The jury returned a verdict of guilty of possession and a verdict that defendant had been previously convicted October 30, 1926, and also a verdict that he had previously been convicted on February 19, 1926, and the defendant was by judgment pronounced upon the verdicts ordered imprisoned in the county jail for two years and to pay a fine of \$2,000. The defendant appeals from the judgment.

[1] In support of this appeal the appellant first attacks the conviction on February 19, 1926. It appears from the record that on February 18, 1926, a complaint was filed charging the defendant with the sale of intoxicating liquor. On the following day the defendant was brought before the justice of the peace as a magistrate, for arraignment, and, after the complaint was read to him, the defendant offered to plead guilty to the offense of possession, which offer was accepted. The docket contains this entry:

"Said defendant offers to plead guilty to the offense of possession of intoxicating liquor for beverage purposes, and the court taking cognizance of the fact that this is a lesser offense and is a part of and is contained in the offense of sale of intoxicating liquor for beverage purposes, accepts the plea as offered, and there appearing no sufficient cause why judgment should not be pronounced, it is by the court ordered and adjudged. * * *

The appellant maintains that the judgment of conviction is void on its face. The defendant was not charged with possession, but with the sale of intoxicating liquors, an offense of which the justice court did not have jurisdiction, except for the purpose of a preliminary hearing. In *re Dal Porte*, 198 Cal. 216, 244 P. 355; *People v. Swain*, 5 Cal. App. 421, 90 P. 720.

[2, 3] Assuming, without deciding, that the offense of possession is a lesser offense necessarily included in the offense of sale of intoxicating liquor, yet the judgment is void on its face. It has been specifically determined in this state that the justice of the peace, sitting as a committing magistrate in a preliminary examination involving grand larceny, has no jurisdiction without the filing of a formal complaint as required by section 1426 of the Penal Code to try the defendant on a charge of petit larceny—an of-

fense cognizable by him when jurisdiction is properly acquired. *People v. Swain*, supra. See, also, *Ex parte Williams*, 183 Cal. 11, 190 P. 163. But while the defendant may waive formalities established for his protection, he cannot waive that which "is of the essence of valid judgment." *Bishop*, New Crim. Proc. § 124. And although it ill becomes the defendant to initiate the void proceeding, nevertheless we are under the compulsion of declaring that there was no valid judgment of conviction of the first offense.

A different situation is presented by appellant's attack upon the second conviction. The city recorder of the city of San Buenaventura was elected as city clerk on the second Monday in April, 1923. An ordinance of the city was passed to become effective on the third Monday in April, 1923, containing the following provision:

"Section 1. The following officers of said city are hereby united and consolidated as follows: (b) The city clerk shall be ex-officio recorder and assessor of said city."

[4, 5] The act setting forth a charter for cities of the fifth class (Gen. Laws of 1915, p. 1099), in section 751, provides that the government of the city shall be vested in certain officers including a recorder and then states:

"* * * Provided, that the board of trustees, may in its discretion, by an ordinance adopted, published and recorded as required for general ordinance, at least thirty days before a general city election, at which city officers are to be elected, unite and consolidate certain offices, by declaring: * * * 2. The city clerk elected shall be ex-officio recorder and assessor."

The appellant's contention is that, inasmuch as the ordinance did not become effective until after the election, there was no city recorder. The appellant was convicted by the recorder, so serving, on October 30, 1926, of the offense of possession. As we view the problem here presented it is not necessary for us to determine whether, as respondent contends, the language quoted from the General Laws be directory or mandatory, or whether during the interim between the going into effect of the ordinance and the next general city election thereafter the city clerk legally became the recorder. For the purposes of the present attack it is all-sufficient if he were a de facto recorder, for if he were, then the proceeding is not void on its face, and is not subject to collateral attack. *Merced Bank v. Rosenthal*, 99 Cal. 39, 31 P. 849, 33 P. 732; *Carpentier v. City of Oakland*, 30 Cal. 439, 446. In the leading American case upon the subject, *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, cited with approval in *Merced Bank v. Rosenthal*, supra, after an exhaustive review of the English and American authorities, it is declared that:

"An officer de facto is one whose acts, though not those of a lawful officer, the law, upon prin-

ciples of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised, first, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be."

It is apparent that the officer here acted under the ordinance adopted by the board of trustees, whether that action was legal or not and the circumstances were sufficient to induce people without inquiry to submit to his action. Indicative of the general acquiescence to the assumption of office is the fact that the defendant here raised no objection at the time and took no appeal therefrom. The conviction therefore in this action is not open to attack.

[6, 7] The next point assigned by appellant is that at the time he pleaded to the information he was not asked how he pleaded to the charges of prior convictions. On January 11, 1926, he was arraigned on the information and at that time asked that January 14, 1926, be fixed as the time for his plea, and personally endeavored to secure the consent of the trial judge at that time to accept a plea of guilty of possession with one prior conviction only. The court declined to bargain with the defendant, but on the 14th, after the defendant had pleaded not guilty, neglected to ask him to plead to the charges of prior convictions. He was not asked how he pleaded to these charges until during the time the jury was being selected, at which time he stood mute and the court entered a plea of not guilty to the charges of prior conviction. The defendant maintains that he was asked to plead too late. The court was manifestly correct in entering the plea of not guilty when the defendant refused to plead, provided the plea was not called for too late. *People v. Coleman*, 145 Cal. 609, 79 P. 283; *People v. Kirk*, 32 Cal. App. 517, 163 P. 696. Again, the appellant fails to point out wherein he was prejudiced. Had he desired to enter a plea of guilty to the charges of prior conviction he could have prevented the jury from being informed thereof. He had the opportunity to so plead and to have the error, if one existed, corrected, but he did not take advantage of the occasion to cure the wrong, if indeed it were wrong. Had he pleaded not guilty in the first instance the testimony would have gone to the jury, just as it did here. We fail to discover where the defendant's rights were prejudiced.

[8] Four additional assignments are very abruptly stated by appellant without argument or authority to support them, and for that reason we decline to assume the burden of further research. Counsel cannot, with nonchalant air, declare without argument that error was committed and by so doing transfer the labor of research from his own

shoulders to the appellate tribunal. People v. Zarate, 54 Cal. App. 372, 201 P. 955.

[9] Appellant also asserts that the evidence is insufficient to support the verdict. It would serve no useful purpose to recite the testimony at any length, but we have scrutinized the transcript, and, while there was testimony by a defense witness that he had put the liquor into defendant's car, having borrowed it in the evening according to his statement, yet there is testimony which, if believed by the jury, sustains the verdict. The car of the defense witness was present and he was arrested as he started away in it. The liquor found in the defendant's car almost immediately after it was moved by him was in a hidden contrivance built into the car for the evident purpose of carrying pint bottles of liquor. There is no suggestion that the defense witness constructed the device. It was testified by one of the officers that the defendant stated that he was ready to plead guilty, and by another that he asked them not to tip over things in the house, that they had enough to convict him already. The testimony is sufficient to support the verdict.

The judgment is reversed, with directions to the trial court to sentence the defendant for the offense charged, with one prior conviction.

We concur: WORKS, P. J.; CRAIG, J.

LIERLY et al. v. McEWEN. (Civ. 5217.)★

District Court of Appeal, First District, Division 1, California. Sept. 6, 1927.

Rehearing Granted Oct. 6, 1927.

Mines and minerals §79(7)—In action for oil royalties, claimant awarded more than claim could not complain though not party to agreement constituting basis for award.

In an action to determine title to certain oil royalties, a claimant who was awarded more than his claim, not being injured, could not complain, although he was not party to an agreement that the royalties should be held in trust by a certain company, on the basis of which agreement the court determined the award.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action to determine title to certain oil royalties by W. S. Lierly and others against Daniel H. McEwen and others, substituted for Security Trust Company. From the judgment, defendants appeal. Affirmed.

See, also, 254 P. 587.

James Donovan, of Los Angeles, and John L. McNab, and Byron Coleman, both of San Francisco, for appellants.

W. W. Kaye, of Los Angeles, and Alfred Siemon, of Bakersfield, for respondents.

TYLER, P. J. This action was originally brought by plaintiffs against Security Trust Company of Bakersfield as defendant for the purpose of having determined the proportionate amount of royalties that certain locators of oil lands were entitled to under a leasing agreement with the Associated Oil Company, which royalties were held by the defendant banking company under a certain trust agreement. The company later came into court under motion, according to the provisions of the Code of Civil Procedure, and deposited the sum of \$1,704.32, the amount held by it, and procured an order bringing into the action certain defendants who thereafter filed pleadings alleging the proportion of the amount they were entitled to.

The facts are somewhat involved. It appears from the record that on January 1, 1910, W. S. Lierly, plaintiff herein, made a number of oil locations on government lands under the then existing system and named B. F. Wilson as one of the locators. Shortly thereafter the Associated Oil Company leased certain of these locations, including those in which Wilson's name was used as a locator. As soon as Wilson ascertained the fact that his name had been used as one of the locators, he communicated the fact to his partner, D. H. McEwen, defendant and appellant herein, advising him that the locations made in his name were for the joint benefit of both, by reason of their partnership. Later the government sought to disturb the locations so made because of the withdrawal of the particular lands from location by President Taft in the fall of 1909. Nothing was determined under these controversies at this time. On February 25, 1920, Congress passed what is known as the "Leasing Act" (30 USCA §§ 181-263; U. S. Comp. St. §§ 4640¼-4640¼-ss). On August 10, 1920, the Associated Oil Company entered into an agreement with certain locators, including McEwen, from whom leases were taken covering the locations in which B. F. Wilson was interested. This agreement had for its object the development of the lands under the Leasing Act, in the event that it should be determined that the locators were entitled to a lease. The Associated Oil Company succeeded in procuring a lease from the government upon the properties on condition that it effected a settlement among the various claimants of their conflicting interests. This the company succeeded in doing, and on April 2d all of the parties to this action, or their predecessors in interest, signed an agreement with the Associated Oil Company, whereby they agreed upon the proportion that each claimant should have under their various claims. The substance of this contract is: That the government of the United States leased to the Associated Oil Company the southeast quarter of section 26, township 30 south, range 24 east, on condition that such company would

clear up any adverse claims against the government upon this quarter section, and upon the further consideration that three other quarter sections which were put into the naval reserve should be surrendered to the government by all the locators or their successors in interest, and that in consideration of the surrender of these three quarter sections, the government leased the quarter section above described to the oil company. This section is outside the naval reserve. It then became incumbent upon those who had claimed some interest, either as locators or subsequent transferees of the three quarter sections, to adjust their respective rights with the Associated Oil Company, which was done under the contract of April 2, 1921. By the terms of this contract the government was to receive 20 per cent. royalty and other interests were to receive 5 per cent., leaving 75 per cent. of the net production to be divided between the oil company and the various locators on the three quarter sections. It is claimed by appellant McEwen that as there were twenty-four locators on these disputed three quarter sections and each surrendered to the government the same quantity that each other person surrendered, they therefore surrendered $\frac{1}{8}$ of each location considered as a separate surrender of each quarter section, or considering the three quarter sections as a unit, each surrendered $\frac{1}{24}$ of the three. That this is the respective relation that each locator stood to the other, $\frac{1}{8}$ of one, or $\frac{1}{24}$ of the three considered as a unit, and the royalty which the Associated Oil Company agreed to pay them was one-eighth of 75 per cent. of the net production. One-eighth of the royalty divided by $\frac{1}{24}$ gives each person $\frac{1}{32}$ part of the royalty of 75 per cent. and the agreement specifically provided that this was the interest that each of the locators was entitled to thereunder. This agreement was signed by both Wilson and McEwen.

Prior to the entering into thereof, Wilson attempted to repudiate and deny that McEwen had any interest in the locations or the contract originally entered into with the Associated Oil Company. McEwen thereupon instituted suit against Wilson, joining the oil company, the Security Trust Company and one William C. Davis; the latter having acquired from Wilson some interest in the property. The issues were joined, and prior to the case going to trial a certain stipulation was entered into by all the parties to said action to the effect that upon its final determination there would be paid to the person or persons to whom said royalty should be awarded, in such proportions as the court should determine. On January 10, 1923, judgment was duly made and entered giving and granting to McEwen one-half of all the interests acquired by Wilson under the locations made on and after January 10, 1910.

It was also decreed that under the contracts of August 10, 1920, and April 2, 1921, above referred to, McEwen was entitled to one-half of the interests acquired by reason of Wilson's locations and also one-half of the compromise agreement made between the government of the United States with the Associated Oil Company under the contract of April 2, 1921. In other words, Wilson's and McEwen's interest collectively in the southeast quarter of section 26, township 30 south, range 24 east, was $\frac{1}{24}$ of the royalty or $\frac{1}{32}$ part of the 75 per cent., which would make their separate interest $\frac{1}{384}$ part of 75 per cent. of all production of oil, gas, and other substances obtained from the quarter section mentioned. Prior to the settlement of the controversy between McEwen and Wilson, the Security Trust Company on September 21, 1921, entered into an agreement with certain of the locators who were entitled to a part of the royalty on the above-described quarter section, whereby the Associated Oil Company was to pay to the Security Trust Company the royalties, and the owners of such royalties were to receive from such trust company the distributive share to which each was entitled. Thereafter, W. S. Lierly brought the present action against the Security Trust Company to recover the royalties in its hands. This action set forth the trust agreement and then alleged the reception by the trust company of a certain sum of money from the oil company. The action was filed on March 20, 1923, subsequent to the rendition of the decree in McEwen v. Wilson. On application of the trust company an order was made permitting it to pay the amount into court, and certain of the royalty owners were then substituted as defendants in the action. As above recited, certain of these defendants filed pleadings. McEwen answered denying any knowledge of the contract of September 21, 1921, with the trust company, and he also alleged that he was not a party to that contract. He then referred to his action against Wilson wherein it was adjudged and decreed that he was the owner and entitled to the possession of $\frac{1}{384}$ part of 75 per cent. of the royalty due from the oil company under the agreement of April 2, 1921; that the judgment had become final. Wilson also filed an answer claiming a $\frac{1}{48}$ interest in the royalties. The action proceeded to trial before the court, without a jury. There was introduced in evidence a certain schedule prepared by W. W. Kaye, Esq., one of the attorneys for plaintiffs herein, which purported to show the proportionate interests of the various grantors and their successors in interest in the fund. This schedule adopts the number 5120 as a common denominator or number of shares into which the entire fractional interests of the several locators and their successors in interest is to be divided. It recites that Wilson is entitled to 80

shares and McEwen to an equal number. Under this computation Wilson and McEwen would be entitled to $\frac{80}{5120}$, or, reduced to its lowest terms, $\frac{1}{64}$ of one-third, or $\frac{1}{192}$ of the total royalties payable to each of the eight locators, of one of the three quarter sections surrendered to the government; there being, as above pointed out, twenty-four locators on the three quarter sections surrendered. The trial court adopted the schedule as showing the interest that each party to the action owned in the fund and rendered judgment accordingly.

It is appellant McEwen's contention that he was in no manner bound by the agreement entered into on September 21, 1921, by certain of the locators with the Security Trust Company, as he was not a party to it; that his rights were fixed and determined under his contract with the oil company, and that never having conveyed any of this interest he was by reason of his judgment against Wilson entitled to one-half of the $\frac{1}{192}$ part of 75 per cent. of the royalties obtained from the oil company, which would be $\frac{1}{384}$ of 75 per cent. But, as pointed out, the schedule or agreement with the Security Trust Company assigned to defendant Wilson and also to McEwen $\frac{1}{64}$ of one-third, or $\frac{1}{192}$ each of the total royalties. By the allegations in his answer and also under the prayer thereof, McEwen claims to be entitled under his judgment against Wilson to $\frac{1}{384}$ of 75 per cent. of all of the royalties from the wells in question. It will thus be observed that the agreement assigned to him a considerably larger portion of the royalties than he claims. The judgment of the court follows the schedule, and while he was not a party to the agreement with the trust company he has been awarded a greater amount than he claims. He is therefore not injured by the judgment and consequently in no position to complain. The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

85 Cal. App. 832

LATKY et ux. v. WOLFE. (Civ. 3295.)

District Court of Appeal, Third District, California. Sept. 6, 1927.

1. Pleading $\S$ 18—Complaint generally alleging that defendant negligently operated, maintained, and controlled automobile held not insufficient for uncertainty.

Complaint alleging that defendant negligently, carelessly, recklessly, and unlawfully drove, operated, maintained, and controlled his automobile, so that plaintiff was injured, held not insufficient for uncertainty in not more specifically setting forth in what manner defendant was negligent.

2. Negligence $\S$ 111(1)—In personal injury cases, negligence may be alleged in general language.

In personal injury cases, it is not necessary to specifically allege various acts which constitute negligence; allegation of negligence in general language being sufficient.

3. Appeal and error $\S$ 1040(10)—Possible error in overruling demurrer for uncertainty held without prejudice, where issues were clearly and fully tried.

Possible error in overruling demurrer for uncertainty held without prejudice, where the demurring party was not misled by the alleged defects in the pleading, and the case was fairly tried on its merits.

4. Damages $\S$ 158(1)—Under general allegations of injuries in automobile accident, proof of specific injuries held proper.

Where the plaintiffs in an automobile accident case generally alleged injuries suffered, it was proper and competent to prove any specific physical injury or mental impairment which injured plaintiff might have sustained.

5. Pleading $\S$ 18—Use of word "unlawfully" in describing negligence, while surplusage, held not to imply violation of unnamed statute or ordinance, making complaint uncertain.

Complaint alleging that defendant "unlawfully" controlled his automobile so as to injure plaintiff held not uncertain because no statute or ordinance was named, since the use of the word "unlawfully" in describing negligence, while mere surplusage, did not necessarily imply violation of a statute or ordinance.

6. Appeal and error $\S$ 843(1)—Review of assignments of errors held unnecessary, where alleged errors, in any event, were not so prejudicial as to require reversal.

Where alleged errors, in any event, were not so prejudicial as to require reversal, it was deemed unnecessary to review assignments of error based thereon.

7. Evidence $\S$ 474(11)—Plaintiff, injured in automobile accident, held competent to testify as to physical condition prior to and following accident.

Plaintiff, injured by being struck by defendant's automobile rolling down incline, held competent to give testimony as to her physical condition prior to and following the accident as indicative of the effect her injuries had upon her body and mind.

8. Evidence $\S$ 222(2)—Statement by defendant automobile owner whose automobile rolled down hill, injuring plaintiff, admitting possibility of defective brakes, held admissible.

Statement made by defendant automobile owner whose automobile rolled down an incline, injuring the plaintiff, in answer to question as to how the accident could have happened, to the effect that he could not understand unless his brakes were out of order, held admissible, being in the nature of an admission.

9. Evidence ⚡222(2)—Declarations made by defendant in personal injury case, tending to show admission of negligence, are admissible.

Any declarations made by defendant in personal injury case, tending to show admission by him that he was guilty of negligence charged against him, are admissible in evidence.

10. Negligence ⚡119(4)—Proving defective automobile brakes under general allegations of negligence held proper.

Where injuries are charged in complaint to have been caused by negligence of automobile driver, it is proper, under general allegations of negligence, to prove brakes were defective.

11. Evidence ⚡528(2)—Question to doctor as to whether automobile accident contributed to recurrence of tuberculosis held proper.

Question to a doctor as to whether injuries received by plaintiff in an automobile accident contributed to the recurrence of tuberculosis of which she had been cured some years before held competent.

12. Evidence ⚡477(3)—Testimony of husband of plaintiff injured by automobile describing her condition as he observed it held competent (Code Civ. Proc. § 1845).

Testimony of the husband of plaintiff injured by automobile, describing her condition as he had observed it after her return from sanatorium where she had been under treatment for several weeks after the accident, held competent, within Code Civ. Proc. § 1845.

13. Witnesses ⚡240(2)—Leading questions are sometimes allowable in court's discretion where situation makes questions so framed necessary.

Leading questions on direct examination are sometimes allowable in the discretion of the court where the situation is such as to make questions so framed necessary.

14. Appeal and error ⚡1048(3)—Asking leading questions, though improper, held harmless.

Where improperly asking leading questions did not affect appellant's substantial rights, error held harmless.

15. Appeal and error ⚡930(2)—Where court charged jury could only find \$341 for medical services, appellate court assumed verdict for personal injuries included \$341 for doctors' bills.

Where, in automobile injury case, doctors' bills to amount of \$341 were admitted as evidence and court charged that the jury's verdict for the element of doctors' services could not exceed that amount, and jury did not segregate elements of damage in verdict, appellate court assumed jury allowed \$341 for medical services.

16. Damages ⚡116—Measure of damages for medical services is reasonable value of services.

The proper measure of damages for medical services in a case arising from an automobile accident is the reasonable value of the services rendered.

17. Damages ⚡191—Amounts paid for medical treatment are sufficient evidence of reasonable value, in absence of contrary showing.

Where bills for medical treatment have been paid, the amounts paid are sufficient evidence of reasonable value, in the absence of a contrary showing, to support finding to that effect.

18. Damages ⚡191—In automobile accident case, where it was not shown unpaid medical bills represented reasonable value of services, verdict partially based thereon was to that extent reduced.

In automobile accident case where it was not proved that unpaid medical bills represented the reasonable value of the medical services, a verdict for personal injuries, which was presumed to include the amount of the unpaid bills, was reduced in the amount represented by such bills.

19. Appeal and error ⚡930(1)—Appellate court must assume testimony of witnesses for prevailing plaintiff in automobile accident case was credited by jury.

Where plaintiff injured by automobile prevails in action brought to recover for injuries, appellate court must assume that the testimony of witnesses favorable to plaintiff was credited by the jury.

20. Municipal corporations ⚡705(6)—Parking car on incline without taking precautions to prevent its rolling down grade held to constitute "gross negligence."

Parking automobile on the incline of a grade and leaving it there unattended without taking necessary precautions to prevent it from leaving its position and rolling down the grade held to constitute "gross negligence."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gross Negligence.]

21. Municipal corporations ⚡705(6)—Knowledge that automobile left at top of incline unattended is liable to roll down is imputable to driver.

Knowledge that a car left on an incline unattended might be expected to roll down the incline from concussion produced by heavy traffic is imputable to driver, who is accustomed to driving and otherwise handling automobiles.

22. Municipal corporations ⚡706(5)—Where testimony showed brakes could hold automobile on incline, it was permissible inference that automobile rolled down, injuring plaintiff, because brakes were not properly set.

Where defendant testified that his automobile had been able to stand on an incline without rolling away shortly after it had rolled down the incline and injured plaintiff, it was permissible inference that the automobile rolled down when plaintiff was injured, because the brakes had not been properly set.

23. Municipal corporations ⚡705(6)—Automobile driver leaving car on incline had duty to see that brakes were properly set.

Where automobile driver left his automobile on an incline unattended, it was his duty to see that his brakes were properly set.

24. Damages $\Rightarrow$ 96—In action for automobile injury, assessment of damages held for jury.

In action for injury sustained from an automobile accident, the measure of damages held not fixed by any precise rule of law but to be a question for the jury.

25. Appeal and error $\Rightarrow$ 1004(1)—Unless damages allowed by jury for injuries from automobile accident are flagrantly outrageous, award will not be disturbed.

The appellate court will not interfere with a jury award of damages in an automobile accident case unless it can justly be held, from the face of the record or as a matter of law, that the damages awarded are flagrantly outrageous and extravagant.

26. Damages $\Rightarrow$ 132(1), 133—\$9,000 held not excessive damages for husband and wife, where wife, 49 years old, in good health, suffered intense pains, physical and nervous ailments, and incapacity for household work.

\$9,000 held not excessive damages to husband and wife where the wife, 49 years old, was injured by defendant's automobile, causing intense pains, seriously impairing her nervous system, possibly causing a recurrence of tubercular trouble, making it impossible for her to perform usual household duties, and otherwise injuring her internally.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by John T. Latky and wife against Fred Wolfe. Judgment for plaintiffs. From the judgment and certain interlocutory orders, defendant appeals. Modified and affirmed.

Cooley & Gallagher, of San Francisco, for appellant.

Butler, Van Dyke & Desmond, of Sacramento, and Hartley F. Peart and Gus L. Baraty, both of San Francisco, for respondents.

HART, J. This is an action for damages in the total sum of \$31,655.56 for personal injuries alleged to have been sustained by the plaintiff, Mary A. Latky, by and through the alleged negligence of the defendant, which includes the sum of \$6,655.56 for damage alleged to have been suffered by her husband (coplaintiff) as the direct consequence of the physical injuries alleged to have been so inflicted upon her.

The cause was tried by a jury, and a verdict returned in favor of the plaintiffs in the aggregate sum of \$9,000. Judgment was entered accordingly, after a motion for a new trial was made by defendant and denied by the court.

The appeal is by defendant from said judgment, "and from each and every other interlocutory order made by the court," and upon a bill of exceptions.

Exceptions to the ruling on the demurrer to the complaint, to rulings with respect to the admissibility of certain evidence, to cer-

tain instructions, given and refused, and the claim that the verdict does not derive sufficient support from the evidence constitute the complaints urged against the result arrived at below.

The brief of the plaintiffs, save in a few particulars, contains an accurate statement of the facts brought out by the testimony presented by them to support the allegations of the complaint and also some of the facts testified to by defendant. Said statement, corrected, though, in the particulars in which the inaccuracies referred to appear, so that it will conform to the testimony so presented, will, in part, be adopted as the statement of the facts herein, as follows:

The plaintiffs are husband and wife, residing on their ranch, consisting of 70 acres of young almond trees, situated about 5 miles out of Winters. On the morning of April 24, 1923, Mrs. Latky drove their auto, accompanied by a neighbor, Mrs. Sellers, to Sacramento to do some shopping, purchasing, among other things, a supply of groceries at Hale Bros., and about closing time she drove her auto, a single seated Overland coupé, in the alley to the rear of Hale's store to have the articles purchased placed in the car. This alley is regularly used by vehicles and is sufficiently wide to permit of the passage of two vehicles; it is immediately to the rear of Hale's store, and runs in a general easterly and westerly direction, connecting Eighth and Ninth streets; it is paved with cobblestone; the alley has quite a steep grade downward from Ninth street; from Ninth street the alley runs down grade for about 35 feet, at which point it continues onward on the level.

Mrs. Latky drove her auto down this grade in a westerly direction to the level portion of the alley and came to a stop about 10 or 15 feet beyond the bottom of this slope; her car was close to the building on her right side. Mrs. Latky stood at the rear left fender of her car, while an employee of Hale's (Witness Thomas) placed the groceries in the rear of her auto. This task completed, Mrs. Latky was about to step into her car, when she was struck by defendant's auto, which had run down this incline from Ninth street without a driver; she was thrown and knocked to the ground and pinned under defendant's auto, as a result of which she sustained severe and permanent injuries, and her husband deprived of her help and companionship.

Defendant, Fred Wolfe, an employee of Hale's—it was closing time at the store—had driven his touring car into this alley from Ninth street; he saw the Latky car at the bottom of the incline with the delivery boys around it, and also noticed the trucks of Hale Bros. on the opposite side of the alley to the Latky car. Wolfe stopped his car about halfway down the incline or near the

top of the grade; he claims he put on the emergency brake, he did not put it in gear, nor turn the wheels toward the building on his immediate right; he then jumped from his car and left it and started to walk back to the top of the incline to get a package in the store. Just then, as he entered the store, he heard a cry, turned around, and tried to jump onto his moving automobile to stop it, but could not do so. Defendant's auto came down this incline at a good speed. After the car had struck Mrs. Latky, it was pushed back off her body and clothes by "quite a few" men without any one first attempting to release or manipulate the brakes.

The evidence showed that, just prior to the accident, Mrs. Latky was of the age of 49 years and that, although in ill health and under treatment by a doctor for tubercular trouble for several months in the year 1919—from April 30th to August 6th of that year—when she was discharged as cured by her physician, she was, from the last-mentioned date to the time of the accident, in good health, an active woman, and capable of and actually attending to her household duties, "doing all of the housework in a five-room modern bungalow, with porches, doing all the washing, cooking for herself and husband and extra men, when necessary." She planted and attended to a vegetable garden which supplies vegetables for the ranch, watered, and weeded it; she had a nice flower garden which she cared for; she had planted and started a young nursery; she had 200 hens and had raised and attended to about 300 young chickens. She drove the auto almost every day for errands to the surrounding cities.

As a result of the injuries sustained when she was struck by defendant's auto, she was rendered unconscious and removed to the Emergency Hospital; she sustained a fracture of the left fibula and a severe cut on her forehead; "pain and suffering was severe; her head was paining as were her eyes, and there was a large lump raised on her head. During all the time she remained in the Emergency Hospital the pain was excruciating. Prior to the accident her hair was black with streaks of gray. When Mrs. Latky was finally taken to her home her hair was white."

She remained in the Emergency Hospital until the night of the 24th of April. She was put on a stretcher and taken by ambulance to the Sisters' Hospital in Sacramento, where she was put under the care of Dr. Von Geldern, and she remained in this hospital for two months. Long splints were placed on her left side from under her arms down to the bottom of her feet and on both sides of the left leg. She suffered severe pain to the left leg and to her head and neck. When she left the Sisters' Hospital, she was not able to walk; she was taken home in a wheel chair placed in an ambulance. She remained

home at Winters for about ten days and was in bed continuously. She was then taken to San Francisco by automobile, propped up in a bed. She was taken to a hotel in San Francisco, where she remained seven days, confined to her bed, with the exception of several trips to the doctor's office, which were made by taxi and by the aid of two men. She was then taken to a sanatorium at Belmont, where she was under constant medical treatment and remained there about five or six weeks. From there she went in an ambulance on August 10, 1923, to the University of California Hospital in San Francisco, where she remained for a further period of six or seven weeks under the care of several physicians and surgeons. A cast was applied to the left leg at the sanatorium at Belmont; it was removed at the University of California Hospital. During all of this time she suffered severe pain. While at the University of California Hospital it was necessary to put a cradle over her body, and this cradle was used for about four months for the reason that she could not stand the weight of bedclothes. She remained in the University of California Hospital, suffering great pain and under constant medical attention, until September, 1923, when she returned to her home. At home she was practically unable to attend to any of the ordinary duties of a housewife; she was constantly attended to by her husband.

When the action was commenced January 30, 1924, Mrs. Latky had not yet discarded crutches; at the time of the accident she weighed 193 pounds; at the time of the trial she weighed 160 pounds—she then weighed more at the time of trial than a few months prior thereto. At the time of the trial, one year after the accident, "Mrs. Latky was still suffering pain in her leg, back, and arm; she had almost lost the hearing of her right ear, sleeps but little; her eyes are painful; she is unable to read. * * * She was in the hospital with the injuries set forth above for three months; for another four months she was confined to her home on crutches;" and at the time of the trial "we find a woman unable to do any housework, with hearing and eyesight gone—unable to be of any help, or assistance to her husband—she is wrecked in body and spirits."

Certain other facts, particularly those to which the defendant testified and to which reference has to some extent been made above, will be adverted to and considered when we come to the consideration of the point made by the defendant that the verdict or judgment is not supported by the evidence, and that the verdict is excessive.

The complaint, in language appropriate to pleadings, sets forth the essential facts embraced within the foregoing statement.

The defendant filed a demurrer to the complaint for want of facts and also on the special grounds that it is ambiguous, unintel-

ligible, and uncertain. The demurrer was disallowed, and the defendant answered by a specific denial of each and every material fact alleged in the complaint.

1. The salient averments of the complaint are:

"* * * That the defendant so negligently, carelessly, recklessly and *unlawfully* drove, operated, maintained, and controlled his said automobile so that by reason thereof said automobile struck and ran into and against plaintiff Mary A. Latky, injuring the person of plaintiff Mary A. Latky, and injuring and damaging plaintiffs to the extent hereinafter alleged.

"That by reason of the said negligence, carelessness, recklessness, and unlawful driving and operating of said automobile by defendant, the plaintiff Mary A. Latky was struck by the said automobile, and was thrown and crushed to the ground, and was severely injured in her person, as follows: She was injured, bruised, cut, and contused about the body, arms, limbs, elbows, knees, neck, head, ears, and eyes; she sustained a severe shock to her nervous system and body and a severe wrenching of her spine and back; that her right eye was injured; and that her left leg was fractured; that her hearing has been impaired; that she sustained internal injuries; that ever since the said 24th day of April, 1923, said plaintiff has been sick, sore, disabled, and weak; that said plaintiff has sustained permanent injury to her left leg, her back, head, ears, and eyes, and to her health in general; that plaintiff has lost many pounds in weight; that ever since said 24th day of April, 1923, said plaintiff has suffered intense and excruciating pain and suffering; she has been unable to sleep for any length of time; has been confined to hospitals for the greater part of the said time and has been continuously, except at odd intervals, in bed; that said plaintiff is able to get about only with the aid of crutches."

[1, 2] The specific criticism of the complaint is that it is uncertain, in that it cannot be determined therefrom in what manner the defendant "*unlawfully* drove" his automobile, or in what manner, if at all, he "*negligently, carelessly, recklessly, or unlawfully* maintained his automobile," or what was the nature of the internal injuries plaintiff Mary A. Latky sustained, or "how many pounds in weight" it is claimed she lost in consequence of her alleged injuries, or "for what length of time" it is claimed she was "confined to hospitals."

[3] The objections to the complaint are untenable. It is, in this state—and we may, from the good sense of the rule, assume also in other jurisdictions—a well-established rule of pleading in personal injury cases that negligence may be alleged in general language. "What was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent. But it must appear from the facts averred that the negligence caused or contributed to the injury." *Stein v. United Railroads*, 159 Cal. 368, 113 P. 663. See, also, *Smith v. Buttner*, 90 Cal. 95, 27 P. 29; *Wiley*

v. Cole, 52 Cal. App. 617, 199 P. 550; *Tietke v. Forrest*, 64 Cal. App. 364, 221 P. 681. The complaint in *Stein v. United Railroads*, supra, was in language quite similar to that by which the negligence imputed to the defendant here is alleged. Moreover, it is further said in the *Stein* Case, and the same is equally true in this, that:

"Even if it were error (and it was not), to overrule the demurrer for uncertainty, it was error without prejudice unless the demurring party was misled by the defects in the pleading and the case [by reason thereof] was not fairly tried on the merits. Here it appears that the issues were all fully, fairly, and understandingly tried. *Bank of Lemoore v. Fulgham*, 151 Cal. 234, 90 P. 936; *Irrgang v. Ott*, 9 Cal. App. 440, 99 P. 528."

See, also, *Dennis v. Crocker-Huffman, etc., Co.*, 6 Cal. App. 58, 61, 91 P. 425, and cases therein cited.

[4] Under the general averments as to the injuries suffered by plaintiff Mary A. Latky, which are alleged to have been proximately caused by defendant's negligence, it was proper and competent for plaintiffs to prove any specific physical injury or any mental impairment which thus she might have sustained. "A plaintiff is not required to allege specifically each physical injury sustained or which may have resulted from the accident. It is sufficient if such injuries can be traced to the occurrence complained of and are such as might naturally result from the injury." *Kuhns v. Marshall*, 44 Cal. App. 588, 186 P. 682; *Samuels v. California St. Ry. Co.*, 124 Cal. 296, 56 P. 1115; *Treadwell v. Whittier*, 80 Cal. 574, 22 P. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; *Worden v. Central Fire Proof Bldg. Co.*, 172 Cal. 94, 155 P. 839.

[5] The complaint that the use of the word "*unlawfully*" in describing the general character or nature of the negligence charged in the complaint against the defendant necessarily implies that such negligence was in the violation by the defendant of some particular statute or local ordinance, and that, therefore, the complaint is obnoxious to the objection of uncertainty in that it does not by reference or otherwise plead such statute or such ordinance, cannot be sustained. Indeed, a complete answer to the proposition is to be found in the case of *Wiley v. Cole*, 52 Cal. App. 617, 199 P. 550. It is obvious that the word "*unlawfully*" was used in the complaint for the purpose of characterizing in a general way the conduct of the defendant constituting the negligence, which, plaintiffs say, was the proximate or efficient cause of the injuries which were inflicted upon the plaintiff Mary A. Latky. Manifestly, if defendant were guilty of negligence as alleged in the complaint, and with the result as so alleged, such negligence was wrongful and unlawful. Every infringement of a right and every tort or other actionable wrong are, in the very na-

ture of the case, unlawful. But the employment of the word "unlawfully" in the connection in which it is used in the complaint was unnecessary and is surplusage. The use of the word as descriptive of the negligence alleged neither added to nor operated to detract from the sufficiency of the complaint in the statement of a cause of action for negligence. *Wiley v. Cole*, supra.

Further consideration of the complaint is not required. The pleading is impregnable as against all the objections urged by the demurrer.

[6] 2. There are here urged too many exceptions to the rulings of the trial court on the question of the admissibility of certain testimony to justify an attempt to give each special attention herein. In fact, such a review herein of those assignments is deemed to be unnecessary, since a careful examination of each of said assignments has made it clear to our minds that none of them, even if it were true that any is well founded (and we do not so hold), is of such gravity, or so prejudicial as to warrant a reversal of the judgment. We will, however, refer to some of them in a general way by stating what it was competent for the plaintiffs to prove, under the averments of their complaint, either by their own testimony or that of other witnesses.

[7] We have already declared that the plaintiffs were entitled to show, in response to the issues made by the complaint and the answer thereto, any particular physical injury directly resulting to the injured plaintiff from the accident. It was competent for Mrs. Latky herself to give testimony as to her physical condition prior to and following the accident as indicative of the effect that the injuries she received in the accident had upon her body or her mind. For instance, it was proper for her to testify, as she did, that a large lump was produced upon her head; that her left leg was so injured as to necessitate the placing of her leg in a splint; that her hair, before the accident "iron gray" in color, shortly after the accident turned entirely white; that she was examined and treated by her physicians for "internal disturbances"; that she suffered pain in her left side; that, after the accident and resultant injuries, she experienced severe pains in her stomach; that she was troubled with nausea, and became so nervous that "moving and turning in bed" caused her to vomit; that her urinary organs (kidneys and bladder) were so affected by her injuries that she was compelled, after receiving them, to empty her bladder at inordinately frequent intervals. The following cases approve the action of the trial courts as proper in allowing a party complaining of injury sustained through the negligence of another to give the same character of testimony as the foregoing by the injured party in this case: *Freiburg v. Israel*,

45 Cal. App. 138, 187 P. 130; *Ehat v. Scheidt*, 17 Cal. App. 430, 120 P. 49; *Samuels v. Cal. St. Ry. Co.*, supra; *Kuhns v. Marshall*, supra. As to all these matters, it may be stated, the physicians professionally attending and treating Mrs. Latky for her injuries described with technical nicety the nature thereof and their effect upon her generally, and that her description of her wounds and their effect upon her physical organization was, as far as she went, substantially the same as that given by the medical men.

[8, 9] The witness Mrs. Maybelle Sellers, a friend of Mrs. Latky, and who accompanied the latter to Sacramento on the day of the accident and who was present when it occurred, testified that she held a conversation with the defendant immediately after the accident happened. She was asked by one of the counsel for plaintiff:

"Now, what was that conversation? A. I said, 'How could that terrible accident have happened?' He (defendant) said, 'I cannot understand, unless my brakes were out of order.'"

At this juncture, or after a few more immaterial words of the conversation were given the witness, counsel for the defendant moved to strike out that part of the testimony of the witness stating that defendant said that he did not understand how the accident happened "unless my brakes were out of order." The motion was denied, and it is here claimed that thus the court erred. The statement of the defendant with reference to the brakes on his automobile did not, as is obvious, involve a direct admission that they were defective or out of order, yet the statement was more or less pregnant with an admission that he (defendant) had not taken the precautionary measures to prevent his car, if unattended by any one, from moving down the grade or decline by gravity which the peculiar circumstances of the situation, of his own creation, would naturally seem to have suggested and required. The testimony was relevant and material and, therefore, admissible for what it was worth and its weight for the jury's determination. Of course, it will not be doubted that any declarations made by a defendant in cases of the class to which this belongs tending to show an admission by him that he was guilty of the negligence charged against him are admissible in evidence. See, on this proposition, *Scott v. Sciaroni*, 66 Cal. App. 577, 226 P. 827.

[10] Nor will it be doubted that, in cases where, as here, the injuries complained of are charged in the complaint to have been caused by the negligence of a driver of an automobile in operating or otherwise handling his car, it is competent and proper under general allegations of negligence, or in other words, where, as here, there is no specific charge that the brakes were defective, to prove that the

brakes of the car were, at the time of the mishap, in a defective condition. *Carnahan v. Motor Transit Co.*, 65 Cal. App. 402, 224 P. 143; *Wirthman v. Isenstein*, 182 Cal., 108, 187 P. 12.

[11] Mrs. Latky, as seen, was, a few years prior to the accident, afflicted with tuberculosis, and was for many months for that disease under the care and treatment of Dr. H. C. Warren, a specialist in lung diseases at the Belmont Sanatorium, in this state. The doctor's treatment effected a cure of Mrs. Latky, and she was discharged by the doctor as cured in the latter part of the year 1919. Within a few months after the accident, she returned to Dr. Warren, and, upon examination, it was found that there was evidence of a recurrence of her lung trouble. When on the witness stand in this case, Dr. Warren, testifying on behalf of plaintiffs, was asked by counsel for plaintiffs whether, in his opinion, the injuries received by Mrs. Latky in the automobile accident in question were a contributing factor to the return of her tubercular affliction. The question was objected to and the objection overruled. The answer in effect was that, in the absence of any evidence of a recurrence of the lung trouble from any other cause, it might be expected that the revival of the tubercular condition was superinduced by the injuries she had received. The question was proper and the answer responsive. Such questions to a medical doctor call for the testimony of an expert upon a subject as to which expert testimony is admissible. *Dow v. City of Oroville*, 22 Cal. App. 215, 134 P. 197.

[12] The husband and coplaintiff of Mrs. Latky was questioned with regard to the physical condition of the latter subsequent to her return to her home from the sanatorium at which she had been under treatment for several weeks after the accident, and, over objections by counsel for defendant, was allowed to describe her condition as he observed it. The ground of the objections was that the questions called "for the opinion and conclusion" of the witness. The witness was competent to describe the condition of Mrs. Latky as he observed it. A lay witness is competent to give testimony upon such subjects where "the injury is such as that its nature, extent, and effect would be obvious to the common mind." *Carr v. Stern*, 17 Cal. App. 397, 406, 120 P. 35, 39; *Code Civ. Proc.* § 1845.

[13, 14] With the exception of certain rulings relating to the evidence introduced by plaintiffs to prove the expenses incurred by plaintiffs for medical treatment administered to Mrs. Latky for her injuries by several doctors, and which rulings will presently be considered, the foregoing embraces a review of the more important assignments involving attacks upon the rulings of the court on matters of evidence. With reference to some of the rul-

ings already considered and disposed of, as well as to some of those not specially considered herein, it is proper to say that to the questions involved therein the objection was also made that they were leading or suggestive of the answers desired. This complaint has some foundation for its support. Of course, such manner of examining a witness on direct examination by the party producing him is improper, sometimes allowable, however, in the discretion of the court, where the situation is such, as sometimes it does arise, as to make questions so framed necessary. But questions in such form are, comparatively speaking, rarely propounded by one to his own witness on direct, and, when considered by the light of the record in its entirety, are generally not justly regarded as so serious in their effect upon the rights of the opposing party as to justify, for that reason alone, a reversal. It is perfectly clear that such objectionable form of propounding questions to one's own witnesses, as was followed in the instances referred to here, could not, as an examination of the record will readily and convincingly show, as thus we have been satisfied, have affected, to his disadvantage or prejudice, any of the substantial rights of the defendant.

[15] 3. The plaintiffs offered, and the court permitted to be received, as in proof of the special damage sustained by them as a result of the physical injuries suffered by Mrs. Latky, and which special damage was specially pleaded in the complaint, certain bills rendered to plaintiffs by the several doctors for medical services performed by them for her in the treatment of her injuries. The aggregate amount of those bills was \$341, and the court, on this subject, instructed the jury that, "There has been no testimony that plaintiffs have incurred any liability for alleged physician and surgeon services in excess of" that sum, and further instructed:

"In case you do find in favor of plaintiffs as to such alleged services, your verdict cannot exceed said amount."

The jury, in their verdict, did not segregate the damages into the several amounts which were to be assigned, respectively, to the several different items or elements of damage alleged and proved, but returned a verdict in gross or for the total amount. It is therefore to be presumed, since the special damage following from expenses incurred for medical services was by the testimony definitely fixed or stated, as measured in money, and in view of the instruction on that subject, that the jury allowed plaintiffs and included in their verdict the total amount of the expenses for medical services as stated in the instructions.

[16-18] The proper measure of damages in such a case is the reasonable value of the medical services rendered, but, as to some of the bills here, no evidence of such value of

the services forming the basis thereof was offered or received. It was not even shown that the particular bills in question had been paid, a circumstance which it has been held, is some evidence of their reasonable value, and sufficient, in the absence of any showing to the contrary, to support a finding to that effect. *Dewhirst v. Leopold*, 194 Cal. 424, 433, 229 P. 30; *Townsend v. Keith*, 34 Cal. App. 564, 565, 168 P. 402; 10 Cal. Jur. § 125, pp. 842, 843, and cases cited. The bills or claims which were not shown to have been paid, and as to which no other testimony was offered or received to the effect that they represented the reasonable value of the medical services rendered, are the following: Dr. Deane, \$5; Drs. Ruggles & Bryan, \$30; Drs. Markel & Baldwin, \$75; Dr. Lennon, \$50; the total amount of the claims or bills being \$160, in which amount the judgment must be reduced.

4. The action of the court in giving and refusing to give and modifying certain instructions is criticized by defendant. None of the points so urged merits special attention herein. The charge of the court to the jury embraced a singularly clear, and a full and correct statement of the law of the case as it was made by the pleadings and the proofs. Every principle of law pertinent to the facts was correctly submitted to the jury by the court. The given instructions to which the defendant here objects have been approved by the Supreme Court in many personal injury cases, the general facts of which are similar to those here. The modification of certain instructions proposed by the defendant, and given as so modified, did not have the effect of so changing such instructions as to render them ineffective in stating clearly the principles or rules of law therein sought to be stated.

[19] 5. The claim that the verdict is without sufficient evidentiary support and that the amount of damages awarded by the jury is excessive is untenable. The circumstances under which the accident happened, as detailed by the witnesses, principally those of the plaintiffs, and as hereinabove presented, being, as we must assume, credited by the jury, are such as to have justified them in finding that it was defendant's negligence which directly or proximately caused Mrs. Latky's injuries. But the defendant's own testimony is almost conclusive of the fact that he was negligent in parking his car as described, and that such negligence was the efficient cause of the accident and its consequences as alleged in the complaint. He testified that at the time of the accident he stopped his automobile on the incline and "put on the emergency brakes"; that he then left the automobile and "went into * * * the entrance of the store" to get a parcel; that as he "was going inside of the store and was clear inside the entrance," he "heard somebody holler"; that he there-

upon "turned around and jumped over to my car, tried to jump to it; it was too late;" that he had to release the brakes in order to push the car back; that after the accident the "automobile stood on the incline all the time when I set the brakes the last time and did not roll away." On cross-examination, he stated that his car was a secondhand automobile when he bought it, it being a 1919 model; that it then had been driven about 20,000 miles. He further stated that after the car was "rolled back" from the point where it struck Mrs. Latky he had to get into it in order to hold it. " * * * My car," he proceeded to say, "stood on the incline all the time when I set the brakes the last time and did not roll away. * * * I did not turn the front wheels in toward the north wall of the alley. I just put on the emergency brakes and jumped out of the car and left it."

[20, 21] There is no reasonable ground for doubt that the defendant's act in parking his car on the incline of the grade and leaving it there parked and unattended, without taking extra precautions which those circumstances would seem to require, to prevent the car from leaving its position and going down the grade, constituted gross negligence. In such a situation, a car left stationed on the brow of an incline, unattended by any one, might be expected to leave its position at any time and proceed down the incline, from the concussion necessarily and constantly produced by the heavy auto traffic or the movements with the usual speed of the bulky trucks and other automotive vehicles along the street with which the alley is connected, unless the brakes were perfectly intact and thoroughly set. Knowledge of these facts is imputable to those who are accustomed to driving and otherwise handling automobiles.

[22, 23] But it is not necessary to proceed further with a discussion of the evidence to show that the verdict, in so far as it is thereby found that the defendant was guilty of negligence in leaving his car in the position in which he left it under the circumstances as disclosed, is amply supported, except to suggest that the statement, to which the defendant himself testified, that after the accident and after moving his car back to the position on the incline from which he left it in the first instance, he "put the brakes on," and the car "stood on the incline all the time" and "did not roll away," is justly susceptible to the interpretation that the reason that the car did not remain in the position on the incline in which he left it to go into the store was because the brakes had not been properly set. In other words, the jury could justly, and probably did, draw the conclusion from that statement of the defendant that the brakes were in good order, and that if defendant, as it was, in view of the peculiar situa-

tion, emphatically his duty to have done, had taken the pains to see that they were properly set when he left the car to go into the Hale store, the accident would not have happened.

6. It cannot with justice be held, as a matter of law, that the damages allowed by the jury are in excess of a reasonable and fair award of compensatory relief when compared with the nature of Mrs. Latky's injuries. In other words, we cannot say, as a matter of law, that the amount of damages awarded plaintiffs by the verdict is so disproportionate to the injuries shown to have been suffered by Mrs. Latky as to justify an appeal court in reversing the judgment. *Meek v. Pac. R. Co.*, 175 Cal. 55, 164 P. 1117; *Reeve v. Colusa Gas & Electric Co.*, 152 Cal. 99, 92 P. 89; *Morgan v. Southern Pac. Co.*, 95 Cal. 99, 30 P. 601.

[24] As to the matter of the admeasurement of damages in actions of this character, what is said as follows in *Eldridge v. Clark & Henery Construction Co.*, 75 Cal. App. 516, 243 P. 43, is cogently pertinent to this, as generally to all personal injury cases:

"Of course, it is to be conceded that the matter of assessing damages in a personal injury case is generally attended with more or less difficulty. The element of pain and suffering, which is proper to be taken into account with other elements in determining in such cases what would be a just admeasurement of compensatory relief, affords no definite or certain criterion by which the amount to be assigned to that item may be ascertained, and the same is often true, in a less degree perhaps, of other elements of the several which it is competent to consider in making the general award. Hence, in the last analysis, in the general run of cases, the determination by the jury of the amount which will fairly compensate for the loss sustained by reason of the defendant's tortious breach of a duty which he owes to others must be accepted as an honest, fair, intelligent, and just adjustment of the matter."

Again in *Rystinki v. Central Cal. T. Co.*, 175 Cal. 336, 345, 165 P. 952, 956, it is said:

"This court has frequently approved the statement in *Aldrich v. Palmer*, 24 Cal. 513, 516, that, 'In actions for personal torts the law does not attempt to fix any precise rules for the admeasurement of damages, but, from the necessity of the case, leaves their assessment to the good sense and unbiased judgment of the jury.'"

[25] It follows from the principles thus declared that, on the question of excessive damages, the appellate court will not interfere unless it can justly be held, from the face of the record or as a matter of law, that the damages awarded are "flagrantly outrageous and extravagant," and this, as we have declared, cannot be said as to the instant case.

The court below, as before stated, instructed the jury upon every material evidentiary

phase of the case, and thus in clear language advised them as to their duty in deliberating upon and considering the evidence and arriving at a final determination. Correctly, it thus told the jury that, if in their judgment the evidence satisfactorily showed that the defendant's negligence was the proximate cause of the injuries suffered by Mrs. Latky, it would be their duty to award plaintiff compensation by way of damages which would be fair and reasonable when measured by the nature and extent of such injuries; and likewise told the jury that the special damage alleged, if proved, should be allowed to the plaintiffs jointly—that is (and the instruction was explicit as to this), that the jury could not allow each plaintiff independently of the other, damages on the plea of special damages, etc.

[26] Under these and the other instructions constituting the general charge to the jury upon the law and the evidence disclosing the character of the injuries suffered by plaintiff Mary A. Latky, and having found that such injuries were the direct consequence of defendant's negligence, it appears that the jury, in awarding plaintiffs \$9,000 on account of all the several elements of damage pleaded generally and specially, showed that they had given a commendably conservative consideration to the case as made by the evidence, so far as compensation was concerned. A brief recapitulation of the facts regarding the injuries and the physical condition in which they left Mrs. Latky may, without impropriety, here be given. For several years prior to the date of the accident, she was in excellent health, capable of and at all times actually performing the onerous and exacting duties incumbent upon a housewife. For about a year from the time of the accident, according to her own testimony and corroborated by the description of her injuries by the doctors, she suffered intense bodily pains, and at the time of the trial, which was exactly one year from the date of the accident, it was still necessary for Mrs. Latky to use crutches to enable her to walk. Her general nervous system was seriously impaired and her digestive and urinary organs so disarranged as to prevent the normal or usual functioning thereof. Because of all the physical disabilities caused by the injuries she received she was unable, at least up to the date of the trial of this action, to attend to her usual household duties in the usual way, her husband and coplaintiff being compelled to assist her therein. She was, at the time of the accident, a woman in middle life, and added to her physical pains, which must have been, and were according to her testimony, intense and excruciating, was the mental anguish and suffering that is the natural concomitant of severe physical hurts and wounds, the effects of which are of long duration.

A general résumé of our conclusions herein may thus be stated: That the complaint in all respects sufficiently and clearly and unambiguously states a cause of action for the relief herein sought; that no prejudicial errors were committed in the matter of the admission or exclusion of evidence; that the charge of the court to the jury upon the law of the case correctly and sufficiently covered all the vital questions of fact submitted to the determination of the jury; that in this connection, speaking more specifically, the court, in no part of its charge, assumed, as defendant contends, the establishment of the fact of the negligence of the defendant, and that such negligence was the proximate cause of Mrs. Latky's injuries; that the verdict is amply supported and the amount of damages awarded to plaintiffs is not excessive, or, at any rate, cannot be held so to be as a matter of law, and that, therefore, the verdict and the judgment thereupon entered, in so far as they are to be regarded as involving implied findings of the essential facts, are binding or conclusive upon this court.

The judgment, as above stated, must be modified for the reason heretofore explained, by striking therefrom the sum of \$160, representing the aggregate amounts due several of the medical doctors for professional services rendered Mrs. Latky in the treatment of her injuries, thereby reducing the amount of the judgment to the sum of \$8,840, and it is hereby so ordered. As so modified, the judgment is affirmed, as are also the several "interlocutory" orders from which, in omnibus form, appeals are taken by defendant. If the appeal from the orders in the form stated was intended to include the order denying defendant's motion for a new trial, then, as such order is not appealable, the same is dismissed.

We concur: FINCH, P. J.; PLUMMER, J.

85 Cal. App. 399

MILLS et ux. v. GARNER. (Civ. 5937.) ★

District Court of Appeal, First District, Division 2, California. Sept. 13, 1927.

Hearing Denied by Supreme Court Nov. 10, 1927.

1. Vendor and purchaser ⇨185—Tender of deed, though subsequent to date when purchase price was due, placed purchaser in default, and contract terminated on purchaser's failure to perform.

Where contract for purchase of realty was not terminated on date when purchase price was to be paid by failure of vendor to tender deed and abstract, purchaser was nevertheless placed in default by subsequent affirmative action of vendor in tendering deed and abstract and demanding payment for balance due, and contract terminated on failure of purchaser to perform.

2. Quieting title ⇨44(3)—Vendor held under evidence entitled to judgment quieting title against purchaser at no time willing to pay price.

In action by vendor of realty to quiet title on purchaser's default, evidence showing that purchaser was at no time ready, able, or willing to pay balance of purchase price authorized judgment for vendor, though contract was not terminated on date when purchase price was due.

3. Evidence ⇨471(25)—Questions whether purchaser was able to perform on date of contract and whether he understood contract was concurrent held properly excluded as calling for conclusions.

In action by vendor to quiet title to land on purchaser's default, questions of purchaser whether he was ready and able to perform contract on day provided in contract, and whether it was his understanding that contract was mutual and concurrent, were properly excluded as calling for conclusion of witness.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action to quiet title by Roy Mills and wife against George W. Garner. Judgment for plaintiffs, and defendant appeals. Affirmed.

Richard S. Miner, of Independence, and White Smith, of Bishop, for appellant.

Swallow & Richards, A. H. Swallow, and Robert Richards, all of Bishop, for respondents.

WARNE, Justice pro tem. This is an action to quiet title to certain real property in Inyo county, together with certain shares of the capital stock of Bishop Creek Ditch Company, a corporation, and the waters for irrigation of said lands represented by said shares and furnished to said land by said corporation. Judgment passed for plaintiffs, and the defendant appeals from the judgment and the order denying the motion for a new trial.

Under date of March 20, 1922, the parties to this action entered into a written contract for the purchase and sale of said property, and defendant paid to plaintiffs the sum of \$1,500 upon the purchase price. The balance of the purchase price was to be paid on or before January 1, 1924, and the contract further provided:

"The parties of the first part agree that, when the second party shall pay or cause to be paid the balance due, then they will make a good and merchantable deed to second party with an abstract showing said property free of all debts and incumbrances except such expenses as might arise under the water settlement which is now under negotiation which second party agrees to assume.

"The party of the second part agrees to make the payments as they shall become due and all taxes and interest that shall become due, and, in case that he shall fail or refuse

to make such payments as they become due, then to forfeit all money paid and improvements made, and said property, and first parties to have immediate possession and ownership in said property restored in full. But if first parties shall receive payment in full and second party shall keep all the covenants and conditions, then said deed to be executed as herein set forth."

The defendant answered, setting up the contract of sale, and alleged an offer to fully perform according to the terms of the contract on his part, but inability and refusal to perform on the part of the plaintiff. The court, after finding all the allegations of plaintiffs' complaint to be true and that defendant's claim was invalid and groundless, found that plaintiffs had duly performed and fulfilled all and singular the terms and conditions on their part to be performed and to be fulfilled of the contract, but that defendant has not performed or fulfilled any of the terms or conditions of said contract on his part to be performed and fulfilled, and by reason whereof said contract is no longer in force and effect, and that the real and personal property therein described was not subject to the terms and conditions of the contract.

Nothing was done on January 1, 1924, by either party; that is, plaintiffs did not tender a deed and abstract to defendant and demand payment, nor did defendant pay or tender to plaintiffs the balance due under the contract. On March 17, 1923, plaintiff Mills notified the defendant in writing that he (defendant) was in default under his contract, and that accordingly that plaintiffs had canceled and rescinded the agreement. The defendant did not respond to this notice, and the plaintiffs took no further action until April 18, 1924, when they tendered to defendant a deed and abstract and made written demand for the payment of the balance due under the contract. The demand was not complied with, and the plaintiffs commenced this action on April 25, 1924.

It is admitted that the balance due on the purchase price of the property has not been paid.

Defendant contends that the evidence is insufficient to support the findings, and that the decision and judgment is against law, on the theory that the delivery of the deed and abstract and the payment of the balance due

on the purchase price were dependent and concurrent conditions, and in support of this contention he cites the case of *Kerr v. Reed*, 187 Cal. 411, 202 P. 142, and cases cited therein, where the Supreme Court announced that it was thoroughly established that, when the final payment comes due under a contract in which time is of the essence of the contract, the obligation to make the payment and the obligation on the part of the vendor to make a deed are dependent and concurrent conditions.

[1] We fail to see wherein the rule as announced in *Kerr v. Reed*, supra, is applicable to the case at bar. Conceding that the contract was not terminated on January 1, 1924, by reason of the plaintiffs having failed to tender the defendant a deed and abstract to the property, nevertheless, the defendant was placed in default by the affirmative action of the plaintiffs in tendering defendant a deed and abstract on April 18, 1924, and demanding payment of the balance due. The contract was terminated by the failure of the defendant to perform after notice. *Boone v. Templeman*, 158 Cal. 290, 110 P. 947, 139 Am. St. Rep. 126; 25 Cal. Juris. 618.

[2] The defendant was offered every reasonable opportunity to pay, but failed to do so. The evidence clearly shows that he was at no time ready, able, or willing to pay the balance of the purchase price. The findings are amply supported by the evidence, and the decision and judgment are not contrary to the law.

[3] The appellant also contends that the court committed error in sustaining plaintiffs' objection to the following questions:

"Were you ready and able to perform that contract with Mr. Mills on the 1st day of January, 1924, on the day provided in the contract? And when the contract was made by yourself and Mr. Mills, was it your understanding of that contract that it would be mutual and concurrent and that the abstract was to come at the same time the money was paid?"

The trial court properly sustained the objections to these questions on the ground that the same called for the conclusions of the witness.

No other points appear worthy of discussion.

The judgment and order are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

85 Cal. App. 400

(259 P.)

PEOPLE v. DERRICK. (Cr. 1500.)

District Court of Appeal, Second District, Division 2, California. Sept. 13, 1927.

1. Criminal law § 478(1)—Experts deciphering slips containing wagers on horse races were not disqualified because of inability to decipher figures on back (Pen. Code, § 337a, subds. 2-4).

Where police officers, testifying in prosecution under Pen. Code, § 337a, subds. 2-4, for keeping a room with papers and paraphernalia for purpose of wagering on horse races, testified as experts in deciphering certain slips of paper containing wagers, it was unnecessary that they be able to decipher certain figures on the back of such slips, after testifying in substance that such figures did not relate to subject-matter set down on the front, which was complete in itself.

2. Criminal law § 481, 1153(2)—Trial court has broad discretion in determining qualifications of expert, and ruling will be sustained, save for manifest error.

Trial court is vested with broad legal discretion in determining the qualifications of one who offers himself as an expert witness, and ruling thereon must be sustained, in absence of manifest error.

3. Criminal law § 472—Characters on slips used in recording bids on horse races held proper subject of expert testimony.

Characters on slips containing record of wagers of money on horse race, with some identification of person laying bet, held proper subject of expert testimony.

4. Witnesses § 37(4)—Excluding character testimony on ground witnesses did not know defendant's residence address held erroneous (Pen. Code, § 337a, subds. 2-4).

In prosecution for violation of Pen. Code, § 337a, subds. 2-4, relative to wagering on horse races, excluding certain character testimony on ground witnesses did not know residence address of defendant held erroneous.

5. Witnesses § 280—Questioning police officer relative to failure to mention observing prosecuting witness on defendant's premises, though testifying at preliminary hearing, held improper cross-examination (Pen. Code, § 337a, subds. 2-4).

In prosecution under Pen. Code, § 337a, subds. 2-4, relative to wagering on horse races, questioning police officer relative to fact that, though he had testified at preliminary hearing, he had not before trial said anything about observing prosecuting witness on defendant's premises, held improper cross-examination, as being so worded as to call for immaterial response.

6. Gaming § 102—Instruction that writing of record of bet on horse race was not indispensable to establish recording held not erroneous under evidence (Pen. Code, § 337a, subds. 2-4).

In prosecution under Pen. Code, § 337a, subds. 2-4, relative to wagering on horse

races, instruction that, in order to establish recording of bet, it was not indispensable that writing of record itself be produced, held not erroneous under evidence justifying conclusion that it was plan or practice of defendant to record wagers on slips produced before the jury.

7. Criminal law § 1186(4)—Evidence, in prosecution under law relative to wagers on horse races, held to render nonprejudicial erroneous exclusion of character testimony (Pen. Code, § 337a, subds. 2-4; Const. art. 6, § 4½).

In prosecution under Pen. Code, § 337a, subds. 2-4, relative to wagers on horse races, evidence held such as to render nonprejudicial, within Const. art. 6, § 4½, the erroneous exclusion of character testimony on ground witnesses did not know defendant's residence address.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

J. E. Derrick was convicted of keeping a room with papers and paraphernalia for the purpose of recording wagers on horse races, and he appeals. Affirmed.

E. L. Johnson, of San Diego, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

THOMPSON, J. The defendant was charged in an information consisting of three counts, with the offenses denounced by section 337a of the Penal Code, in subdivisions 2, 3, and 4 thereof, the first count accusing him in effect of keeping a room with papers and paraphernalia for the purpose of recording wagers laid on horse races, the second of holding or forwarding money wagered on horse races, and the third of registering a wager upon a horse race. The section of the Code is not limited to this specific contest, but it would extend this opinion beyond proper length to define the offenses with greater particularity. The jury returned a verdict of guilty on each count, and sentence was pronounced upon the first count and suspended upon the second and third. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The grounds assigned in support of the appeal are four, as follows: (1) That the court erred in admitting expert testimony; (2) that the court erred in rejecting character testimony; (3) that error was committed by the curtailment of cross-examination; and (4) that the jury was incorrectly instructed.

[1-3] With regard to the first assignment, certain slips of papers, eight in number, were found by the officers in a tin cup in a cigar box back of the barber chair operated by defendant. On these slips of paper were written figures and names more or less unintelligible to persons inexperienced in the methods

of gambling. On the reverse side of the papers were some figures which may or may not have had reference to the wager recorded on the first side. Two policemen who were called by the prosecution testified that they had worked on the gambling detail in San Diego—one for a period of two years and the other for a period of four years; that they had become familiar with the expressions, symbols, and characters used by bookmakers in recording bets on horse races; that each slip of paper found was the record of a wager of money on a horse race, with some identification of the person laying the bet. This last testimony was admitted over the objection of defendant, who elicited from the witnesses that they could not say what the figures on the reverse side meant. He now contends that the witnesses should have been able to decipher the entire instrument (both sides) before they could testify as experts. We conclude from appellant's argument that his objection to the reception of this evidence is based upon the thought that if the witnesses could not decipher the whole they were not qualified to decipher a part; a conclusion which does not follow from the premise. For example, suppose the reverse side had been written in Chinese laundry marks, or Sanskrit, it certainly would not be contended that it was any part of the first side or that familiarity therewith was necessary foundational knowledge to an interpretation of the gambling symbols. The testimony of the witnesses, in substance, that they did not know what the figures on the back of the slip meant, was in effect a statement that the figures did not relate to the subject-matter set down on the front. The record contained on the first side of the slips was complete in itself. That being the case, familiarity with the reverse side was in no way essential. The trial court is vested with a broad legal discretion in determining the qualifications of one who offers himself as an expert witness, and without manifest error, which we do not find in this instance, the ruling must be sustained. *People v. Goldsworthy*, 130 Cal. 600, 605, 62 P. 1074. That the characters constituted a proper subject of expert testimony cannot be questioned. Section 1863, Code Civ. Proc.: *People v. Sutherland*, 59 Cal. App. 462, 210 P. 965; *People v. Hinkle*, 64 Cal. App. 375, 221 P. 693.

[4] It is equally as certain that the trial court did commit error in the rejection of certain character testimony. Two character witnesses had testified to the good reputation of the defendant as a law-abiding citizen when it appeared from the cross-examination of each that neither of them knew the residence address of the defendant, whereupon the court struck out the testimony. With the third witness the same lack of knowledge appeared on direct examination and an objection was sustained to the query as to whether

he knew the reputation of defendant as a law-abiding citizen in the community in which he lived and did business. These rulings limited the defendant to one character witness, plus the testimony of his sister-in-law, who testified that his reputation was good, and whose testimony the jury would undoubtedly consider as flowing from an interested source. In this age of rapid transit and quick communication it is not only conceivable, but a matter of common knowledge, that business men may acquire no reputation one way or the other in the community in which they actually reside, and bear an excellent reputation miles distant where they follow their daily vocations and come in contact with many associates. *People v. Schmidt* (Cal. App.) 249 P. 832. See, also, *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225, 240; *State v. Cushing*, 14 Wash. 527, 45 P. 145, 147, 53 Am. St. Rep. 883. Any other view would prevent many eminent citizens from proving well-earned reputations. Nor in this case can we justify the exclusion of the testimony on the sole ground that it was a reasonable limitation placed upon the number of this class of witnesses. The ruling was erroneous, and if a reversal is not to be ordered it must be that after a consideration of the entire record, including the testimony, we are satisfied that a miscarriage of justice has not resulted.

[5] It appeared from the testimony of Police Officer Shea that he had gone into the defendant's barber shop on December 28, 1926, and had heard a man place a bet of \$2 on some horse in one of the Tia Juana races and had seen him hand the defendant the money. Shea testified that he returned on the next day and placed a bet himself. The defendant did not take the stand in his own behalf. His brother, Wardie E. Derrick, and the boot-black employed in the shop, both testified that they were present on the 28th and 29th and did not see Officer Shea there. On rebuttal the district attorney placed on the stand Officer Burke, one of the two officers who found and took possession of the slips of paper, who testified that he had stood on the street corner and watched Officer Shea go into the barber shop. On cross-examination the witness said he had testified at the preliminary hearing and then he was asked this question by the defense counsel:

"Q. And to-day is the first time, although you testified at the preliminary examination, and testified before you took the stand this time—this moment is the very first time you have ever said anything about observing the witness Shea in the premises of Derrick?"

The objection that it was immaterial, argumentative, and not proper cross-examination was sustained. There is no merit in the argument of counsel that when the court stated in ruling upon the objection that, "when the defendant's witness went on the stand and

alleged that he did not go in there, that raised the question; so, as far as this trial is concerned, that is the first time this question was up"; that the court was commenting on the facts. The court was referring to the order of proof, which it was perfectly justified in doing, and quite correctly stated that there was no occasion for the witness to so testify until upon rebuttal. Furthermore, it should be noted that counsel did not attempt to impeach the witness by showing that he had testified differently upon a former occasion. The question was so worded as to call for an immaterial response and was not proper cross-examination.

[6] Counsel complains, as his last objection, that the trial court erred in instructing the jury as follows:

"You are instructed that, in order to establish the recording of a bet, it is not indispensable that the writing of the record itself be produced in court, where such a writing is lost or destroyed or cannot be produced, if, from the testimony of witnesses, the jury is reasonably satisfied, beyond a reasonable doubt that a bet was made, and that the defendant wrote down a memorandum thereof upon paper or other writing material as alleged in the information."

His objection to this instruction is, he says, that it assumes the fact that the defendant wrote down the wager testified to by Shea, when in fact there was no direct testimony to this effect introduced. From the evidence introduced, however, the jury were justified in drawing the deduction that it was the system, plan, or practice of defendant to record the wagers on the slips produced before it, and that subsequent to Shea's wager that the defendant had made similar note of it. In 1 Greenleaf on Evidence, at page 72, quoted with approval in *People v. Sindici*, 54 Cal. App. 193, 201 P. 975, it is said:

"Where the very doing of the act charged is in issue and is to be evidenced, one of the essential facts admissible is the person's plan or design to do the act. This plan or design itself may be evidenced by his conduct, and such conduct may consist of other similar acts so connected as to indicate a common purpose including in its scope the act charged. There is a decided difference between this use' and the one to show intent; 'for there the object is merely to give a complexion to an act conceded or proved, i. e., to negative innocent intent, while here the object is to evidence a prior general plan, scheme or design, which in its turn is to evidence the doing of the act so planned.'"

In denying a rehearing in the case just cited the Supreme Court uses this language:

"The application for a hearing in this court * * * is denied for the reason that evidence

objected to of the commission of similar offenses by defendant was clearly admissible on the ground stated by the District Court of Appeal that such evidence tended to prove such similarity of plan or system in committing the other acts as to indicate that the offense charged was likewise the act of this defendant.
* * *

See, also, *People v. Ciulla*, 44 Cal. App. 719, 187 P. 46, and *People v. Burke*, 18 Cal. App. 72, 98, 122 P. 435, 447.

In the last-cited case it is stated:

"It is held by all the authorities that, whenever there is a clear connection between two offenses, from which it may be logically inferred that, if guilty of one, the defendant is also guilty of the other, evidence of such other offense is admissible."

It is a logical deduction from the evidence that, if the defendant recorded the wagers evidenced by the eight different slips of paper, he also recorded the wager laid by Officer Shea. The slip itself was not produced, and the instruction must have been understood by the jury to mean that it was not essential to conviction that such a writing be produced, if they were convinced beyond a reasonable doubt that the defendant had made note of it. So understood, the instruction could not have prejudiced the defendant in the minds of the jury.

[7] We have left for the last consideration the question of whether the rejection of the character testimony requires or justifies a reversal of the judgment. From the recitation of the facts as we have proceeded, the defense consisted of testimony that Officer Shea was not present at the time stated by him. There was no effort made to explain the existence or presence of the slips of paper containing the records of wagers laid, other than the statement by Wardie Derrick that slips of paper of similar size were used by him and his brother to record the amount that they each took in during the day. There is no denial in the record of wagers having been recorded by defendant. From the written record it does not appear that there is a serious doubt that defendant was guilty. While character testimony may always be introduced concerning the trait involved in the charge, nevertheless, in considering the entire case and the fact that at least one witness testified without being contradicted that defendant's reputation was good, we are satisfied that there has not been a miscarriage of justice as required by section 4½ of article 6 of the Constitution before we are authorized to order a reversal.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

85 Cal. App. 338

WILLIAMS et al. v. BLUE BIRD LAUNDRY CO. (Civ. 4595.)★

District Court of Appeal, Second District, Division 2, California. Sept. 12, 1927.

Hearing Denied by Supreme Court Nov. 10, 1927.

1. Nuisance ⇨75—Allegations of irreparable injury to health and value of homes and destruction of property by operation of laundry held to charge special injury.

Complaint alleging that unless an injunction is issued, irreparable injury will be done to plaintiffs in that their homes will be made uninhabitable by reason of the noxious fumes emanating from defendant's laundry, and that the operation of the laundry will become a nuisance to the health of the plaintiffs and their neighbors and will impair the value of their homes and property, destroy the flowers and vegetation in their yards, and make it impossible for plaintiffs to continue to reside therein, *held* sufficient to charge a special injury, even though the same conduct may be alleged to have been injurious to the general public.

2. Nuisance ⇨72—Cause of action to enjoin nuisance is not destroyed because rights of indefinite number of others are similarly infringed.

If a nuisance invades a distinct private right, plaintiff's cause of action is not destroyed by the fact that similar rights of an indefinite number of other persons are also infringed in the same manner.

3. Nuisance ⇨6—Operation of laundry in district zoned for such business does not justify creation or continuance of private nuisance by laundry owner.

That district was zoned to permit operation of laundries therein did not justify creation or continuance of a private nuisance by owners of laundry so as to preclude injunctive relief to persons building residences in the vicinity on the theory that they must submit to the discomforts and injuries ordinarily incident to operation of similar industries in the manner in which they are customarily conducted.

4. Nuisance ⇨75—Finding that operation of laundry constituted nuisance by emitting noises, odors, blocking of sidewalks, and soot and grease deposits, held sustained by evidence.

Evidence as to noises, noxious odors, blocking of sidewalks, soot and grease deposits resulting from operation of defendant's laundry, *held* to warrant finding that nuisance was created by such operation, entitling plaintiffs to injunction.

5. Appeal and error ⇨931(1)—Every intendment must be resolved in support of trial court's judgment.

Every intendment must be resolved in support of trial court's judgment.

6. Judgment ⇨21—Judgment restraining operation of laundries so as to cause loud noises, offensive odors, black smoke and soot, or to be deleterious to health, held not too indefinite.

Judgment enjoining defendant from so operating its laundries as to avoid causing loud

noises, offensive odors, black smoke or soot, or in any other such manner as to be deleterious to the health of plaintiffs, residents of the vicinity, *held* not objectionable as too indefinite.

7. Nuisance ⇨73—That defendant operated laundry in same manner more than ten years held not to estop nearby residents suing to enjoin nuisance.

That defendant operated its laundry for more than ten years in the same manner before plaintiffs took any action to enjoin nuisance claimed to be created thereby *held* not to estop plaintiffs from maintaining action for abatement of the alleged nuisance on theory of waiver or estoppel by acquiescence, in absence of contention that delay and acquiescence misled defendant into expenditure of money in reliance thereon.

8. Appeal and error ⇨1071(6)—Trial court's failure to find respecting matters as to which it would necessarily have found against appellant held not prejudicial.

Failure of trial court to make findings respecting matters as to which it would necessarily have found against appellant's contentions *held* not prejudicial.

9. Evidence ⇨78—Evidence as to suppression of evidence held to justify court in concluding that unless restrained, elements constituting nuisance in operation of old laundry would be continued in building to be constructed (Code Civ. Proc. § 1963, subd. 5).

Where, in suit to enjoin nuisance, there was evidence that defendant willfully suppressed physical evidence when court made personal inspection of defendant's laundry, *held* that under Code Civ. Proc. § 1963, subd. 5, and *maxim falsus in uno, falsus in omnibus*, court would have been warranted in disbelieving defendant's representations concerning the alleged harmless and inoffensive means and methods to be employed in its new laundry under construction and would have been justified in concluding that unless restrained, objectionable elements in the operation of the old laundry would be continued in the new one.

10. Nuisance ⇨84—Decree properly enjoined defendant from so operating its laundry as to be deleterious to health instead of enjoining operation thereof.

Where injury complained of resulted from manner of operating laundry business, which is not per se a nuisance, court properly refused to restrain operation of laundry, but enjoined defendant owner from so operating the laundry or a new one to be constructed by it as to be deleterious to the health of plaintiffs, residents of the vicinity.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Suit by Myrtle Mae Williams and others against the Blue Bird Laundry Company. Decree for plaintiffs, and defendant appeals. Affirmed.

Ward Chapman and L. M. Chapman, both of Los Angeles, for appellant.

James Donovan and Hugh E. Macbeth, both of Los Angeles, for respondents.

CRAIG, J. Appellant was the owner of and operated a steam laundry in the city of Los Angeles and had obtained a permit for and contemplated erecting and operating another laundry in the same community. The respondents, residents of that vicinity, sued to obtain an injunction restraining the operation of the old laundry, and from constructing the new building and using it for the operation of a like business. The complaint alleged that at the establishment being operated when suit was filed, unwashed laundry was strewn upon the sidewalk which emitted offensive odors, machinery was operated late at night which caused loud and disturbing noises to nearby residents, crude oil was burned which gave off heavy black smoke and soot, and an offensive odor was created by materials used in operating the laundry, all of which created a nuisance and were offensive to the senses and deleterious to the health of the plaintiffs; that the defendant had begun the construction of another laundry across the street from the one first mentioned, which would be operated in the same manner and under the same conditions as the old laundry, and which also would create a nuisance. Issue having been joined, and a trial had upon the pleadings so framed, the trial court found the foregoing facts to be true, and rendered judgment in favor of the plaintiffs, enjoining the defendant from operating machinery in either laundry between the hours of 9 o'clock p. m. and 6 o'clock a. m. of each day, and from causing loud noises, creating offensive odors, black smoke, or soot, and from so operating either laundry as through any of the last-mentioned causes, or in any manner, to render them deleterious to the health of the plaintiffs.

[1] A number of grounds are urged for a reversal. First, it is complained that the facts stated in the complaint are not sufficient to constitute a cause of action, because the nuisance, if any be alleged, is not one resulting in special damage to the plaintiffs. Among other things the complaint alleges that unless an injunction is issued irreparable injury will be done to plaintiffs, in that "their homes will be made uninhabitable by reason of the noxious fumes arising and emanating from said laundry and the operation of said laundry will become a nuisance to the health of the plaintiffs and their neighbors, and will impair the value of their homes and property, destroy the flowers and vegetation in their yards, and make it impossible for the plaintiffs to continue to reside therein," etc.

[2] These allegations are sufficient to charge a special injury, even though the same conduct may be alleged to have been injurious to the general public. *McIntosh v. Brimmer*, 68 Cal. App. 770, 230 P. 203; *Lind v. City of San Luis Obispo*, 109 Cal. 340, 42 P. 437. If the nuisance invades a distinct pri-

vate right, a cause of action for injunction is not destroyed by the fact that similar rights of an indefinite number of other persons are also infringed in the same manner. *Williams v. Los Angeles R. Co.*, 150 Cal. 592, 89 P. 330; *Brown v. Rea*, 150 Cal. 171, 88 P. 713; *Fisher v. Zumwalt*, 128 Cal. 496, 61 P. 82.

[3] It seems to be assumed that because the premises on which the laundry is situated were zoned to permit the maintenance of such establishments, all persons building residences in that vicinity must submit to such discomforts and injuries as are ordinarily incident to the operation of similar industries in the manner in which they are customarily conducted. We do not understand this to be the law. The doctrine of coming to a nuisance was long ago exploded. The operation of a business under municipal permission does not justify the creation or continuance of a private nuisance. *Strong v. Sullivan*, 180 Cal. 331, 181 P. 59, 4 A. L. R. 343; *Judson v. Los Angeles Suburban Gas Co.*, 157 Cal. 168, 106 P. 581, 26 L. R. A. (N. S.) 183, 21 Ann. Cas. 1247; *Sullivan v. Royer*, 72 Cal. 248, 13 P. 655, 1 Am. St. Rep. 51; *Tuebner v. California St. R. Co.*, 66 Cal. 171, 4 P. 1162; *Humphrey v. Dunnells*, 21 Cal. App. 312, 131 P. 761; *Coats v. Atchison, T. & S. F. R. Co.*, 1 Cal. App. 441, 82 P. 640.

[4] The trial court found that the manner in which the existing laundry was operated was offensive to the senses, deleterious to the health of the plaintiffs, and constituted a nuisance, and it is urged that the evidence is insufficient to support such finding. From the evidence introduced by the plaintiffs it appears that the Blue Bird laundry was operated daily, frequently on Sunday, and at times until 11 o'clock or later at night; that a shrill whistle was blown mornings, at noon, and in the evening; that the boilers were often blown out, causing loud noises and filth to permeate the air; the machinery rumbled and roared like "the billows at the beach"; thick, heavy, oily smoke emanated from the laundry, which settled upon the outside of houses, and inside upon the furniture and linen, covering them with a dark, greasy substance which it was found difficult, or impossible, to remove; soot and grease were deposited upon the grass and flowers of neighboring yards to a distance of 500 feet in all directions, which discolored and wilted vegetation; obnoxious, offensive odors from chemicals or substances used in the laundry floated throughout the community; that during the early part of each week, for two or three days at a time, large quantities of unwashed laundry which gave off offensive odors were piled on the sidewalks, and which also blocked the walks, requiring school children and others desiring to pass to travel in the middle of the street or else go around the block; that as a result of these things roomers had been compelled to move from the

neighborhood, and permanent residents in ill health were constantly irritated and prevented from sleeping at night. There is in the record an abundance of evidence of these noises, odors, blocking of sidewalks, soot and grease deposits. Some of the witnesses swore that at times the air was so dense with pungent odors as to cause violent coughing and sneezing.

[5] Every intendment must be resolved in support of the judgment of the trial court, and under this rule we are impelled to accept as true the foregoing facts which the evidence of the plaintiffs, respondents here, strongly tended to establish, and the findings and judgment of the court that a nuisance was created by such operation of the defendant and appellant's establishment. This being true, we think the evidence was amply sufficient in that respect.

[6] It is strenuously contended that because the judgment merely restrains the defendant from so conducting its plants as to cause loud noises, offensive odors, black smoke and soot, it is so indefinite as to render it ineffective, and that it must be reversed; that it is impossible to determine what degree of noise, or degree of odor, etc., would constitute a violation of the injunction; and that the defendant may be subjected to citations for contempt at any time that one of the plaintiffs may deem any noise, odor or smoke objectionable to himself. However, the judgment plainly states that the laundry or laundries shall be so operated as to avoid causing loud noises, offensive odors, black smoke, or soot, or in any other such manner as to be deleterious to the health of the plaintiffs. We think the entire judgment when read together is sufficiently definite in this regard. Appellant bases its argument upon *Powers v. Perry*, 12 Cal. App. 77, 106 P. 595, and *Steinberger v. Meyer*, 130 Cal. 156, 62 P. 483, wherein judgments were held to be fatally uncertain. In *Powers v. Perry* it was held that the complaint failed to allege the amount of water needed for the plaintiffs' needs, and that the language of the judgment providing that they should be afforded "sufficient water for household purposes," it would be impossible to determine the extent of servitude sought to be placed upon the defendants' land, since the plaintiffs might build several houses upon the land in the future. In *Steinberger v. Meyer* the judgment declared that the plaintiff had the legal right to divert all of the water of Willow Ranch creek at any and all times, and in the same judgment it was recited that the defendant as against the plaintiff was lawfully entitled to the free and unobstructed flow and to the diversion and use of sufficient water from certain springs to properly and thoroughly irrigate three acres of land for domestic purposes. It was there said by the Supreme Court that nothing was said in the judgment as to the injunction

prayed for in the complaint, and that it would be utterly impossible to determine how much water was necessary to "properly and thoroughly irrigate in the aggregate three acres of land." It is obvious that these cases are not in point, for while any amount of water might be diverted in either case without violating the inhibiting clause of the judgment, any of the acts forbidden by the decree in the instant case would constitute an infraction of its provisions if sufficiently serious to be "offensive to the senses" or "deleterious to the health of the plaintiffs." The injunction is not more indefinite than that in *Judson v. Los Angeles Suburban Gas Co.*, 157 Cal. 168, 106 P. 581, 26 L. R. A. (N. S.) 183, 21 Ann. Cas. 1247, which was upheld. There the judgment enjoined the defendant from operating gas works in such a manner as to cause or permit smoke, gases, or offensive smells or fumes to be emitted therefrom or to be precipitated upon the property of the plaintiff. In interpreting this language the Supreme Court said: "The appellants are enjoined from maintaining the same sort of nuisance that had caused the annoyance to plaintiff." This is true in the instant case. The evidence showed and the court found that loud noises, offensive odors, black smoke and soot emanating from the appellants' laundry were offensive to the senses and deleterious to the health of the plaintiffs, and that they created a nuisance. It is these objectionable emanations, the same sort of nuisance which had caused the annoyance to the plaintiffs, that are enjoined. Even if true, it is no objection to the validity of an order that there is room for difference of opinion as to what noises are loud, what odors are offensive, and what smoke is black. An injunction against the diversion of more than a continual flow of six miner's inches of water would hardly be questioned as indefinite, and yet when charged with its violation it might be seriously contended that the amount taken was not six miner's inches, though after a hearing the court should so find and hold. An order restraining the maintenance of a flume on a certain property would scarcely be attacked as indefinite, and yet upon citation for its violation the defendant might claim that the conduit which he had built was not a flume. Such a theory as that the term "black smoke" is indefinite because one of the parties might be color blind and claim that the smoke was blue, would render practically all injunctions indefinite and result in it being possible to nullify almost any judgment. The shriek of a steam engine is surely a loud noise, and yet some persons might think and argue otherwise. If the operation of the defendant's plant should be deemed by the plaintiffs to create such noises or pollution of the atmosphere as to be deleterious to their health or offensive to their senses and should they produce competent and satis-

factory evidence that any or all of these objectionable features were injuring or destroying their health, we think they would be entitled to relief under the terms of the judgment, otherwise not.

[7, 8] It is next insisted that, the defendant Blue Bird Laundry Company having operated its laundry for a period of more than ten years, and the plaintiffs having been fully aware of the manner in which it was conducted, they acquiesced, and that they waived any legal objection which they may have had, and therefore approved and ratified the nuisance which the trial court found existed. No California authority is cited which recognizes this rule, and we are unable to find one. It has repeatedly been held that in suits for injunction by a private person to enjoin an offense amounting to a public nuisance, no lapse of time will justify the special injury; that while laches or the statute of limitations may in proper cases be pleaded in bar of the original act which created the conditions sought to be enjoined, neither one is a ground of defense to a continuing nuisance, since the character of such offense gives rise to successive rights of action. *Bowen v. Wendt*, 103 Cal. 236, 37 P. 149; *McLean v. Llewellyn Iron Works*, 2 Cal. App. 346, 83 P. 1082, 1085; *Kafka v. Bozio*, 191 Cal. 746, 218 P. 753, 29 A. L. R. 833. The appellant was not sought to be restrained from erecting the Blue Bird laundry. The respondents alleged, their evidence tended to establish, and the court below found, that its present operation was such as to constitute a nuisance. Nor in this case is it contended or shown that the delay and acquiescence on the part of the plaintiffs misled the laundry company so as to result in the expenditure by the latter of large sums of money or in fact any money whatever. In this regard the instant case is similar to those cited in this paragraph. We must therefore hold that the respondents were not estopped to maintain their action for abatement of the offenses of which they complained. From what we have said it is apparent that had findings been made upon the defenses of acquiescence and estoppel which were interposed, such findings would necessarily have been against the defendants' contentions; hence, the failure of the trial court to make findings upon these issues was not prejudicial.

[9] The only other point advanced by appellant is that the evidence, portions of which have heretofore been stated, and the finding of the trial court which in substance recites the same facts, do not justify an injunction against the establishment and maintenance of the proposed new laundry. As we have already observed, the judgment of the trial court restraining the operation of the old laundry in such manner as to create odors, noises, smoke, etc., which were deleterious to health, was warranted by the evidence. With

respect to the new laundry, it was alleged that the defendant would, unless restrained from so doing, erect, maintain and conduct another laundry across the street from the first one, in the same manner and with the same injurious features as those complained of with respect to the laundry then in operation. The defendants denied by their answer that the new laundry would be so operated as to constitute a nuisance to the plaintiffs, or that any deleterious odors would emanate therefrom. It appears that application was made to the city of Los Angeles for a permit to build an addition to the old laundry; that the defendant commenced the construction of another laundry across the street from the one in operation, and intended using electric power, but that the oil burners would be maintained in the old plant, and steam-piped under the street to the new one, where the actual washing was to be done. During the trial the court visited and inspected the premises for the purpose of observing the character and extent of the noises, odors, smoke and soot complained of, which, when the inspection was made, appear from the record to have been negligible. Appellant's witnesses swore that the court had been shown the average existing conditions, and that at no time was there appreciably more noise, smoke or odor than existed at that time; that a bell could be substituted for the whistle, objectionable odors, if any, might be eliminated, and that soiled laundry need not be piled upon the sidewalk, but that they could offer no assurance that the small flow of smoke could be avoided. On the day following the court's inspection witnesses called by the plaintiffs in rebuttal testified that there was as much difference between the noises made while the judge was present and that on other days "as an empty wagon going on a rocky mountain and a buggy going on a level ground," "something like using a .22 rifle to an ordinary shotgun"; that when standing within 50 feet of the laundry the witness on the day of the court's visit could scarcely hear any noise, whereas all during the preceding four years one "could hear that noise for blocks"; that while there was but little or no smoke the day before "worth anything compared with the smoke that there would usually be"; on other days it flowed "just as full as that smokestack can hold it."

The trial court having made a personal inspection, and having had all of the witnesses before it, may have concluded that the defendant willfully suppressed physical evidence, and that notwithstanding its strenuous protests to be contrary, the noises and odors at the new plant would in all probability be no less than those complained of and restrained at the old one. Code Civ. Proc. § 1963, subd 5. Upon the maxim falsus in uno, falsus in omnibus, the court would have been warranted in disbelieving the represen-

tations of the defendant and its witnesses concerning the alleged harmless and inoffensive means and methods to be employed in the laundry under construction, and would have been justified in concluding that unless restrained the objectionable elements involved in the operation of the old laundry would be continued in the addition.

Since the appellant represented that it contemplated removing its machinery and operating its laundry in the new building, the only reasonable ground for the court's viewing the old plant would have been for the purpose of determining in what manner the new one would be conducted. If the court concluded that with this in view the defendant had misled the court as to the true situation, it was wholly justified in restraining deleterious noise, odor, and smoke at either laundry.

[10] The court did not grant the injunction prayed by the plaintiffs, restraining the operation of both laundries, but enjoined the defendant from so operating either laundry as to be deleterious to the health of the plaintiffs, which we think was not improper in view of all of the evidence before it. In *McIntosh v. Brimmer*, 68 Cal. App. 770, 230 P. 203, it was said:

"Where the injury complained of results from a business which is not per se a nuisance, it being caused only by reason of the manner in which the business is conducted or by the surrounding circumstances, it is always proper for the court so to frame its decree that defendant's business will not be absolutely prohibited, if this can be done and still give to plaintiff the relief to which he is entitled. *Collins v. Wayne Iron Works*, 227 Pa. 326 [76 A. 24]; 20 R. C. L., p. 482."

We find no error in the granting of the injunction as framed, and the judgment is therefore affirmed.

We concur: **WORKS, P. J.; THOMPSON, J.**

85 Cal. App. 454

GOYTAN et al. v. DEASY, Judge. (Civ. 5916.)★

District Court of Appeal, First District, Division 1, California. Sept. 15, 1927.

Hearing Denied by Supreme Court Nov. 14, 1927.

Depositions ⚡71—Witnesses ⚡297—Court held without power to compel defendant to answer questions tending to incriminate him or questions relating to immaterial matters.

Where plaintiff sought to take a deposition and defendant refused to answer questions propounded, superior court held without power to compel him to answer questions tending to incriminate him, or questions relating to matters immaterial to the issues involved.

Application for a writ of mandate by Rose Mary Goytan and others, prayed to be directed to Daniel C. Deasy, as Judge of the Su-

perior Court of the State of California in and for the City and County of San Francisco, to compel respondent to order defendant in a case in which petitioners were plaintiffs to answer certain questions. Writ denied.

Hearing denied by Supreme Court; **CURTIS, J.**, dissenting.

Bronson, Bronson & Slaven, of San Francisco, for petitioners.

PER CURIAM. Petitioners are plaintiffs in an action for damages pending in the superior court of the state of California, in and for the city and county of San Francisco, and sought to take the deposition before a notary public of one of the defendants named in said action, who refused to answer the questions propounded to him. He was thereupon cited to appear before respondent as judge of said superior court to show cause why he should not so answer, and after a hearing was had the citation was dismissed without requiring the defendant to answer said questions. Petitioners now apply to this court for a writ of mandate requiring respondent to compel said defendant to answer said questions, or, upon defendant's refusal so to do, to adjudge him guilty of contempt and to cause him to be punished accordingly.

We have given careful consideration to the import of the questions petitioners seek to have said defendant answer, and are of the opinion that as to most of them said defendant was entitled to rely upon the privilege claimed by him that his answer thereto may tend to incriminate him in the courts of this state; the remaining questions, we think, relate to immaterial matters. We conclude, therefore, that for the reasons stated, respondent was without legal power to compel said defendant to answer said questions, and consequently the application for the writ herein must be denied. It is so ordered.

85 Cal. App. 435

PEOPLE v. TOSSEY et al. (Cr. 979.)

District Court of Appeal, Third District, California. Sept. 13, 1927.

Infants ⚡68—Defendant pleading guilty before disclosing that he was less than 18 years old held properly sentenced on such plea (Juvenile Court Law, § 4d, and § 6, as amended by St. 1921, p. 799, § 1).

Where defendant pleaded guilty in superior court to charge of robbery before disclosing that he was under the age of 18 years, and where proceedings were thereafter had in juvenile court which certified case back to the superior court to be prosecuted under the general law, held proceedings in superior court before transfer to juvenile court were valid, under Juvenile Court Law, § 4d, and section 6, as amended by St. 1921, p. 799, § 1, and superior court did not err in pronouncing sentence on plea of guilty previously made.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Joseph Tossey, alias James Trautman, and another, pleaded guilty to charge of robbery, and Joseph Tossey appeals from judgment. Affirmed.

Mrs. V. E. Parkinson, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The information herein, charging the defendants with the crime of robbery, was filed October 21, 1926. On their arraignment two days later the defendants appeared without counsel and, after being duly informed of their rights, stated that they did not desire counsel to represent them. Tossey, who will be referred to as the defendant, stated that his true name is James Trautman. They both entered pleas of guilty and waived time for pronouncing sentence. The court thereupon examined Tossey, who was not under oath, however, in part as follows:

"Q. How old are you, Trautman? A. Fifteen.

"Q. Fifteen? A. Yes, sir.

"Q. Tell me the truth about it, how old are you? A. I told you the truth, sir.

"Q. You are only fifteen? A. Yes, sir.

"Q. You are a big boy for fifteen. * * * I don't know as I can send a boy of your age to San Quentin, to state's prison. * * * A. I never knew you could send a juvenile to prison.

"Q. Of course you can; that doesn't prevent sending you to prison; don't think you are immune because you are a juvenile that you can go out and commit any crime. A. I never meant that; but what are our reformatories for?

"Q. * * * What year were you born? A. 1911. * * *

"Q. At the time you committed this robbery, did you have any deadly weapons with you? A. Yes, sir.

"Q. A gun? A. Yes, sir.

"Q. What did you do, point the gun at him? A. Yes, sir.

"Q. And make him give up his overcoat? A. Yes, sir.

"Q. Did you tell him to stick up his hands? A. Yes, sir.

"Q. Was the gun loaded? A. Yes, sir.

"Q. Who did the gun belong to? A. Me.

"Q. And where did you get the gun? A. At Evanston, Wyo.

"Q. How many other similar holdups had you committed on the way out here from Wyoming? A. I think four.

"Q. The two of you together? A. No, sir.

"Q. How many have you committed since the two of you were together, you and Pulliam? A. Four. * * *

"Q. Had you stuck anybody up before you met Pulliam? A. Yes, sir.

"Q. How many times had you stuck any one up before you met him? A. Four. * * * I pulled four myself and four with him."

The court then sentenced appellant to imprisonment in the state prison. In doing so, the court said:

"When sentencing this defendant to San Quentin, the court takes into consideration the fact this is not his first offense; he seems to have started out on a wild career of crime, traveling through the country committing these holdups by the use of deadly weapon. It is a case, under the law, that does not permit of the granting of probation, and it would be a tragedy to take a boy like this and send him to the reform school among other young boys, a fellow who is a wholesale highwayman, just going there for the purpose of educating other boys in similar crime."

The court apparently proceeded upon the theory that sections 4d and 6 of the Juvenile Court Law are inapplicable to cases pending in the superior court. It does not appear that any suggestion was made on defendant's preliminary examination that he was under the age of 18 years, and the first suggestion to that effect was made by the defendant in his aforesaid examination by the superior court after the entry of his plea of guilty, and no application or request was then made to certify the case to the juvenile court. Thereafter, on application to Division 2 of the District Court of Appeal, First District, for a writ of habeas corpus it was held that the trial court had exceeded its jurisdiction in sentencing the defendant to imprisonment without having first certified the case to the juvenile court, and it was "ordered that said defendant be discharged from the custody of the warden at San Quentin prison, and that said minor be delivered into the custody of the sheriff of the county of Sacramento, and that he be there dealt with as provided by law." Ex parte Tassey (Cal. App.) 253 P. 948. Thereafter the defendant was taken into the trial court and, for the first time, application was made to that court that the case be referred to the juvenile court. The case was so referred and thereafter the juvenile court after reciting the history of the case, made the following finding and order:

"The said James Trautman, true name Joseph Tossey, appeared in person, represented by his attorney, Mrs. Valla Parkinson, and after hearing evidence, and being fully advised in the premises, and it appearing that the said James Trautman, true name Joseph Tossey, is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law, now, therefore, it is hereby ordered, adjudged and decreed * * * that the said James Trautman, true name Joseph Tossey, be and he is hereby certified to the superior court, there to be prosecuted under the general law, and he is remanded to the custody of the sheriff."

Thereafter the defendant was again taken into the superior court, whereupon his counsel asked that he be permitted to withdraw his plea of guilty and enter a plea of robbery of the second degree, and the defendant tes-

tified, in support of the request that the gun used in committing the robbery was not loaded at that time but the court denied the request and sentenced the defendant to imprisonment in the state prison. The defendant has appealed from the judgment.

The Juvenile Court Law provides:

"Sec. 4d. No person under the age of eighteen years at the time of the commission of an alleged offense or crime shall be prosecuted for crime until the matter has first been submitted to the juvenile court by petition as hereinbefore provided, or by certificate of the lower court as hereinafter provided." Stats. 1915, p. 1228.

"Sec. 6. Whenever a deposition or complaint shall be filed in any court *other than a superior court*, charging a person with a crime and it shall be suggested or shall appear to the judge, justice or recorder before whom such person is brought that the person charged was at the date the offense is alleged to have been committed under the age of eighteen years, said judge, justice or recorder, shall immediately *suspend* all proceedings against such person on said charge and examine into the age of such person, and if, from such examination, it shall appear to the satisfaction of said judge, justice or recorder, that such person was at the date the offense is alleged to have been committed under the age of eighteen years, he shall forthwith certify to the juvenile court of his county (a) that said person * * * is charged with such crime * * *; (b) that said person appears to be under the age of eighteen years, * * * and (c) that proceedings have been *suspended* against such person on such charge by reason of his age; * * * and immediately thereupon all proceedings against the said person on said charge shall be *suspended* until said juvenile court shall issue its mandate, as hereinafter provided, directing the court before which said charge was made to proceed with the examination into or trial thereof. * * * If such judge [of the juvenile court] shall at any time conclude that such person is not a fit subject for further consideration under this act, * * * he may remand such person to the court in which said person is charged with said offense for further proceedings on said charge, and upon receipt of the mandate of said juvenile court, or the judge thereof, the court before which said charge is then pending shall be vested with full authority to proceed with the examination or trial thereof." Stats. 1921, p. 799.

Appellant contends that:

"The superior court had competent jurisdiction up to and including the determination of the age of the infant. From that point on in case at bar all proceedings were void and the reassigning of the case to the superior court from the juvenile court could not in any man-

ner validate any irregularity in the former proceedings."

Without expressing any opinion as to whether the superior court had jurisdiction to enter the first judgment, or whether sections 4d and 6 are applicable to cases pending in the superior court, and assuming, for the purposes of this opinion, that such sections are so applicable and that the court was without jurisdiction to enter such judgment it may be conceded that counsel's statement is correct. But the defendant had entered his plea of guilty prior to any suggestion that he was under the age of 18 years. The statute does not provide that, upon such suggestion being made, the proceedings theretofore had shall be vacated or become of no effect, but that all proceedings shall be suspended until the juvenile court shall direct the court in which the defendant is charged to proceed with the case. The reasonable interpretation of the statute appears to be that all proceedings prior to any suggestion that a defendant is under 18 years of age are perfectly valid and need not be repeated on his being remanded by the juvenile court. This is in accordance with the ordinary and natural meaning of the word "suspend" as used in the statute. The most that can be said in favor of a defendant under such circumstances is that the trial court should resume proceedings at the point where the statute required the suspension thereof, all subsequent proceedings prior to the certification to the juvenile court being treated as void. If the defendant had been tried and found guilty and had thereupon, for the first time, suggested that he was under 18 years of age, it would hardly be contended that the subsequent certification of the case to the juvenile court and that court's remand of the defendant to the trial court would have the effect of vacating the verdict and making a new trial necessary. It does not appear why a different rule should apply in case of a plea of guilty. The following cases while not directly in point, are at least consistent with the foregoing views: *In re Wolff*, 183 Cal. 602, 192 P. 33; *People v. Wolff*, 182 Cal. 728, 190 P. 22; *People v. Oxnam*, 170 Cal. 211, 149 P. 165; *In re Northon*, 35 Cal. App. 369, 169 P. 1051; *In re Tom*, 17 Cal. App. 678, 121 P. 294.

The judgment is affirmed.

We concur: PLUMMER, J.; BURROUGHS, Justice pro tem.

85 Cal. App. 433

(259 P.)

PEOPLE v. FEARY. (Cr. 975.)★District Court of Appeal, Third District,
California. Sept. 13, 1927.Rehearing Denied Oct. 13, 1927. Hearing De-
nied by Supreme Court Nov. 10, 1927.

1. Criminal law §419, 420(10)—In prosecu-
tion for lewd and lascivious conduct with
child, child's extrajudicial statements held in-
admissible.

In prosecution for lewd and lascivious con-
duct with child, child's extrajudicial statements
held inadmissible to prove any element of the
crime charged.

2. Criminal law §562—Where only evidence
tending to show guilt of defendant of lewd
and lascivious conduct with child, was child's
extrajudicial statements, conviction was re-
versed.

Evidence held insufficient to sustain convic-
tion of lewd and lascivious conduct with child,
where only evidence of the crime was child's
extrajudicial statements.

Appeal from Superior Court, San Joaquin
County; George F. Buck, Judge.

Richard V. Feary was convicted of lewd
and lascivious conduct, and he appeals. Re-
versed.

George Stahlman, Jr., and Sydney C. Ben-
nett, both of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles
Jones, Deputy Atty. Gen., for respondent.

FINCH, P. J. The defendant was convicted
of the crime of lewd and lascivious conduct
with a child, his daughter, then of the age of
9 years. This appeal is from the judgment
and the order denying a new trial.

[1, 2] At the trial the child positively de-
nied that the defendant committed any of the
acts charged. On the ground that he was
taken by surprise by such denial, the district
attorney was permitted to prove by the tes-
timony of the girl and that of other wit-
nesses that at other times she had stated that
the defendant had committed such acts. In
admitting this testimony the court stated that
it was admitted for the purpose of contradict-
ing the girl's testimony given at the trial, to
the effect that the defendant had not com-
mitted such acts, "to impeach and wipe out
that testimony; and that is the only effect
and purpose that this testimony can have, is
to wipe out her previous testimony, if the
jury so believe that it does, but it is not for
the purpose of showing the fact itself." It is
elementary, of course, that the girl's extra-
judicial statements were inadmissible to prove
any element of the crime charged. Appellant
contends that there is no other evidence to
support the verdict. At the oral argument
counsel for the people confessed inability to
find any such other evidence and a careful
reading of the entire record fails to disclose

any such evidence. The appellant therefore
is entitled to a reversal.

The court instructed the jury that "testi-
mony has been introduced by the prosecution
tending to prove other acts of lewd and las-
civious conduct of the defendant toward" the
girl "prior to the acts relied upon for con-
viction," and that this evidence might be
considered as tending to prove "the lewd and
lascivious disposition and tendency of the
defendant to commit lewd and lascivious
acts." No evidence of such "other acts of
lewd and lascivious conduct of the defendant"
has been discovered in the record.

The judgment and the order are reversed.

We concur: **PLUMMER, J.**; **BUR-
ROUGHES**, Justice pro tem.

85 Cal. App. 461

**VIGNOLO v. SUPERIOR COURT OF CALI-
FORNIA, IN AND FOR CITY AND
COUNTY OF SAN FRANCISCO. (Civ.
5942.)†**

District Court of Appeal, First District, Divi-
sion 1, California. Sept. 16, 1927.

As Modified Sept. 29, 1927. Hearing Denied by
Supreme Court Nov. 14, 1927.

1. Justices of the peace §171(3)—Adjudica-
tion of facts in justice court is necessary
before de novo trial and judgment on merits
may on appeal, be had in superior court.

When an action is commenced in a justice
of the peace court, there must be an adjudica-
tion of the facts therein before a trial de novo
may be had and a judgment rendered on the
merits in the superior court.

2. Justices of the peace §171(3)—Where un-
verified answer in justice court denied alle-
gations of complaint, but parties orally
stipulated facts were as pleaded, judgment
rendered was on fact adjudication, hence per-
mitted appeal on facts.

Where defendant's unverified answer in a
justice of the peace court denied all allegations
of the complaint, but on trial the defendant
stipulated orally that the facts were the same
as pleaded in the complaint, judgment there-
after rendered was based on an adjudication
of facts, hence afforded plaintiff a right to ap-
peal to the superior court on questions of fact
as well as of law.

3. Justices of the peace §31—Trials in ju-
stice courts may be had upon issues of law
and of fact (Code Civ. Proc. §§ 878-882).

Trial in justice of the peace courts may be
had upon issues of law and upon issues of fact,
in view of Code Civ. Proc. §§ 878-882.

4. Justices of the peace §171(3)—Fact ad-
judication required in justice court before
de novo appeal to superior court will be al-
lowed may be based upon party's judicial ad-
missions (Code Civ. Proc. § 1824).

The adjudication of facts necessary to en-
title a party to appeal de novo to the superior
court from a justice court may, in view of

Code Civ. Proc. § 1824, be based upon a party's judicial admissions, the kind of proof being immaterial.

5. Justices of the peace ☞104—Judicial admissions in justice court held evidential and of same value as witnesses' testimony for decision on merits.

Judicial admissions of the defendant in a justice court held evidential in character and dispensing with the necessity of any further evidence for a decision on the merits, and, when accepted by the plaintiff for whose benefit they were made, carried the same probative force as the testimony of witnesses with reference to the disposal of the issues of fact.

6. Justices of the peace ☞106—Upon facts being established, though only by admissions, judgment upon merits before justice was mandatory (Code Civ. Proc. §§ 890, 890a, 925).

Where the facts in a trial before a justice of the peace were established by defendant's admissions only, no other evidence being adduced thereon, rendition of judgment upon the merits was mandatory, in view of Code Civ. Proc. § 925, relative to limited jurisdiction of justice courts, and sections 890 and 890a, relative to restrictions of justices' authority to dismiss actions.

7. Justices of the peace ☞106—Justice courts may not render nonsuit judgments (Code Civ. Proc. §§ 890, 890a, 925).

Justice courts have no authority to render judgments of nonsuit, in view of Code Civ. Proc. §§ 890, 890a, 925.

8. Justices of the peace ☞141(5)—Defendant's voluntary participation in superior court de novo trial on appeal from justice court, without objection to de novo jurisdiction, precluded his questioning latter court's jurisdiction to determine appeal on merits.

Where defendant voluntarily participated in a trial de novo in the superior court appealed from a justice court, without objection being made to the jurisdiction of the superior court to try the action anew, he was thereafter precluded from questioning the jurisdiction of the superior court to proceed de novo to determine the appeal on its merits.

Action by James Neary against Pietro Vignolo in a justice of the peace court. Judgment for defendant, and plaintiff appealed to the superior court of California in and for the city and county of San Francisco, where a de novo trial resulted in judgment for plaintiff, and defendant petitions for a writ of review to have the judgment of the superior court annulled. Proceedings affirmed.

Sawyer & Sawyer, of San Francisco, for petitioner.

Frederic Appelman, of San Francisco, for respondent.

KNIGHT, J. Petitioner applies for a writ of review for the purpose of having annulled a judgment of the respondent superior court rendered on the merits, after trial de novo,

in an action brought before said superior court on an appeal from the justice court taken on questions of law and fact. Petitioner's main contention is that there was no trial of the facts in the justice court, and that therefore the appeal to the superior court was in effect one taken upon questions of law alone, whereunder the power of the superior court was limited to a reversal of the judgment and a remand of the cause to the justice court for trial on the issues of fact tendered by the pleadings.

The action was commenced by one James Neary against petitioner to recover upon an assigned claim for real estate broker's commissions. The essential allegations of the complaint were that petitioner authorized plaintiff's assignor, a duly licensed firm of real estate brokers, to sell his real property; that thereafter said brokers secured a purchaser, with whom petitioner entered into a written contract of sale, a copy of which was attached to and made a part of the complaint; that at the time of the execution of said contract petitioner accepted from the purchaser a deposit of \$400; and that, although said purchaser was ready, willing and able to consummate the sale in accordance with the terms of the written contract, petitioner refused to do so.

Petitioner demurred to the complaint on general grounds, and the demurrer was overruled. Thereupon he filed an unverified answer denying "generally and specifically, each and every, all and singular, the allegations of said complaint." The cause then came on for trial before the justice, and petitioner stipulated orally "that the facts are the same as pleaded in the complaint," following which judgment was given in favor of petitioner, and the plaintiff appealed to the superior court on questions of law and fact. Thereafter the cause came on for trial on the merits before the latter court, without objection being made thereto by petitioner, and a second and similar stipulation was made by petitioner as to the facts; whereupon the superior court rendered its judgment granting unto plaintiff the relief prayed for in the complaint. The parties then filed a written stipulation waiving findings of fact and conclusions of law, and judgment for plaintiff was entered accordingly. At this stage of the proceedings petitioner's present counsel were substituted as his attorneys, and they made a motion for a new trial, which was denied. Execution was thereafter issued and levied on certain real property belonging to petitioner. This proceeding was then instituted.

[1, 2] Conceding, as petitioner contends, that when an action is commenced in the justice court there must be an adjudication of the facts therein before a trial de novo may be had and a judgment rendered on the merits in the superior court (*Myrick v. Superior Court*, 68 Cal. 98, 8 P. 648; *Null v. Superior*

Court, 4 Cal. App. 207, 87 P. 392), the present case, in our opinion, does not fall within the rule stated because the proceedings had before the justice here doubtless constituted a trial upon and a disposal of the issues of facts; consequently, the judgment rendered was based on the merits and afforded the aggrieved party thereto a right of appeal on questions of law and fact, and to have such appeal heard and determined accordingly in the superior court.

[3-5] Trials in the justice courts may be had upon issues of law and upon issues of fact. Code Civ. Proc. §§ 878, 881, 882. An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof, and must be tried by the court. Code Civ. Proc. §§ 879, 881. "An issue of fact arises—1. Upon a material allegation in the complaint controverted by the answer * * *" and "must be tried by a jury, unless a jury is waived, in which case it might be tried by the court." Code Civ. Proc. §§ 880, 882. The action here came on for trial before the justice upon the issues of fact joined by the allegations contained in the complaint, and the denials thereof contained in the answer. By reason of such controversion of facts plaintiff was required to substantiate the allegations of his complaint by proof, which is defined by section 1824 of the Code of Civil Procedure to be "the effect of evidence, the establishment of a fact by evidence." It was therefore wholly immaterial, we think, as to the kind of evidence plaintiff adduced, whether it consisted of the testimony of witnesses or the judicial admissions of the defendant. The latter were evidently made for the purpose of saving time and expense, and to avoid the inconvenience of calling witnesses to establish the facts about which there was no dispute; and that they were intended to relate only to the particular trial in the justice court is shown by the fact that a second and similar stipulation as to the facts was made in the trial *de novo* before the superior court. Such judicial admissions were therefore merely evidential in character (Volker, etc., *Lumber Co. v. Vance*, 36 Utah, 348, 103 P. 970, 24 L. R. A. [N. S.] 321, Ann. Cas. 1912A, 124), doing away with any further evidence, and, when accepted by plaintiff, for whose benefit they were made, carried the same probative force as the testimony of witnesses with reference to the disposal of the issues of fact (5 *Wigmore on Evidence*, pp. 604, 605).

[6, 7] The facts being thus established after trial the justice was called upon to render judgment, and under the law governing the procedure in justice courts the rendition of a judgment on the merits was mandatory. As declared by section 925 of the Code of Civil Procedure, "Justice courts being courts of peculiar and limited jurisdiction, only those provisions of this Code which are, in their nature, applicable to the organization, powers and course of proceedings in justices' courts,

or which have been made applicable by special provisions in this title [part II, tit. XI], are applicable to justices courts and the proceedings therein;" and with reference to the exercise of such limited powers it has been held that a justice of the peace is not vested with authority to pass upon or grant a motion for a nonsuit, that the dismissals he may enter are restricted to the causes mentioned in section 890 of said Code, of which the failure of plaintiff to establish his case by evidence is not one, and that "where evidence has been introduced in a trial of a case before him and the plaintiff rests his case upon evidence which, to the mind of the justice, is not sufficient to entitle him to judgment, the result is that there has been a trial upon the merits, that the plaintiff has failed to establish his cause, and that judgment upon the merits should be rendered for the defendant. Such is the clear meaning of our law, and so it has been construed in 1 Cowdery's Justice Treatise, p. 664, § 1134." *Peacock v. Superior Court*, 163 Cal. 701, 126 P. 976, overruling in effect the decision in *Smith v. Superior Court*, 2 Cal. App. 529, 84 P. 54, as to the power of a justice court to grant a nonsuit. Subsequent to the rendition of the decision in the case just quoted from, section 890a of said Code was enacted, which granted to justice courts authority to dismiss actions upon grounds other than and in addition to those enumerated in said section 890; but the power to render a judgment of nonsuit was not included therein, and consequently justice courts are still lacking in such authority.

In the present case, therefore, after the justice had proceeded with the trial of the facts pleaded in the complaint, and the same had been proved by the judicial admissions of the defendant, it was imperative that he render a judgment upon the merits, for, being without legal authority to dismiss the action by nonsuit, he could do nothing else; and the fact that such judgment was grounded upon judicial admissions rather than upon oral testimony or any other kind of legal proof manifestly did not change the nature of the trial from one of fact to one of law, nor affect the character of the judgment as being one upon the merits. As said in *Freeman on Judgments*:

"A judgment is on the merits when it amounts to a declaration of the law as to the respective rights and duties of the parties, based on the ultimate facts or state of the facts disclosed by the pleadings and evidence upon which the right of recovery depends, irrespective of formal, technical or dilatory objections or contentions. But it need not be the result of a trial or hearing on controverted facts, if the parties have had a legally sufficient opportunity to present the merits of the controversy and have waived or otherwise lost the right to such a hearing." 2 *Freeman on Judgments*, p. 1543.

Even though petitioner's stipulation as to the facts be considered as having nullified the

denials in his answer, and consequently that the judgment be deemed to be one rendered upon the pleadings, it nevertheless was a judgment upon the merits. *Takekawa v. Hole*, 17 Cal. App. 653, 121 P. 296; *Bailey v. Aetna Indemnity Co.*, 5 Cal. App. 740, 91 P. 416.

The cases cited by petitioner in support of his contention do not reach the point involved here. They either are essentially different in their facts from the present one or declare legal principles which are foreign to the issue herein. For instance, in *Null v. Superior Court*, supra, and *Myrick v. Superior Court*, supra, there was no adjudication of the facts whatever by the justice, a judgment of dismissal being entered in each action after the justice had refused to entertain jurisdiction. It was held that under such circumstances the superior court, in the exercise of its appellate jurisdiction, was without power to try the action de novo. In *People v. County Court*, 10 Cal. 19, and *Fabretti v. Superior Court*, 77 Cal. 305, 19 P. 481, no issues of fact were tendered by the pleadings, the appeals having been taken from default judgments, and it was held that appeals on questions of law alone would lie. The case of *Maxson v. Superior Court*, 124 Cal. 468, 57 P. 379, determined merely that the superior court, in the exercise of its appellate power, had jurisdiction upon reversal of a judgment of the justice court appealed upon questions of law alone to make its judgment of reversal effectual by remanding the cause to the justice court for further proceedings according to its directions, and might thereby control and direct the subsequent action of the justice court. *Abbey Land & Improvement Co. v. County of San Mateo*, 167 Cal. 434, 139 P. 1068, 52 L. R. A. (N. S.) 408, Ann. Cas. 1915C, 804, and *Quist v. Sandman*, 154 Cal. 748, 99 P. 204, were actions commenced originally in the superior court. The causes were submitted for decision on the pleadings or on stipulated facts, and it was held that since the facts were not controverted motions for a new trial would not be entertained. In *Gregory v. Gregory*, 102 Cal. 50, 36 P. 364, which was also a superior court action, it was held that a stipulation as to the facts dispenses with findings; and in *Southern Pacific R. R. Co. v. Superior Court*, 59 Cal. 471, it was held that where a plaintiff in the justice court has appealed to the superior court on questions of law from a judgment of dismissal entered against it upon the ground of failure to serve summons, and the defendant in the action appeared specially in the superior court for the purpose of moving the dismissal of the appeal, the superior court has not the right to ignore the appeal and order the defendant to answer and proceed to trial therein.

[8] Furthermore, and aside from the merits of the legal questions presented, we are convinced that petitioner, having voluntarily participated in the trial de novo in the su-

perior court, without objection being made to the jurisdiction of that court to try the action anew, and having entered into a second stipulation therein as to the facts, is now precluded from attacking the judgment rendered therein on the merits. As held in *Stehlin v. Superior Court*, 12 Cal. App. 421, 107 P. 568, the superior court acquired jurisdiction of the appeal as taken, both of the parties and of the subject-matter; and where, under such circumstances, petitioner voluntarily appeared and submitted the whole controversy to the superior court, and an adverse judgment was rendered against him, he cannot be allowed for the first time upon certiorari to question the power of the court to try and determine the appeal on the merits.

For the reasons hereinabove set forth, the proceedings sought to be annulled are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

85 Cal. App. 385

MURERO v. REINHART LUMBER CO. et al.
(Civ. 5821.)★

District Court of Appeal, First District, Division 2, California. Sept. 12, 1927.

Hearing Denied by Supreme Court Nov. 10, 1927.

1. Trial ~~§~~203(1), 295(1)—Trial court must give proper instructions supporting defendant's theory, as well as plaintiff's theory, and all instructions given must be read together.

Just as it is trial court's duty to give all proper instructions supporting plaintiff's theory of case, it is equally its duty to give all proper instructions supporting defendant's theory, and all instructions given must be read together.

2. Evidence ~~§~~558(7)—Evidence that physician testifying as expert in personal injury case was frequently called as expert held not to show his interest.

Evidence that physician testifying for defendant in personal injury action was frequently called as expert witness in cases involving questions of medical jurisprudence did not show or tend to show his interest, and exclusion of such evidence to show interest was not prejudicial to plaintiff.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Louise Murero against the Reinhart Lumber Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Hearing denied by Supreme Court; WASTE, C. J., and SEAWELL, J., voting for transfer.

Reisner & Deming, of San Francisco, for appellant.

Louis V. Crowley, of San Francisco, for respondents.

STURTEVANT, J. The plaintiff commenced an action against the defendants to recover a judgment for damages alleged to have been suffered by reason of being struck by an automobile truck owned by the defendant lumber company and operated by the defendant Peter Leonard. The defendants answered and a trial was had before the trial court sitting with a jury. The jury returned a verdict in favor of the defendants and the plaintiff has appealed.

The plaintiff contends that the trial court erred in instructing the jury. Before considering the specific instructions it is necessary to state some of the facts. About 9 o'clock in the morning on the 26th day of September, 1923, the plaintiff had ridden on an east-bound car across Sixteenth street to Bryant street in San Francisco. She claimed that the car stopped on the east side of Bryant street, and that she stepped down onto the ground and turned to assist her daughter-in-law to also alight. While so standing immediately alongside of the car, she claims that the defendants' truck approached from the west and knocked her down and caused the injuries complained of.

The witnesses for the defense stated quite a different set of facts. The story as recited by those witnesses, in so far as necessary to be recited, was as follows: They claim that the defendants' truck was traveling along the south side of Sixteenth street toward Bryant street; that when it reached Bryant street a car was in the act of crossing over Sixteenth street running south on Bryant; that the truck paused for that car to cross Sixteenth street and thereafter the truck proceeded on its way. About that time a car on Sixteenth street approached from the west going in an easterly direction. As the defendants' truck was waiting for an opportunity to cross over Bryant, the two women were standing about on the south rail of the Sixteenth street car line, approximately on a line with the westerly sidewalk of Bryant. When the driver started ahead and when his front wheels were on the westerly rail of the south-bound Bryant street car track, he heard a yell and stopped. The plaintiff had come in collision with his left rear wheel. According to this theory the plaintiff was not in the act of alighting from any street car, her street car was not seen, and another street car was approaching from the west on the Sixteenth street tracks. In other words, it was the theory of the plaintiff that the accident occurred on the east side of the intersection of Sixteenth street and Bryant, and it was the theory of the defendants that the accident occurred on the west side of the intersection.

The trial court gave the jury an exhaustive charge and a number of instructions. It did so in groups and stated to the jury what portion was the charge of the trial court, what

portion included instructions requested by the plaintiff, and what portion included instructions requested by the defendants. We do not understand the plaintiff to claim that any one instruction was an erroneous statement of the law. However, she does claim that some of the instructions were prejudicial—inapplicable to the case on trial. In other words, she relies on that part of section 134 of the Motor Vehicle Act (Stats. 1923, pp. 517, 560) which is as follows:

"In passing any * * * street car while passengers are alighting from or boarding the same, vehicles shall be operated or driven on the right-hand side of such cars and at a rate of speed not exceeding ten miles an hour and no portion thereof or of any load thereon shall come within six feet of the running board or steps of such cars. * * *"

That six-foot space she claims is a zone to which she had a superior right, and in which she could stand, relying on the presumption that all others would obey the law and not injure her while she was standing in that position. That contention it may be conceded is wholly sound. However, the concession does not assist the plaintiff. The trial court fully instructed the jury on that subject.

[1] Just as it was the duty of the trial court to instruct the jury giving all proper instructions supporting the theory of the plaintiff, it was equally the duty of the trial court to give to the jury all proper instructions supporting the theory of the defendants. It could not give all of the instructions in one. It is settled law, however, that all of the instructions are to be read together. As so read the instructions given in the instant case are not in conflict, but are full, fair, and exact. From an examination of the record it will readily be seen that the jury could not have been misinformed regarding the plaintiff's six-foot zone and her special rights therein. It is equally clear that if, as testified to by the witnesses for the defendants, the plaintiff's car had long since passed by and there was not involved a question of alighting from, or boarding a car, then it is equally clear that the jury should have been advised and was advised of the rights of the respective parties to use the streets.

[2] The last point made by the plaintiff is that the court erred in limiting the plaintiff on her cross-examination of Dr. McElroy, a witness tendered by the defendants. In this connection the record discloses that on cross-examination the plaintiff attempted to prove that Dr. McElroy is frequently called, and in the past has been frequently called, as an expert witness on questions of medical jurisprudence. She stated that in entering upon that line of proof she expected to show Dr. McElroy's interest. The trial court informed her that she was entirely at liberty to make any showing to place before the jury the interest

of the witness. However, the trial court ruled that a showing that Dr. McElroy had frequently been called as an expert witness was not evidence showing, or tending to show, his interest. The ruling was clearly correct. The evidence tendered would be material as fortifying the qualifications of the witness and thus of strengthening the case for the defendants and disproving the case which the plaintiff was attempting to introduce. The plaintiff was not prejudiced by its rejection.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

85 Cal. App. 419

BLOOM v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA. (Civ. 3281.)★

District Court of Appeal, Third District, California. Sept. 13, 1927.

Hearing Denied by Supreme Court Nov. 10, 1927.

1. Insurance ☞665(2)—Evidence held to warrant conclusion that life policies were unconditionally delivered to insured by insurer's agent.

In action to recover on policies of life insurance alleged to have been issued to plaintiff's husband, evidence held to warrant conclusion that policies were unconditionally delivered by insurer's agent to insured.

2. Insurance ☞136(3)—Life policies became effective on delivery discharged of any condition on which delivery was made (Civ. Code, § 1626).

Under Civ. Code, § 1626, to effect that contract in writing takes effect upon its delivery to a party in whose favor it is made or to his agent, insurance policies became effective on delivery discharged of any condition on which delivery was made.

3. Insurance ☞136(2)—Policy was constructively delivered when by agreement it was so understood.

An insurance policy is constructively delivered when, by agreement of parties at time of execution, it was understood to be delivered and under such circumstances that insured is entitled to immediate delivery.

4. Insurance ☞136(2, 5)—Delivery of life policy is complete when sent to local agent for delivery, and acceptance binds acceptor as well as insurer.

Delivery of life policy is complete when policy is sent to local agent to be unconditionally delivered, and, though lost on the way, it is nevertheless the property of insured, and receipt of policy and acceptance by the insured binds the acceptor as well as insured to terms thereof.

5. Insurance ☞141(2)—That full payment of premiums was not made at time of unconditional delivery of life policies held immaterial.

That full payment of premiums on life policy was not made at time of unconditional de-

livery of policies by insurer's agent held immaterial, where it was shown that agreement was made that he was to call for payment of premium that evening and policies were unconditionally delivered.

6. Insurance ☞134(1)—Insured's failure to sign additional applications forwarded with policies to make insurer's records clear held not to affect recovery.

Failure of insured to sign additional applications contained in envelopes with policies and unconditionally delivered to him, in order to make records of insurer clear, held not to affect recovery thereof, since application forwarded with insured's name typewritten thereon became part of policy as fully to all intents and purposes as though actually signed by insured.

7. Evidence ☞271(19)—Private correspondence between insurer and agent held inadmissible, in action to recover on life policies.

In action to recover on life policies alleged to have been issued by defendant to plaintiff's husband, private correspondence between defendant and its agent after issuance of policy held inadmissible as not constituting evidence against a third party.

8. Appeal and error ☞1170(9)—Failure of instruction on distrusting false witness to require that testimony must be on material matter held not erroneous (Const. art. 6, § 4½; Code Civ. Proc. § 2061, subd. 3).

Under Const. art. 6, § 4½, failure of court to embody in instruction, under Code Civ. Proc. § 2061, subd. 3, to effect that witness, false in one part of testimony, was to be distrusted in others, the element that testimony must be on a material matter held not to have resulted in miscarriage of justice.

9. Insurance ☞669(2)—Trial ☞194(11)—Instruction on insured's purpose in obtaining physical possession of life policies and inability to accept them without examination held properly refused as invasion of jury's province and not supported by evidence.

In action to recover on life policies alleged to have been issued to plaintiff's husband, instruction relative to insured's purpose in obtaining physical possession of policies and to his inability to accept them without examining them and papers accompanying them held properly refused as being invasion of province of jury as instruction on facts and not supported by testimony.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Rose Bloom against the Pacific Mutual Life Insurance Company of California. Judgment for plaintiff, and defendant appeals. Affirmed.

R. S. Gray, of San Francisco, for appellant.
Evan J. Hughes, of Sacramento, for respondent.

PLUMMER, J. Plaintiff had judgment in the sum of \$9,284.50 upon an action instituted to recover said sum on two certain policies of life insurance alleged to have been is-

sued by the defendant, insuring plaintiff's husband, William Wolf Bloom. The policies in question were each for the sum of \$5,000, and judgment was awarded for the amount of each policy, less the premium due thereon in the sum of \$320.25 for each policy. From this judgment the defendant appeals.

The transcript discloses the following facts:

That on or about the month of April, 1923, one Stillman, acting as the agent of the defendant and then residing in the city of Modesto, where the plaintiff then resided, interviewed the plaintiff and her husband, William Wolf Bloom, relative to the taking out of a life insurance policy by the said Bloom. After considerable negotiation the said William Wolf Bloom consented to the taking out of a policy in the sum of \$5,000. Thereupon said Stillman wrote out and submitted a written proposal to the defendant, Pacific Mutual Life Insurance Company of California, whereby the said Bloom made application for the issuance to him of a life insurance policy in said sum. The application as filled out consists of questions and answers, and was upon a form presented by the said Stillman representing himself as the agent of the defendant.

It further appears from the transcript that the negotiations were had in the office adjoining the storeroom occupied by the Blooms in the conducting of a shoe store. That during the time the negotiations were being had Mr. Bloom was waiting upon customers. That he was going into the storeroom and waiting upon customers and returning to the place where the negotiations were being conducted. That at the completion of the writing out of the answers and questions contained in the application, Mr. Bloom was called into the storeroom to wait upon a customer, and thereupon Mr. Stillman requested that the plaintiff sign the name of William Wolf Bloom to the application, by herself, and this was done.

The transcript further shows that in pursuance of the application the said William Wolf Bloom went to the defendant's medical examiner in the city of Modesto, was there examined by him, made answers to the questions propounded by said medical examiner, signed the same, and this, together with the medical examiner's report and the report of Mr. Stillman, as well as the application, was sent to the defendant at its home office, in the city of Los Angeles.

It further appears that at the time these negotiations were being had and the application for a policy in the sum of \$5,000 was being written, Mr. Stillman told Mr. Bloom that he would have another policy for an additional \$5,000 prepared and issued for delivery; that he (Bloom) ought to take out insurance in the sum of \$10,000. The application to which we have referred bears date of the 26th day of April, 1923, and was for an

ordinary life policy. At the time of making the application just referred to the Blooms executed a promissory note for the payment of the first premium on the policy applied for, in the sum of \$223, and delivered the same to said Stillman. A short time after these occurrences, the said Stillman, having learned that the company was preparing or issuing a different kind of policy from the one applied for, went to the Blooms and said to them:

"I just found out from the company that they are not issuing these policies. They are issuing higher premium policies."

He said they were \$320 and some odd cents each. To this statement the record shows that both the plaintiff and Mr. Bloom replied, "That is all right."

That on about the 9th day of June, 1923, the defendant issued and forwarded to its agent in the city of San Francisco two 15-year endowment policies on the life of William Wolf Bloom. These policies were, by the San Francisco agent of the defendant, forwarded to Mr. Stillman in the city of Modesto. Thereafter, and on the morning of the 15th day of June, 1923, these policies were placed in the physical possession of William Wolf Bloom and plaintiff. The testimony of Stillman as to this particular transaction is, in substance, as follows:

"Approximately about 2½ months later I received two policies on the 15-year endowment plan and a note of not accepting the noncancelable at all. In other words, that was rejected. I was having breakfast at the Hughson Hotel and Mr. Bloom then passed the window. I called his attention and showed him the policies through the window. He came into the dining room, and he asked if those were his. I told him, 'Yes,' and then he said: 'Can I take them to show them to Mrs. Bloom?' I answered, 'Yes.' I finished my breakfast and followed to the store. I thought I would have a hard time in selling the insurance that was more than double the premium, and I began to explain to Mrs. Bloom what they were, and Mrs. Bloom at the time said: 'Come back in the evening, and we will talk it over.' I put the policies in my pocket, returned to my regular work, and in the afternoon I received a wire from the Pacific Mutual not to deliver the policies."

The testimony of Mrs. Bloom, corroborated by witness Robishaw, concerning this occurrence is, in substance, as follows:

"Mr. Bloom came into the store and handed me the policies. I looked at the policies and saw that they were for \$5,000, with \$320 premium each. I did not take the policies out of the envelope, but saw what they were by looking through the transparent covering of the envelopes in which they were contained."

The language of this witness, also corroborated by Robishaw, as to what occurred when Stillman called on the Blooms, after handing the policies to Mr. Bloom, is as follows:

"I set the policies on my ledger. It was about half past 10 or 11 o'clock that morning while I was sitting at my desk. Mr. Stillman came in and came right to my desk and talked about different things about 15 minutes and then said: 'Mrs. Bloom, can I borrow those policies and take them down the street to show to somebody, that I have a prospective customer,' and I handed them to him and said, 'If anything should happen to Mr. Bloom, is he covered?' And he said, 'He sure is.' So then I said, 'Come in to-night and get your money,' and he said, 'That is all right.' Mr. Stillman said the company would expect cash, and I said, 'Yes, sir.'"

The transcript further shows that on or about the 3d day of July, 1923, the promissory note for \$223, executed by the Blooms and hereinbefore referred to, was returned to them by the company.

On the part of the defendant, it is contended that the envelopes containing the policies also contained a certificate of health to be signed by Bloom, and also another application for insurance to be signed by Bloom personally, and that delivery of the policies and their becoming effective were dependent upon the signing of another application by Mr. Bloom, and also his signing a certificate of health. The testimony of Mrs. Bloom, is to the effect that neither she nor Mr. Bloom saw either one of the papers referred to. As against this the defendant contends that these papers were inclosed in the envelopes containing the policies, and that if the Blooms had examined the contents of the two envelopes, they would have discovered these papers.

While the arguments of counsel are voluminous and many points have been made by the appellant in seeking reversal of the judgment in this cause, only two questions are really presented. First, were the policies delivered by the agent of the company to the Blooms? Second, was that delivery conditional? Upon the question of delivery and what Stillman had said to Bloom when the policies were handed to him, or what Bloom may have said at the time of handing said policies to Bloom, the jury was entitled to take into consideration what occurred between the Blooms and Mr. Stillman when he obtained possession of the policies at a later hour during the day, in relation to borrowing the policies.

The record further shows that William Wolf Bloom died on or about the 4th day of February, 1924, and that application was made for blanks to make proof of death, etc. These were declined by the defendant on the ground of nonliability. The record also shows that probably on the 14th day of June, 1923, Bloom consulted a physician who was the medical examiner employed by the defendant. This physician testified first that he was consulted on the 17th of June, but later in the day testified that he had re-examined his records and ascertained that Bloom had consulted him on June 14th. However,

as the record does not show that said Bloom was afflicted with any disease at that time that caused his death, or in any way could be said to impair his physical condition or render him an unfit subject for insurance, it is immaterial on what day Bloom may have consulted a physician, as there is nothing in the record which shows any connection between the cause which induced Bloom to consult the physician in the month of June, 1923, and the cause which resulted in the death of Bloom in February, 1924.

Some contention is also made that Stillman was not authorized to deliver the policies in question to the Blooms. The record shows, however, that the application for an insurance policy to be issued by the defendant was taken by Stillman as the agent of the defendant; that the medical examination of Bloom was had at the instance of Mr. Stillman, and the papers pertaining to the same were all sent by Stillman to the home office of the defendant, and that the defendant, acting upon the same, issued the policies involved in this action. It may also be stated that practically all the papers in the record produced by the defendant, as well as by the plaintiff, bear the name of J. Stillman as agent of the defendant. The telegram sent by the defendant to Stillman to withhold the policies in question were received by him on the afternoon of June 15, 1923, after the policies had been placed in the possession of Mr. Bloom and after Mr. Stillman had called at the store to request, as testified by Mrs. Bloom and the witness Robishaw, that he might borrow the policies to show to a prospective customer. The testimony further shows that Stillman did not inform the Blooms of the telegram which he received on the afternoon of June 15, 1923, until two or three days later when request was made of him for the return of the policies. Mr. Stillman did not keep his appointment to meet the Blooms at 8 o'clock on the evening of June 15th, but telephoned to them that he had to make a trip to Stockton, some 30 miles away.

That the policies placed in the possession of the Blooms by Stillman were not so placed conditionally as contended for by the respondent is evidenced by a letter written by one L. W. Morgan, an official of the company and the manager of the company at San Francisco, transmitting the policies in question to the agent of the company at said city, and by said agent transmitted to Stillman. The letter is as follows:

"Laurence W. Morgan, Asst. Secretary and Superintendent Policy Department.

"Los Angeles, Cal., June 12, 1923.

"500789-90-Bloom.

"Mr. Arthur C. Parsons, Mgr., San Francisco, Cal.—Dear Sir: We inclose herewith the above numbered policies issued on the nonparticipating fifteen-year endowment plan without extended insurance as approved, rather than on

the plan applied for. This case had the careful consideration of our application committee and it was decided that the plan as outlined above was the best we could offer on the life of Mr. Bloom.

"Kindly have the inclosed certificate of health signed and returned to the home office.

"Inasmuch as the application submitted is signed by Mrs. Bloom for her husband, and the medical report is signed by Mr. Bloom himself, we are inclosing herewith a typed copy of the application which we must ask you to kindly have Mr. Bloom sign himself in order that our records may be complete. When the application has been personally signed, please return same to the home office.

"Yours very truly,
"M.G.

L. W. Morgan."

[1] The transcript further shows that the said Arthur C. Parsons referred to in this letter, upon receipt of the policies, forwarded the same to J. Stillman, at Modesto, with a letter couched in identical language. These letters constitute all there is in the record relative to what was desired by the company in relation to having another and additional application signed by Mr. Bloom himself, and also as to Bloom signing a health certificate. The record is absolutely silent as to Bloom having been requested by the agent Stillman to sign either of said papers. Whether said papers were or were not in the envelopes at the time they were handed to the Blooms does not satisfactorily appear, but, assuming that they were, there is nothing to show that the Blooms ever saw them. However, the language of the two letters which we have set forth herein establishes beyond question that delivery of the policies was not made conditional upon the signing of either an additional application or the health certificate. The very language of the letter establishes that the company wanted at least one of the papers, to wit, the application, simply "in order that our records may be complete." These letters were admitted in evidence at the request of the defendant over the objection of the plaintiff, and while they would not be binding upon the plaintiff, having been produced and admitted in evidence at the request of the defendant, the defendant cannot very well now be heard to insist that they mean anything other or further than as stated by the express language used therein. And, as we have said, there is not a word in the letters accompanying the policies indicating to Stillman or to the Blooms that the delivery of the policies and their becoming effective was conditional upon Bloom signing either the health certificate or a new application to take the place of the one upon which the policies were issued. The record likewise shows that it was the practice of agents of the company, upon writing a policy in the sum of \$5,000, to request the writing also of a policy in an additional sum of \$5,000, in the event that the insured was financially able to carry the same. That as we have stat-

ed, Mr. Stillman so informed the Blooms and the Blooms agreed thereto, in pursuance of which Stillman did indorse upon the application forwarded to the company a request for an additional insurance in the sum of \$5,000 bearing a like premium rate of \$320 per annum, and that the two policies were sent by Mr. Morgan, the assistant secretary and superintendent of the policy department of the defendant, to its agent at San Francisco to be forwarded to Stillman for delivery to the Blooms. It may be here stated that the policies in question were numbered 500789 and 500790, the latter of which is referred to in the testimony as the "optional policy." The testimony of Mr. Morgan upon this fact is as follows:

"Q. Mr. Morgan, policies that you have identified here and marked 'Defendant's Exhibit 3', for identification, being policy 500789, and the policy marked 'Defendant's Exhibit 4' for identification, being 500790, were the policies that were issued on the life of William Wolf Bloom by the Pacific Mutual Life Insurance Company and sent through your San Francisco office to J. Stillman, the agent in Modesto? A. Yes, sir."

In addition to this the testimony of Stillman shows that he told Bloom he had two policies and that they were his (Bloom's) policies, and that he actually gave them to Bloom. As to whether the agent Stillman delivered the policies in question to Mr. Bloom as his policies or merely to show to his (Bloom's) wife, the jury was entitled to take into consideration the testimony of Stillman as to the manner and purpose of securing repossession of said policies, as contrasted with the testimony of the plaintiff and the witness Robishaw; and if the jury believed the version given by the plaintiff and the witness Robishaw, we think they had a right to conclude that there was nothing conditional in the delivery of the policies by Stillman to Bloom, at the Hughson Hotel, on the morning of June 15, 1923.

[2-4] As further bearing upon the question of delivery and whether the same was or was not conditional, we may further quote from the testimony of Stillman:

"Q. State whether or not you received any instructions in writing at the time you received and accompanying these two policies designated 500789 and 500790? A. I don't remember that. There might have been a letter with them saying that the company sent a 15-year endowment instead of ordinary life."

It is evident from this that nothing was sent by the company to its agent at Modesto indicating an intent to make delivery conditional or calling attention of its agent to the fact that any conditional delivery was contemplated. We think the jury was entitled to conclude from this testimony and the letter accompanying the policies forwarded by the company to its agent in San Fran-

cisco, and by him forwarded to Stillman, that no conditional delivery was contemplated, and that the taking effect of the policies did not depend in any wise upon Bloom signing a health certificate or a new application to take the place of the one first forwarded to the company, even though the envelopes containing the policies also contained said papers when they were placed in the possession of the Blooms. If the jury had a right so to conclude from the testimony, then section 1626 of the Civil Code applies. This section reads:

"A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent."

We may also here refer to the text set forth in 14 California Jurisprudence, page 425:

"Delivery is absolute, and thereupon the policies become effective discharged of any condition upon which delivery was made."

The text-writer in 14 California Jurisprudence, page 425, further states the rule, supported by many authorities, to wit:

"It is settled that when a contract of insurance is executed with a full knowledge of an existing fact which would render it void under a condition precedent embodied therein, the condition will be considered as waived, since otherwise it would be an unmeaning form, the only effect of which would be to deceive and defraud. It has been held, accordingly, that an express provision in a policy that the company shall not be liable until the premium is actually paid is waived by the unconditional delivery of the policy, as a completed and executed contract under an express or implied agreement that a credit shall be given for the premium; and the company is liable for a loss which may occur during the period of credit. A policy is constructively delivered when, by agreement of the parties at the time of execution, it is understood to be delivered, and under such circumstances that the insured is entitled to immediate delivery. * * * Moreover, it seems that if the insurer so far accepts the application as to prepare and forward a policy to its agent for delivery, and a payment of the premium has been made or waived or is not a condition of a policy taking effect, the contract is then complete and the insurer cannot revoke acceptance, though the policy has not been delivered. Delivery is complete, therefore, when the policy is sent to the local agent to be unconditionally delivered, and though lost on the way, it is nevertheless the property of the insured."

And, further, from the same volume, page 427:

"The receipt of a policy purporting to embody all the terms of the contract, and the acceptance thereof by the insured without objection, binds the acceptor as well as the insurer to the terms thereof. The insured may not thereafter be heard to say that he did not read it or know its terms, since it is his duty to read his policy, and it will be assumed that he did so."

[5] The transcript shows that after the receipt of the policy by the Blooms, a statement was made by them to the effect that they were ready and willing to pay for both policies in full, and if the agent would be there at 8 o'clock on the evening of the day when the policies were placed in the possession of the Blooms, full payment would be made, to which the agent stated, "That is all right." It is also to be borne in mind that the defendant already had in its possession a promissory note of the Blooms in the sum of \$223. The fact that full payment was not made of the premiums on the two policies on the morning of June 15, 1923, under the circumstances which we have detailed, is wholly immaterial. This has been squarely decided in the case of Griffith v. New York Life Insurance Co., 101 Cal. 627, 36 P. 113, 40 Am. St. Rep. 96, where it held:

"An express provision in a policy of insurance that the company shall not be liable thereon unless the premium is actually paid is waived by the unconditional delivery of the policy to the assured as a completed and executed contract, under an express or implied agreement that a credit shall be given for a premium, and in such a case the company insuring is liable for a loss which may occur during the period of credit."

See, also, cases cited in 14 Cal. Jur. 425 et seq.

Many definitions of what is meant by delivery are cited in 18 C. J. 478, only one of which we need quote, to wit:

"A surrender of something to a person as his own property."

The very first statement of Stillman in relation to the policies to Bloom, by his own testimony, is that he held up the policies for Mr. Bloom to see, and stated to him (Bloom) that they were his (Bloom's) policies.

[6] Again, accepting the testimony of Stillman, the agent of the defendant, that the envelopes in which the policies were contained also contained an additional application for Mr. Bloom to sign to make the records of the defendant clear, as requested by them, the legal situation is unchanged. This question was presented and decided adversely to the contention of the appellant in the case of Kahn v. Royal Indemnity Co., 39 Cal. App. 180, 178 P. 331. Hearing in that case was denied by the Supreme Court. There the policy in question read as follows:

"This policy with a copy of the application therefor signed by the insured, and such other papers as may be attached to or indorsed hereon, shall constitute the entire contract between the company and the insured."

The application was not signed by the insured, and such failure was held immaterial. The policies with which we have to do read as follows:

"In consideration of the application for this policy, a copy of which is attached hereto and made a part hereof," etc.

The transcript shows, accepting the testimony of Stillman, that typewritten copies of Bloom's application, with Bloom's name typewritten therein in the place where ordinarily the signature of the applicant would be found, accompanied the policies, and under the case which we have cited and the authorities there referred to, the application became and was a part of each policy as fully to all intents and purposes as though actually signed by Bloom.

[7] The appellant in this case presented to the trial court a motion for nonsuit, a motion for a directed verdict, and a motion for a new trial. As grounds for a reversal herein appellant has argued these three points separately, but what we have said applies to all of said objections.

In further support of its appeal appellant alleges that the court erred in refusing to admit in evidence a letter written by the defendant to Stillman, dated June 30, 1923. Also, in refusing to permit in evidence a letter from Stillman to the defendant returning the policies to the defendant, and a letter from the defendant's San Francisco office to Stillman, dated June 15, 1923. As to the third letter just mentioned, it refers to the fact that the defendant had issued a form of policy different from that actually applied for. As to the two other letters referred to, no authorities are cited to support the contention of appellant that private correspondence between the defendant and its agent, after the occurrence of an event, is admissible, and we assume that none can be cited, as it is self-evident that statements and letters passing between a principal and an agent in support of a defendant's contentions do not constitute evidence against a third party, though they may be admissible as admissions of a party writing the same when offered as admissions against interest.

[8] It is further urged that the trial court erred in its instructions to the jury. In this behalf our attention is specifically called to the following, given at the request of the plaintiff:

"You are instructed that a witness, false in one part of his or her testimony, is to be distrusted in others. If you believe that any of the witnesses in this case testified falsely in any one part of his or her testimony, you have the right to distrust that witness in every other part of his or her testimony."

This instruction almost a literal repetition of subdivision 3 of section 2061 of the Code of Civil Procedure. However, in the case of *People v. Plyler*, 121 Cal. 160, 53 P. 553, it was held that the instruction given the language of the section should have added to it words incorporating the element of the witness being willfully false upon any material

part of his testimony. The case referred to, however, was not reversed upon this ground, and under section 4½ of article 6 of the state Constitution we think that the failure of the court to embody in the instruction quoted the element of the witness being willfully false upon a material would not lead to a miscarriage of justice or tend to confuse or mislead the jury.

[9] It is further urged that the court committed reversible error in refusing to give to the jury the following instruction requested by the defendant:

"If you are satisfied from the evidence that the William Wolf Bloom named in the writings in evidence, known as 15-year endowment policies, obtained or received or was permitted to have physical possession of them because he asked for them to show to his wife, or otherwise than as then and there becoming absolutely his property without anything further being done, he could not accept them without examining them, and any papers that may have accompanied them, and the reading by him or the plaintiff of the indorsements on the back of said policies was not sufficient in that regard, and he and the plaintiff were bound by whatever would have been learned by reasonable examination of such policies and anything that may have accompanied them."

It is evident from a reading of this instruction that its refusal was proper. Besides being, in part, an invasion of the province of the jury as an instruction upon the facts, it is not supported by the testimony, as the record discloses that had Bloom and his wife examined the contents of the envelopes in which the policies were contained, as we have shown, they would not have ascertained or found anything therein indicating that any act should be done or performed by them as a condition precedent to the policies becoming effective. Under such circumstances, the trial court could not do otherwise than refuse the requested instruction. The instructions set forth in the transcript are very full, and have been carefully read and examined. We find no error therein prejudicial to the appellant, but we do find that the instructions given by the trial court are slightly more favorable to the appellant than appellant was entitled to. As to the immateriality of the objection that payment of the premium was not made on the morning of June 15th, but was promised to be made in full on the evening of said day, does not affect the validity of the policies, we may cite the cases of *Raulet v. Northwestern Insurance Co.*, 157 Cal. 213-224, 107 P. 292, *Farnnum v. Phoenix Insurance Co.*, 83 Cal. 246-253, 23 P. 869, 17 Am. St. Rep. 233, and *Griffith v. New York Life Insurance Co.*, 101 Cal. 627-631, 36 P. 113, 40 Am. St. Rep. 96. We do not deem it necessary to review the cases cited by appellant for the reason that, as heretofore stated in this opinion, really but two questions are presented—delivery and acceptance of the

policies. These are questions involving simply the act and intent of the parties, and the finding of the jury thereon in favor of the plaintiff appears to us to be amply justified.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; GLENN, Justice pro tem.

HIGGINS v. EVA. (Civ. 5460.)★

District Court of Appeal, First District, Division 1, California. Sept. 15, 1927.

Hearing Granted by Supreme Court Nov. 14, 1927.

1. Maritime liens ⚡60—Proceeding in rem against vessel in federal court held sole remedy of co-owners, voluntarily advancing money for salvaging and repairs of wrecked vessel.

Where part owners of wrecked vessel voluntarily provided funds for salvaging and repairs without any agreement by defendant co-owner to share such expenses, the remedy of such persons was solely in rem against the vessel, and hence within exclusive jurisdiction of the federal courts.

2. Shipping ⚡21—Managing owner, as such, cannot bind co-owners personally for repairs at home port.

A managing owner of a vessel, as such, cannot bind his co-owners, to a personal liability for repairs at a home port.

3. Limitation of actions ⚡28(1), 39(1)—Action by part owners of vessel, if treated as one, for money judgment for defendant's proportionate share of cost of repairs, held barred by limitations (Code Civ. Proc. § 343, and § 339, subd. 1).

Action, if treated as one, by part owners of vessel to recover money judgment against defendant co-owner for his proportionate share of cost of salvaging and repairs, held barred by two-year and four-year statute of limitations, Code Civ. Proc. § 343, and § 339, subd. 1.

4. Tenancy in common ⚡29(2)—Cotenant's interest is subject to lien for improvements authorized or assented to, though personal judgment for cost thereof cannot be had against cotenant, in absence of contract.

If a cotenant has assented to or authorized improvements to be made, he is answerable therefor, and a lien exists against his property for the amount thereof; but, in the absence of contract, one cotenant cannot recover a personal judgment against another for cost of improvements.

5. Tenancy in common ⚡32—Cotenant in possession may deduct from rents or profits cost of working, developing, or protecting property.

A cotenant in possession is entitled to deduct from rents or profits received the cost of all proper expenditures made in working the property and developing it or in protecting the common estate.

6. Shipping ⚡21—Tenancy in common ⚡1—Tenancy in common can exist in personality, as well as realty, and, ordinarily, owners of merchant vessels or steamers so hold.

Though definitions of tenancy in common generally relate to tenancy in common in real property, such a tenancy can exist in personality, as well as in realty, and, ordinarily, the owners of merchant vessels or steamers hold their interest therein as tenants in common.

7. Shipping ⚡21—In absence of contrary agreement, ship owners hold as tenants in common and not as partners.

Ships are chattels of which the owners, in the absence of an agreement to the contrary, are possessed as tenants in common and not as partners.

8. Shipping ⚡21—Part owners held not entitled to personal judgment against co-owner for cost of unauthorized alterations.

Plaintiffs, part owners of vessel, held not entitled to judgment against co-owner for his proportionate share of cost of alterations and repairs, in the absence of any contract authorizing such expenditures.

9. Shipping ⚡21—Co-owner's silence, coupled with knowledge of salvaging and repairs of vessel, held not to warrant personal judgment for proportionate cost thereof in excess of profits.

Mere silence of co-owner of vessel, coupled with knowledge of expenditures for salvaging, reconstructing, and repairing vessel, will not warrant a personal judgment against such co-owner for his proportionate share of such expenditures in excess of profits earned, on theory that contract resulted.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by C. H. Higgins, for himself and for and on behalf of his co-owners of record in the American steamship Fort Bragg, other than the defendant, against William J. Eva, for specific performance of alleged contract and for money judgment. From the judgment rendered, defendant appeals. Reversed.

Randolph V. Whiting, of San Francisco, for appellant.

Edwin T. McMurray, of San Francisco, for respondent.

CAMPBELL, Justice pro tem. The steamer Fort Bragg was owned by appellant, respondent, and others as tenants in common. The steamer was wrecked in the Gulf of California; it was salvaged, repaired, and lengthened by respondent and other owners, not including appellant; appellant did not pay any portion of the cost of salvage, etc.; and this action involves the respective rights of the parties as the result of appellant's failure or refusal to pay his proportionate part of the cost of such salvage and moneys

expended in repairing and lengthening the vessel.

According to the allegations of the complaint the steamer in question was wrecked; its owners are numerous, and it is impracticable to bring them all before the court; and that the questions involved are of common interest to all record owners, with the exception of defendant owner, Eva. Plaintiff was acting as managing owner. The vessel was determined to be a constructive total loss, and the underwriters paid the insurance carried by the several owners on their respective interests in full, thereby acquiring a 69 per cent. ownership in the wreck; that for approximately two months prior to January 17, 1916, the plaintiff, as managing owner and representative of the original owners of the steamer, undertook to sell the wreck and salvage the vessel for the account of those interested therein, but no substantial offer could be obtained therefor. On account thereof on or about January 17, 1916, plaintiff undertook to secure financial co-operation of the underwriters with the original owners in chartering, fitting out, and dispatching a steamer to the wreck in an attempt to float and tow it to an American port. Said underwriters declined to assume any portion of the financial hazard or obligation of such an undertaking, but, in order to induce said original owners to make an effort to float said steamer, agreed with plaintiff, as the representative of said owners, that, if they would assume the financial risk of such a venture, the underwriters would transfer their entire interest in said steamer to said owners without consideration, upon the condition, however, that, if said vessel were successfully floated, said owners would pay therefor on the basis of a valuation of \$10,000 for the entire vessel, and upon the basis of a valuation of \$15,000 for the entire vessel, if said owners succeeded in reaching an American port with said wreck. Immediately all of the owners, including the defendant, Eva, were advised and notified of said offer by said underwriters, and certain of the owners, including plaintiff, believed that an effort to float and repair said wreck should be made and agreed together with all other owners who should signify their willingness to pay pro rata to assume the expense thereof, upon the condition, however, that any or all of the other owners who did not desire to assume the risk and hazard and pay their portion of the expense would transfer their interest upon the same terms and conditions as the underwriters had agreed to do. There was no opposition or objection and all the owners who had declined to participate in the undertaking, excepting defendant, Eva, transferred their interests. A steamer was chartered, equipped, and dispatched to said wreck, and said vessel was floated and towed into the port of

San Francisco at an expense of \$17,264.77, and was reconstructed and repaired at a cost of \$78,175.30, which amounts were paid by the original owners who had agreed to bear the same. The amount due defendant, Eva, under the agreement was tendered to him in due course and at various times up to and including July 20, 1920, and he at all times refused to transfer his interest, and his interest in said steamer still stands of record in his name in the United States custom house at San Francisco. At various times subsequent to the completion and repair of said vessel said owners offered to waive any right of transfer of said interest provided defendant, Eva, would be willing to assume the responsibility of an owner for the expense incurred aforesaid. Defendant at all times has consistently refused to admit any liability. Since the repair of said vessel it has been operated at a loss, and on March 1, 1921, an assessment of \$348.26 was levied against each interest therein. All of said expense and losses chargeable against the interest of defendant, Eva, have been paid by plaintiff. The complaint further alleges that the registration in said custom house of the interest of William J. Eva is prejudicial to and a cloud upon the title of the owners therein who assumed the financial risk and hazard of operating said steamer. The prayer of the complaint is for judgment against defendant for the execution and delivery, by said defendant, Eva, of a good and sufficient bill of sale conveying said interest to plaintiff as the managing owner of said steamer upon payment to him by said owners of \$150, or such other sum as the court may find to be just and equitable, or for such other and further relief as the court may deem fair and equitable in the premises.

Defendant demurred to the complaint on numerous grounds, among which being that the complaint does not state facts sufficient to constitute a cause of action; that the court has not jurisdiction of the subject of the action; and that the alleged cause of action is barred by sections 339 and 343 of the Code of Civil Procedure. The demurrer being overruled, defendant sets up in his answer, as further and separate defenses, the bar of the statute of limitations under the provisions of sections 339 and 343 of the Code referred to, and that the court has not jurisdiction of the subject-matter of the action, alleging that the action is a civil cause of admiralty and maritime jurisdiction within the exclusive jurisdiction of the United States District Court.

From an examination of the allegations of the complaint in the light of the specific prayer thereof, it appears the action was intended as one to compel appellant to transfer his interest in the steamer to respondent and the other owners. The complaint, however, does not allege, nor does the evidence

show, any agreement whereby appellant agreed to transfer his interest, and our attention has not been called to any statutory authority for compelling him to do so. The relief prayed for being in rem against the vessel and not a common-law remedy giving the plaintiff a right to proceed in personam against the defendant, the power to grant such relief was vested exclusively in the United States District Court. *Fischer v. Carey*, 173 Cal. 185, 159 P. 577, L. R. A. 1917A, 1100. However, in so far as this appeal is concerned, this theory of the case may be dismissed, for even though respondent had pleaded an agreement by appellant to convey his interest and the evidence had been sufficient to justify such a finding, the trial court did not grant any such relief, but specifically found "that specific performance of defendant's agreement to transfer his $\frac{1}{100}$ th interest in the steamer Fort Bragg should not be enforced."

[1] The allegations of the complaint, which the court found to be true, show that the several payments made by respondent and certain other owners for salvaging and repairs were voluntary payments and without any agreement by appellant to bear any part of the expense; therefore the only remedy of the former was in rem against the vessel. *The Steamboat Mayflower v. The Steamboat Sabine*, 101 U. S. 384, 25 L. Ed. 982.

While the court found that specific performance of defendant's agreement to transfer his interest in the steamer should not be enforced as prayed for by plaintiff, it did find "that defendant refused to pay the portion of said amount chargeable to his $\frac{1}{100}$ th interest, to it, \$954.40, and on or about September 1, 1916, plaintiff, as managing owner of said vessel, was required to borrow, and did borrow, the said amount in order to meet the indebtedness so incurred," and also "that on or about December 28, 1920, the amount of \$34,826 was expended by the owners of said steamer in making necessary alterations and repairs, and defendant refused to pay the portion thereof chargeable to his $\frac{1}{100}$ th interest amounting to \$348.26; and plaintiff was required to borrow, and did borrow, the said sum of \$348.26 to pay for said repairs and alterations," and concludes from such facts that plaintiff is entitled to a money judgment against defendant. From what has been said it follows that in our opinion these amounts claimed to be due for salvaging the vessel and repairing it under the circumstances here disclosed, in the absence of any authorization by appellant, cannot be recovered in an action in personam, but must be maintained in rem in the federal court, which has exclusive jurisdiction.

[2] The evidence also shows that the repairs were made in San Francisco, the home port of the steamer Fort Bragg. A managing owner as such—and respondent was no more

than that—cannot bind his co-owners to a personal liability for repairs at a home port. *Woodall v. Dempsey* (D. C.) 100 F. 653; *The William Thomas v. Ellis*, 4 Har. (Del.) 309; *Hill v. Crocker*, 87 Me. 208, 32 A. 878, 47 Am. St. Rep. 321; *Benson v. Thompson*, 27 Me. 470, 46 Am. Dec. 617; *Pentz v. Clarke*, 41 Md. 327.

Respondent in his brief states that there is practically no conflict as to the facts; that "a controversy arose and existed at the time the action was brought between the several owners, not partners, in the steamer Fort Bragg arising out of the salvaging and repair of the vessel after being wrecked in the Gulf of California. On one side of the controversy is the appellant, owing a $\frac{1}{100}$ interest in the steamer, and on the other, the owners of the remaining $\frac{99}{100}$. The action was brought by respondent, the acting managing owner of $\frac{99}{100}$ interests, under section 964 of the Civil Code to determine this controversy." The section of the Code referred to provides:

"If a ship belong to several persons, not partners, and they differ as to its *use* or *repair*, the controversy may be determined by any court of competent jurisdiction."

We are unable to find any evidence in the record to support respondent's claim that the parties to the action differed either as to the *use* or as to the *repair* of the vessel, or that any controversy whatever arose over its *use* or *repair*. It appears that respondent, without any suggestion or interference on the part of appellant, repaired, reconstructed, and lengthened the vessel. The controversy seemed to be over the sale of the vessel. Respondent was seeking to compel appellant to sell his interest in the vessel for an amount that was not satisfactory to him, while appellant was claiming a right to inspect the books—to an accounting.

[3] If, however, the action be treated as one for a money judgment, it is clear that the claim for \$954.40, which plaintiff as managing owner borrowed on September 1, 1916, and paid on the salvage indebtedness and the reconstruction expenditure to cover the proportionate share of defendant, arose in September, 1916, when the money was paid, and as the complaint was not filed until December 1, 1921, it is apparent such cause of action was barred by the statute of limitations, whether we apply the two-year limitation for implied oral contracts provided by subdivision 1 of section 339 of the Code of Civil Procedure or the four-year limitation prescribed by section 343 of the same Code for causes of action not coming within one of the other sections of the Code, as more than four years elapsed between the time the cause of action accrued and the action was commenced.

As to the \$348.26, which the court found was chargeable to appellant's proportionate share, paid by respondent for repairs and alterations on or about December 28, 1920, and

for which an assessment was levied on March 1, 1921, and concerning which there is no evidence to show that such repairs or alterations were authorized or agreed to by appellant or that he had any knowledge concerning the making of such repairs or alterations, it may be said:

"Neither cotenant has any power to compel the other to unite with him in erecting buildings or in making any other improvements upon the common property." Freeman on Cotenancy (2d Ed.) par. 262.

[4, 5] If a cotenant has assented to or authorized the improvements to be made, he is answerable therefor, and a lien exists against his property for the amount thereof (Robinson v. Bledsoe, 23 Cal. App. 687, 139 P. 245; Arroyo Ditch & Water Co. v. Bequette, 149 Cal. 543, 87 P. 10, but we know of no authority, and none has been called to our attention, holding that one cotenant can recover a personal judgment against another cotenant in the absence of contract to that effect. A cotenant in possession, however, is entitled to deduct from the rents or profits received the cost of all proper expenditures made in working the property and developing it, and protecting the common estate (McCord v. Oakland Q. M. Co., 64 Cal. 134, 27 P. 863, 49 Ann. Rep. 686; Raun v. Reynolds, 18 Cal. 275), which the evidence shows was done in this case; profits having been earned and payment of appellant's proportionate share withheld.

[6, 7] While definitions of tenancy in common generally relate to tenancy in common in real property, this tenancy can exist in personalty, as well as in realty (Haven v. Mehlgarten, 19 Ill. 91; Livingston v. Lynch, 4 Johns Ch. [N. Y.] 573), and authority generally holds that owners of merchant vessels or steamers holding their interests therein as tenants in common are governed by the rules of law applicable to that species of tenure. See authorities, 36 Cyc. 29, note 31. Ships are declared to be chattels, of which the owners, in the absence of agreement to the contrary, are possessed as tenants in common and not as partners. Thorndike v. De Wolf, 6 Pick. (Mass.) 120.

[8] While the court found in finding that all the allegations of the complaint are true that an assessment of \$348.26 expended in making alterations and repairs in December, 1920, was levied in March, 1921, against appellant, respondent pleads no contract authorizing the levy of an assessment, nor did he prove any such contract; neither did he plead nor prove any corporate status or other relationship giving any right to levy or collect by personal action an assessment to cover a deficit in operating expenses.

As has been said, according to the complaint, this action was brought for the purpose of enforcing specific performance of a contract of sale, the basis of the action being

an implied agreement or acquiescence in the terms of a contract contained in a circular letter mailed to all of the owners of the steamer Fort Bragg, advising them that effort would be made to salvage such vessel, and explaining to them that it was proposed to charter and equip a steamer for that purpose, and advising any owners not wanting to incur the financial risk involved to join in the proposal made by the underwriters; that before anything could be done it would be necessary for those electing to join in the attempt to salvage the steamer to make their election and obligate themselves to pay their portion of the expense in writing. It also provided that, if no objection was made to the plan of procedure within a reasonable time, which was definitely specified, the plan would be considered approved and the proposed action taken, and that any of the owners not expressly making an election under the plan within the time specified would be considered as approving the plan and electing to join in the offer made by the underwriters; that is, to accept as payment for their respective interests what their proportionate interest bears to a valuation of \$15,000 for the steamer, the steamer being floated and towed to the port of San Francisco.

[9] The appellant claims that he never received a copy of the circular letter, and, while the court made no finding that he did in fact receive such letter, it did find that appellant "had full knowledge of the action of his co-owners in the steamer Fort Bragg in reference to salvaging, repairing, and reconstructing said steamer, and ratified the same by his acquiescence." In other words, that mere silence on his part, coupled with knowledge of the fact of the salvaging, reconstruction, repair, and lengthening of the vessel, bound appellant to a contract upon which recovery could be had by way of personal judgment; that under such circumstances one tenant in common can enforce a personal judgment for money in excess of the profits earned. Respondent has not cited us to any authority sustaining such a position and what authority we have found is to the contrary. We do not deem it necessary to a decision of the case to discuss the points raised on demurrer, as the case can be disposed of on its merits.

From what has been said, it follows that we are of the opinion that if the action be one as indicated by the prayer of the complaint for the execution and delivery by defendant, Eva, of a bill of sale conveying his interest in the vessel to plaintiff, Higgins, as the managing owner of the steamer upon payment therefor, such action is one in rem and in the exclusive jurisdiction of the federal court; that if it be construed to be an action for the recovery by one tenant in common against another tenant in common for money paid in protecting, improving, and repairing the common property, no authorization existing

therefor, no personal judgment may be had against the cotenant defendant, and, further, that the claim for money borrowed and paid by respondent, Higgins, to cover the proportionate share of appellant in salvaging, lengthening, and repairing the vessel in 1916 is barred by the statute; that the item of \$348.26, which respondent borrowed and paid in December, 1920, as the proportionate share of appellant, as the court found, to cover the cost of repairs, and that an assessment was levied to cover this item, which occasioned a loss in operating expenses, no authorization by appellant being shown, cannot be recovered by way of personal judgment.

Upon the record here presented a reversal of the judgment must be ordered, and as there is no material conflict in the evidence, and upon a retrial no different result would obtain from that here indicated, the judgment is reversed, and the trial court directed to enter judgment for defendant.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

85 Cal. App. 450

PEOPLE v. HOTZ. (Cr. 1519.)★

District Court of Appeal, Second District, Division 2, California. Sept. 14, 1927.

Hearing Denied by Supreme Court Nov. 10, 1927.

1. Embezzlement ⚡8—Partner cannot embezzle partnership funds.

Partner cannot be guilty of embezzlement of partnership funds.

2. Partnership ⚡17—In determining whether agreement is partnership or agency agreement, designation adopted by parties should be considered.

In determining whether an agreement was a partnership or agency agreement, while the substance and terms must govern, some weight should be given to the designation adopted by the parties.

3. Partnership ⚡1—Some joint ownership and joint liability are essential elements of "copartnership."

To constitute a "copartnership" undertaking it is essential that there be some joint ownership and joint liability.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Copartnership.]

4. Embezzlement ⚡8—Partnership ⚡12—Mere agreement to share profits from sale of new automobiles and profits and losses from old automobiles received in exchange held not partnership, and defendant's appropriation of receipts therefore constituted embezzlement.

Mere agreement to share profits from the sale of new cars and the sale of used cars which were taken in trade, and to share losses from the sale of any of the used cars, where there was no joint ownership, joint liability, or joint con-

trol of the business, and where defendant had no share in paying general overhead expense, held one of agency, and not of partnership, and the defendant's appropriation of receipts therefore constituted embezzlement.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Lloyd G. Hotz was convicted of embezzlement, and he appeals. Affirmed.

John S. Cooper and Greenschlag & Schaffer, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

THOMPSON, J. The defendant was convicted by the verdict of the jury with the offense of embezzlement, and he appeals from the judgment pronounced upon the verdict and an order denying his motion for a new trial.

The facts essential to an understanding of this appeal are as follows: C. B. James & Son were the owners and operators of a garage in San Fernando, and as a part of that business sold new and used automobiles. Shortly before January 1, 1927, they orally entered into an agreement with the defendant, whereby he was to sell new automobiles for them and to receive as his compensation, as stated by defendant, "50 per cent. of the net profits of the sale of new cars, and 50 per cent. of the sale of used cars that we were taking in trade, and if it was sold for any less I was to assume 50 per cent. of the loss of the sale." Amplified by other witnesses, the contract under which the defendant went to work provided that he was to receive as his compensation one-half of the amount realized upon the sale of a new car over and above its cost, with the further understanding that if a used car were accepted as part payment and it was resold for a sum less than the sum allowed when taken in exchange, plus the cost of conditioning it for resale, if any, one-half of such deficiency was to be charged against the defendant. "The net profits" referred to by the defendant was defined by the witness Raleigh James as being the difference between the cost price and the selling price, and the loss referred to by the defendant as being the loss upon any automobile taken in on a sale of a new car by the defendant.

[1] There is no denial of the fact that the defendant used the proceeds resulting from the sale of a new car by him in the sum of \$500, but he asserts that the relationship which existed between himself and C. B. James & Son was that of a partnership. He does not contend that he was a partner in the general garage business, but only in the business of selling new automobiles. He further

asserts that, inasmuch as the money used by him was partnership funds, he could not be guilty of the offense of embezzlement. Since it is well established that a partner cannot be guilty of embezzlement of partnership funds (Ex parte Sanders, 23 Ariz. 20, 201 P. 93, 17 A. L. R. 980, and annotation, 982), the sole question for determination is whether the contract made did constitute the defendant a partner. It should be noted that in all of the testimony of the witnesses they referred to the employment of the defendant rather than entering into a copartnership.

[2] While the substance and terms of the agreement must govern, some weight should be given to the designation adopted by the parties. Title Ins. & Trust Co. v. Grider, 152 Cal. 746, 94 P. 601; Auditorium Co. v. Barsotti, 40 Cal. App. 592, 181 P. 413; Gray v. Yarbrough, 61 Cal. App. 724-729, 215 P. 914.

[3, 4] As a further indication of the intent of the parties it should be noted that the agreement did not contemplate any deduction for general overhead expense prior to the division between the defendant and C. B. James & Son. While the term "net profits" was used, its subsequent definition proved that compensation was based on gross profits, subject only to the deduction liable to arise by reason of taking in as part payment a used automobile at too great a value. It is apparent therefore that there was no joint liability. Furthermore, there was no community of interest in the automobiles to be sold. The agreement in no way contemplated that they should become partnership assets. Some joint ownership and joint liability are essential elements of a copartnership undertaking. Ward v. State, 113 Miss. 22, 73 So. 865. Again, it should be borne in mind that the agreement did not provide that the defendant and C. B. James & Son should carry on business together, but rather that the defendant should sell automobiles for C. B. James & Son, who had the direct control of the business. Perhaps the most distinguishing feature of a copartnership is the association for the "purpose of carrying on business together" (Coward v. Clanton, 122 Cal. 451-454, 55 P. 147, 148), and the agreement to divide profits is not sufficient (Auditorium Co. v. Barsotti, supra). It is stated in the case of Wheeler v. Farmer, 38 Cal. 203-213, that one of the elements of partnership is the "community of interest in capital, stock, profit, or loss," and that "an agreement to divide the gross earnings does not constitute the parties to it partners." There can be no question under the authorities cited that the relationship existing between the parties here was that of principal and agent rather than that of partners.

The judgment and order are affirmed.

We concur: WORKS, P. J.; CRAIG, J.

3. Quieting title $\S$ 52—Where judgment roll, in action to quiet title, showed publication order was filed subsequent to publication, judgment held void, notwithstanding recital that publication was regular (McEnerney Act).

Where the judgment roll in an action to quiet title showed that the order of publication of summons was not filed until after the publication had been made, the judgment was void, in view of McEnerney Act (St. Ex. Sess. 1906, p. 78), notwithstanding it recited that the summons was regularly published.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action to quiet title by James D. Phelan and others against all persons claiming any interest in or lien on the real property herein described, or any part thereof, Francis J. Sullivan, and others. Judgment for plaintiffs, and defendant Francis J. Sullivan appeals. Affirmed.

Cushing & Cushing, of San Francisco (Robert P. Troy, of San Francisco, of counsel), for appellant.

D. C. Murphy, of San Francisco, and R. M. J. Armstrong, of Los Angeles, for respondents.

Randolph V. Whiting, of San Francisco, for Charles A. Sullivan.

LANGDON, J. This action was commenced by plaintiffs to quiet title to certain parcels of real property in the city and county of San Francisco, alleging that they were tenants in common of the same. The city and county of San Francisco filed a formal answer thereto, but no proof was made by them at the trial. Francis J. Sullivan filed an answer asserting that "he has a right, title, and interest in the real property referred to in the complaint." He also alleged that he was president of the plaintiff corporation, Alice Phelan Sullivan Corporation, and also a stockholder thereof; "that said corporation is a family corporation composed of 10,000 shares; that James D. Phelan owns a very few shares, to wit, one share, but absolutely controls the board of directors, who are also stockholders; that all the business of the corporation, as well as the officers thereof, except affiant, are subject to his will and act in conjunction with him; and that for this reason it would be of no avail to make a demand on the directors to file an answer herein. Such a request would have been useless and would have been refused; therefore affiant has verified and filed this answer on behalf of all the stockholders of the Alice Phelan Sullivan Corporation and of the corporation itself." It is also alleged that defendant Sullivan is the sole owner of

202 Cal. 175

PHELAN et al. v. ALL PERSONS, etc., et al.
(S. F. 11565.)

Supreme Court of California. Sept. 26, 1927.

1. Quieting title $\S$ 10(2)—Ownership of stock held not to give stockholder interest in corporation's real property.

In an action to quiet title, the ownership of shares of stock in a corporation held to give no legal title to the stockholder to the property of the corporation.

2. Quieting title $\S$ 31—Statutory requirement that order of publication of summons, in action to quiet title, must be filed with clerk, held mandatory (McEnerney Act).

Requirement of McEnerney Act (St. Ex. Sess. 1906, p. 78) that the order of publication of summons, in an action to quiet title, designating the newspaper in which such publication is to be made, shall be signed and filed with the clerk, held mandatory.

the lot on the southwest corner of Folsom and Ninth streets, having purchased the same from the plaintiffs, but no proof was adduced at the trial of his ownership of this lot.

[1] From a judgment in favor of plaintiffs, defendant Sullivan appealed, and one of his contentions upon appeal is that the finding that he had no interest in said property or any part thereof at the time of the commencement of the action is contrary to the admitted fact that he was a stockholder of the Alice Phelan Sullivan Corporation at the commencement of the action, one of the tenants in common of the property. It is elementary that the ownership of shares of stock in a corporation gives no legal title to the property of the corporation to the stockholder. *Kohl v. Lilienthal*, 81 Cal. 378, 385, 20 P. 401, 22 P. 689, 6 L. R. A. 520.

[2, 3] It is also contended that the present action was barred by reason of a judgment obtained in 1909 in a *McEnerney* suit, affecting the property involved here, in which James D. Phelan, Mary L. Phelan, and Alice Phelan Sullivan were plaintiffs. Respondents take the position that said prior judgment was void on its face, because the judgment roll showed that no order for publication of summons was on file at the time publication was made. The publication of summons was completed on August 27, 1908, and the order for publication, though dated as of an earlier date, was not filed until January 13, 1909. Section 4 of the so-called *McEnerney Act* (Stats. 1906, p. 79) contains the following provision:

"The newspaper in which such publication is to be made shall be designated by an order of the court or a judge thereof to be signed and filed with the clerk."

The time allowed by the act (section 8) for pleading to the complaint begins to run from the first publication of summons. It is apparent, therefore, that the requirements as to the filing of the order for publication is mandatory and jurisdictional. Such a construction was placed upon section 1491a, Code of Civil Procedure, requiring the filing of a copy of notice to creditors, in the case of *Hawkins v. Superior Court*, 165 Cal. 746, 134 P. 329, where it was said:

"If it is directory merely, it, of course, follows that the notice need not be filed within the time specified in the section, but at any other time, even after the publication has been completed and the time for presenting claims has expired, and when the filing of it could serve

no purpose whatever. The practical effect of such a construction would be to hold that the filing of the required notice need not be made at all."

It has also been held (*Brownell v. Superior Court*, 157 Cal. 703, 109 P. 91), that an order has no inherent vitality or effect until filed with the clerk. Inasmuch as the judgment roll in the prior action to quiet title to the property involved here shows the actual date of filing the order for publication of summons therein, as of a date subsequent to the publication of summons, the recital in the judgment therein that summons was regularly published does not cure the defect. *Grinbaum v. Superior Court*, 192 Cal. 546, 221 P. 635.

There are other matters urged by the appellant, but they are without merit and need not be discussed in detail, for the reason that it appears from the record that the judgment rendered is correct and proper and that no substantial right of appellant has been prejudiced thereby.

Since this appeal was perfected the appellant has been declared incompetent to manage his own affairs and a guardian of his person and estate has been duly appointed. The appellant acted as his own attorney in filing the appeal and the opening brief presented to the court and Robert P. Troy appeared as associate counsel. Mr. Troy contested the appointment of a guardian, but it was held in the case of *Sullivan v. Dunne*, 198 Cal. 183, 244 P. 343, that he had no authority to act for appellant under the circumstances. After the appointment of the guardian for appellant an additional brief was filed in this court by said guardian on behalf of appellant, in which brief the guardian recognized his duty to his ward not to prolong useless and meritless litigation, and in which it was admitted that no substantial right of appellant had been invaded by the judgment and that the judgment should be affirmed.

It is also true that Robert P. Troy has filed a brief herein as *amicus curiæ*, raising various technical objections, which it is unnecessary to set forth in this opinion because we find no merit in the appeal nor in any of the matters urged for reversal of the judgment.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.

202 Cal. 134

(259 P.)

WHITWORTH et al. v. FERNANDEZ et al.
(L. A. 7665.)★

Supreme Court of California. Sept. 14, 1927.

Rehearing Denied Oct. 13, 1927.

1. Adverse possession ☞95—Evidence held to justify finding of payment of taxes for over 5 years by plaintiffs and predecessors before suing to determine adverse claims (Code Civ. Proc. § 749).

In action to determine adverse claims, under Code Civ. Proc. § 749, against claimant under quitclaim deed from plaintiffs' grantor, evidence held to support trial court's finding that plaintiffs and their predecessors had paid taxes on land in dispute for over 5 years, which, with elements conceded, completed elements to establish title by adverse possession as of such date, even though not founded on instrument, and to give perfect title as against grantor, predecessor of defendant grantee, by quitclaim deed.

2. Appeal and error ☞1035—Judgment quieting title in plaintiffs will not be reversed because plaintiffs might properly have brought suits of different character (Code Civ. Proc. § 749).

Although plaintiffs suing grantee by quitclaim deed from their grantor to determine adverse claims, under Code Civ. Proc. § 749, might properly have brought suit or suits of different character and obtained same or equivalent relief, as, for example, suit to compel proper conveyance or to establish by parol testimony agreed boundary line where boundary was uncertain, judgment for plaintiffs based on title by adverse possession will not be reversed in order that more appropriate remedy may be sought.

In Bank.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by James C. Whitworth and another against Michael M. Fernandez and others to quiet title. From a judgment for plaintiffs, defendants appeal. Affirmed.

Superseding former opinions in 255 P. 873 and 257 P. 205.

J. H. De La Monte and Walter W. Little, both of Los Angeles, for appellants.

C. L. Kilgore, Chandler, Wright & Ward, and Jefferson P. Chandler, all of Los Angeles, for respondents.

PRESTON, J. This is an action by plaintiffs, under section 749 of the Code of Civil Procedure, to determine adverse claims to what is known as lot 13 of the Whitworth tract, county of Los Angeles. The real dispute centers around the easterly 42.1 feet of said lot 13.

It appears that on the 20th day of January, 1883, and for some time prior thereto, one Christopher Greve was the owner of a tract of land situated in the westerly portion of what is officially known as lot 1 of the Rancho

Rodeo de las Aguas, lying north of Eberle road, now known as Pico road; that on the 20th day of January, 1883, said Greve granted to Joseph Whitworth the westerly portion of said subdivision of said lot 1, described as follows:

"Beginning at the southwest corner of the land now owned by Jas. A. Whitworth and being one of the corners of lot number two (2) of the Rancho Rodeo de las Aguas as recorded on page 572, book one (1), of the Miscellaneous Records of Los Angeles County; thence following the north line of lot number two (2) east 6.76 chains; then south 4.52 chains to the north side of county road; thence north 76°, 54' W. along north side of county road 7.94 chains to a stake, thence N. 2° 21' east 4.48 chains to the place of beginning, containing three (3) acres of land more or less."

This conveyance made the easterly line of the Whitworth purchase the westerly line of said grantor Greve. Within a very short time after said purchase, the two neighbors built through their joint efforts a fence along said line between their properties and also planted along the fence a row of eucalypti, both of which landmarks have remained for the past 40 odd years. Whitworth used the fence as a portion of the inclosure of the tract of land purchased by him and continuously since said purchase he and his successors in interest have cultivated and enjoyed the whole of said tract of land to said fence line without hinderance of any kind from said Greve and his successors in interest or any one else except as hereinafter stated. Likewise, said Whitworth and his successors in interest have for more than 20 years last past had said strip of land here in dispute set to walnut trees.

About the year 1910 said grantor Greve caused the remaining portion of his land in that vicinity, to wit, 16.22 acres, to be known as a portion of tract 470 and a map thereof to be duly and officially filed. Later, about 1911, the successors in interest of said Whitworth, who had died in 1904, caused to be made and filed a map and plat of the property conveyed by said deed of 1883 and other lands and caused the same to be officially known on the records of Los Angeles county as the Whitworth tract. The strip of land here in dispute is, as above stated, the easterly 42.1 feet of said lot 13 of said Whitworth tract. These families were friends during their residence on these tracts and apparently the friendship between them still obtains, notwithstanding the acts and conduct of the defendant Michael M. Fernandez.

It appears that said Fernandez, in 1910 or 1911, discovered what he thought was a discrepancy in the descriptions in the deeds under which the respective parties to said tract of land were claiming, and induced said grantor Greve to cause to be put on the assessment

roll for the year 1911 the said strip of land as a separate assessment, and it has continued to be separately assessed since said date—for some years to Greve, and a few times to both Greve and Whitworth.

On the 15th day of February, 1915, said Greve and wife made a quitclaim deed to defendant Fernandez of all said strip of land and to a separate tract described also as part of said lot 13, but the evidence shows that Fernandez paid no consideration for said deed and took same for the purpose of attempting to get some money consideration from the Whitworths, agreeing to divide any money so received equally with Greve. Later Christopher Greve died, and his widow and children and heirs at law also made a quitclaim deed to said strip of land to plaintiffs herein and likewise became witnesses for them in this cause, repudiating entirely, in so far as they could, the quitclaim deed made to Fernandez, and repudiating as well the conduct of Fernandez. In other words, it is apparent that the claim of Fernandez is wholly inequitable and entirely without moral justification.

It will be observed that in the description in the deed to Whitworth above mentioned, there are many discrepancies and uncertainties. Lot 2 is mentioned, which apparently should have been lot 1 of said Rancho. The starting point is uncertain and indefinite, and the calls of the deed do not correspond to the fixed monuments therein mentioned. It is difficult to say whether it is the east line or the west line of said tract that is most in doubt. The acreage computed by the calls of the deed alone, disregarding fixed monuments, makes only 2.53 acres. The acreage computed to the fence line would make 3.63 acres, so the description "three acres more or less" may fit either description. Moreover, it is conceded that every element of adverse possession against the defendant Fernandez is present save and except alone the one of payment of taxes. This must be true because the uncontradicted evidence shows, as above stated, peaceful enjoyment by Whitworth and his predecessors in interest of this entire tract of land, adversely and under a claim of right, over a period of more than 40 years.

The court found for the plaintiffs upon all points and found that taxes had been paid by them and their predecessors in interest for a continuous period of more than 5 years, to

wit, for the years 1906, 1907, 1908, 1909, 1910, and 1911. During these years the evidence shows that on the tax receipts and tax roll the land here in controversy was described as the west 3 acres of lot 1, but an examination of the block books or record maps of the assessor shows that the property was described as "3 acres more or less." The assessment during those years covering property of Greve did not necessarily include property west of the fence line between the two landowners. The Greve property was assessed as 16.22 acres, and there is no contention that the 42.1-foot strip is necessary to complete this acreage.

[1] We therefore conclude that there was ample evidence to justify the trial court in finding the payment by plaintiffs and their predecessors in interest of all the taxes levied or assessed against the said property for the 5-year period mentioned. This finding of the court completed the elements required by the law to establish a title by adverse possession as of that date, even though not founded upon an instrument. As against Greve, the predecessor of defendant Fernandez, the title became a perfect one at that time in the predecessors of plaintiffs. The defendant Fernandez claims only under his predecessor, Greve.

[2] It is perhaps worth noting that plaintiffs might more properly have brought a suit or suits of a different character and obtained the same or equivalent relief—for example, a suit to compel a proper conveyance or a suit to establish by parol testimony an agreed boundary line where the true boundary was uncertain. But we are of the opinion that the evidence justifies the findings made and the judgment rendered thereon by the court below. This being true, there is no need for a reversal of the judgment in order that a more appropriate remedy be sought. We feel the more positive of this position, in view of the fact that the evidence shows without contradiction the claim of defendant Fernandez to be without a semblance of merit in it. These views render it unnecessary to consider the effect of the quitclaim deed from the successors in interest of Greve to plaintiffs intended to nullify the quitclaim deed to defendant Fernandez.

Judgment affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

202 Cal. 95

GRIFFIN v. BOYLE, Auditor.

JACKSON et al. v. BADARACCO et al.

(S. F. 12675, 12677.)

Supreme Court of California. Sept. 12, 1927.

Municipal corporations §176(1)—Charter provision, if giving board of election commissioners control of salaries of its employees, held repealed by later provision (Charter of city and county of San Francisco, art. 11, c. 1, § 4; art. 3, c. 1, § 3).

Charter of city and county of San Francisco, art. 11, c. 1, § 4, if giving the board of election commissioners exclusive and absolute control of the fixing of the salaries of its employees, held expressly repealed by charter article 3, c. 1, § 3, declaring that the board of supervisors shall make a budget itemizing the salaries of employees of each department or board, and repealing conflicting provisions.

Preston, J., dissenting.

In Bank.

Application by W. W. Griffin for a writ of mandate to compel Thomas F. Boyle, as Auditor, etc., and others, to appropriate for the conduct of the department of elections the respective amounts itemized and set forth in its budget estimate, and to adopt and levy a tax rate sufficient to provide for the amounts set forth therein, with a similar application by J. W. Jackson and others, as the Board of Election Commissioners, etc., against J. B. Badaracco and others, as the Board of Supervisors, etc. Writs denied.

In Case S. F. 12675:

Cameron King, of San Francisco, for petitioner.

Frank L. Fenton, of San Francisco, for respondents.

In Case S. F. 12677:

Glensor, Clewe & Van Dine, of San Francisco, for petitioners.

John J. O'Toole, City Atty., of San Francisco, for respondents.

LANGDON, J. [1] The above causes have been consolidated in the argument presented therein to this court, and as they present the same legal problem they will be determined together.

In each a writ of mandate is sought to compel the board of supervisors of the city and county of San Francisco to appropriate for the conduct of the department of elections the respective amounts itemized and set forth in its budget estimate, and to adopt and levy a tax rate for the fiscal year ending June 30, 1928, sufficient to provide for the amount set forth therein.

A similar question was presented to this court and decided adversely to petitioners in the case of Fitzgerald et al. v. Badaracco et al. (Cal. Sup.) 258 P. 937. The decision of

that case would be conclusive here, unquestionably, except for the fact that an additional consideration enters into the present situation by reason of a special provision of article 11, c. 1, § 4, of the Charter of the city and county of San Francisco, relating to the power of the board of election commissioners to fix the salaries, etc., of its employees, and which special provision is found in this language:

"The provisions of this section shall have full force and effect, all other sections of the charter notwithstanding."

If we were to give to the language just quoted the force and effect contended for by petitioners, and hold that it insures to said board of election commissioners the specific right to exclusively control the employment and fix the salaries of its employees, because it prevails over the general right of the supervisors to estimate the amounts to be allowed to the election department, we should also be bound to hold that, so construed, it is in conflict with a later amendment (section 3, c. 1, art. 3, as amended November 4, 1924, approved by Legislature January 17, 1925 [St. 1925, p. 1172]) to said charter, and being thus in conflict is expressly repealed thereby.

The last-cited section reads as follows:

"The supervisors shall meet annually between the first Monday of May and the first Monday of June, and by a vote of the majority of all the members thereof make a budget of the amounts estimated to be required to pay the expenses of conducting the public business of the city and county for the next ensuing fiscal year * * * and the items thereof allowed to each department, office, board or commission, as the supervisors shall deem advisable; provided, however, that the salaries, wages or rates of compensation of the various deputies, clerks, assistants or employees of every kind and classification of each department, office, board or commission, except the police, fire, park, playgrounds, public library and school departments, shall be itemized in said budget; and provided, further, that any and all amounts so set apart, itemized and allowed in any department, office, board or commission, as wages, salary or compensation, as aforesaid, shall be expended for such purpose only, and, if not so expended, shall at the end of each and every month, revert to a special fund which may be reapportioned for the same purposes as those originally set out in the budget ordinance.

"Before finally determining upon the budget, the supervisors shall fix such sufficient time or times as may be necessary to allow the taxpayers to be heard in regard thereto, and the supervisors shall attend at the time or times so appointed for such hearing. All provisions of the charter in conflict with this section are hereby repealed."

It is apparent that if section 4, c. 1, art. 11, be construed as giving exclusive and absolute control to the board of election commissioners of the matter of fixing the salaries of

its employees, it would be in direct conflict with the result sought to be effected by section 3, c. 1, art. 3, which is a later provision and expressly repeals conflicting provisions.

It follows that the writs sought must be denied, and it is so ordered.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.; KOFORD, Justice pro tem.

I dissent: PRESTON, J.

202 Cal. 110

ESBERG et al. v. BADARACCO et al.
(S. F. 12678.)

Supreme Court of California. Sept. 12, 1927.

1. Schools and school districts ⇨20—School system is matter of state supervision, and statutes respecting it are controlling over city charters (Const. art. 9, §§ 1, 5, 6).

School system of state is a matter of state supervision, rather than a "municipal affair" as that term is used in connection with charter cities, and statutes respecting it are controlling over conflicting provisions of city charters, under Const. art. 9, § 1, requiring Legislature to encourage intellectual improvement; section 5, requiring Legislature to provide system of common schools; and section 6, requiring Legislature to provide for city and county tax for school purposes.

2. Schools and school districts ⇨20—City charters may provide for matters concerning schools not enumerated in general laws, and matters specifically authorized by constitution (Const. art. 11, § 8½).

While statutes providing general system for creation and conduct of common schools prevail over conflicting provisions of city charters, the charters may provide for matters not enumerated in the statutes and not in conflict therewith, including matters in furtherance of their purpose, and also for matters specifically authorized by constitutional provisions, as, for example, Const. art. 11, § 8½.

3. Schools and school districts ⇨20—Powers of city are derived from charter, but powers of school district from Political Code, though two bodies embrace same territory (Pol. Code, § 1576).

City and school districts derive their powers from different sources, even though they comprise same territory, under Pol. Code, § 1576; city deriving its powers from its charter, whereas school district derives its powers from Political Code.

4. Schools and school districts ⇨21—School district embracing city and county held distinct corporate entity, notwithstanding consolidation of city and county (Pol. Code, § 1576).

School district established in territory embraced by city and county of San Francisco held distinct corporate entity, under Pol. Code, § 1576, not extinguished by consolidation of city and county.

5. Evidence ⇨25(2)—Court takes judicial notice that only consolidated city and county in California is city and county of San Francisco.

It is a matter of judicial knowledge that there is but one consolidated city and county in the state of California, which is the city and county of San Francisco.

6. Schools and school districts ⇨99—Power of board of education to determine amount of money to be raised for school purposes under general statute held controlling over power of city and county board of supervisors under charter (Const. art. 9, § 6; Pol. Code, § 1612a, as added by St. 1921, p. 720).

Power of board of education to determine the amount of money to be raised for school purposes, under Pol. Code, § 1612a, as added by St. 1921, p. 720, requiring board to make budget showing all purposes for which school district will need money and the amount thereof, and the board of supervisors of each city and county to levy such rate as will produce the money requested by the district, which was enacted under Const. art. 9, § 6, held controlling over the power of the city and county board of supervisors to determine the amount to be raised under charter provisions approved by St. 1925, p. 1172, in view of Pol. Code, § 1838, St. 1856, p. 155, and St. 1921, p. 1795.

7. Constitutional law ⇨70(3)—What power should be conferred on boards of education to raise money by current taxation is exclusively for Legislature so long as tax limit is not exceeded.

Matter of conferring on boards of education powers to raise money by current taxation is one of legislative policy with which courts may not interfere so long as the limitation on taxation for school purposes is not exceeded.

8. Statutes ⇨64(8)—Provision in statute relating to taxation for schools, authorizing county auditor to levy tax if supervisors do not, if unconstitutional, held severable (Const. art. 11, § 13; Pol. Code, § 1612a, as added by St. 1921, p. 720).

If that provision of Pol. Code, § 1612a, as added by St. 1921, p. 720, relating to taxation for school purposes, which authorizes county auditor to levy tax if board of supervisors refuse or neglect to do so, is invalid under Const. art. 11, § 13, forbidding Legislature to delegate to any special commission or others, power to levy taxes, the provision is severable.

9. Schools and school districts ⇨99—Statute authorizing boards of education to fix sums to be raised for schools by taxation held constitutional (Const. art. 9, § 6; Pol. Code, § 1612a, as added by St. 1921, p. 720).

Pol. Code, § 1612a, as added by St. 1921, p. 720, authorizing boards of education to fix sums to be raised for school purposes by taxation, and requiring boards of supervisors to levy the tax required to provide such sum, is not unconstitutional as to powers conferred on boards of education, under Const. art. 9, § 6, directing Legislature to provide for levy of tax by board of supervisors.

10. Evidence 83(2)—Court will not assume that board of education will impose unjust amount of taxes.

It is not to be assumed that board of education, in determining amount of money to be raised by taxation, will act without regard to rights of taxpayers so as to unduly extend taxation.

In Bank.

Original application by Alfred I. Esberg and others, constituting the Board of Education of the city and county of San Francisco, for a writ of mandate to compel John B. Badaracco and others, as members of and constituting the Board of Supervisors of the city and county of San Francisco, to include in its proposed tax ordinance such levy of taxes for school purposes as would produce a certain sum, exclusive of amounts required for redemption of school bonds or interest thereon. Writ granted.

Sloss & Ackerman, of San Francisco, for petitioners.

John J. O'Toole, City Atty., of San Francisco, for respondents City and County of San Francisco.

H. W. Hutton, of San Francisco, for Adolph Uhl.

SHENK, J. [1] This is an original application for a writ of mandate by the board of education of the city and county of San Francisco to compel the respondents, as members of and constituting the board of supervisors of said city and county, to include in its proposed tax ordinance for the fiscal year ending June 30, 1928, such levy of taxes for school purposes as will produce the sum of \$7,621,529, exclusive of amounts required for redemption of school bonds or interest thereon.

There is no dispute as to the facts. Within the time prescribed by law the board of education prepared its budget setting forth the amounts required for the ensuing fiscal year for public instruction in the city and county of San Francisco, including therein the needs for high schools, elementary schools and kindergartens. This budget was prepared on forms prescribed by the board of supervisors and specified the proposed expenditures under the headings (1) Teachers' Salaries, (2) Other Maintenance Expenditures and (3) Capital Outlays and Permanent Improvements. The superintendent of schools approved this budget, and by computation determined therefrom the total amount of money required to be produced by a school tax after deducting the estimated income from the state of California and all other sources. A copy of the budget so proposed and approved was filed with the board of supervisors and with the auditor, as the law

requires. From this budget it appears that the board of education has determined that the sum of \$7,621,529 is necessary for school purposes for the ensuing school year. The assessed valuation of all of the taxable property in the city and county for the said fiscal year is \$783,000,000, and a tax levy of \$.97338 on each \$100 valuation of said taxable property is necessary in order to produce the sum required by the board of education. During the months of May and June, 1927, the board of supervisors from time to time considered the budget of the board of education. After examination and consideration of the same, it deducted from the budget the sum of \$987,306 and fixed a tax rate for school purposes of \$.84729, which would produce approximately the amount allowed by the board of supervisors. The items included in the school budget and disallowed or refused by the board of supervisors were \$87,306 on account of salaries, maintenance, and operation, and \$900,000 on account of lands, buildings, and repairs. Following the refusal of the board of supervisors to fix a tax rate sufficient to raise the amount required by the board of education, this proceeding was commenced.

The sole question for determination is whether the board of supervisors has discretion to revise, change, or modify the budget as so prepared and presented by the board of education and fix the tax rate for school purposes accordingly; or must the board of supervisors fix such a tax rate as will raise the amount of money specified in the budget of the board of education without diminution? It is the contention of the board of supervisors that a discretion is lodged in that body to fix a budget allowance for the board of education within which the latter board must confine itself in making its expenditures for the ensuing school year. The claim is based principally on section 3 of chapter 1 of article 3 of the charter of the city and county, as amended in 1925. Stats. 1925, p. 1172. That section provides that the supervisors shall meet annually between the first Monday of May and the first Monday of June and "make a budget of the amounts estimated to be required to pay the expenses of conducting the business of the city and county for the next ensuing fiscal year." This budget must be prepared in such detail as to the aggregate sum and the items thereof allowed each department as the supervisors deem advisable, except that in departments other than the police, fire, park, playground, public library, and school departments the salaries, wages, and rates of compensation of deputies, clerks, assistants, and employees of all kinds and classifications shall be itemized in the budget and shall be expended for the purpose for which the same was set apart, and none other. This section of the charter as amend-

ed in 1925 expressly repealed all provisions of the charter in conflict therewith.

We had occasion to consider and define the scope of the budget making power of the board of supervisors under this charter amendment and prior thereto in the recent cases of *Fitzgerald v. Badaracco*, 258 P. 937, *Griffin v. Boyle*, S. F. No. 12675, and *Jackson v. Badaracco*, S. F. No. 12677, 259 P. 729, wherein it was held that the board of public works and the board of election commissioners of said city and county were, as to the expenditures to be made in their several departments, limited to the amounts appropriated by the board of supervisors in the exercise of its budget-making power. The respondents rely especially on the *Fitzgerald Case* as announcing a construction of the charter provisions which should be made applicable to the school department. In that case and in the other recent cases referred to we were dealing with subordinate boards of the city and county concerning which it was entirely competent to provide in the charter for whatever powers, duties, restrictions, and regulations the people of the city and county might desire to prescribe in adopting or amending said charter pursuant to the provisions of the Constitution. In those cases the boards are those whose activities, from a governmental standpoint, are primarily, if not wholly, of local concern and subject to charter regulation. But with the school department we are confronted by different and controlling considerations of law. The school system of the state is a matter of general concern as distinguished from a "municipal affair," as that term is considered in connection with charter cities. Article 9 of the organic law of California provides for the establishment of a public school system. It is provided in section 1 of that article:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement."

Section 5 of the same article provides that:

"The Legislature shall provide for a system of common schools. * * *"

Section 6 of the article provides that the Legislature "shall provide for" the levy of a "city and county" tax by the board of supervisors for school purposes. By this article of the Constitution the people of the state have made the school system a matter of state supervision, and judicial declarations to the same effect are numerous. *Kennedy v. Miller*, 97 Cal. 429, 32 P. 558; *Hancock v. Board of Education*, 140 Cal. 554, 561, 74 P. 44; *Los Angeles School District v. Longden*, 148 Cal. 380, 383, 83 P. 246; *Board of Education v. Davidson*, 190 Cal. 162, 210 P. 961.

[2] The effect of this framework of laws

surrounding and supporting our public school system is that the acts of the Legislature, within constitutional bounds, are controlling over conflicting provisions of freeholders' charters.

"While statutes providing a general system of laws concerning the creation and conduct of common schools prevail over conflicting charter provisions, the charters may provide for matters not enumerated in the general laws and not in conflict therewith, including matters in furtherance of the purpose of the general laws of the State." 18 Cal. Jur. 814, and cases cited.

Likewise the charter may, of course, include such matters concerning school management and supervision as are specifically authorized in the Constitution. For example, section 8½ of article 11, as adopted in 1896, provided:

"It shall be competent, in all charters framed under the authority given by section eight" of article eleven of this Constitution, "to provide, in addition to those provisions allowable by this Constitution and by the laws of the state as follows: * * * 2. For the manner in which, the times at which, and the terms for which the members of the boards of education shall be elected or appointed, * * * and for the number which shall constitute any one of such boards."

This constitutional provision has remained by continuing amendment to the present time with the enlargement in 1911 in the respect that since that amendment the charter may also provide for the "qualifications, compensation, and removal" of members of boards of education. The city and county of San Francisco has availed itself of this constitutional authorization and has, in article 7 of its charter, provided for such matters concerning its board of education as it is competent therein to provide. In recognition of the effect of general state laws over school matters within the city and county, the charter in chapter 3 of article 7 provides:

"In addition to the powers conferred by the general laws of the state, the board of education shall have power. * * *"

Then follow numerous powers conferred on the board which it is assumed are not directly conferred by general law.

[3] Since the adoption of the Political Code it has been provided in section 1576 thereof that each city in the state shall constitute a separate school district and shall be governed by its board of education or board of trustees. The school district and the city may comprise the same territory, but each derives its powers from a different source, "the powers of the city being derived from its charter, the powers of the school district being derived from the provisions of the Political Code." *Los Angeles School District v. Longden*, supra, page 383.

[4] The fact that the city of San Francisco has also the characteristics of a county,

would not, we think, extinguish the school district established therein as a corporate entity long before the adoption of the freeholders' charter. It cannot be doubted that the present board of education is the successor of the board of education established under acts of the Legislature as far back as 1856. Stats. 1856, pp. 154, 155. That act consolidated the city and the county of San Francisco. In article 3, § 33 thereof, under the head of "Public Instruction," the board of education was given power "to determine annually the amount, not exceeding the rate of thirty-five cents on each one hundred dollars' valuation upon the assessment roll, to be raised by tax upon the real and personal property within the city and county not exempt from taxation, for the support of free common schools therein, and for providing suitable school houses, furniture, libraries and apparatus." It was therefore determined by the Legislature at the early date of 1856 that the board of education of the city and county of San Francisco should exercise the power to determine the amount needed for school purposes. Whether that power was conclusive under the consolidation act need not now be determined, for the reason that the Legislature, by recent enactment, has provided that such determination shall be conclusive. An examination of legislation applicable to boards of education in charter cities, including the school department of the city and county of San Francisco, convinces us that the board of education of said city and county is the governing board of the school department, and responsible to the people of the city and county through the manner of the appointment of the members thereof by the mayor and confirmation by the electors. It may also be noted that in chapter 1 of article 3 of the charter as amended in 1921, the board of education is referred to as the "school directors." Stats. 1921, p. 1795. The amendment of section 6 of article 9 of the Constitution in 1920 makes it especially clear that the territory comprised within the city and county of San Francisco is, for school purposes, a school purpose authorized by the legislature."

"The legislature shall provide for the levying of school district taxes by the board of supervisors of each * * * city and county, for the support of public elementary schools, secondary schools, technical schools, and kindergarten schools, or for any other public school purpose authorized by the legislature."

[5] Judicial notice is taken of the fact that there is but one city and county in the state of California, viz., the city and county of San Francisco. The constitutional amendment of 1920 therefore applies directly to the city and county of San Francisco and provides therein for the levy of a "school district tax."

[6] Since it is clear that in the conduct of its school affairs the city and county of San

Francisco is subject to and is controlled by general law and in all matters of conflict the general law must prevail, it will next be noted what conflict exists between the general laws of the state and the charter provisions respecting the determination of the amount of the expenditures to be made for school purposes. In obedience to the mandate of section 6 of article 9 of the Constitution, as amended in 1920, the Legislature enacted section 1612a of the Political Code in 1921. Stats. 1921, p. 720. In that section it is provided that each board of education shall have the power and it shall be its duty annually in the month of June "to make a school budget showing all the purposes for which the school district will need money and the amount of money that will be needed for each of said purposes for the next ensuing school year." It is then provided that this budget be filed with the superintendent of schools of the city and county, be examined and approved by him, and after such approval it is made the duty of the superintendent of schools to determine by computation the total amount shown by the budget to be necessary for school purposes for the ensuing year after deducting income from all other sources. The approval of the budget by the superintendent of schools is not made a prerequisite to the submission of the budget to the board of supervisors. The section then provides as follows:

"The board of supervisors of each * * * city and county, must annually at the time and in the manner of levying * * * city and county taxes levy and cause to be collected a district tax for each school district whose budget shows a district tax to be necessary, and to fix such a rate for such district tax as will produce at least the amount of district tax money requested by the particular district. If the board of supervisors refuse or neglect to make the levy provided for under this section then the levy shall be made by the county auditor."

The act adding said section 1612a to the Political Code in 1921 expressly repealed all acts and parts of acts "not in harmony" with the new section.

The italicized portions of the foregoing quotations from said section 1612a make plain the obvious conflict between the powers lodged in the board of education to determine the amount of money to be raised for school purposes and the power conferred on the board of supervisors under the provisions of the charter. The powers of the two boards cannot be exercised over the same subject-matter at the same time. The law abhors such a conflict of authority, and since the general law is paramount the functions of the board of supervisors in the premises must yield to the authority of the state exercised through the Constitution and enactments of the Legislature.

[7] On oral argument, counsel for respondents conceded the plain mandatory force of

the language of said section 1612a, but urged that it could not have been intended that this legislative requirement should apply to such communities as San Francisco and Los Angeles, where the assessed valuations are of such magnitude as to make it possible for the board of education to specify so large an amount of money to be raised in current taxes as to enable the board to embark on an enterprise of capital construction and extension of school facilities only justifiable under a bond issue. But the statute has made no exception of populous and prosperous communities, and we can make none. Furthermore, it is a matter of common knowledge that in populous centers the need for additional school facilities is a constantly pressing one. The law prescribes a tax limit for school purposes. So long as that limit is not exceeded—and it is not claimed that it is exceeded in this case—the matter of conferring such powers on boards of education is one of legislative policy with which the court may not interfere. It is readily conceivable that some expenditures on capital account may be necessary each year. Additions to existing structures, reconstruction, repairs, and new schoolhouses are essential aids in the promotion of education, and are incidental to the proper maintenance of the school system.

[8] It may well be questioned whether the provision in said section 1612a, of the Political Code, authorizing the county auditor to levy the required tax in the event the board of supervisors refuses or neglects to make the levy, is constitutional under the provisions of section 13 of article 11 of the Constitution, which provides that the Legislature shall not delegate to "any special commission, private corporation, company, association or individual" any power to levy taxes. Assuming said provision of the Code section to be invalid, it is clearly severable from the remainder of the section.

[9] The inclusion of that provision, however, serves to accentuate the plain intention of the Legislature to make the board of supervisors merely the instrumentality through which the tax levy for school purposes is to be accomplished. The board of education as the "school directors," under the charter, does not answer to the description of a "special commission, private corporation, company, association or individual," as those terms are used in the constitutional provision. On the contrary, the board of education is the duly constituted governing board of the public school system of the city and county of San Francisco, established as such under the Constitution and laws of the state. It may here be noted that it would have been entirely consistent with our system of government if the power were conferred by the Constitution on the Legislature to vest authority to levy school taxes directly in the board of

education. Separate machinery could then be set up for the levy and collection of the same. However, the simpler and more inexpensive method has been followed, namely, of vesting the Legislature with power to "provide for" the levy and collection of school taxes by the board of supervisors of the city and county. Const. § 6, art. 9. When this method of raising the tax is prescribed, the responsibility for the amount to be raised for school purposes is with the board of education.

Counsel appearing for *amicus curiæ* urges that, since the Constitution provides that the Legislature "shall provide for" the levy "by the board of supervisors," the power to levy the tax carries with it the exclusive discretion to determine the amount of the tax. This is a non sequitur. When the Legislature has authorized the board of education, the duly constituted governing board of the school department, to fix the amount to be raised and has required the board of supervisors to levy the tax to provide the sum required, the Legislature has "provided for" the levy of the tax. We find no constitutional inhibition against the conferring of such powers on the board of education, although the full exercise of the power of taxation may necessitate the joint action of both boards—the determination of the amount by one board, and the levy of the tax by the other.

Counsel for respondents and for *amicus curiæ* rely on *McCabe v. Carpenter*, 102 Cal. 469, 36 P. 836, as direct authority against the petitioners. But such is not the fact. That case involved the validity of the act of March 20, 1891 (Stats. 1891, p. 182), which provided for the levy of the school tax "estimated by the county superintendent of schools," and it was made the duty of the "proper authorities," upon receiving the estimate, "to levy such a rate as will produce the amount estimated." Section 4. It was held that this was an unlawful delegation of legislative authority to an executive officer. That was all that was involved in that case. It was there said, however:

"Looking to the provisions in the general school law, in regard to the discretion of county superintendents, and trustees of school districts, we find they have a wide range of discretion in regard to expenditures. The trustees have, however, no voice in making this estimate; they are not even required to furnish any data for it."

Following the *McCabe Case*, a similar question was presented in *People v. Lodi High School District*, 124 Cal. 694, 57 P. 660. In that case the provisions of section 1670 of the Political Code, as amended in 1895 (St. 1895, p. 293), were under review, where it was provided that the high school board, among other things, should furnish to the board of supervisors an estimate of the cost of the construction of buildings and conducting the

school for the school year. Subdivision 15 of the section provided that when the estimate had been submitted it should be the duty of the tax levying body to levy a tax "sufficient in amount to maintain the high school." It was contended that the decision in the McCabe Case rendered this provision unconstitutional, but it was very properly held that, when the duty of the board of supervisors was to levy a tax "sufficient to maintain the high school," a discretion was vested in the board of supervisors to determine the sufficiency of the amount, and that the estimate of the school board was advisory only.

The case of Board of Education of City of Woodland v. Board of Trustees, 129 Cal. 599, 62 P. 173, is also relied on by the respondents. It was there held that the board of education of a city organized under the general municipal corporations act must be regarded, not as an independent public entity, but as a component part of the municipality wherein the legislative power is vested in another body. The court was at pains in that case to point out that the decision was to be restricted to a determination of the status of the school departments in cities organized under general law, and not to the status of school departments governed under the provisions of the Political Code. Further, that under the Code system the city territory, with its inhabitants, constitutes a school district, a corporate body, or quasi municipality, distinct from the municipality itself.

Counsel for respondents concedes that the cases relied upon by him arose before the amendment to the Constitution in 1920 and the enactment of section 1612a of the Political Code in 1921, but contends that the principles enunciated in the old cases are applicable to the present situation. We deem the recent legislation, both constitutional and statutory, of controlling importance, and are satisfied that such recent legislation is applicable to the school department of the city and county of San Francisco. Other cases cited and other points made by the respondents and by counsel for amicus curiæ have been noted, but it is deemed unnecessary to discuss them. The cases cited are either distinguishable on the facts or arose before the recent pertinent legislation, and we find nothing in the additional points made which would warrant a different conclusion herein. That the Legislature fully intended to invest the board of education of municipalities with the full power to determine the amount of money to be required for the needs of the public schools is further made manifest by the action of the Legislature in its recent amendment to section 1838 of the Political Code changing the word "may" to "must" in defining the duty of the board of supervisors in the matter of the adoption of the estimates of the board of education as to the

amount of money required for the purchase of school lots or the building, purchasing or making alterations, additions, or repairs of school buildings. This section was evidently amended to make its provisions conform with the provisions of section 1612a of the Political Code.

[10] The recent constitutional and statutory provisions referred to were undoubtedly adopted on the theory that boards of education, being constantly in touch with school matters, are more conversant with the needs of the school departments and are in better position to judge of the required expenditures for school purposes. Whether placing the responsibility of determining the amount to be raised for school purposes directly on the shoulders of the boards of education and not on the boards of supervisors be the wiser policy may present a subject of legitimate controversy, but with that policy the courts have nothing to do except to see that constitutional bounds are not transcended. It is to be assumed that the boards of education will exercise proper regard for the rights of the taxpayers to the end that the burden of taxation be not unduly extended. The responsibility for fixing the amount to be raised by taxation for school purposes is with those boards, and for such responsibility the members thereof, it is assumed, may be held accountable to the electorate as provided by law.

Let the peremptory writ issue as prayed.

We concur: WASTE, C. J.; PRESTON, J.; SEAWELL, J.; RICHARDS, J.; KOFORD, Justice pro tem.

I concur in the judgment: LANGDON, J.

202 Cal. 143

BROWN v. AGUILAR. (S. F. 11647.)

Supreme Court of California. Sept. 14, 1927.

1. Appeal and error §1010(1)—Court's findings for plaintiff suing on building contract, supported by evidence, held conclusive on appeal.

In action for balance due on contract for construction of a garage, court's findings in favor of plaintiff on questions of delay in completion, improper encroachment, and other variations from drawings and written specifications, supported by evidence, held conclusive on appeal.

2. Appeal and error §1010(1)—Court's finding of "substantial performance" of building contract, supported by evidence, held conclusive on appeal.

In action for balance due on contract for construction of a garage, court's findings that contractor furnished necessary labor and materials and constructed garage and fully performed all terms and conditions, and that slight changes in specifications were made by defend-

ant, supported by evidence, held conclusive on appeal and to entitle plaintiff to recover at least on ground of "substantial performance," which means performance in good faith on all substantive terms of contract without willful departure therefrom and without omission of any of essential parts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Substantial Performance.]

3. Pleading ⚡238(1)—Application to amend pleading may be denied, unless showing justification of exercise of discretion to grant it.

Application for leave to amend pleading is addressed to court's sound discretion, and may be denied where no showing is made to justify exercise of such discretionary power.

4. Pleading ⚡236(6)—Denial of fourth amendment to change admission in answer that certain person was defendant's architect and agent to draw plans for and supervise erection of garage held not abuse of discretion.

In action on building contract, refusal to permit fourth amendment to answer, changing admission therein that certain person was architect and agent employed by defendant to draw plans for and supervise erection of garage, was not abuse of discretion, in view of fact that same question had been previously presented on demurrer.

5. Pleading ⚡36(3)—Defendant, sued on building contract, held bound by admission in answer that certain person was her architect to draw plans for and supervise building.

Defendant, sued on building contract, was bound by admission in answer that certain person was her architect and agent to draw plans for and supervise erection of building.

6. Contracts ⚡346(7)—Excluding evidence that architect's certificates were result of gross mistake amounting to fraud, not alleged in pleadings, held not error.

In action on building contract, where there was no allegation of fraud or gross mistake in pleadings, exclusion of defendant's evidence that architect's certificates were issued without authority and by gross mistake amounting to fraud was proper.

7. Fraud ⚡41—Where actual or constructive fraud constitutes element of action or defense of affirmative nature, facts must be alleged.

Where fraud, either actual or constructive, constitutes element of action or defense which is of affirmative nature, facts must be alleged.

8. Contracts ⚡287(2)—Building contract held to authorize architect's issuance and delivery of certificates to contractor and to make them conclusive.

Under building contract requiring work to be done in conformity with plans, drawings, and specifications made by owner's architect, and providing that, when payment or installment was due and at final completion of work architect should give certificates in writing and that dealings between owner and contractor were to be transacted through offices of architect, whose decision as to interpretation of drawings or specifications was to be final and conclusive,

architect was authorized to issue certificates which were conclusive on property owner.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Action by E. J. Brown against Minnie C. Aguilar on a contract. From a judgment for plaintiff, defendant appeals. Affirmed.

Dahlin & Jackson and Walter A. Dold, all of San Francisco, for appellant.

Cooley & Gallagher, of San Francisco, for respondent.

PRESTON, J. By the complaint in this action it is alleged that on June 29, 1922, plaintiff's assignor, a contractor, entered into a written agreement with defendant whereby said contractor agreed to furnish the necessary labor and materials required for the construction of a one-story brick and concrete garage in San Francisco, and said defendant agreed to pay to the contractor therefor the sum of \$3,000; that said contractor furnished the necessary labor and materials and constructed said garage and fully performed all of the terms and conditions of said agreement on his part to be performed, "except such, if any, as were waived or changed by defendant; and that one Frank S. Holland, who was the architect and agent employed by defendant to draw plans for and supervise the construction of said garage, after the completion of said garage issued as such architect his certificate stating that the final payment was due under said agreement, and during the progress of said construction issued his certificate for the two progressive payments as provided in said agreement"; that defendant entered into possession of the garage and paid on account of said \$3,000 the sum of \$1,000, leaving a balance of \$2,000 due, owing, and unpaid; that said contractor duly assigned said agreement and all rights thereunder to this plaintiff, wherefore plaintiff prayed judgment against said defendant in amount of \$2,000.

Defendant filed an answer, counterclaim and cross-complaint, also first, second, and third amended answers. The articles of agreement signed by defendant and said contractor are set forth in full in paragraph I of the third amended answer. It is further alleged therein that said garage was not constructed in accordance with the terms, plans, or specifications of said agreement; that inferior and unsuitable materials were used; that the garage building was negligently and carelessly erected partly upon land of the next adjacent property owner, necessitating reconstruction or removal by defendant; that defendant, by reason of failure of said contractor to complete said building within the stipulated time, lost \$450 in prospective rentals, covering a period of eighteen months.

Said pleading "admits that one Frank S. Holland, who was the architect and agent employed by defendant to draw plans for and supervise the erection of said garage, issued his certificate stating that the final payment was due under said agreement, and during the progress of said construction issued his certificates for two progressive payments as provided in said agreement," but it is alleged that said certificates were issued by said architect improperly and in error.

The court found for plaintiff on all points. It found that the garage was properly constructed, without encroaching upon the adjacent owner's property; that proper materials were used; that the delay in completion was excusable, being due to inclement weather and to obstructive action of labor organizations; that there was no evidence showing loss of prospective rentals; that said architect during the progress of said construction properly issued his certificate for the two progressive payments as provided in said agreement, and properly issued his certificate stating final payment was due; and that such slight changes as were made in the specifications were made by defendant, through said architect. Judgment was accordingly rendered for plaintiff in amount of \$2,236.88.

[1] The first question is: Did the contractor fully perform, or at least substantially perform, said contract, so as to enable respondent to recover under the doctrine of substantial performance? Appellant sets forth much testimony in an effort to show delay in completion, improper encroachment, and many other variations from the drawings and written specifications. These are all questions of fact upon which we are bound by the findings of the trial court when supported by proper evidence. In other words, it is unnecessary for us to review the testimony at length herein. It is sufficient to state that there is evidence in abundance to support the findings, and each of them, and they are therefore conclusive upon appeal as to these matters.

[2] Furthermore, it would seem that there was indeed such a performance by the contractor of his obligations under the contract as would entitle respondent to recover under the doctrine of substantial performance. This doctrine is well stated in the following quotation from *Connell v. Higgins*, 170 Cal. 541, 556, 150 P. 769, 774, in which case a similar situation was involved:

"The criticism is that the jury were not informed what was meant by the term 'substantial performance,' and that they were therefore left to infer, if they chose, that, if the plant, as constructed, would do the work which the owner desired it to do, the plaintiff could recover as for completion, although it might, in many particulars, vary from the plans and specifications, or lack completion as the plans and specifications required. The defendant did not offer any instruction on this subject, as he might

well have done. The definition of substantial performance is difficult to give in general terms. It is usually a question to be determined in each case with reference to the existing facts and circumstances. In 2 Elliott on Contracts, § 1607, it is defined as follows (page 912):

"Substantial performance means that there has been no willful departure from the terms of the contract, and no omission of any of its essential parts, and that the contractor has in good faith performed all of its substantive terms. If so, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed. If the omission is so slight that it cannot be regarded as an integral or substantive part of the original contract, and the other party can be compensated therefor by a recoupment for damages, the contractor does not lose his right of action; and this rule is peculiarly applicable in a case where the other party has received the benefit of what has been done, and is enjoying the fruits of the work. It is the sound and settled rule that the right of a party to enforce a contract will not be forfeited or lost by reason of technical inadvertence, or unimportant omissions or defects. A substantial performance must be established, in order to entitle the party claiming the benefit of the contract to recover; but this does not mean a literal compliance as to the details that are unimportant. There must be no willful or intentional departure, and the defects of performance must not pervade the whole or be so essential as substantially to defeat the object which the parties intend to accomplish. Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact.' This we believe to be a correct statement of the law on the subject."

As above stated, this being a question of fact, and the court having found that said contractor furnished the necessary labor and materials and constructed said garage and fully performed all the terms and conditions of said agreement on his part to be performed, and having further found that the slight changes in the specifications were made by defendant, through her architect, and there being proper evidence to support such findings, they are conclusive upon appeal, and entitle respondent to recover on the ground of substantial if not complete performance.

Appellant's chief complaint, however, centers around the issuance of the above-mentioned certificates by the architect accepting said construction work as satisfactory under the agreement. If the architect did in fact have power to authorize the various changes in the specifications and in the character and selection of materials and labor and to extend the time within which the building was to be completed, and if the said certificates were properly issued by him, then indeed is every claim of appellant defeated.

Appellant contends that the court abused its discretion in refusing to allow her to file a fourth amendment to her answer changing the admission therein that Frank S. Holland

was the architect and agent employed by her to draw plans for and supervise the erection of the garage. In refusing leave to amend a fourth time, it was recalled that the same question in a way had been previously presented on demurrer, that three subsequent amendments to the answer had been permitted, and the court also said:

"* * * I am all the more averse to allowing you to amend, first, on the broad, general proposition that, when counsel's attention was called to the faulty allegation, it was discussed plainly and clearly and at length, and he was given leave to amend, and did amend with the express view to clarifying the pleadings in that one regard, and if, after having done so, the pleading does not plead just what he sought to have it express, unless there is some overwhelmingly strong equitable consideration involved, he should be forced to stand on it. All the more is that so, where, as here, it is essentially a technical point. In other words, if this work was done as it ought to have been done under that contract, and if that work has not been paid for, then this plaintiff should recover, and no technical defense will be permitted to stand in his way, except in so far as the law is supposed to accept such defenses. I recognize the pleading, as does plaintiff's counsel, as being practically a statement or admission, whatever its form may be, that the architect mentioned was at all times the architect and agent, so to speak, of the defendant."

[3] An application for leave to amend is addressed to the sound discretion of the court and such application may be denied where no showing is made to justify the exercise of the court's discretionary power. 21 Cal. Jur. § 126, pp. 181, 182. The rule is stated in 31 Cyc. 422, as follows:

"As a general rule a party will not be allowed to file an amendment contradicting an admission made in his original pleadings. If it be proper in any case, it must be upon very satisfactory evidence that the party has been deceived or misled, or that his pleading was put in under a clear mistake as to the facts."

See, also, *Bank of Woodland v. Heron*, 122 Cal. 107, 110, 54 P. 537, and cases there cited.

[4, 5] We hold that here there was no abuse of discretion by the court, but that, on the contrary, he acted wisely in denying the application. Appellant is therefore bound by said admission of fact in her third amended answer. "While a pleader is not bound by allegations of evidence or conclusions of law, he is concluded by material averments of his pleading, and may not, as a rule, prove facts contrary thereto. * * * A pleader is likewise concluded by admissions in his pleading, unless they are withdrawn by amendment." 21 Cal. Jur. § 5, p. 16. See, also, *Howard v. Throckmorton*, 48 Cal. 482, 490, *Brusie v. Gates*, 96 Cal. 265, 268, 31 P. 111, and *People v. S. & C. R. Co.*, 49 Cal. 420.

[6, 7] Appellant next complains of the court's refusal to permit her to adduce evidence to prove that the architect's certificates

were issued without authority and by gross mistake amounting to fraud. This contention is likewise without merit, as it is a well-known rule that the facts constituting an alleged fraud must be pleaded. Here there is no allegation whatsoever of fraud in the pleadings, or of gross mistake. As stated in 12 Cal. Jur. § 62, pp. 800, 802:

"Fraud is never presumed. Whenever fraud constitutes an element of action or defense which is of an affirmative nature the facts must be alleged. One against whom charges of fraud are made is entitled to specific averments of the acts of which he is accused, so that he may admit or deny them, and thus present real issues. This is the rule whether the fraud relied on is actual or constructive. It is not, therefore, sufficient to allege fraud in general terms; such allegations are merely of conclusions which the pleader is not permitted to draw and which present no issuable facts."

[8] The only question remaining is whether, under the contract and the authority granted thereby, said certificates were properly issued by said architect and are binding upon appellant and conclusive. In this regard, the written contract, which is pleaded in *hæc verba* by defendant in her third amended answer, contains the following provisions: That the work is to be done "in conformity with the plans, drawings, and specifications for the same made by Frank S. Holland the authorized architect employed by the owner, * * *" and that "the work is to be done and the materials furnished in accordance therewith under the direction and subject to the approval of said architect; * * *" again "that, when each payment or installment shall become due, and at the final completion of the work, certificates in writing shall be obtained from the said architect, stating that the payment or installment is due or work completed, as the case may be, and the amount then due, and the said architect shall at said times deliver said certificates under his hand to the contractor, or, in lieu of such certificates, shall deliver to the contractor in writing, under his hand, a just and true reason for not issuing the certificates, including a statement of the defects, if any, to be remedied, to entitle the contractor to the certificate or certificates. And in the event of failure of the architect to furnish and deliver said certificates, or any of them, or in lieu thereof the writing aforesaid, within three days after the times aforesaid, and after demand therefor made in writing by the contractor, the amount which may be claimed to be due by the contractor, and stated in the said demand made by him for the certificate, shall, at the expiration of said three days, become due and payable and the owner shall be liable and bound to pay the same on demand;" and, lastly, "should the owner or architect, at any time during the progress of the work, request any alterations

or deviations in, additions to, or omissions from, this contract or the plans or specifications, either of them shall be at liberty to do so, and the same shall in no way affect or make void this contract, but the amount thereof shall be added to, or deducted from, the amount of the contract price aforesaid, as the case may be, by a fair and reasonable valuation. And this contract shall be held to be completed when the work is finished in accordance with the original plans, as amended by such changes whatever may be the nature or extent thereof. * * * " Paragraph 4 of the general conditions in the specifications provided:

"All dealings between the owner and contractor to be transacted through the offices of the architect, whose decision as to the character and selection of any materials or labor furnished, or interpretation of the drawings and specifications to be final and conclusive to both the owner and contractor."

Mr. Holland, the architect, testified that, at the time he issued the final payment certificate and delivered it, the work had been completed to his satisfaction according to the plans and specifications, and that whatever changes were made in the garage building were made at his suggestion and with his approval. His testimony was corroborated by that of other witnesses.

It will be noted that, although the contract does not state in so many words that the certificates of the architect are to be final and conclusive, yet such is clearly the import of the above-quoted provisions. The rule is stated in 9 Corpus Juris, 722, as follows:

"The decision, estimate, or certificate of an architect, engineer, or superintendent, in approving or disapproving the work as a performance of a contract, or in passing on questions relating thereto, is, in the absence of fraud, bad faith, or mistake, conclusive and binding on the parties, where the contract either in express terms provides that it shall be final and conclusive or in plain language shows that it was the intention of the parties that the person to whom the question is submitted should be the final arbiter thereof. * * *"

The case of *Moore v. Kerr*, 65 Cal. 519, 4 P. 542, involved a building contract which provided merely that the work was to be done "under the direction and to the satisfaction of the superintendent appointed by said board." The court said:

"The work was done to his satisfaction, and it was so found. It does not appear that there was any fraud or mistake on the part of Perrott. His judgment is therefore conclusive, and the defendants are not allowed to go behind it. *Smith v. Brady*, 17 N. Y. 177 [72 Am. Dec. 442]; *Wyckoff v. Meyers*, 44 N. Y. 145; *Stewart v. Keteltas*, 36 N. Y. 388; *Hudson v. McCartney*, 33 Wis. 340."

In the case of *Dingley v. Greene*, 54 Cal. 333, it was held that, where the contract

provided that payments should be made on the certificate of the architect, his certificate was conclusive of the rights of all parties concerned, unless it could be shown that it was obtained by the owner by collusion or fraud. See, to the same effect, *Gray v. Cotton*, 166 Cal. 130, 134 P. 1145.

In the case of *Connell v. Higgins*, supra, the facts were similar to those in the case at bar. Connell and Higgins executed a written contract for the construction of a building and installation of a power plant therein; said contract providing that "the work should be done according to the plans and specifications and to the satisfaction of 'A. L. Haley, Architect, Inc.,' and one Martin, an engineer." There as here, the questions of unreasonable delay in completion of the structure, conclusiveness of the architect's certificates, and lack of substantial performance were involved. The court charged the jury that if they should find that the architect and engineer "correctly" certified to the owner that the plaintiff had failed and refused to supply a sufficiency of properly skilled workmen, or material of the proper quality, as provided in said contract, or to pursue the work with promptness or diligence and that the plant was unsound and improper," and that such refusal and neglect afforded sufficient ground for the termination of the contract, then defendant was justified in terminating same and had a right to deduct from the unpaid portion of the contract price all expenses necessarily incurred by him in the completion of the work to make it conform to the contract. There was a conflict of evidence on the question whether or not Connell had neglected to supply skilled workmen and proper materials, and had prosecuted the work diligently. The court said:

"This instruction was clearly erroneous. The question of the effect of such a certificate under the provisions of this contract was considered in *American-Hawaiian, etc., Co. v. Butler*, 165 Cal. 504, 133 P. 280 [Ann. Cas. 1916C, 44]. At page 513 [133 P. 286], the court says: 'It is well settled that, where the parties to a building contract thereby authorize the architect, as arbiter, to determine and certify the existence of a fact when such fact becomes material to a proceeding under such contract, the certificate of the architect, duly made, that the fact exists, is conclusive upon the parties with respect to the thing to be done to which such fact relates, or as to which, under the proceeding, it is to affect the rights of the parties and that such certificate can be impeached as to such facts only for fraud, or for gross mistake amounting to fraud. *Dingley v. Greene*, 54 Cal. 333; *Moore v. Kerr*, 65 Cal. 519, 4 P. 542; *City Street Imp. Co. v. Marysville*, 155 Cal. 419, 101 P. 308, 23 L. R. A. (N. S.) 317. * * *'" In the case at bar the certificate and notice were in proper form. The certificate could not be impeached by merely showing that it was incorrect. * * * The instruction practically said to the jurors that, if they believed from the evidence before them

that the architect and engineer had not correctly decided the question, they were at liberty to disregard the certificate and to refuse to allow to Higgins the expense of completing the work to which he would have been entitled. Such, as we have seen, is not the law. The certificate is conclusive unless it is impeached by showing that it was made fraudulently or in bad faith, or under some mistake with regard to a material fact. * * * The court below should at least have instructed the jury that the certificate was conclusive, unless they found from the evidence that it was given fraudulently."

It cannot be doubted that by the terms of the contract in this case the architect was authorized to and did properly issue the said certificates, and under the above authorities it is also our opinion that said certificates are binding upon appellant and conclusive. Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

202 Cal. 193

STOWELL v. RIALTO IRR. DIST.
(L. A. No. 7866.)

Supreme Court of California. Sept. 26, 1927.

1. Waters and water courses §230(2)—Conveyance of pipe line and rights of way to irrigation district held consideration for bonds of district, regardless of prior contracts.

Where corporation, building distributing system and supplying water to irrigation district, became insolvent and was unable to proceed with contract, agreement between the district and company supplying such corporation with pipe, that corporation should deed pipes, pipe line, and rights of way to district, which would give its bonds therefor to receiver of corporation, to be turned over to company supplying pipe, was valid, and such transfer of bonds was founded on consideration, regardless of nature of previous contracts between corporation and district or such contracts as modified.

2. Waters and water courses §230(2)—Deed executed 10 days after delivery of bonds by irrigation district held part of same transaction and to constitute sufficient consideration for bonds (Irrigation District Act, § 12).

Where company supplying irrigation district with water and irrigation system became insolvent and could not complete contract, deed by its receiver of pipe line, pipes, and rights of way to district, executed 10 days after district's transfer of its bonds to receiver to be given to company supplying pipe, was part of same transaction, and was sufficient consideration for such bonds, which were not invalid on ground that consideration was construction work for district, contrary to Irrigation District Act, § 12 (St. 1887, p. 29).

3. Waters and water courses §230(2)—That property conveyed to irrigation district was not sufficient consideration for bonds held no defense to action on interest coupons.

Where corporation constructing irrigation system and supplying water for irrigation district became insolvent and could not complete work, and its receiver conveyed to district pipes, pipe line, and rights of way, in return for district's bonds to be paid to furnisher of pipe, alleged fact that property which corporation conveyed was of little value to it and was not worth amount of bonds transferred is no defense to action to collect interest on coupons of bonds.

4. Waters and water courses §230(2)—Failure of furnisher of pipe to join in deed conveying pipe line to irrigation district held not to invalidate transfer of bonds.

Where contract of furnisher of pipe with corporation constructing irrigation system for irrigation district made title of pipe pass to district when laid, failure of such furnisher of pipe to join with receiver of insolvent corporation in deed to district, in return for bonds which were transferred by receiver to furnisher of pipe, did not render such transfer of bonds invalid, and was no defense in action on interest coupons of bonds.

5. Waters and water courses §230(2)—In absence of default on contract to lay irrigation pipe, conveyance of irrigation district's bonds on resolution requiring completing contract held valid.

Including in resolution to transfer irrigation district bonds in return for deed to pipes, pipe lines, and rights of way, that furnisher of pipe should diligently continue laying pipe lines according to its contract cannot invalidate bonds and defeat action on interest coupons, in absence of showing default as to such condition, especially where district accepted deed and retained benefits thereof.

In Bank.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Two actions by N. W. Stowell against the Rialto Irrigation District, tried together. From a judgment for plaintiff but denying plaintiff recovery on certain bond coupons, plaintiff appeals. Reversed.

Swanwick & Donnelly, Carroll Searls, and C. C. Haskell, all of Los Angeles, for appellant.

Leonard, Surr & Hellyer, of San Bernardino, for respondent.

SHENK, J. A former judgment of reversal in this case was set aside on petition for rehearing in order that further consideration might be given to the contentions of the defendant. Upon such further consideration we are unable to arrive at a different conclusion.

Two actions were brought by plaintiff, based on amounts claimed to be due on in-

terest coupons detached from certain bonds of the defendant irrigation district. The defense was made on the ground that the issuance of said bonds was unauthorized by law; that the consideration, if any, for the issuance thereof, was insufficient, inadequate, and unlawful, in that said consideration consisted in the doing of construction work for the district in violation of section 12 of the Irrigation District Act (Stats. 1887, p. 29), that the plaintiff was not a holder of said bonds in good faith, or in ordinary course of business without notice of the facts constituting the alleged invalidity, and that payment of certain of said coupons was barred by the statute of limitations. The two cases were tried together by agreement of the parties, and a single record is now presented. The court found for the plaintiff on all of said coupons excepting those barred by the statute of limitations and excepting also the coupons detached from 54 bonds of the par value of \$27,000. As to these 54 bonds, the court found that the issuance thereof was unauthorized and void under the statute, and that the plaintiff, at the time he acquired the same, had notice and knowledge of such invalidity. The plaintiff appeals from that portion of the judgment which denies recovery on the coupons attached to the 54 bonds.

The record is presented in a bill of exceptions, wherein it is the sole claim of the plaintiff that the evidence is insufficient to justify the findings of the court adverse to his present contentions.

The Rialto irrigation district was organized on October 13, 1890, pursuant to provisions of said Irrigation District Act as originally enacted and as subsequently amended and supplemented. As the result of an election held for that purpose on November 15, 1890, bonds of the district in the total sum of \$500,000 were authorized. On December 10, 1890, the district entered into an agreement with the Semi-Tropic Land & Water Company, wherein the district agreed to issue and deliver to the Semi-Tropic Company all of said bonds as consideration for 1,000 inches of water and a distributing system. Before the covenants of this contract had been fully performed by the Semi-Tropic Company, and under date of December 22, 1890, another agreement was entered into between the same parties modifying the agreement of December 10, 1890, in minor particulars. Again on May 26, 1892, the same parties executed another agreement modifying the previous contracts and confirming the same as modified. The contract of December 10, 1890, was involved in a former appeal in this case, *Stowell v. Rialto Irrigation District*, 155 Cal. 215, 100 P. 248. It was there held that the bonds issued pursuant to the 1890 contract were, in fact, given as payment for water and pipe lines purchased and were valid in the hands of the

original holder. Under date of June 12, 1893, the district and the Semi-Tropic Company entered into an agreement formally abrogating and canceling the previous agreements in so far as they remained unexecuted. The new contract specified that the Semi-Tropic Company should transfer to the district certain water and water rights and complete the distributing system as therein provided; that, if the Semi-Tropic Company should fail to perform its covenants under the contract, the district could, on 30 days' notice, in writing, perform the contract and charge the cost thereof to the Semi-Tropic Company; that, if said company should perform its contract, as agreed, then the district would turn over the balance of said \$500,000 issue of bonds to the company; that all questions arising between the parties as to the sufficiency of the pipe lines to be constructed or as to the measurements of water, should be submitted to a board of arbitrators, consisting of three competent engineers, one to be appointed by the district, one by the Semi-Tropic Company and the third by the two so chosen, and the determination of the board was to be final and conclusive; that the remaining bonds of the \$500,000 issue be forthwith deposited with W. S. Hooper, cashier of the San Bernardino National Bank, as trustee, for said parties, the same to be held by him in accordance with the terms of said agreement and be delivered to the Semi-Tropic Company on the order of the boards of directors of the respective parties. Three days after the contract was made, to wit, on June 15, 1893, Mr. Hooper received 314 of said bonds. Subsequently on orders he delivered the 54 bonds in question to the plaintiff. These 54 bonds were delivered to the plaintiff on October 8, 1894, under circumstances hereinafter to be related.

On June 4, 1892, the Semi-Tropic Land & Water Company entered into an agreement with the Stowell Cement Pipe Company, wherein the latter company agreed to furnish a good and serviceable pipe of cement concrete of specified size, dimensions, and price, and lay the same in ditches to be constructed by the Semi-Tropic Company, for which the latter agreed to pay the Stowell Company 60 per cent. of the contract price when the pipe was made and 40 per cent. when the pipe was laid. Considerable work was done under this contract for which the Stowell Company accepted as payment bonds of the district at par in the hands of the Semi-Tropic Company in lieu of cash, as provided in said contract. In the month of February, 1894, W. M. Sheldon was appointed receiver of the Semi-Tropic Company in an action entitled *San Francisco Savings Union v. Semi-Tropic Land & Water Company*, pending in the superior court in and for San Bernardino county. On August 16, 1894, the board of directors of the district adopted the following resolution:

"That on order of the president and secretary of this board, W. S. Hooper be and he is hereby authorized to deliver to W. M. Sheldon, receiver of the Semi-Tropic Land & Water Company, such an amount of the bonds of this district as a committee to be appointed may determine, said bonds to be delivered by said Sheldon to Stowell Cement Pipe Company as payment for pipe already laid in this district and accepted.

"Provided that this district shall receive a good and sufficient deed and title to all pipe lines in and out of the district (not already deeded), laid by said Stowell Cement Pipe Company, for the use and benefit of this district. Said W. M. Sheldon, receiver, and said Stowell Cement Company shall join in executing said deed; and provided further that this district shall receive a perfect deed and title to rights of way for all pipe lines already laid, or that may be laid for the use and benefit of this district through the lands of the Semi-Tropic Land & Water Company, and all rights of way now owned by them. And be it further resolved that W. M. Sheldon, receiver, be requested to continue to completion the contract existing between the Semi-Tropic Land & Water Company and Stowell Cement Company, for the laying of pipe lines for the use of this district; and be it further resolved that, on the order of the president and secretary of this board, W. S. Hooper be and he is hereby authorized to deliver the bonds of this district to W. M. Sheldon, receiver, to be by him turned over to the Stowell Cement Company in amounts at par value and at times as this board shall direct. This resolution shall be operative only on condition that the Stowell Cement Company shall diligently continue the laying of pipe lines in this district to completion, as per their contract with the Semi-Tropic Land & Water Company."

The minutes of the district of date June 5, 1894, disclose the following:

"N. W. Stowell of the Stowell Cement Pipe Company made a statement of the account between the Semi-Tropic Land & Water Company and the Stowell Cement Pipe Company and asked for a settlement with the district. On motion, a committee consisting of Robinson, Dyer, and Hunton were appointed a committee to investigate on the matter and report back to the board."

The minutes of the district of October 6, 1894, include the following:

"The committee appointed to investigate the Stowell Cement Pipe Company's account reported that they found the count correct, and on motion were discharged. The following resolution was read: Resolved, that, on order of the president and secretary, W. S. Hooper be and he is hereby authorized to deliver to W. M. Sheldon, receiver of the Semi-Tropic Land & Water Company, the bonds of the district in the amount of \$27,000 at par value, detaching all coupons, * * *" then overdue.

On October 4, 1894, the receiver of the Semi-Tropic Company filed in said superior court a petition wherein he alleged the indebtedness of the Semi-Tropic Company to the plaintiff in said action in the sum of \$280,000 secured by a mortgage on 16,700

acres of land belonging to the Semi-Tropic Company, 7,000 acres of which were situated within the boundaries of the irrigation district; that the Semi-Tropic Company was unable, for want of money, to comply with its contract of June 12, 1893, with the district or to insist upon compliance by the Stowell Company under said contract of June 4, 1892; that the district was desirous of having further pipe furnished and laid by the Stowell Company to the end that all the lands within the district might be furnished with conduits and pipes for conducting water to the lands of the district, and was desirous of availing itself of the terms of the contract between the Semi-Tropic Company and the Stowell Company for the furnishing and laying of pipe and thus avoid advertisement for bids and consequent delays; that the additional work would be of the value of \$15,000, and that the district desired to furnish bonds of the district at par in payment thereof to the receiver, the same to be delivered to the Stowell Company in payment for said work; that both the district and the Stowell Company and the receiver were willing to relieve the Semi-Tropic Company of all responsibilities under the latter's contracts; that it would be greatly to the interest of the Semi-Tropic Company and its general creditors to have the lands included within said district, and particularly about 1840 acres of said Semi-Tropic Company's lands still unpiped, piped for water by the Stowell Company; that the Stowell Company would not furnish or lay pipe thereon without the delivery of bonds unto it through the receiver; that the receiver desired to convey to the district all of the right, title, and interest of the Semi-Tropic Company in and to all of the pipe and pipe lines situate within the district, and that these pipes and pipe lines had been made and laid for the sole use and benefit of the district; that the receiver desired to convey to the district all of the right, title, and interest of the Semi-Tropic Company in and to the Raynor ditch and flume, which were acquired by the Semi-Tropic Company solely for the benefit of the district, and which were and are not subject to the lien of said mortgage; that in October, 1890, the district purchased from the Semi-Tropic Company certain water and tunnel rights in the Lord ranch; that the district has water which it desires to discharge through the aforesaid pipes for the irrigation of lands owned by the Semi-Tropic Company; that the district is willing to maintain and care for said pipes and conduits at its own expense after the same have been conveyed to it and to accept a conveyance to it of the said pipe and pipe lines and said interest in the Lord ranch; that the district is cognizant of said petition and is willing to relieve the Semi-Tropic Company and the receiver of all liability in the premises and that the

Stowell Company is cognizant of the petition and consents thereto and is likewise willing to relieve the Semi-Tropic Company of all liability upon the granting of said petition. The receiver prayed for an order authorizing him "to make the conveyances hereinbefore particularly mentioned" and to transfer to the Stowell Company whatever bonds he may receive from the district "in payment for the pipe and the laying of piping within and upon the lands of said" district by the Stowell Company and for such other relief as might be deemed proper in the premises. On the day after the foregoing petition of the receiver was filed, to wit, on October 5, 1894, the court made an order reciting that the statements in the petition were true, and ordering that the receiver transfer to the Stowell Company whatever bonds he may receive from the district "in payment for piping and the laying of pipe within and upon the lands of said Rialto irrigation district by said Stowell Cement Pipe Company." The order further authorized the receiver to convey to the district, by good and sufficient deed, all of the right, title, and interest of the Semi-Tropic Company in and to the pipe and pipe lines situated within the boundaries of the district or leading from the water sources thereto and all of the right, title, and interest of the Semi-Tropic Company in and to the Raynor ditch and flume and the Lord ranch.

Thereafter, and on October 8, 1894, the president and secretary of said district, pursuant to a resolution of the board of directors adopted on the same day, authorized W. S. Hooper to deliver to said receiver bonds of said district then in his possession under the contract of June 12, 1893, in the amount of \$27,000 par value. These bonds were on the same day delivered to the plaintiff in this action, who concededly was the directing head and dominating spirit of the Stowell Company. On the 18th day of October, 1894, the receiver, on behalf of the Semi-Tropic Company, signed a deed conveying to the district the pipe, pipe lines, easements, and other real property authorized to be conveyed by order of court of October 5, 1894. This document was duly acknowledged and was later recorded at the request of the district. The contract of June 12, 1893, was assigned to Mr. Stowell on November 9, 1894, who thereafter, on January 2, 1895, entered into an agreement with the district modifying said contract in certain particulars and entering upon new and additional covenants and agreements with the district to furnish material and do construction work. For aught that appears in the record, Stowell was not remiss in the execution of his part of the contract, as modified and re-executed. However, it was determined in *Rialto, Irrigation District v. Stowell* (C. C. A.) 246 F. 294, that a large number of the bonds

of the district, issued to Stowell under the contract of January 2, 1895, were issued for construction work, and were therefore void in his hands under the inhibitions of the statute. When the contract of January 2, 1895, was executed, a settlement on account of pipe theretofore made and laid was had between the plaintiff and the district, in which the \$27,000 in bonds involved herein was taken into account as an item of payment from the receiver of the Semi-Tropic Company to the plaintiff.

[1] The principal problem presented for solution in this case is whether there was a lawful consideration for the 54 bonds running from the Semi-Tropic Company to the district. Section 12 of the Irrigation District Act prohibits the issuance of bonds except for cash or property purchased. The trial court concluded that the bonds in question were issued in payment of work done under the contract which had been abrogated and canceled by agreement of June 12, 1893, and were therefore void under section 12 of the act, as being founded upon an illegal or unauthorized consideration. The only conflict in the evidence is as to whether plaintiff's claim arose for work done prior to June 12, 1893, or subsequent thereto. The trial court found, on what is assumed to be sufficient evidence, that the claim arose for work done by the Stowell Company prior to June 12, 1893, and was therefore for work done under a contract that was not in existence at the time of the delivery of the 54 bonds. It is very clear from the record that the Stowell Company furnished the material and performed the work, amounting to and somewhat exceeding in value the par value of the \$27,000 in bonds received by it, and that the work was done and the material was furnished prior to the time the Stowell Company, the predecessor of the plaintiff, received the bonds from the receiver of the Semi-Tropic Company, which was, of course, the same as receiving the bonds from the company itself. There was no statutory or other impediment restricting the right of the Semi-Tropic Company to contract with the Stowell Company for payment for work done and materials furnished in bonds of the district which the Semi-Tropic Company might rightfully have in its possession. So all question of a valid and sufficient consideration for the transfer of the bonds to the Stowell Company by the Semi-Tropic Company or its receiver may be dismissed as having been fully shown in plaintiff's favor.

As to the consideration flowing from the Semi-Tropic Company to the district, it is deemed of no controlling significance whether the plaintiff's claim against the Semi-Tropic Company arose before or after June 12, 1893. A legal consideration for the issuance of said bonds is shown by what transpired on and shortly prior to October 18,

1894. It appears from the evidence, without conflict, that on June 5, 1894, Mr. Stowell appeared before the board of directors of the district and made a statement of his account with the Semi-Tropic Company and asked for a settlement so that he might receive payment from that company. Obviously he could not demand settlement with himself directly from the district for the reason that there was then no contractual relation between himself and the district. His claim was against the Semi-Tropic Company. As a result of his appearance before the board, a committee was appointed by the board, consisting of three of its members, "to investigate on the matter and report back to the board." The resolution of the board of date August 16, 1894, authorizing W. S. Hooper, on the order of the president and secretary of the board, to deliver to the receiver of the Semi-Tropic Company bonds in an amount to be determined after the report of the committee appointed to ascertain the amount of pipe already laid by the Stowell Company and unpaid for, upon condition of the receipt of a deed conveying to the district all pipe and pipe lines and rights of way owned by the Semi-Tropic Company in the district's distributing system; the petition of the receiver of October 4, 1894, for leave of court to make the deed required by the district under said resolution and including the Raynor ditch and flume and the Lord ranch; the granting of the petition on October 5th; the report of the committee of the district board of October 6th, certifying to the board the correctness of the Stowell Company's pipe and working account, and the resolution of said board on the same day authorizing Mr. Hooper to deliver to the receiver the \$27,000 in bonds which was less in amount than the Semi-Tropic Company owed the Stowell Company for pipe already laid; the delivery of said bonds to the plaintiff for the account of the Stowell Company on the order of the district and of the receiver of the Semi-Tropic Company on October 8th, and the execution of the deed by said receiver to the district of date October 18, 1894—all constitute a part of the same transaction wherein the bonds were transferred to the receiver in consideration of the property conveyed by said deed, a transaction authorized by section 12 of the Irrigation District Act. It is therefore apparent that there was a legal consideration for said bonds in the hands of the original holder, namely, the Semi-Tropic Company, or its receiver, regardless of the nature of the contract of December 10, 1890, as modified, or the contract of June 12, 1893.

[2, 3] The defendant district urges that the deed of October 18, 1894, should not be considered a part of the same transaction or as consideration for said bonds, because it was delivered to the district and recorded some 10 days after the delivery of the bonds to Mr.

Stowell. The contention is without substantial merit, as the record plainly shows that the execution of the deed was but a culmination of all the prior transactions. It may properly be argued that it would have been better if the officers of the district had required the delivery of said deed before the bonds were delivered, as the resolution of the board plainly contemplated, but there was no difficulty in identifying the deed to be received or the bonds to be delivered therefor. Ever since delivery of the said deed, the district has been in full enjoyment of the title and possession of the property thereby conveyed. The defendant contends that the record shows that the property thereby conveyed was not of the value of said bonds; especially is it urged that the petition of the receiver for leave to convey the same discloses that said property was of very little value to the Semi-Tropic Company and of no market value. Even so, the value of said property to the district may have been all that the directors of the district plainly considered it was worth when they authorized the \$27,000 in bonds to be delivered in exchange for the same. The record does not show what the value of the property thereby conveyed was to the district. The district may have made a bad bargain. That fact, if it be a fact, would be no defense under the circumstances here shown. *Ham v. Grapeland District*, 172 Cal. 611, 618, 158 P. 207.

[4] The defendant makes the further point that the resolution of the board of date August 16, 1894, provided that the Stowell Company should join in executing the deed, and that it did not do so. No reason is advanced why that company should have so joined in order effectually to pass the title. Whatever interest the Stowell Company had in the pipe passed to the Semi-Tropic Company upon the laying thereof, and such was no doubt taken into consideration by the officers of the district when they accepted and recorded the deed.

[5] It is also insisted by the defendant that the resolution of August 16 provided that it would be operative only on condition that the Stowell Company should diligently continue the laying of pipe lines in said district to completion in accordance with its contract with the Semi-Tropic Company. The answer to this contention is that the record does not disclose any breach of said contract by the Stowell Company or by Stowell himself after the contract of June 12, 1894, was assigned to him. Without a showing that there was a default of some sort, we are not justified in permitting the inclusion of the condition in the resolution to defeat the consideration for the deed, especially where, as it now appears, the district has accepted the deed and is retaining the benefits thereof.

The determination that said bonds were-

valid in the hands of the original holder renders it unnecessary to pass upon the further contention of the defendant that the plaintiff is not a bona fide holder without notice.

Since the findings of the trial court to the effect that the consideration for the issuance of said 54 bonds was illegal is without support under the uncontradicted evidence, the judgment must be reversed, and it is so ordered.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; PRESTON, J.; LANGDON, J.

GOLDEN GATE FERRY CO. v. RAILROAD COMMISSION OF CALIFORNIA.★
(S. F. 12388.)

Supreme Court of California. Sept. 27, 1927.

Rehearing Granted Oct. 27, 1927.

1. Ferries ⇨15—Company adding second vehicular ferry route to former passenger route held not required to obtain certificate of public convenience, being within exemption (Public Utilities Act, § 50 [d], as amended by St. 1923, p. 836).

Where a company had previously maintained one vehicular ferry route, it was not required to obtain a certificate of public convenience and necessity for adding a new vehicular service on a route formerly carrying passengers only, since it was held within the exemption of Public Utilities Act, § 50 (d), as amended by St. 1923, p. 836, providing that no such certificate should be required of any corporation or person which was actually operating vessels in good faith at the time the act became effective.

2. Ferries ⇨31—Company operating vessels under exemption of statute requiring certificate of public convenience may amend tariff schedules to cover commodities not before transported (Public Utilities Act, § 15, and § 50 [d], as amended by St. 1923, p. 836).

Company operating vessels under exemption of Public Utilities Act, § 50 (d), as amended by St. 1923, p. 836, providing that companies operating vessels in good faith at the time the act became effective would not be required to obtain a certificate of public convenience and necessity, may amend its tariff schedules on file so as to cover commodities not before transported, and hence company formerly furnishing only passenger ferry service on one of its routes could file, in compliance with Public Utilities Act, § 15 (St. Ex. Sess. 1911, p. 26), amended schedules and tariffs covering vehicular ferry service.

Langdon, Curtis, and Seawell, JJ., dissenting.

In Bank.

Certiorari by the Golden Gate Ferry Company, to review an order of the Railroad Commission of the State of California de-

claring that the Southern Pacific Company is not required to secure a certificate of public convenience and necessity for adding additional facilities to its ferry service. Writ denied.

Dudley D. Sales and Devlin & Brookman, all of San Francisco, for petitioner.

Carl I. Wheat, of San Francisco, Arthur T. George, of Los Angeles, and Reginald L. Vaughan, of San Francisco, for respondent.

Brobeck, Phleger & Harrison, of San Francisco, amici curiæ.

Guy V. Shoup, Evan J. Foulds, and Henly C. Booth, all of San Francisco, for Southern Pacific Co.

RICHARDS, J. This is an application for a writ of review. The petitioner, the Golden Gate Ferry Company, alleges that it was and now is engaged in the business of operating a public ferry for which tolls are charged for the transportation of passengers and self-propelled and other vehicles on, over, and across the waters of the San Francisco Bay; that it is the owner and in the possession of a franchise granted by the board of supervisors of the city and county of San Francisco authorizing the establishment, operation, and maintenance of a public ferry between points in the said city and county of San Francisco and the city of Alameda, county of Alameda; that on the 26th day of March, 1926, petitioner filed its application with the Railroad Commission of the state of California, pursuant to the provisions of section 50 (d) of the Public Utilities Act (Stats. Ex. Sess. 1911, p. 18, and amendments thereto), requesting said commission to issue and grant to petitioner a certificate of public convenience and necessity to operate vessels between the city of San Francisco and the city of Alameda; that a hearing was had thereon by said commission, but no decision or order has as yet been made or rendered therein; that on or about September 3, 1926, the Southern Pacific Company, a railroad corporation, commenced the operation of a public vehicular ferry between a point within the city of San Francisco and a point within the city of Alameda; that in commencing said vehicular ferry service between said points, the Southern Pacific Company for the first time put into operation between said cities an entirely new, different and distinct type of vessel; namely, that type of vessel which is designated as a vehicular ferry; that vessels of such construction and type had never theretofore been operated by said Southern Pacific Company between any points in San Francisco and Alameda; that on July 15, 1926, and prior to its operation of said vehicular ferry between San Francisco and Alameda, the Southern Pacific Company filed with the respondent commission an amendment to its tariff schedules naming

rates for vehicular ferry service between, among other points, San Francisco and the Alameda Pier; that said amendment was the first filing by the Southern Pacific Company of any rate for vehicular ferry service between any point in San Francisco and any point in Alameda; that prior to said amendment the Southern Pacific Company had no rate on file with the respondent commission or any tariff applicable to the transportation of vehicles between any point in San Francisco and said Alameda Pier, or any other point in Alameda; that said Southern Pacific Company has never received or petitioned for or in any manner sought from the respondent commission a certificate of public convenience and necessity to operate vessels in vehicular ferry service between San Francisco and the Alameda Pier or any vehicular ferry service between the city of San Francisco and the city of Alameda; that there has never issued to the Southern Pacific Company, nor to any of its lessors or subsidiaries, any such certificate of public convenience and necessity as required by the provisions of section 50 (d) of the Public Utilities Act, and said Southern Pacific Company is without lawful right, authority, or privilege to operate said or any vessels for automobiles or rather vehicular ferry service between the city of San Francisco and the said city of Alameda; that the Southern Pacific Company had not for a period of 32 years prior to September 3, 1926, engaged in the transportation of vehicles between any point in the city of San Francisco and the city of Alameda; that the respondent commission, of its own motion, instituted a proceeding having for its purpose an investigation into the construction of facilities and the rendering of a vehicular ferry service by the Southern Pacific Company between said two points without first having obtained a certificate of public convenience and necessity; that the respondent commission permitted the petitioner herein to intervene in said proceeding as an interested party; that petitioner has been and now is an interested party in said proceeding and in the action, determination, and decision therein; that the respondent commission, on the 17th day of December, 1926, made, rendered, and filed its opinion and order, concurred in by a majority of its members, declaring, in effect, that the Southern Pacific Company was and is not required to secure a certificate of public convenience and necessity under the provisions of section 50 (d) of the Public Utilities Act authorizing it to inaugurate a vehicular ferry service between the city of San Francisco and the Alameda Pier; that thereafter and within 20 days from the making of said order and decision the petitioner herein filed with the respondent commission its petition for rehearing, which said petition was denied on January 6, 1927; that the majority opinion and order of the respondent com-

mission declaring that the Southern Pacific Company was and is not required to secure a certificate of public convenience and necessity, under section 50 (d) of the Public Utilities Act, for the operation of a vehicular ferry service between the city of San Francisco and the city of Alameda, is illegal, void, and in excess of the jurisdiction of the respondent commission. Wherefore the petitioner prays that this court enter its decree and judgment annulling and setting aside the majority opinion and order of the respondent commission referred to above.

[1] The sole question presented in this proceeding for a review of said order revolves about the interpretation to be given to section 50 (d) of the Public Utilities Act, as amended in 1923. Stats. 1923, pp. 834, 836. The section reads:

"No corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall hereafter operate or cause to be operated, any vessel between points exclusively on the inland waters of this state, without first having obtained from the railroad commission a certificate declaring that present or future public convenience and necessity require or will require, such operation, but no such certificate shall be required of any corporation or person which is actually operating vessels in good faith, at the time this act becomes effective, between points exclusively on the inland waters of this state under tariffs and schedules of such corporations or persons, lawfully on file with the Railroad Commission."

It is contended by the Southern Pacific Company that its operation is and has been such as to bring it within the exemption contained in section 50 (d); that is to say, it is urged by said company that on August 16, 1923, the effective date of section 50 (d) of the Public Utilities Act, it was operating vessels in good faith between points exclusively on the inland waters of this state and more particularly between the city and county of San Francisco and the Alameda Pier, under tariffs and schedules lawfully on file with the respondent commission. In view of the existence of these facts it is urged by the Southern Pacific Company that it may properly operate and maintain, by virtue of the exemption provision found in section 50 (d), a public vehicular ferry service between said points without first acquiring from the respondent commission a certificate of public convenience and necessity.

Petitioner contends, on the other hand, that the operation of a vehicular ferry service by the Southern Pacific Company between San Francisco and the Alameda Pier does not fall within the exemption provided for in said section 50 (d), for "that section exempted any existing operator from the necessity of obtaining a certificate of public convenience and necessity for any operations being conducted in good faith on that date, or for the exercise of any rights being exercised on that date,

but did not exempt any operator from securing a certificate of public convenience and necessity for the commencement of any new operations not theretofore being conducted or for the exercise of any rights not theretofore being exercised."

The respondent commission contends in its brief filed herein that:

"The Public Utilities Act of this state provides that no certificate shall be required from any corporation or person which on August 16, 1923, was actually operating vessels in good faith between points exclusively on the inland waters of this state under tariffs and schedules lawfully on file with the Railroad Commission. The evidence herein, in our opinion, shows that the Southern Pacific Company was, on that date, so operating between its Alameda Pier and San Francisco, and we therefore submit that no certificate was requisite before it might commence the operation here in question by transporting vehicles, as well as passengers, between these points."

We are unable to accept the interpretation placed upon section 50 (d) by the petitioner. The majority opinion of the respondent commission would seem to be correct in declaring that:

"The operative right possessed by the Southern Pacific Company, by virtue of the exemption contained in section 50 (d) of the Public Utilities Act, is not limited to the class of service covered by the tariffs lawfully on file with the commission on the effective date thereof, and that the said company may properly amend its tariffs to include therein rates for vehicular service, as has been done in this case."

[2] The Legislature by its employment of the broad language found in section 50 (d) has evinced an intention to exempt from the requirement of securing a certificate of public convenience and necessity all ferries actually operating vessels in good faith at the effective date of said section. Had it been desired to confine the exemption found therein to the class of service theretofore rendered by a ferry company, it would have been an easy matter for the Legislature to have expressed such intention. In the absence of language so confining said exemption we are of the opinion that the Southern Pacific Company properly filed with the respondent commission, in compliance with the provisions of section 15 of the Public Utilities Act, its amended schedules and tariffs covering vehicular ferry service between San Francisco and the Alameda Pier and thereafter properly commenced the carriage and transportation of vehicles and their contents between said two points. In other words, it is our opinion that a corporation or person possessed of a right to operate vessels between given points, under the exemption of section 50 (d), may properly amend the tariff schedules on file so as to cover commodities not theretofore transported. This conclusion

would seem to be in harmony with the changing conditions of commerce. Any other construction of the exemption provision found in section 50 (d) would be narrow and unreasonable. This exemption provision was placed in the act, unquestionably, for the benefit of established ferry companies operating vessels between points on the inland waters of this state and to obviate the necessity of their having to acquire a certificate of public convenience and necessity.

The early development of ferry service between the city and county of San Francisco and the county of Alameda tends to support the conclusion announced herein. By the year 1887 the Southern Pacific Company had purchased practically all of the stock of three independent groups of railroads theretofore operating in Alameda county. As a result of such purchase the Southern Pacific Company acquired the right to control and operate all of said railroads, together with any ferry service maintained in connection therewith. The ferry operations so acquired by the Southern Pacific Company included both vehicular and passenger ferry service between San Francisco and the Oakland mole, San Francisco and the Alameda Pier, and San Francisco and the foot of Broadway, Oakland—this latter ferry being commonly known as the Creek route. In 1894 the passenger boats of the Southern Pacific Company operating between San Francisco and the Alameda Pier discontinued the carrying of vehicular traffic and the Creek route ferry was thereupon required to transport all vehicles destined for the city of Alameda. Thereafter and in the year 1912 the Southern Pacific Company likewise restricted the amount and character of vehicular traffic to be carried on its boats running between San Francisco and the Oakland mole, thus again augmenting the vehicular traffic passing over its Creek route ferry. This gradual expansion and enlargement of the vehicular ferry service over the Creek route together with the restriction of the vehicular ferry service on the passenger boats of the Southern Pacific Company placed the burden of carrying the major portion of vehicular traffic destined for Oakland or Alameda upon the Creek route ferry. It is true, however, that the Southern Pacific Company in 1923 again established a daily vehicular ferry service between San Francisco and the Oakland mole.

From the foregoing, it is readily apparent that the Creek route ferry has, for a number of years, served, indifferently, vehicular traffic, and, of recent years, particularly automobile traffic, traveling between the city of San Francisco and the contiguous cities of Oakland and Alameda. This ferry traverses a narrow estuary, known as San Antonio creek, the center line of which constitutes a common boundary between the said contiguous cities of Oakland and Alameda. City of

Alameda v. City of Oakland, 198 Cal. 566, 246 P. 69. Said Creek route ferry has therefore, for a great many years, undertaken to serve both Oakland and Alameda without distinction, and we therefore attach no particular significance to the fact that the east bay terminal of said ferry happens to be situated upon the Oakland side of said estuary. If such terminal had early been established upon the opposite and Alameda side of said estuary, the Southern Pacific Company undoubtedly would not be required to secure a certificate of public convenience and necessity as a prerequisite to a change of terminal to another point on the Alameda side of the estuary. The dual service rendered by the Creek route ferry therefore warrants the conclusion that the Southern Pacific Company need not procure a certificate of public convenience and necessity before establishing an automobile ferry service between San Francisco and the Alameda Pier. In other words, we are of the opinion that the exemption provision in section 50 (d) is such as to authorize the establishment and operation by the Southern Pacific Company of a vehicular ferry between said two points without first having to secure such certificate of public convenience and necessity. The Southern Pacific Company had on file with the respondent commission a rate schedule covering the transportation of vehicles to and from Alameda by way of its Creek route ferry. In view of this fact, we are unable to perceive of any reason which would prevent it from amending said rate, as was done here, so as to provide for the transportation of a part of its vehicular traffic on a ferry operating directly to and from its Alameda Pier.

This determination is not at variance with the rule announced in the case of *Motor Transit Co. v. Railroad Commission*, 189 Cal. 573, 209 P. 586, which case is strongly relied on by the petitioner herein. The language of the exemption clause there considered clearly indicated that its provisions were to be confined solely to the service theretofore rendered by the utility, for it was provided that:

"No such certificate shall be required of any transportation company as to the fixed termini between which, or the route over which, it is actually operating in good faith at the time this act becomes effective."

No such restrictive language appears in the exemption provision herein concerned.

The conclusion we have reached renders it unnecessary that we consider the other contentions advanced by the parties.

The application is denied and the decision and order of the respondent commission affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.

LANGDON, J. I dissent. It is undisputed that for a period in excess of 32 years immediately preceding September 3, 1926, Southern Pacific Company operated no vessels between any point in Alameda and any point in the city and county of San Francisco except for the transportation of passengers carried on its trains. Prior to 1894 said company operated vessels which were used to transport vehicles between its Alameda Pier and a point in San Francisco. In December, 1894, however, the plank road along the Alameda Pier was torn up and since that time and until a new road was built in 1926, no service was offered to the public by Southern Pacific Company for the transportation of vehicles between any point in Alameda and any point in San Francisco. It is apparent, therefore, that whatever service the Southern Pacific Company or its predecessors may heretofore have offered to the public in the way of vehicular transportation between Alameda and San Francisco was abandoned. It would seem to follow that after such service was abandoned, the obligation to render it ceased and the right of the public to insist upon it was terminated. A similar situation was presented in the case of *Atchison, Topeka & Santa Fé Railway Co. v. Railroad Commission*, 173 Cal. 577, 160 P. 828, 2 A. L. R. 975. There railroad service between two points had been discontinued for about 20 years. A complaint was filed with the Railroad Commission to require the re-establishment of that service. The commission made an order requiring the railroad company to re-establish the service. Upon appeal, it was held that the commission acted beyond its jurisdiction, the following language being used:

"Nor is the fact that a railroad line had once existed between Fallbrook and Temecula a factor of any moment in the present inquiry. No question is made of the authority of the Railroad Commission to compel a railroad company or other public utility to restore a service which it has been furnishing. Here, however, the line between Fallbrook and Temecula had been destroyed for about 20 years before the action of the commission was invoked, and, indeed, before the enactment of the law upon which the commission relies for its authority to act. It is expressly found that 'that portion of the line was left abandoned and service discontinued. It has remained abandoned ever since.' In view of this fact, it cannot be doubted that any obligation of the predecessor of the Santa Fé Company to maintain and operate the line from Fallbrook to Temecula had long since ceased (*Public Service Com. v. Philadelphia, etc., Ry. Co.*, 122 Md. 438 [89 A. 726]) and that no such obligation ever rested upon the Santa Fé Company itself. The duty to maintain the line was dependent upon the right to maintain it, and this right was lost by abandonment (*Home Real Estate Co. v. Los Angeles Pac. Co.*, 163 Cal. 710 [126 P. 972]), without regard to the question whether it had been forfeited under the provisions of section 468 of the Civil Code.

The case must therefore stand precisely as it would if there had never been any connection between these two points."

Likewise in the instant case, it would appear that vehicular service between the points in question having been abandoned by Southern Pacific Company and its predecessors, there was no obligation upon the part of the company to render it and no right in the public to insist upon receiving it.

How, then, can it be said that a certificate of public convenience and necessity was unnecessary to inaugurate this service because the Southern Pacific Company was "actually operating vessels in good faith under tariffs and schedules lawfully on file with the Railroad Commission?" Does this language of the Public Utilities Act mean to exempt a corporation, operating vessels in any type of service on the inland waters of this state, from securing a certificate, or does it mean to exempt a corporation that is operating a similar service to the one sought to be inaugurated, or does it mean to exempt a corporation that is operating, at the time the act became effective, a service which is later to be continued? The language of the majority opinion holds that the first alternative is the proper construction, but, later, attempts to characterize the new service inaugurated by the Southern Pacific as closely similar to the service previously rendered between different points and to make the differences between the two of no significance.

I am of the opinion that the third alternative is the one which was intended by the Legislature, i. e., that a corporation is exempted from obtaining the certificate if it was, at the effective date of the act, actually operating a service in all respects substantially the same as the service to be rendered after the act became effective. Since it is apparent that the section of the act under consideration is not clear and definite in expressing any of the above suggested alternatives, it becomes the duty of this court to construe the same with reference to the purposes sought to be served and the public policy underlying the legislation. The entire act evinces a determined purpose to give to the Railroad Commission power to regulate transportation on the inland waters of the state by granting or refusing certificates of public convenience and necessity, and to so construe the section we are considering as to exempt any person or corporation from applying for such a certificate, if it has been operating any type of vessel in any type of service before the act became operative, would leave with the Railroad Commission but a semblance of power. To construe the section so as to exempt a corporation from securing a certificate to carry freight if it has previously carried

passengers over the same route, or to exempt it if it has previously carried freight over a different route, but one comparable in some of its features to the new route sought, would be to give an elasticity to the language, and the action to be taken under it, which would result in confusion and litigation and impotency on the part of the commission. The safe, definite rule, and the one supported by the reason and purpose of the Public Utilities Act, would seem to be to construe the language, "operating vessels in good faith," to mean operating them in good faith in the essential and inherent features of the service sought to be continued after the effective date of the act. It seems apparent from the admitted facts that the Southern Pacific Company was not operating such a service at the date mentioned. A different type of vessel is to be used by the Southern Pacific Company from that used at the date of the act, a different route is to be taken, and a different class of service rendered.

As respondent clearly presents in its brief herein, the filing of a tariff amendment to the Creek route vehicular tariff is not the addition of a commodity to the Alameda passenger tariff. The tariff, which was amended, covered no service whatever between any point in the city of San Francisco and any point in the city of Alameda. At the time of the tariff amendment, the Southern Pacific Company was engaged in the operation of vessels between Alameda Pier and the ferry building in San Francisco for the transportation only of passengers transported over its railroad. It had no tariff on file for the transportation of any freight of any kind whatever. The operation of a vehicular ferry has no connection with the operation of a railroad service. It is in no way an adjunct of the railroad operation. A vehicular service could just as well be rendered by a corporation which had no rights whatever to operate a railroad. The Southern Pacific Company, in another action, successfully maintained this contention before this court. *Southern Pac. Co. v. Richardson*, 181 Cal. 280, 184 P. 3.

The majority opinion of the commission, approved by this court, opens the door to a stretching of this section of the Public Utilities Act until it becomes a means of promoting the very evils it was designed to remedy. By this ruling, the commission has curtailed the powers vested in it by law to determine the public convenience and necessity of future service to be rendered by transportation companies. Whatever ambiguity there may be in the section under consideration, the purpose of the act is too clear to warrant a construction which will weaken the Railroad Commission's control of public utilities.

We concur: CURTIS, J.; SEAWELL, J.

202 Cal. 159

PEOPLE v. GAYLE. (Cr. 2988.)

Supreme Court of California. Sept. 23, 1927.

1. Forgery $\S$ 12(2)—Convictions for forgery will be upheld, notwithstanding signatures forged are to unenforceable obligations.

The fact that signatures alleged to have been forged were to unenforceable obligations will not prevent conviction for forgery.

2. Forgery $\S$ 7(1)—Test of what instruments may be subject of forgery is whether it is possible to defraud by means of forgery.

The true test of whether an instrument may be the subject of forgery is whether or not by reason of the forgery or utterance of the instrument it is possible to defraud.

3. Criminal law $\S$ 29—Forging contract for real estate sale and check as payment are two separate offenses, though instruments were forged at same time.

Forging a contract for the sale of real estate and check purporting to be payment, so that forger might obtain commissions from apparent sale, are two separate offenses, though the instruments were forged at the same time.

4. Criminal law $\S$ 29—Passing or uttering at same time contract for real estate sale and check as payment constitutes but one offense.

Passing or uttering at same time contract for sale of real estate and check purporting to be payment therefor, so that agent might collect commissions, constitutes one offense only.

5. Criminal law $\S$ 1144(16)—Where defendant was charged with forging six instruments and jury brought general verdict of guilty, appellate court assumes they found defendant guilty of falsely making and counterfeiting all the instruments.

Where defendant was charged separately in six counts with making, forging, altering, counterfeiting, uttering, publishing, and passing three checks and three contracts, and the jury brought a general verdict of guilty, the appellate court assumed they found defendant guilty of falsely making and counterfeiting all the instruments.

6. Criminal law $\S$ 878(2)—General verdict of guilty on six counts charging making, forging, altering, etc., six instruments without specifying acts done, and no objection made, held supported.

Where defendant was charged separately in six counts with making, forging, altering, counterfeiting, uttering, publishing, and passing three checks and three contracts, and the jury brought a general verdict without specifying which of the acts done were found as to each instrument, and no objection was made on ground of erroneous form or insufficiency of the verdict, and the evidence supported conviction for making and counterfeiting all the instruments, though uttering or passing of check and corresponding contract at the same time would have constituted but one offense, the conviction on the general verdict was upheld.

7. Forgery $\S$ 37—Instruments alleged to have been forged held admissible, whether or not they were enforceable.

On trial for forgery, instruments alleged to have been forged held admissible, whether or not they were unenforceable obligations, since whether an instrument is legally enforceable is immaterial to whether a person can be guilty of a crime of forging it.

8. Criminal law $\S$ 1144(16)—Where district attorney adopted theory that defendant caused forgery, though not personally signing, appellate court on appeal from conviction must presume jury believed district attorney's theory.

In prosecution for forgery, where the district attorney in argument stated that the prosecution did not adopt the theory that the defendant actually wrote the forged signatures, but claimed that he caused and procured the forgery, the appellate court, on appeal from a conviction, must presume that the jury reached its verdict in accordance with that theory, especially in view of trial court's instruction that they should find defendant guilty if he caused or procured the forgery.

9. Forgery $\S$ 21—Person causing or procuring forgery is guilty of forgery (Pen. Code, $\S$ 971).

Person causing or procuring a false name to be signed to an instrument, or aiding, abetting, encouraging, or assisting another to so forge the instrument, is guilty of forgery, in view of Pen. Code, $\S$ 971, providing that all persons concerned in committing felony, whether they directly commit the offense, or aid and abet, are punishable as principals.

10. Forgery $\S$ 8—Whether signatures are forgeries of names of existing or fictitious persons is immaterial.

In prosecution for forgery, whether signatures alleged to have been forged were of names of existing persons or were names of fictitious persons is immaterial.

11. Witnesses $\S$ 274(2)—It was proper to ask witnesses testifying to defendant's good reputation on forgery trial whether they had heard of defendant's jail sentence.

It was proper on forgery trial, on cross-examination, to ask witnesses who testified to defendant's good reputation whether or not they thought defendant's reputation was good after they had heard that defendant had been arrested and sentenced for petit larceny.

12. Criminal law $\S$ 722½—District attorney's remark in argument on forgery trial that defendant's reputation was good notwithstanding jail sentence held proper, where defendant's witnesses testified to good reputation, though they had heard of arrest and sentence for larceny.

District attorney's remark in argument on forgery trial that defendant's reputation was good, though he had served a sentence of 30 days in jail held proper, where on cross-examination some of defendant's witnesses, testifying to good reputation, said that they had heard that defendant had been arrested and sentenced for petit larceny.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Carl R. Gayle was convicted of forgery, and he appeals. Affirmed.

Faucett & Ring, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

LANGDON, J. Defendant was charged by information containing a number of separate counts, with the making, forging, altering, and counterfeiting of certain checks and contracts. The jury found him guilty of the crime of forgery, and from a judgment entered upon that verdict and from an order denying his motion for a new trial he has appealed.

The outstanding facts appearing in the record are that the defendant was a real estate salesman in Los Angeles, Cal., and was attempting to sell property owned or controlled by persons doing business under the name of Clear Lake Beach Company. He handed to said company three purported contracts of sale of lots in its subdivision. These contracts were signed, respectively, by Warburton, McLendon, and Martin, as purchasers, and by the defendant, as agent of the Clear Lake Beach Company, and each was accompanied by a check of the supposed purchaser for the first payment upon the land. Upon turning these contracts and checks over to his company, the defendant collected commissions upon two of them, amounting to \$155. Later all the checks were returned by the banks upon which they were drawn, marked "No account," and the purported purchasers could not be located at the addresses given or elsewhere.

[1] The first contention of the appellant is that as the contracts in question purported to be contracts for the sale of land in an unrecorded tract, and therefore were not enforceable at law, there could be no crime of forgery with reference to unenforceable obligations. This contention is disposed of by the case of *People v. Munroe*, 100 Cal. 664, 35 P. 326, 24 L. R. A. 33, 38 Am. St. Rep. 323, which considers the earlier cases relied upon by appellant and comes to the conclusion that—

"To declare the law to be that all contracts which are not enforceable, because against the policy of the law, are not the subject of forgery, would be offering a carte blanche to the professional forger of which he would not be slow to take advantage, and hereafter he would confine himself to the manufacture of spurious paper in the nature of contracts against public policy."

[2] The true test, as laid down in the case last cited, is whether or not it is possible to defraud by reason of the forgery or utterance. This rule has been followed in subsequent cas-

es. *People v. James*, 110 Cal. 155, 42 P. 479; *People v. McGlade*, 139 Cal. 66, 72 P. 600.

[3-6] It is also contended that there is a fatal variance between the pleading and proof. Defendant was tried upon six counts of the information. These counts charged, separately, the making, forging, altering, counterfeiting, uttering, publishing, and passing of the three different checks and their corresponding contracts. Appellant's contention is that there were only three separate transactions; that each check was connected with a contract and the two were one inseparable transaction; and that, at most, the defendant could only be charged with three offenses and not with six. The form of the pleading is supported by the authority of *People v. Frank*, 28 Cal. 507, 513, and under the authority of *People v. Ryan*, 74 Cal. App. 125, 239 P. 419, the false making and forging of two separate instruments, although done at the same time, are separate and distinct offenses, although the passing or utterance of several forged instruments at the same time constitutes but one offense. Here the defendant was charged with the forgery of six separate and distinct instruments. A general verdict was returned which meets the situation here and we must assume, in support of the same, that the jury found the defendant guilty of falsely making and counterfeiting all of the instruments. No question was raised at the time of the return of the verdict as to its form or sufficiency in not indicating which of the acts charged as forgery had been committed by defendant with reference to each of the instruments. Had such an objection been made, the court, probably, would have returned the verdict to the jury and directed a reconsideration of it, as provided by section 1161 of the Penal Code. The jury was justified in finding that the defendant had falsely made and counterfeited all the instruments, for while the handwriting expert produced by the prosecution did not state, positively, that the handwriting upon all the documents was that of defendant, nevertheless, the jury had a right to come to a conclusion independent of this expert opinion evidence, as it had an opportunity to examine the documents alleged to have been forged and the exemplars of the handwriting of defendant which were also in evidence and to make its own deductions therefrom.

[7] The basis of appellant's objection to the admission of the forged contracts and checks in evidence, i. e., that the contracts were void and not the subject of forgery, has been discussed hereinbefore.

[8] It is also vigorously contended that the prosecution made no claim that defendant had actually written the signatures upon any of the instruments, and therefore the verdict and judgment are improper. This contention is made because of certain language used by the district attorney in presenting his case to the jury. In reviewing the evidence, the district attorney correctly stated that Mr. Carlson, the

handwriting expert called by the prosecution, had been unwilling to state positively that the handwriting upon the three checks was the handwriting shown by the exemplars of the defendant's handwriting, but that he had been of the positive opinion that the three checks were signed by the same person. The district attorney called attention to the fact that, if the three checks were signed by the same hand, then it was apparent that defendant had not made bona fide sales of the three lots, and that the prosecution did not adopt the theory that defendant actually wrote the forged signatures, but that it was claimed by the prosecution that somebody, at the instigation of Gayle and with his knowledge and consent and acting upon his advice, wrote the checks, and that thereafter defendant took them to the company and received his commissions, and that it was all done as a part of defendant's definite scheme and plan. In accordance with this theory of the case, we must presume the jury reached its verdict, for the trial court gave an instruction to the effect that, if the jury believed from the evidence that the defendant caused or procured to be signed the name of another person as alleged in the information, or aided, abetted, encouraged, or assisted another to sign the name of said person thereto, knowing he had no authority so to do, they should find the defendant guilty.

[9, 10] This instruction stated the law, for all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are punishable as principals. Section 971, Pen. Code. Whether the signatures in question were forgeries of names of existing persons or whether they were names of fictitious persons is immaterial under our present law. *People v. Whitaker*, 68 Cal. App. 7, 228 P. 376; *People v. Jones*, 12 Cal. App. 129, 106 P. 724; *People v. Lucas*, 67 Cal. App. 452, 227 P. 709.

[11, 12] The only other matter that requires discussion upon this appeal is the assignment as prejudicial error of a remark made by the district attorney in his closing address to the jury. Defendant had called witnesses who testified that his reputation for truth, honesty, and integrity was good. Upon cross-examination, they were asked if they had heard that defendant had been arrested for petit larceny and had served a sentence in jail as a result thereof. Some of them answered in the affirmative. In commenting upon the testimony of these witnesses, the district attorney remarked to the jury that defendant's reputation was good, although he had served a sentence of 30 days in jail. Objection was immediately made and the district attorney modified his remark by stating that he was merely making the remark in connection with defendant's reputation. The trial

court then and there instructed the jury that the remark was not evidence of the fact itself. As restricted by the district attorney and by the trial court, the statement was unobjectionable. It was proper to ask the witnesses who had testified to the good reputation of defendant whether or not they entertained their opinions after having heard that defendant had been confined in jail for petit larceny and when it appeared from their replies that they had heard of the incident mentioned and, nevertheless, thought defendant's reputation was good, it was proper for the district attorney to remark upon the incongruity of the testimony.

No further discussion of the points raised upon appeal is necessary. No substantial or prejudicial error appears in the record and the guilt of the defendant appears therefrom beyond a reasonable doubt.

The judgment and order appealed from are affirmed.

We concur: WASTE, C. J.; PRESTON, J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

202 Cal. 251

ETIENNE v. KENDALL. (S. F. 11529.)

Supreme Court of California. Oct. 3, 1927.

1. Corporations ⇨121(5)—Evidence held to sustain findings that representations of seller of mining stock as to tonnage of mine and cost of extracting minerals were mere statements of opinion.

In action to rescind contract for purchase of shares of stock in mining corporation on ground that defendant falsely represented tonnage of ore in mine and cost of extracting minerals, evidence held to sustain findings that defendant's statements were opinions only and were treated as such by plaintiff.

2. Contracts ⇨94(1)—Truth of any one of material misrepresentations alleged in complaint for rescission will entitle aggrieved party to judgment.

If any one of material misrepresentations, upon which complaint for rescission of contract is based, is true and other elements entitling party to rescission are present, party aggrieved is entitled to judgment.

3. Appeal and error ⇨1170(3)—Admission in answer of some of misrepresentations alleged, by failure to deny misrepresentations separately in action for rescission, held not ground for reversal where plaintiff was not prejudiced (Const. art. 6, § 4½).

In action to rescind contract for purchase of mining stock on ground of misrepresentations, admission of some of misrepresentations by answer which failed to deny each representation separately held not ground for reversal of judgment for defendant, under Const. art. 6, § 4½, where defect in pleadings was not

called to attention of trial court and where plaintiff received fair and impartial trial and was not prejudiced.

4. Appeal and error ⇨1170(3)—To avoid judgment for error in pleadings, appellant must show miscarriage of justice resulted (Const. art. 6, § 4½).

When attack upon judgment is based upon error in pleadings, burden is on appellant to demonstrate that error complained of has resulted in miscarriage of justice, under Const. art. 6, § 4½.

5. Appeal and error ⇨1170(3)—Court may not reverse judgment for defect in pleadings without considering entire case, including evidence (Const. art. 6, § 4½).

Under Const. art. 6, § 4½, providing no judgment shall be set aside for error as to any matter of pleading unless miscarriage of justice resulted, appellate court must examine entire case, including evidence, before reversing for defect in pleadings.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Victor Etienne, Jr., against Zeb Kendall. Judgment for defendant, and plaintiff appeals. Affirmed. For opinion of District Court of Appeals, see 258 P. 435.

J. P. O'Brien, of San Francisco, for appellant.

William H. Metson and W. G. Deal, both of San Francisco, for respondent.

PER CURIAM. This cause was transferred to the Supreme Court after decision and judgment in the Second Division of the District Court of Appeal of the First District, on petition of the appellant, who contends that the decision is in error in holding, first: That the representations made by the defendant were merely statements of his opinion, and not of facts; and, second, that the plaintiff treated the answer of the defendant as raising an issue as to the falsity of the representations charged. Upon a further consideration of the matter we are satisfied that under the facts of this particular case the opinion written by Mr. Justice Nourse, and concurred in by Mr. Justice Sturtevant and Mr. Presiding Justice Koford, disposed of those matters correctly.

The opinion is, therefore, adopted as the opinion of this court:

"Plaintiff sued for the rescission of a contract for the purchase of shares of stock in a mining corporation, alleging fraudulent misrepresentations as an inducement to the execution of the contract. Judgment went for the defendant, and the plaintiff has appealed upon a bill of exceptions.

"The complaint alleged that on November 21, 1921, the plaintiff and the defendant entered

into a written agreement wherein the plaintiff agreed to purchase and the defendant agreed to sell 250,000 shares of the capital stock of the Consolidated Virginia Mining Company, a corporation, for the total purchase price of \$152,005; that upon the execution of the agreement the sum of \$20,822.25 was paid by the plaintiff to the defendant in cash and at the same time plaintiff delivered to the defendant his promissory note for the balance, secured by the shares of stock covered by the purchase and also by other collateral; that for the purpose of inducing the plaintiff to enter into said agreement the defendant represented to him that the said corporation 'contained known ores and minerals and ore bodies situate in the so-called 'Old Bonanza stopes,' in said mine, and between the 1,500 and 1,600 foot levels, in said mine, amounting to 2,000,000 tons of ores and minerals, that were valued at from \$20 to \$25 per ton; that all of said ores, minerals and ore bodies, could be mined, extracted, and reduced at a cost not exceeding \$3 per ton; and that within a very short time thereafter the stock of said corporation would greatly increase in value and large dividends thereon would be paid; 'that the representations so made, by the defendant, to the plaintiff, as aforesaid, were and are untrue, and were then known to the defendant to be false and untrue, and the said representations were fraudulently made, by the defendant, with the intent to mislead and deceive the plaintiff, and to induce him to enter into the agreement, aforesaid;' that the plaintiff, believing and fully relying upon said representations, was induced to enter into said agreement because of them; that the plaintiff did not discover the falsity of said representations until about July 30, 1923, and that upon discovering the facts which entitled him to rescind said agreement he immediately gave notice of rescission thereof to the defendant; that the defendant for many years past has been a stock broker and engaged in the business of promoting, operating and dealing in mining properties, but that the plaintiff was practically unfamiliar with the business of mining or the manipulation of the stocks of mining corporations. The answer alleged that for some time prior to the execution of the agreement the plaintiff had become interested in the purchase of mining stocks of corporations operating in the vicinity of the Consolidated Virginia and had urged the defendant to sell to him some of the stock of the latter company believing that because of renewed activity of operations in that locality the stock of the Consolidated Virginia would enhance in value; that the plaintiff had been to Virginia City, Nev., where the properties of these corporations were located, and had familiarized himself with the Consolidated Virginia mine and with other properties in the immediate neighborhood; that the stock was sold to the plaintiff at the latter's solicitation and upon the basis of quotations then made on the San Francisco Stock Exchange. The answer further denied that the 'defendant estimated or represented to the plaintiff the amount or value of said ores described in said complaint, or at all, or made any representations or inducements that led the plaintiff to purchase any of said stock, or at all.' The answer further denied that the defendant 'represented to the plaintiff that the Old Bonanza stopes in said mine be-

tween the 1,500 and 1,600 foot levels contained ore amounting to 2,000,000 tons; that said ore was valued at \$20 to \$25 per ton; that said ore minerals and ore bodies could be mined and extracted at a cost of \$3 per ton; that dividends would be paid; or at all made any representations or extended any inducements to plaintiff of any nature relative to the purchase by the plaintiff of any stock in said company.'

[1] "On this appeal it is contended on behalf of appellant that the decision is not sustained by the evidence; that the decision is against law; that the decision does not sustain the judgment; and that the judgment is erroneous and against law. Although on the face of the briefs it appears that four separate points are raised in the attack upon the judgment, there is but one, as all four points advanced are really an attack upon the nature of the denials in the answer. In reference to the first three charges of fraudulent representations—the tonnage in the Bonanza stopes, the value thereof and the average cost of extracting and treating the ore therefrom—the trial court found that the respondent did inform the appellant that the old Bonanza stopes contained approximately 2,000,000 tons of ore of a value of \$20 to \$25 a ton, but that in this connection the appellant knew that the respondent had no information as to the amount of the tonnage or the value of the ore, but was merely giving an estimate or opinion based upon information given him by others, and that there was no evidence that the ore in said stopes did not amount to said quantity or that it was not of said value. The court expressly found that it was not true that there was not 2,000,000 tons of ore in said stopes of the value of \$20 to \$25 per ton. It was further found that the respondent told the appellant that with improved facilities for treating ore at the mine the ore taken from said stopes could be extracted and reduced at a cost of about \$3 per ton, and that under such circumstances large profits would result from the operation of said mine and that the dividends to be paid upon said stock would greatly increase. In this connection, however, it was found that these statements were also opinions only, were understood as such by the appellant, and were not treated by him as representations of fact. These findings were amply supported by the evidence. The properties of the Consolidated Virginia had been operated for a period of about 50 years prior to the execution of the contract. The old Bonanza stopes were known to have contained much valuable ore, but because of a fire which occurred therein in the year 1873 they had been bulkheaded off and had not been mined. The opinion had been freely expressed by those familiar with the conditions of the mine that these stopes would run 2,000,000 or more tons of ore of a value of \$20 to \$25 a ton. The problem which confronted those interested in the operation of the mine was to extract this ore, and the appellant and others interested in the affairs of the company entered upon this project in anticipation of procuring this large body of ore. However, some time after the execution of the contract, when the stopes were opened for the purpose of extracting the ore, operations were stopped because of a recurring fire. There is really no conflict in the evidence which goes to support these findings of the trial court. In fact, the appellant frankly stated that he had no information as to the quantity of

ore or its value or as to the cost of extracting and treating it if the proposed new mill and improved facilities were put in operation.

[2, 3] "As we have said, the real ground advanced by the appellant on this appeal is that, because of the character of the denials in the answer, the falsity of representations charged in the complaint was admitted, that, therefore, the findings should have been in accord with the admissions of the pleading rather than upon the evidence adduced at the trial, and, consequently, the decision is against law and does not sustain the judgment. The theory of the appellant is that as the complaint alleged misrepresentations in respect to the quantity and quality of the minerals contained in the Old Bonanza stopes and the cost of mining and reducing said ores and alleged that each of said representations was false and known to be false by the defendant, while the answer denied these allegations in the language of the complaint and did not deny in the disjunctive that each alleged representation was false or that the respondent knew each to be false or that each of such representations was made with intent to mislead and deceive appellant, or that appellant acted or relied upon any one of said representations or was misled or deceived by any one of them, the answer must be treated as an admission of any one of the alleged false representations. From this it is argued, in accordance with the well-settled rule, that if any one of the material representations upon which the complaint for rescission is based is true and the other elements entitling a party to a rescission are present the party aggrieved is entitled to judgment. 2 Pomeroy's Equity Jurisprudence (2d Ed.) § 880.

"If the appellant had moved for judgment upon the pleadings upon the ground of respondent's failure to specifically deny the allegations of the complaint noted there would be some merit in his attack upon the answer. However, he was not content to do this, but proceeded to trial upon the theory that the issues were properly presented. This trial commenced on December 26, 1923, and after a number of witnesses were called, was continued to January 10, 1924, for further hearing. At this time other testimony was heard and another adjournment to January 24, 1924, was taken, at which time further testimony was taken all on the subject of the issues raised by the complaint, that is to say, the truth or falsity of the representations upon which the appellant relied and the truth or falsity of his allegations of lack of knowledge or means of knowledge of the conditions of the mine and the quantity and value of the ore bodies located therein. Throughout the trial no objection was made to the admission of any of this evidence, and no suggestion was made until the opening brief was filed on this appeal that any of the facts alleged in the complaint were admitted by the answer.

[4, 5] "The cause having been tried upon the theory that the issues were properly pleaded, we are now asked to reverse the judgment for the sole reason of an error in the answer which was not suggested to the trial court at any stage of the proceeding. Section 4½ of article 6 of the Constitution provides that: 'No judgment shall be set aside * * * for any error as to any matter of pleading * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opin-

ion that the error complained of has resulted in a miscarriage of justice.'

"Under the terms of this section when the attack upon the judgment is based upon an error in the pleadings, it is incumbent upon the appellant to demonstrate before the appellate court that the error complained of has resulted in a miscarriage of justice. But even in such a case the appellate court may not reverse the judgment except upon an examination of the entire cause, including the evidence. Where, therefore, upon an examination of the evidence, the appellate court is satisfied that the error complained of has not resulted in a miscarriage of justice, but that in fact, it has not affected the substantial rights of the appellant in any particular it would be a distinct violation of this section of the Constitution to reverse the judgment solely upon the ground of the error occurring in the pleadings. Our examination of the record here discloses that the appellant suffered no prejudice because of any defect in respondent's pleading, but that to the contrary the pleading was treated as having fully tendered the issues to be tried by the trial court, and that after a fair and impartial trial of those issues the trial court found against the appellant upon substantial evidence, which in all essential matters was uncontradicted."

For the foregoing reason, the judgment is affirmed.

202 Cal. 205

In re FISHER'S ESTATE. (L. A. 8906.)

Supreme Court of California. Sept. 26, 1927.

1. Wills ⚡52(1)—Law presumes testator was sane, and contestant must show incapacity when will was executed.

Court will presume that testator was sane, and the burden is on contestant to show by a preponderance of the evidence that the testator was of unsound mind at time when he executed will.

2. Wills ⚡53(2)—Evidence of testator's mental condition before and after execution of will is admissible as bearing on capacity at time of execution.

In a will contest, where testator is claimed to have been of unsound mind, evidence of his mental condition both before and after execution of will is relevant and admissible as shedding light upon his mental capacity at the time when he executed the will.

3. Wills ⚡53(7)—Evidence of use of liquors alleged to destroy testamentary capacity before and after execution of will and of effect thereof is admissible if revealing capacity when will was executed.

In will contest, where testator is claimed to have been of unsound mind when he executed will because of long and intemperate use of alcoholic liquors, evidence of his use thereof both before and after the execution of the will and of the effect upon his mind is admissible so far as it tends to reveal his mental condition at the time of the execution of the will.

4. Wills ⚡52(1)—Intemperate use of liquors, however long continued, raises no presumption of testamentary incapacity.

Fact that testator habitually indulged in intemperate use of alcoholic liquors raises no presumption that the habit destroyed testamentary capacity, no matter how long the habit is shown to have continued, but proof of incapacity by reason thereof is necessary.

5. Wills ⚡53(3)—Where testator is claimed to have lost testamentary capacity from use of alcoholic beverages, evidence of commitment to state hospital for inebriety is admissible (Pol. Code, § 2185c).

In will contest, where testator is claimed to have lost testamentary capacity from habitual intemperate use of alcoholic beverages, evidence that testator was committed to state hospital for inebriety, under Pol. Code, § 2185c, providing for commitment of persons addicted to intemperate use of stimulants so far as to have lost the power of self-control or who are subject to inebriety, held admissible in proof of intemperate use of liquors.

6. Wills ⚡53(3)—Commitment of testator to state hospital for inebriety two years before execution of will held not too remote on question of testamentary capacity (Pol. Code, § 2185c).

In a will contest, where testator's use of alcoholic liquors was claimed to have destroyed his testamentary powers, his commitment to state hospital for inebriety two years before execution of will, under Pol. Code, § 2185c, held not too remote to be shown.

7. Wills ⚡55(1)—Testator's commitment to state hospital for inebriety is not prima facie evidence of permanent impairment of mental faculties (Pol. Code, § 2185c).

Mental disorder is presumed to continue only where it has become settled, and fact that testator was committed to state hospital for inebriety under Pol. Code, § 2185c, is not even prima facie evidence that use of alcoholic liquors caused permanent impairment of mental faculties.

8. Wills ⚡52(4)—That testator committed to state hospital for inebriety was victim of liquor habit when committed raises no presumption that habit persisted thereafter (Pol. Code, § 2185c).

In a will contest, where testamentary capacity is attacked on ground of intemperate use of alcoholic liquors, fact that when testator was committed to state hospital for inebriety under Pol. Code, § 2185c, he was a victim of the liquor habit raises no presumption that the habit persisted thereafter.

9. Wills ⚡384—Excluding evidence of testamentary incapacity held harmless, where if admitted proof would still have been insufficient to sustain finding of incapacity (Const. art. 6, § 4½).

Where testator's use of alcoholic liquors was claimed to have destroyed his testamentary capacity, exclusion of evidence of commitment to state hospital for inebriety under Pol. Code, § 2185c, and of other competent evidence of incapacity, held harmless error under Const. art.

6, § 4½, where, giving the fullest effect to the excluded evidence, the facts shown would still have been insufficient as a matter of law to sustain a finding of incapacity.

10. Wills $\Rightarrow$ 324(2)—Evidence held not to show as a matter of law that decedent was testamentarily incompetent.

Evidence held insufficient as matter of law to show that use of intoxicants by decedent had rendered him testamentarily incompetent.

11. Evidence 498½—Court has wide discretion in determining whether witness can express opinion respecting sanity as intimate acquaintance (Code Civ. Proc. § 1870, subd. 10).

Trial court is vested with a wide discretion in determining whether witness has qualified himself to give his opinion respecting the mental sanity of another by reason of being an intimate acquaintance within the meaning of Code Civ. Proc. § 1870, subd. 10.

12. Evidence $\Rightarrow$ 474(4)—Policeman who saw testator frequently in course of duties held qualified as intimate acquaintance to give opinion of sanity (Code Civ. Proc. § 1870, subd. 10).

Where police officer in course of duties saw testator, addicted to use of alcoholic liquors, off and on almost every evening during May, 1919, and made him go home, arrested him on one occasion, and saw him less frequently in 1920, he was qualified to express his opinion as to testator's sanity in 1919 as an intimate acquaintance, within Code Civ. Proc. § 1870, subd. 10.

In Bank.

Appeal from Superior Court, Los Angeles County; J. D. Murphy, Judge.

Application by the Security Trust & Savings Bank of the City of Los Angeles for the probate of the holographic will of Harry C. Fisher, deceased, opposed by Hart C. Fisher. From an order admitting the will to probate contestant appeals. Affirmed.

Fogel & Beman, of Los Angeles, for appellant.

Meserve & Meserve and Clifford E. Hughes, all of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for respondent.

SEAWELL, J. This is an appeal from an order admitting the will of decedent to probate. The Security Trust & Savings Bank of the city of Los Angeles filed a petition in the superior court of the county of Los Angeles for the probate of the holographic will of Harry C. Fisher, deceased, wherein it was named as executor. Said will was produced subsequent to the issuance of letters of administration to Hart C. Fisher, father of the decedent. The said father opposed the admission to probate of said will, which was dated August 12, 1919, alleging that said Harry C. Fisher was not of sound mind at the time he executed the purported will; that the instrument was not entirely written, dated, and signed in the handwriting of de-

cedent; and that if executed at all by decedent it was procured by the undue influence of Josephine Anderson, his aunt, who was named as a beneficiary therein. At the hearing contestant introduced no evidence whatsoever in support of his charges that the instrument was not entirely written, dated, and signed by the decedent and that it was procured by the undue influence of decedent's aunt, but relied wholly upon decedent's unsoundness of mind as a ground of opposition to the admission of the will to probate. The contest being heard by the court without a jury, it found against contestant on all three issues and accordingly decreed that the will was entitled to be admitted to probate and directed that letters testamentary be issued to petitioner.

Contestant asserts that the trial court committed reversible error in refusing to permit him to introduce in evidence the record in a proceeding in the superior court of the county of Los Angeles taken under the provisions of section 2185c, Political Code, wherein decedent was committed to a state hospital for inebriety for a period of two years commencing June 21, 1917. It is contestant's contention that the order of commitment was a judicial determination that decedent was of unsound mind on the date of the order; that the presumption is that insanity judicially established continues until restoration to capacity, and that the evidence introduced by petitioner was insufficient to rebut the presumption of incompetency. It is further contended that the court erred in refusing to permit the witnesses offered by contestant to testify as to decedent's soundness of mind.

[1-4] The presumption of law is that a person is sane, and the burden is always upon the contestant to show affirmatively by a preponderance of evidence that the testator was of unsound mind at the very time of the execution of the will. Estate of Perkins, 195 Cal. 699, 235 P. 45, and cases therein cited; 26 Cal. Jur. 635. Evidence of the testator's mental condition both before and after the execution of the instrument is relevant and admissible for the light that it sheds upon the soundness of his mind at the time of the execution of the will. Estate of Perkins, supra; In re Wilson, 117 Cal. 262, 49 P. 172, 711; Estate of Barr, 69 Cal. App. 16, 230 P. 181. It appears from the testimony adduced on behalf of proponent, as well as from that of contestant, that decedent for several years before his death was addicted to the excessive use of alcoholic liquors and possessed confirmed habits of intoxication. Contestant makes no claim that decedent suffered from mental disability or unsoundness of mind as the result of any other cause or condition. Where the point is made that a decedent was of unsound mind at the time he executed his will because of long use of alcoholic liquors,

evidence of such use both before and after the execution of the will and of the effect thereof upon his mind is admissible in so far as it tends to reveal his mental condition at the time of the execution of the will. The intemperate use of alcoholic beverages, if continued for a sufficient length of time, may destroy testamentary capacity. Nevertheless, in the absence of proof that the intemperate use has actually destroyed testamentary capacity, no presumption will be indulged, however long continued the habit is shown to have been, that it has thus been destroyed.

[5-8] Contestant offered in evidence the records in a proceeding in the superior court of the county of Los Angeles in which decedent was committed to a state hospital for a period of two years commencing June 21, 1917, in pursuance of the provisions of section 2185c, Political Code. The trial court ruled that such record was inadmissible, on the theory that it related to decedent's condition at a time too remote from the date of the execution of the will, in 1919, and on the further ground that a commitment for inebriety is not an adjudication of mental incompetency. Section 2185c, Political Code, provides for the arrest and commitment to a state hospital by the judge of the superior court, after an examination and hearing in open court, of persons who are "so far addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control," or who are "subject to dipsomania or inebriety." Where a claim is made that an excessive addiction to alcoholic liquors for a period of years preceding the execution of the will has destroyed a testator's mental powers, we are of the opinion that the record of a commitment under section 2185c is admissible in proof of the intemperate use of such liquors, and the fact that the acts of intemperance for which the commitment was made took place at a period two years before the execution of the will did not render the record inadmissible on the theory that the acts therein recited were too remote to be weighed as evidence. The commitment in such cases is based on a determination that the subject is one who, when under the influence of liquor, loses the power of self-control, and that he is so frequently in such a condition as to require confinement. It is not, however, even prima facie evidence that the use of alcoholic liquors has caused a permanent impairment of the mental faculties and a loss of self-control which persists after the temporary effects of the liquor have passed away, nor will it be presumed from the fact that the subject of the commitment was a victim of the liquor habit at the time of the commitment that such habit persisted thereafter. It is only in those cases where the mental disease has become settled that the mental disorder is presumed to continue.

[9] If it be conceded that the record of the

commitment proceedings was admissible in the instant case, its exclusion did not prejudice contestant's case and does not constitute reversible error, for, giving the fullest effect possible to said record and the evidence introduced by contestant as to testator's indulgence in the excessive use of alcoholic stimulants and to the evidence which, it is charged, was erroneously excluded, the proof would be wholly insufficient as a matter of law to sustain a finding of mental incompetency. Practically all of the facts as to the effect of the inordinate use of alcoholic liquors upon decedent were shown in evidence.

The witness Webb, who since 1916 has been chief of police of the city of Santa Monica, where decedent resided for a time, testified that in the course of the performance of his duties he had come in contact with decedent at various times between 1916 and the date of his death, when decedent was arrested for drunkenness; that he had been arrested on an average of "probably two or three times a year"; and that he had talked to decedent on the streets on "an average of once every two or three months," on which occasions he gave evidence of having been drinking, but was not sufficiently intoxicated to be arrested; that to his knowledge he had never seen him when he was sober. The witness also stated that he did not recall having seen him at any time during the year 1919, in which year the will was executed, and that the records of his department did not show that he had been in custody during that year. Appellant contends that this witness was qualified to testify as to the decedent's condition of mind under the rule permitting an intimate acquaintance to testify respecting the mental sanity of a person, the reason for the opinion being given (section 1870, subd. 10, Code Civ. Proc.), and that the trial court erred in sustaining objections to certain questions put to this witness. As a matter of fact said witness was permitted to testify to all matters within his knowledge, over the objection of opposing counsel. The following excerpt from the testimony of said witness shows the extent and basis for his knowledge on the issue of decedent's soundness of mind:

"The Court: He has already said he was incompetent. Let's find out what was the reason. What did you mean by 'incompetent'? That a man can't transact business at any time? Do you think he was continually insane? A. Well; he was continually intoxicated, I would say, under the influence of liquor.

"Q. That is not what you are asked at all. A. And at times we brought the man in, he talked like a wild man.

"Q. That is not the question here. The question at issue here is whether he was insane or sane. A. I can't testify to that, because I am not a medical man.

"Q. The question is whether in your judgment the man was sane or insane. A. In my judg-

ment, your honor, I would say the man was insane.

"Q. All the time? A. No; I wouldn't state that. Mr. Meserve (Attorney for Petitioner): You mean he was insane when he was drunk? A. Yes; I would say he was insane drunk.

"Q. Insane drunk? A. Yes; and he wasn't competent.

"Q. That was due entirely to the use of liquor just before that time, when he got drunk? A. To the continual use of liquor; yes, sir.

"Q. Now, you kept him there in the jail until he got sober, didn't you? A. Yes.

"Q. And when he would get out he would be sober? A. Yes.

"Q. And then he wouldn't be insanely drunk when he was sober? A. Well; I would say the man—he was very intemperate. When we let him out—we continually had trouble with Harry Fisher.

"Q. Let's just get down to it. You stated you were chief of police. You kept him in jail until he was sober? A. Yes.

"Q. When you turned him out he was sober, wasn't he? A. Yes.

"Q. And he wasn't insane when he was sober, was he? A. No."

[10] This evidence is wholly insufficient to show that the use of intoxicants by decedent had rendered him testamentarily incompetent. The witness testified that he saw decedent once every two or three months, and on the occasions when he arrested him, which was two or three times a year, and that he never saw him sober except when he was released from jail. Proof that decedent was "incompetent" or "insane" when so intoxicated that it was necessary to arrest him or upon occasions when, in the words of the witness, he "only needed another drink to put him down and out," is entirely insufficient to show that decedent never enjoyed lucid intervals during which he was competent to execute a will. The witness himself testified that the decedent was not released from jail until sober and that he was not insane when sober.

The court also refused to permit the witness Davis, a police officer of the city of Venice, to state whether decedent was competent and of sound mind in 1919, on the ground that it had not been shown that said Davis was qualified as an intimate acquaintance. Davis stated that in the course of his duties he saw decedent "off and on almost every evening" during May, 1919; that he made him go home, put him on the car and talked to him "just long enough to get him across the line into Santa Monica"; that he arrested him on one occasion; and that he saw him less frequently in 1920.

Proponent's objections to the testimony of C. K. Pierce, a patrolman connected with the Santa Monica police department, were sustained by the court after said witness stated that he had never met decedent until August, 1921, two years after the will was executed. Although, as pointed out above, evidence of a testator's mental condition sub-

sequent to the execution of the will is generally admissible, the court, in sustaining the objection to Pierce's testimony, no doubt acted under the apprehension that said witness' acquaintance with decedent was similar in nature to that of Officers Webb and Davis, and that any testimony which he might offer would relate to decedent's state of mind when his condition and conduct were such as to require the attention of officers of the law. Contestant made no offer to prove any other or different matters by said witness.

Wallace Braden, the only witness offered by contestant in addition to the three police officers to establish testator's unsoundness of mind, was shown to have resided in the flat next to that where decedent lived during 1916 and 1917. Said witness stated that after decedent moved away he saw him "some time during 1918" and in January or February, 1919, and on the day before his mother died, in May, 1919. The court sustained proponent's objection on the ground that the witness had not qualified as an intimate acquaintance and refused to permit him to state whether decedent was of sound mind. Thereupon counsel for contestant said: "That is all." No attempt was made to show that the witness had ever talked to decedent, or that they had had dealings with each other as neighbors, friends or acquaintances.

[11, 12] While the court is vested with wide discretion in determining whether a witness has brought himself within the intimate acquaintance rule. Section 1870, sud. 10, Code Civ. Proc.), we are of the opinion that some of the witnesses, particularly witness Davis, who were not permitted to express an opinion, were qualified to do so as to the mental sanity of decedent. The facts upon which their opinions must have been predicated were, however, fully stated to the court, and it is quite evident that an expression of opinion by them would not have been of sufficient added weight to have established testamentary incapacity at the very time the will was executed. If the case was a close one upon the evidence, a more serious question would be presented.

Neither contestant, who was the testator's father, nor the testator's brother, testified as to his sanity. Testator's aunt, a beneficiary under the will, with whom he resided a large portion of the time after the death of his mother and to the time of his own death, testified that testator was sane and competent and that he had not been intoxicated in her presence at any time during the summer of 1919. Herbert M. Haskell, a disinterested witness and an attorney who practiced law in this state for a number of years and later became a banker, testified that the testator consulted him soon after his mother's death as to the requirements for a valid will and as to whether it would be legal if

drawn by himself; that he was competent at that time to make a will; that he saw him from six or seven to a dozen times during the ensuing two or three months and discussed with him literary subjects, and that decedent was a well-informed man; that he was of sound mind and competent to make a will, and that he did not observe a single thing in any of the conversations he had with him that would indicate that he was of unsound mind; that he was a clean-cut looking young chap who looked a good deal like a college man; and that he was rather favorably impressed with him personally.

The contestant was not prejudiced by the error of the court in refusing to admit the record of commitment in evidence nor by the ruling excluding the opinions of the witnesses above referred to. Every fact which from necessity must have formed the basis of the commitment and likewise the basis of the "reasons" of said witnesses had they been permitted to express an opinion, were fully before the court. The former habits of testator were not shown to have affected or influenced his testamentary act. "No judgment shall be set aside, or new trial granted, in any case, on the ground of * * * the improper admission or rejection of evidence * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Article 6, § 4½, state Const. If the opinions of said witnesses were based upon the facts as detailed by them, the expression of their opinions thereon doubtless would not and should not have changed the decision as to the testamentary capacity of testator.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

202 Cal. 233

RIVERSIDE COUNTY v. TITLE INS. & TRUST CO. (L. A. 8250.) ★

Supreme Court of California. Sept. 29, 1927.

Rehearing Denied Oct. 27, 1927.

1. Agriculture ☞11—County's unlawful entry by mistake on lands not included in notice to abate nuisance does not invalidate lien, where service was properly performed (Pol. Code, §§ 2322, 2322a, as amended by St. 1917, pp. 627, 631, §§ 1, 2).

That county made unlawful entry by mistake on lands not included in notice to abate nuisance, admitting that such entry would have been premature had it been made on lands specifically designated in notice, does not afford ground for invalidation of lien on lands on which service was performed, as provided by

Pol. Code, §§ 2322, 2322a, as amended by St. 1917, pp. 627, 631, §§ 1, 2.

2. Agriculture ☞11—Premature entry will not bar county's right to foreclose lien on landowner's failure to abate nuisance after statutory notice (Pol. Code, §§ 2322, 2322a, as amended by St. 1917, pp. 627, 631, §§ 1, 2).

Premature entry and partial performance would not, of itself, bar county as lien claimant from foreclosing lien on failure of landowner to abate nuisance within time prescribed by statutory notice, though county would lose claim for compensation for services prematurely performed, in view of Pol. Code, §§ 2322, 2322a, as amended by St. 1917, pp. 627, 631, §§ 1, 2.

3. Agriculture ☞11—Land not included in notice to owner to abate nuisance held properly excluded from burden imposed on land included.

Where street divided defendant's land and that on one side was not mentioned in notice to owner to abate nuisance, it was properly excluded from burden imposed on tract lying across street and included in notice.

4. Agriculture ☞11—Eradication of noxious weeds and extermination of ground squirrels for benefit of tract of land are presumed beneficial to its several parts (Pol. Code, §§ 2322, 2322a, as amended by St. 1917, pp. 627, 631, §§ 1, 2).

It must be presumed that services performed for benefit of entire tract of land by eradicating noxious weeds and exterminating ground squirrels, under Pol. Code, §§ 2322, 2322a, as amended by St. 1917, pp. 627, 631, §§ 1, 2, were beneficial to its several parts.

5. Agriculture ☞11—County held not entitled to enforce lien for extermination of ground squirrels (Pol. Code, §§ 2322, 2322a, as amended by St. 1917, pp. 627, 631, §§ 1, 2).

County held not entitled to enforce statutory lien for extermination of ground squirrels, under Pol. Code, §§ 2322, 2322a, as amended by St. 1917, pp. 627, 631, §§ 1, 2, where board of supervisors of county or other governing body did not determine in advance which of alternative systems or methods of procedure should be selected for extermination of such animal pests.

6. Agriculture ☞15—County's unenforceable claim for exterminating ground squirrels may be deducted from judgment to enforce lien for eradicating noxious weeds.

Where county was not entitled to enforce statutory lien for extermination of ground squirrels, such claim, being entirely separable from claim for eradication of noxious weeds, may be deducted from judgment to enforce lien for eradicating such weeds without injury to landowner.

In Bank.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Action by the County of Riverside against the Title Insurance & Trust Company to en-

force a statutory lien for the eradication of noxious weeds and extermination of ground squirrels. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Rehearing denied: WASTE, C. J., and SHENK, J., voting for a rehearing.

Superseding opinion of District Court of Appeal, First District, Division 2 (252 P. 776).

Woodruff & Shoemaker, of Los Angeles, for appellant.

Loyal C. Kelley and Albert H. Ford, Dist. Atty., both of Riverside, for respondent.

SEAWELL, J. This appeal was taken by the defendant, Title Insurance & Trust Company, a corporation, from a judgment entered in favor of the county of Riverside decreeing the foreclosure of a lien upon defendant's real property as security for the payment of a charge of \$1,260.71, including interest and costs, on account of expenses and costs incurred by said county in the abatement of a nuisance after notice to and failure or refusal on the part of defendant to exterminate, destroy and eradicate from the soil of said real property a certain noxious weed known as Russian thistles, and ground squirrels, a common animal pest. Sections 2322, 2322a, c. 508, Stats. 1917. By the second amended complaint filed in the court below it was alleged that defendant, corporation, was the owner of a tract of land situated in the county of Riverside, this state, particularly described as "lots 1 to 12, inclusive; lots 29 to 50, inclusive; lots 67 to 84, inclusive; lots 114 to 119, inclusive; lots 124 to 125, inclusive, of Fairhaven Farms, West Riverside, as shown by map on file in Book 6, page 2 of Maps, Records of Riverside County." The 60 lots above enumerated contain 5 acres each, totaling 300 acres, and lay north of Limonite street, while the remaining 50 acres, which according to the map on file are subdivided into 10 lots of 5 acres each, lie south of said street, 8 of which abut thereon. The court found that said 300 acres lying north of said street, notwithstanding the legal subdivisions into which they had been mapped, constituted a single tract or parcel of land. As a matter of fact, no contention is made that there are any physical lines or marks or objects separating one lot from another in said 300-acre tract against which the lien herein is asserted. It appears that Limonite street which forms the southern boundary of said 300-acre tract was not merely a platted street, but it was actually in use as a thoroughfare. It also appears that a portion of the exterior limits is partially marked by a fence. But we do not regard this as a circumstance of great moment, inasmuch as said lots are specifically referred to by numbers in both the notice to abate the nuisance and in the notice of lien. The argument of appellant is that the entire acreage of said Fairhaven Farms tract constitutes one entity and no part is severable

from another and that an entry upon any one lot is an entry upon the whole. Therefore, it is argued, the entry by the county upon the 10 lots south of Limonite street having been made without authority of law, for the reason that it was made before the expiration of the 10-days' period allowed by law to the owner to abate the nuisance, the proceedings taken by the horticultural commissioner commanding the owner to exterminate said ground squirrels and destroy the Russian thistles growing on said lands are invalid in toto and must fall, even though the services prematurely performed were rendered upon said 10 lots which were neither included in the notice to abate the nuisance nor in the notice of lien filed thereafter. The rule of *in invitum* which generally applies in cases of this class does not carry with it such far-reaching nullifying power. It is true that the county by its agent did enter upon said 10 lots south of Limonite street and performed service thereon on the assumption that it was acting under authority of law, but its acts were wholly unauthorized, and the court so found and refused to allow the county's claim for services performed on said 10 lots so entered upon. We are not able to see, as appellant seems to see, how an unauthorized entry and performance of services upon lands not sought to be charged with a lien can affect or nullify the right of lien upon a specifically described tract of land in the absence of a material defect in procedure or the violation of some substantial right of the owner of said specifically described body or tract of land. As observed above, the services charged against appellant's lands began on July 24, 1919, a period incontrovertibly beyond the time fixed by statute as a limitation upon the owner's right to avail himself of the privilege of abating the nuisance.

[1] The fact that the county made an unlawful entry by mistake upon lands not included in the notice to abate a nuisance, admitting that said entry would have been premature had it been made upon the lands specifically designated in the notice, does not afford the slightest ground for the invalidation of the lien upon the lands upon which service was performed as provided by law. The notice to abate the nuisance was posted on the same day that notice was deposited in the mail, to wit, July 8th, on the 300-acre tract at a place near Limonite street where it was most likely to give notice to the owner and the public. The services charged against said 300-acre tract were reckoned from and included July 24, 1919, which was 2 days *after* the expiration of the period when the right to enter said lands and perform the duty imposed upon the owner accrued to the county.

[2] We do not understand that a premature entry and partial performance would, of itself, constitute a bar to the right of the lien claimant to foreclose its lien upon the fail-

ure of the owner to perform within the time prescribed by a statutory notice. In such a case the county would lose its claim for compensation for services prematurely performed, but a premature entry and partial performance would not ipso facto invalidate the lien for services thereafter rendered within the period allowed by law. By the notice 10 days were granted to the landowner, dating from July 8, 1919, to abate the nuisance. The work for which compensation was allowed was for labor done after the expiration of the 10-day period. This was alleged, proved, and found by the court. Subdivision 7, § 2322a, Political Code, provides that the expense of abating the nuisance shall become a lien on the property from which said nuisance has been removed. " * * * Notice of such lien shall be filed and recorded in the office of the county recorder * * * within 30 days after the right to the said lien has accrued and a copy" mailed to the owner. The notice of lien was filed within the statutory time. It contains an error as to the exact date the labor was performed, but so far as the requirements of the statute are concerned it need not have done more than to give notice that a lien was claimed on the described premises for the abatement of the nuisance filed within 30 days after the right to the lien accrued. The important question is that notice of lien should state that a lien is claimed, and that notice has been filed within 30 days after the lien accrued. The notice to abate the nuisance was duly posted and served, making allowance for the full statutory time that appellant was entitled to by reason of its place of business being 60 miles distant from Riverside, before the services sued on were commenced.

[3] In its petition for a hearing by this court appellant contended that the 70 lots described in the second amended complaint were contiguous, thereby forming a whole. We above pointed out the severability of the 10 lots south of Limonite street from the area on the northerly side of said street, but be that as it may, said 10 lots were not included by description or mention in any way in the notice to the owner to abate the nuisance and were not proceeded against by the action nor were they regarded as in any way contributing to said nuisance. This would be a sufficient reason for excluding them from the burden imposed upon the tract lying north of said street.

[4] If the argument of appellant as to the contiguity of the plotted lots forming one parcel or tract of land be sound, then it must follow that its claim of exemption of 16 of said plotted lots included in the 300-acre tract, upon which it is claimed no labor was actually done, must fall. Viewed upon the ground none of said 16 lots were distinguishable from any other lots contained in the area. It must be presumed that services performed for the benefit of an entire tract were

beneficial to its several parts. Especially is this true where, as here, the subject-matter both animate and inanimate, is ambulatory in character.

[5] The court made a separate finding that the expense incurred in exterminating ground squirrels on said premises, amounting to the sum of \$15, was incidental and secondary to the destruction of Russian thistles. Under the authority of *County of San Benito v. Wapple*, 188 Cal. 423, 205 P. 673, this finding cannot stand. It was therein held that by the amendment of chapter 4b, Political Code, § 2322 et seq. (Stats. 1917, p. 627), providing for an alternative system of proceedings for the destruction of ground squirrels, in view of the dual system provided by statute, vesting horticultural commissioners and local boards of health or health officers, respectively, with the power of providing for the destruction of ground squirrels and charging the lands infested by them with a lien for the expense of so doing, it was a necessary condition precedent to the action of said horticultural commissioners or local boards of health that the board of supervisors of the county or other governing body determine in advance which of the alternative systems or methods of procedure should be selected for the extermination of said animal pests. In the instant case this requirement was not observed. The amended complaint contains an allegation, doubtless in an attempt to comply with the suggestion made in the above-cited case, and the court found, that the extermination of said ground squirrels was incidental and secondary to the destruction of Russian thistles. There is no evidence in the record, however, which seems to justify the finding that the destruction of one pest was the primary, and the other the secondary, object of the horticultural officer.

[6] There is absent from the amended complaint herein any averment that the proceedings taken by the horticultural commissioner or his deputed representative were preceded by any action on the part of the board of supervisors of the county of Riverside authorizing either of said officers to initiate the proceedings as to the extermination of ground squirrels. This finding and branch of the case is clearly severable from the other dealing with the destruction of Russian thistles and the latter branch remains unaffected by expunging from consideration said finding.

The foregoing disposes of the important points made by appellant, which, in our judgment, demand special consideration. Others discussed by counsel have been considered.

In conclusion, it is proper to state that the instant case is before us for hearing after decision by the District Court of Appeal, First Appellate District, Division 2, 252 P. 776, Mr. Justice Sturtevant writing the opinion. Upon a reconsideration of the arguments of counsel we are of the opinion that the conclusions reached by said District

Court of Appeal are sound and properly indicate the judgment that should be rendered. The judgment therefore will be modified by deducting \$15 from the principal amount contained in the judgment, and as so modified the judgment will stand affirmed. It is further ordered that respondent recover its costs.

We concur: WASTE, C. J.; RICHARDS, J.; LANGDON, J.; CURTIS, J.

PEOPLE v. MOUSE. (Cr. 1502.) ★

District Court of Appeal, Second District, Division 2, California. Sept. 12, 1927.

As Modified, Oct. 17, 1927. Hearing Granted by Supreme Court Nov. 10, 1927.

1. Criminal law § 97(1/2)—State has jurisdiction over all offenses committed within state, unless deprived of authority by United States Constitution or legislative enactment.

State of California has jurisdiction to punish all persons committing offenses against its penal laws within state, unless deprived of such authority by Constitution of United States or by express legislative enactment.

2. Criminal law § 97(4)—State is not precluded from possessing concurrent jurisdiction in case where United States government has jurisdiction (24 USCA § 137).

Mere fact that United States government has jurisdiction in given case does not itself preclude state government from also possessing concurrent jurisdiction; Rev. St. U. S. § 4835 (24 USCA § 137 [U. S. Comp. St. § 9279]), not being applicable.

3. United States § 3—Maintenance of national soldiers' home held not one of purposes for which lands, when taken, come, ipso facto, within exclusive jurisdiction of United States government (Const. U. S. art. 1, § 8).

Under Const. U. S. art. 1, § 8, limiting use of land required by United States government for erection of forts, magazines, arsenals, dockyards, and other needful buildings, maintenance of National Home for Disabled Volunteer Soldiers at Sawtelle is not one of purposes for which lands, when taken, come, ipso facto, within exclusive jurisdiction of United States government.

4. United States § 3—Jurisdiction of United States is not exclusive over land purchased for purposes not named in Constitution, unless expressly so declared (Const. U. S. art. 1, § 8).

When land is purchased by the United States government for purposes not among those named in Const. U. S. art. 1, § 8, jurisdiction of the United States is not exclusive unless expressly so declared.

5. United States § 3—Land over which Congress can exercise exclusive jurisdiction must not only be ceded by state, but must be accepted by Congress (Const. U. S. art. 1, § 8).

For Congress to have power to exercise exclusive jurisdiction over land purchased by it

as provided by Const. U. S. art. 1, § 8, such land must not only be ceded by particular state, but there must be an acceptance of same by Congress.

6. United States § 3—Creation of national soldiers' home by act of Congress does not make it part or representative of United States government.

Mere fact that National Home for Disabled Volunteer Soldiers, a corporation, was created by Congress, does not imply that such entity is part or representative of United States government.

7. United States § 3—State does not necessarily waive jurisdiction over land owned by national soldiers' home, organized under act of Congress, but not shown to be owned by United States (St. 1897, p. 51).

Ownership of land by National Home for Disabled Volunteer Soldiers, organized under act of Congress, not shown to be in the United States, does not necessarily result in waiver by state government of jurisdiction over such land, as provided by St. 1897, p. 51, expressly limiting cession of exclusive jurisdiction to lands held by United States government for "military purposes or defense."

8. United States § 3—Maintenance of national soldiers' home held not within purpose of law providing for cession of exclusive jurisdiction by state to lands occupied by United States for military purposes (St. 1897, p. 51).

Under St. 1897, p. 51, expressly limiting cession of exclusive jurisdiction by state to lands held, occupied, or reserved by United States government for military purposes, maintenance of National Home for Disabled Volunteer Soldiers did not fall within scope of such law.

9. Criminal law § 97(4)—State court properly assumed jurisdiction over offense committed by inmate of national soldiers' home within its domains; federal government not having exclusive jurisdiction thereover.

Where land occupied by National Home for Disabled Volunteer Soldiers, organized under act of Congress, was not conveyed to federal government or accepted by it, federal government did not have exclusive jurisdiction over such land, and state court properly assumed jurisdiction over offense against penal laws of state committed by inmate of home within its domains.

10. Sodomy § 6—Evidence held to authorize conviction of defendant for committing infamous crime against nature.

In prosecution for committing infamous crime against nature, evidence was sufficient to authorize jury to convict defendant.

11. Criminal law § 1023(8)—Appeal does not lie from order denying motion in arrest of judgment.

Law does not provide for appeal from order denying motion in arrest of judgment.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

William M. Mouse was convicted of an infamous crime against nature, and he appeals. Affirmed.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

CRAIG, J. The appellant was charged by information consisting of two counts with having committed the infamous crime against nature, a felony, in the county of Los Angeles, on the 20th day of November, 1926, and on the 1st day of January, 1927. Thereafter, and on February 10, 1927, the appellant pleaded guilty to the first count of the information and applied for probation, whereupon the trial court continued the pronouncing of judgment and sentence as to the first count, and plea to the second count until the 24th day of February, 1927. Upon the date last mentioned, the defendant was permitted to withdraw his plea of guilty, and to enter a plea of not guilty, to the first count, his trial was set for March 8, 1927, as to both counts, and he was then tried by a jury and was convicted of having committed both offenses as charged. Motions for new trial and in arrest of judgment were presented and denied, and the defendant appeals from the judgment and from each of said orders.

It appeared that one of the offenses alleged to have been committed by appellant occurred within the boundaries of the National Home for Disabled Volunteer Soldiers at Sawtelle, and that the other was committed outside its grounds. Appellant was an inmate of the home, and the principal contention of appellant is that the superior court of the state of California was without jurisdiction to try him for any offense committed within the domain of the soldiers' home, because it is insisted the government of the United States has exclusive jurisdiction to punish for all offenses committed therein.

[1-9] There can be no doubt that the state of California has jurisdiction to punish all persons committing offenses against its penal laws within the state, unless deprived of such authority by the Constitution of the United States or by express legislative enactment. In citing authorities in an attempt to establish his theory, appellant has, we think, overlooked certain important considerations. The mere fact that the United States government has jurisdiction in a given case does not in itself argue against the state government also possessing a concurrent jurisdiction; hence the citation of section 4835 of the United States Revised Statutes (Barnes' Federal Code, § 8821 [24 USCA § 137; U. S. Comp. St. § 9279]) is of little value. The maintenance of a soldiers' home is not one of the purposes named in article 1, § 8, of the Constitution, for which lands, when taken, come,

ipso facto, within the exclusive jurisdiction of the United States government, and, when land is purchased by the general government for purposes not among those named, the jurisdiction of the United States is not exclusive unless expressly so declared. In *re Kelly* (C. C.) 71 F. 545. In order that Congress shall have power to exercise exclusive jurisdiction over land purchased by it, as provided by section 8 of article 1 of the Constitution, such land must not only be ceded by the particular state, but there must be an acceptance of the same by Congress. In this case the record fails to show any acceptance by the federal government of the property involved or any conveyance to the general government by the state. Deeds were introduced in evidence showing a conveyance by John P. Jones and Arcadia B. de Baker to the National Home for Disabled Volunteer Soldiers, a corporation. However, in passing it might be said that section 8 of article 1 apparently has no application to the maintenance of a home for disabled soldiers, but it expressly limits its uses to those for the "erection of forts, magazines, arsenals, dockyards, and other needful buildings." The mere fact that the National Home for Disabled Volunteer Soldiers, a corporation, was created by an act of Congress does not imply that such entity is a part, or is representative, of the United States government. Nor does the ownership of land by said corporation necessarily result in a waiver by the state government of jurisdiction as provided by the Statutes of 1897, at page 51. This law expressly limits its cession of exclusive jurisdiction to lands held, occupied, or reserved by the government of the United States for "military purposes or defense." Here the purposes do not fall within the scope of this law nor is the ownership shown to be in the United States. That ownership by the National Home for Disabled Volunteer Soldiers, a corporation, is not the same as by the government of the United States was held in *re Kelly*, supra, which authority is decisive of this appeal. In the matter of upholding the jurisdiction of the state courts the present case is even stronger than that presented by *In re Kelly*, since there the land was conveyed directly to the government, which in turn conveyed to the corporation, whereas here there is no evidence tending to show that the state or the United States had any direct or indirect part in the conveyance, or that the state renounced, or the United States accepted, any interest in the lands, or jurisdiction over offenses committed thereon.

[10] The only remaining point advanced by the appellant is an asserted insufficiency of evidence to sustain the verdict and judgment, but there is no merit in this contention, and it is apparently not urged with great confidence. Two young boys testified to the acts alleged in the information, an eyewitness to

one of the offenses testified that he saw it committed, and an officer swore that appellant admitted one of them at the time of his arrest. Upon the trial, the defendant denied his connection with either offense, and produced several character witnesses. From all of this evidence the jury, under the instructions of the trial court, determined that the defendant was guilty in each instance. Upon the record thus presented, the judgment and orders appealed from will not be disturbed.

[11] No provision is made by law for an appeal from an order denying a motion in arrest of judgment.

The judgment and order denying motion for new trial are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

VENTURA COUNTY v. BARRY, County Assessor. (Civ. 5718.)★

District Court of Appeal, Second District, Division 1, California. Sept. 3, 1927.

Hearing Granted by Supreme Court Oct. 31, 1927.

1. Statutes $\S$ 170—Repeal of special act relating to assessor's fees in certain county did not revive as to such county former general law (Pol. Code, $\S$ 4252, par. 6, and $\S$ 4290).

The repeal of a special act (Pol. Code, $\S$ 4252, par. 6) relating to assessor's fees in a certain county, by St. 1925, p. 70, did not automatically revive as to such county the general statute on the same subject (Pol. Code, $\S$ 4290), which had been repealed as to said county by the enactment of the special statute.

2. Taxation $\S$ 310—Special law relating to fees in certain county repealed general law as to that county in so far as laws were inconsistent (Pol. Code, $\S$ 4252, par. 6, and $\S$ 4290).

Special law (Pol. Code, $\S$ 4252, par. 6) relative to the fees of the county assessor in a certain county held to repeal the provisions of a general law (section 4290) relating to the same subject, in so far as the two were inconsistent.

Application by the County of Ventura for a writ of mandate to be directed to Jasper Barry, Assessor of Ventura County, to require him to pay into the county treasury the fees collected, under Pol. Code, $\S$ 4290, on unsecured personal property taxes. Writ granted.

James C. Hollingsworth, of Ventura, for petitioner.

Clarke & Bowker and Walter E. Barry, all of Los Angeles, for respondent.

YORK, J. The question involved in this application for a writ of mandate is whether or not the respondent is entitled to collect

fees in accordance with the provisions of section 4290 of the Political Code, to wit, 6 per cent. of the total amount received by him as such assessor as unsecured taxes levied on personal property taxed within Ventura county.

Respondent's contention is that, although the amendment in 1923 (St. 1923, p. 1209) to section 4252 of the Political Code swept away the provisions contained in section 4290 of the Political Code, in so far as fees and commissions of the assessor on personal property taxes collected is concerned in Ventura county, the subsequent "repeal" of section 4252 of the Political Code (by amendment [St. 1925, p. 70] omitting certain provisions thereof) would have the effect of reviving or reinstating section 4290 of the Political Code so as to enable such assessor to retain the 6 per cent. claimed by him on unsecured personal property tax collections.

[1] We are of the opinion that section 4290 of the Political Code has never been revived or re-enacted since its repeal, in so far as it affects such assessor, by the 1923 amendment to section 4252 of the Political Code. As was said in *People v. Hunt*, 41 Cal. at page 439:

"The repeal of an act repealing a former act does not revive the former act, or give it any force and effect. This result can be accomplished only by the re-enactment of the former act. The repeal of the act of 1864 [St. 1863-64, p. 243] by section 3 of the act of 1868 [St. 1867-68, p. 448] worked the same result as would an act directly repealing the act of 1864."

See, also, *Thomason v. Ruggles*, 69 Cal. 465, 11 P. 20.

[2] Section 4290 of the Political Code is a general act, while section 4252 is an act affecting Ventura county only, therefore this is a case where a general act has been repealed by an act of more limited application, and the law is as stated in 23 California Jurisprudence 708, $\S$ 92:

"* * * The more general provisions of a prior general act are considered as superseded and repealed by a valid special act subsequently approved, relating to the same subject-matter, so far as the two are necessarily inconsistent, although the special act contains no words of repeal."

In other words, under the act of 1923, section 4290 was superseded, and therefore repealed, by reason of paragraph 6 of section 4252, because in said act of 1923 the following words were used:

"All commissions or fees now or hereafter allowed by law shall be paid into the county treasury."

In 1925 the Legislature did not pass a general county government act affecting Ventura county, but did by its statutes of 1925 make many changes by way of amendment in various provisions contained in the Coun-

ty Government Act as then set forth in the Political Code. Paragraph 6 of such amending act eliminated the provisions which we have heretofore quoted from the act of 1923 with reference to the assessor, and there were no provisions therein repealing or amending section 4290 of the Political Code.

We therefore hold that the part of the act of 1923 hereinbefore quoted did not suspend only, but did actually repeal, section 4290 of the Political Code as the same applied to Ventura county, and that section 4290 did not thereafter become effective merely by the failure of the Legislature to incorporate the provisions hereinbefore quoted of the act of 1923 in any later legislation or by the adoption of a reenactment of the act of 1923 omitting the portion hereinbefore specifically quoted.

The demurrer is therefore overruled, and the peremptory writ of mandate is ordered issued out of this court commanding respondent to pay the sum of \$8.85 to the county treasury of Ventura county, Cal., as such.

We concur: CONREY, P. J.; HOUSER, J.

85 Cal. App. 499

HOGAN v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 5997.)★

District Court of Appeal, First District, Division 1, California. Sept. 20, 1927.

Rehearing Denied Oct. 19, 1927.

Mandamus ☞31—Mandamus to require submission of cause which has never been under submission for trial court's final decision will be denied.

Where clerk's docket showed, long after trial court directed cause to be briefed, that one defendant filed amended answer to second amended complaint and later filed notice of motion, after due service on petitioner's attorney, that on day on which writ of mandate was applied for she would move for order permitting filing of amended answer to complaint, cause had not been under submission for trial court's final determination and writ of mandate to require judge to submit cause for decision will not lie.

Original petition by Walter L. Hogan for a writ of mandate to be directed to the Superior Court in and for the City and County of San Francisco and Hon. Walter Perry Johnson, Judge thereof. Writ denied.

See, also, 74 Cal. App. 704, 241 P. 584.

Thomas T. Califro, of San Francisco, for petitioner.

PER CURIAM. The application herein for a writ of mandate is denied. Neither the transcript of the minutes of the trial court nor of the entries in the clerk's docket show that said cause was ever ordered submitted for determination and decision. On the con-

trary, it appears from said docket entries and from the files in said cause that on February 28, 1927, which was long after the trial court had directed that the cause be briefed, Sue R. Merriman, one of the defendants in said action, filed an amended answer to the second amended complaint, and on August 27, 1927, filed a notice of motion, after due service of the same on petitioner's attorney, that on September 2, 1927, which was the day on which the writ herein was applied for, she would move said court for an order permitting the filing of an amended answer to the complaint. Whether or not this latter motion related to the amended answer filed on February 28, 1927, is not made clear.

However, in view of these latter proceedings, it is evident that the cause has never been under submission for final determination and decision. Therefore the writ applied for will not lie.

85 Cal. App. 496

McDOWELL v. WILLIS et al. (Civ. 4486.)

District Court of Appeal, Second District, Division 2, California. Sept. 19, 1927.

Brokers ☞52—Contract for exchange of property, not signed by all parties in interest, held not to give right to commissions thereunder.

Where real estate broker knew that contract for exchange of property was not signed by two parties who had interest therein, such contract was not complete, and he could not, in reliance thereon, collect commissions provided for therein.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by Nat McDowell against J. Willis and another. From a judgment for defendants, plaintiff appeals. Affirmed.

George H. Stone, of San Diego, for appellant.

George L. Flagg, of San Diego, for respondents.

PEAIRS, Justice pro tem. This is an appeal by the plaintiff from a judgment in favor of the above-named defendants, who had signed a proposed agreement for exchange, reading as follows:

"This agreement witnesseth: That J. Willis, Maria A., Theresa S., and Frances W. Griebnow, owners of the following described * * * first piece of property situate, lying and being in California, county of Imperial, * * * all of which we desire to exchange for the following second piece of property owned by S. R. Clark and wife, situate, lying and being in California, county of San Diego, city of San Diego. * * * Terms: Each property to be delivered free and clear of all incumbrance. Nat McDowell is hereby authorized to act as our agent in nego-

tiating an exchange. * * * And it is further agreed with said Nat McDowell that, when he has secured an acceptance of the proposition to exchange the above-described property on the above terms, we then pay the sum of one thousand (\$1,000) dollars as commission for such services. * * * J. Willis, Frances W. Griebnow. Witness to signatures: Nat McDowell, Dated at San Diego, Calif., this 13th day of February, 1923."

The acceptance reads as follows:

"This agreement witnesseth: That S. R. Clark, of San Diego, Calif., owner of the second piece of property described within, hereby accepts the proposition of exchange made herein, and upon the terms therein stated, * * * and then to furnish bargain and sale deed conveying title to said property to J. Willis, Maria A., Theresa S., and Frances W. Griebnow or assigns or their representatives. And I further agree to pay Nat McDowell five hundred (\$500.00) dollars commission for said exchange. Dated at San Diego, this 13th day of February, 1923, S. R. Clark, Nat McDowell. [Witness to signature.]"

It will be noted that Maria A. Griebnow (now Brown) and Theresa S. Griebnow did not sign the agreement, and the evidence shows that they refused to sign or concur in said exchange in any manner, and that plaintiff was aware of their interest in the property. The acceptance of S. R. Clark was clearly an agreement for all of the Willis and Griebnow properties, and not simply for the interest of J. Willis and Frances W. Griebnow therein, and, without the signatures of Maria A. Griebnow (now Brown) and Theresa S. Griebnow, plaintiff knew that he could not complete the deal, and the acceptor, S. R. Clark, knew that McDowell, the plaintiff, did not have complete authority.

The evidence further shows that Frances W. Griebnow paid plaintiff \$200, and that J. Willis gave a check to plaintiff for \$300, which were, by oral agreement, to be returned if the deal did not go through.

It was held by the judge of the superior court that the agreement set out above never became valid or binding on any of the parties thereto because not signed by all of the parties, and that defendants were therefore entitled to the money and check paid to the plaintiff by them, and to their costs.

The only point, therefore, to be decided is whether the said agreement binds the two defendants in this case. In this connection we call attention to the case of Mullarky v. Young, 9 Cal. App. 686, 100 P. 709, which case also cites from the case of Jackson v. Torrence, 83 Cal. 521, 23 P. 695, and Olson v. Lovell, 91 Cal. 506, 27 P. 765. The case of Jennings v. Jordan, 31 Cal. App. 335, 160 P. 576, is also referred to. Other decisions cited either agree with the aforesaid citations or are not entirely applicable to this case. The following quotation from the case of Mullarky

v. Young, supra, at page 687 (100 P. 710), aptly applies to this case:

"But the correct position here is that the purported contract was not executed and therefore it never created any reciprocal rights and obligations. It related to the conveyance of real property, and under the statute it was required to be in writing and subscribed by the party to be charged. But as the written instrument was signed by only two of the four parties to the agreement, it does not constitute a complete contract, and therefore it does not constitute the ground for a cause of action. This is clear from the exhibit. * * *"

In view of these decisions of our courts, and the incomplete authorization of the plaintiff, the judgment is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

85 Cal. App. 484

Ex parte GILKEY. (Cr. 1552.)

District Court of Appeal, Second District, Division 1, California. Sept. 19, 1927.

1. Habeas corpus ⇨ 10—Habeas corpus does not lie, where petitioner is not imprisoned or under actual restraint.

Writ of habeas corpus does not lie, where petitioner, or person on whose behalf the petition is filed, is not imprisoned or under actual restraint; it being necessary for him to be under such control or custody of person against whom petition is directed that his body can be produced at hearing.

2. Habeas corpus ⇨ 10—One admitted to bail may not test validity of order of commitment by habeas corpus.

Habeas corpus lies only where petitioner, or person on whose behalf petition is filed, is imprisoned, or under actual restraint, and one charged with felony, but admitted to bail, may not test validity of order of commitment by habeas corpus.

Original application by Dan Gilkey for a writ of habeas corpus to be directed to the Sheriff of Riverside County. Writ denied.

Welburn Mayoek, of Los Angeles, for petitioner.

CONREY, P. J. Pursuant to a complaint filed in the justice's court of Temescal township, county of Riverside, charging the defendant therein (petitioner here), with the commission of a felony, defendant was arrested, and, after examination, was committed and ordered to be held for trial on information to be filed in the superior court. The defendant, however, in accordance with the magistrate's order admitting him to bail, filed an undertaking of bail, and is not in actual custody. Nevertheless, he alleges that

he has been held without probable cause, and that under these circumstances he is entitled to test by writ of habeas corpus the validity of the order of commitment.

[1, 2] We are of the opinion that the writ of habeas corpus does not lie where the petitioner, or person on whose behalf the petition is filed, is not imprisoned, or under actual restraint; "in other words, he must be in such control or custody of the person against whom the petition is directed that his body can be produced at the hearing by the said custodian or restrainer." *Palmer v. State*, 170 Ala. 102, 54 So. 271. See, also, note to same case, Ann. Cas. 1912C, page 951.

The petition is denied.

We concur: HOUSER, J.; YORK, J.

85 Cal. App. 489

IN re MAHONY'S ESTATE.

FLATLEY v. CONNER.

(Civ. 5842.)

District Court of Appeal, Second District, Division 1. California. Sept. 19, 1927.

1. Wills $\S$ 302(9)—Copy of record of probate of foreign will and decree admitting it to probate, duly authenticated, held to authorize admission of will to probate (Code Civ. Proc. $\S$ 456, 1323, 1324, 1906).

Evidence consisting of duly authenticated copy of record of probate of foreign will in foreign jurisdiction, containing copy of will and order or decree admitting it to probate, as required by Code Civ. Proc. $\S$ 1323, and showing facts required by section 1324, duly authenticated under section 1906, was sufficient to authorize admission of such foreign will to probate, under section 456, requiring party pleading to establish on trial facts conferring jurisdiction.

2. Wills $\S$ 302(9)—In probate of foreign will, certificate of presiding magistrate held not ineffective because of reference to letters testamentary and proof of will (Code Civ. Proc. $\S$ 1323).

In probate of foreign will, under Code Civ. Proc. $\S$ 1323, letters testamentary and proof of such will are not required to be produced, so that certificate of presiding foreign magistrate was not rendered ineffective because of reference thereto.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

In the matter of the estate of Ellen Mahony, deceased. Petition by Charles S. Conner to probate the will of Ellen Mahony, deceased, opposed by Ellen Flatley. From a judgment overruling an objection to the admission of the will to probate, the contestant appeals. Affirmed.

Thomas A. Sanson, of Los Angeles, for appellant.

Charles Cassat Davis, of Los Angeles, for respondent.

McLUCAS, Justice pro tem. The contestant appeals from a judgment, order, and decree overruling her objection to the admission to probate of the foreign will of the deceased, and admitting the same to probate, and appointing the petitioner administrator of the estate with the will annexed.

[1] The sufficiency of the proofs of the foreign probate is the sole question presented on this appeal. The petitioner produced and offered in evidence the duly authenticated copy of the record of the probate of the will of Ellen Mahony, in the High Court of Justice (probate), the district registry at Kilkenny, containing a copy of the will and the order or decree admitting the same to probate, as required by the provisions of section 1323 of the Code of Civil Procedure. Appellant in her written opposition to the probate of the document controverted the jurisdiction of the Irish court to admit the will to probate, and now calls attention to the fact that section 456, Code of Civil Procedure, provides in that event that "the party pleading must establish on the trial the facts conferring jurisdiction." In support of this position appellant cites the case of *Wickersham v. Johnston*, 104 Cal. 407, 38 P. 101, as authority that the pleadings, petition, and proceedings which lead up to the order admitting the will to probate should have been included in the record. In (St. 1919, p. 165), section 1323, Code of Civil Procedure, was amended by changing the words in the first sentence, "When a copy of the will, and the probate thereof," to "When a copy of the will, and the order or decree admitting same to probate." So that the section now reads as follows:

"When a copy of the will, and the order or decree admitting same to probate, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters, the same must be filed, and the clerk of the court must appoint a time for the hearing; notice whereof must be given as hereinbefore provided for an original petition for the probate of a will."

Section 1324, Code of Civil Procedure, requires the admission of such authenticated form of will to probate in this state, and reads as follows:

"If, on the hearing, it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate, and have the same force and effect as a will first admitted to probate in

this state, and letters testamentary or of administration issued thereon."

In the case at bar the facts required by section 1324, Code of Civil Procedure, are shown on the face of the record and by the copy of the will included therein.

Section 1906, Code of Civil Procedure, provides that a judicial record of a foreign country may be proved by the attestation of the clerk or of the legal keeper of the record with the seal, together with a certificate of the chief judge that the person making the attestation is the clerk of the court or legal keeper of the record, that the signature is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador or a consul or vice consul or consular agent of the United States in such foreign country. Each of these requirements is complied with in the authenticated copy of the will and the order or decree admitting the same to probate. The record as specified in sections 1323 and 1324, Code of Civil Procedure, authenticated as prescribed in section 1906, Code of Civil Procedure, is the evidence required by the Code for the admission of a foreign will to probate. Section 1323, Code of Civil Procedure, as amended in 1919, has been construed in *Estate of Sankey*, 199 Cal. 391, at page 398, 249 P. 517, where the court says:

"Our statute provides only for the presenting of duly certified copies of the will, and the decree admitting the will to probate."

On page 399 (249 P. 520), the court further says:

"If a lack of jurisdiction does not appear on the face of the record, on collateral attack, the jurisdiction will be presumed, even though the necessary facts conferring it do not affirmatively appear in the decree. Under such circumstances it will be assumed the parties were properly before the court, and that the proceedings were regular. 15 Cal. Jur. 68. In 1 Freeman on Judgments (5th Ed.) p. 723, it is said: 'If the residence of the deceased within the territorial jurisdiction of the court at the time of his death is essential to give the court power to admit the will to probate, or to grant letters of administration of his estate, its adjudication of such fact cannot * * * be drawn in question collaterally.' In the *Estate of Dole*, 147 Cal. 188, 81 P. 534, the court said: 'The determination of the probate court as to the residence of the deceased at the time of his death is final in all collateral proceedings.' *Irwin v. Scriber*, 18 Cal. 500; *In re Griffith*, 84 Cal. 107, 23 P. 528, 24 P. 381; *In re Eichhoff*, 101 Cal. 605, 36 P. 11; *Estate of Latour*, 140 Cal. 421, 73 P. 1070, 74 P. 441."

In the case at bar no lack of jurisdiction appears on the face of the record, but the necessary facts conferring it do affirmatively appear in the decree, which is sufficient to

meet the requirements of section 456, Code of Civil Procedure, in the absence of any contrary showing.

[2] Appellant further objects that the certificate of the presiding magistrate could not have been attached to the record introduced in evidence because it refers to "letters testamentary" and "the proof of such will." The foregoing are not required to be produced by the terms of section 1323, Code of Civil Procedure, and would be considered surplusage. *Estate of Sankey*, supra.

It is ordered that the judgment be affirmed.

We concur: HOUSER, J., Acting P. J.; YORK, J.

55 Cal. App. 493

WEISMAN et al. v. BOARD OF BUILDING AND SAFETY COM'RS OF CITY OF LOS ANGELES et al. (Civ. 5263.)

District Court of Appeal, Second District, Division 2. California. Sept. 19, 1927.

1. Mandamus ☞181(3)—Judgment on hearing in mandamus, where defendants building commissioners appeared by attorney and evidence was presented, held not default (Code Civ. Proc. § 1095).

Judgment rendered at hearing in a mandamus proceeding to compel board of building commissioners and chief inspector to issue a permit, where the defendants appeared by attorney and the judgment, rendered upon a hearing as prescribed by Code Civ. Proc. § 1095, recited that the court reviewed the petition and heard and considered the evidence, *held* not a judgment by default, though defendants had made no appearance by answer or demurrer.

2. Mandamus ☞12—Ordinance is a "law," within statute providing for mandamus to compel performance of act which law specially enjoins (Code Civ. Proc. § 1085).

An ordinance is a "law," within the meaning of Code Civ. Proc. § 1085, providing that a writ of mandamus may issue against any inferior board to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel board to permit petitioner to enjoy a right from which he is unlawfully excluded.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Law.]

3. Mandamus ☞182—Peremptory mandate, issued before formal judgment was filed but after oral pronouncement, held not prematurely issued (Code Civ. Proc. § 1095).

Peremptory writ of mandate, issued before formal written judgment was filed but after oral pronouncement of judgment, *held* not prematurely issued, in view of Code Civ. Proc. § 1095, providing that after judgment had been given the peremptory writ must issue without delay; sections 577-680½ concerning trial and judgment in civil actions being inapplicable.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action for a writ of mandate by Isadore Weisman and others against the Board of Building and Safety Commissioners of Los Angeles and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Jess E. Stephens, City Atty., and Charles B. MacCoy and Herman Mohr, Deputy City Attys., all of Los Angeles, for appellants.

John J. Dillon, of Culver City, for respondents.

CRAIG, Acting P. J. The respondents herein petitioned the superior court for an order to compel the board of building and safety commissioners of the city of Los Angeles and the chief inspector of that board to issue a permit to erect a building on certain real property situated in said city. Appellants, although given legal notice, made no appearance by answer or demurrer. However, at the time of the hearing on the petition, through their attorney, the city attorney of Los Angeles, they appeared in open court and stated that they had no defense. The court then duly viewed the papers, received evidence on the hearing of the alternative writ which had previously been issued, and gave judgment for the issuance of a peremptory writ as prayed. This hearing took place on the 11th day of August, 1925, and the court announced its judgment at that time. The formal judgment was not filed until the 19th day of the same month. In the meantime, and on the 17th day of August, appellants served and filed their notice of appeal "from the judgment, order, and decree, and from the whole thereof rendered in the above-entitled court on the 11th day of August, 1925, in favor of the plaintiffs in said action and against the said defendants."

[1] It is claimed that this judgment was granted by default. This obviously is not true. The judgment recites, and there is nothing in the record to impeach the statement, that the court reviewed the petition and "heard and considered the evidence." Furthermore, appellant appeared by attorney, and judgment was rendered upon the hearing as prescribed by section 1095 of the Code of Civil Procedure. *Pereria v. Wallace*, 129 Cal. 397, 62 P. 61.

Appellants quote authority that mandamus is not to be permitted to compel the performance of acts which could not legally be done. There is nothing in the record to show that such would be the case in this instance. The same answer makes it unnecessary to consider cases to the effect that mandamus will not issue where its result would be inequitable or unjust.

[2] Appellants argue that an ordinance is not a law, within the meaning of section 1085 of the Code of Civil Procedure, but this has

no foundation. It was decided to the contrary in the early case of *Pimental v. San Francisco*, 21 Cal. 351. The same rule has been recognized in subsequent cases, among them *City of San Luis Obispo v. Fitzgerald*, 126 Cal. 279, 58 P. 699.

Finally, appellants argue that the peremptory writ of mandate was unlawfully and improvidently issued, because it preceded the entry of the formal judgment on the 19th day of August. Appellants themselves have treated the judgment as having been made on the 11th day of August, for their notice of appeal expressly states that it is taken from the judgment rendered on that day.

Appellants' argument in this behalf has no bearing upon the merits of the appeal. If the order made on the 11th of August directing the issuance of a peremptory writ is appealable and this appeal be regarded as taken therefrom, it is apparent that the complaint concerning the issuance of the peremptory writ does not affect the regularity or legality of the judgment. If, for the sake of argument, we accept appellants' contention that the peremptory writ was issued prematurely, the judgment would not be invalid because subsequently to its announcement the peremptory writ was thus improvidently issued; the writ might be quashed, but the judgment would be unaffected. On the other hand, if the only appealable judgment herein is the written one based upon the court's findings and entered on August 19, and if this appeal under the authority of *Estate of Stone*, 173 Cal. 675, 161 P. 258, be regarded as taken from this latter judgment, it would remain unimpaired by reason of the fact, if it be one, that the peremptory writ was issued too soon. In a word, neither the final judgment entered on August 19, nor the decision of the court announced on August 11, can be involved through an attack upon the writ of mandamus.

[3] There is a further reason why appellants' argument in this behalf has no merit. It is provided in section 1095 of the Code of Civil Procedure that in mandate proceedings, if judgment is given for the applicant, a peremptory writ must issue without delay. The purpose of mandamus is to provide a speedy remedy. The judgment was given; that is, rendered, on August 11th. It is mandatory that the peremptory writ issue "without delay"; that is, immediately. In this respect the practice provided by law in mandamus differs from that in civil actions, hence the sections of title 8 of part 2 of the Code of Civil Procedure do not control, and since the decision of a court when announced is a judgment (*Schurtz v. Romer*, 81 Cal. 244, 22 P. 657), a peremptory writ may and should issue immediately upon its rendition.

The judgment is affirmed.

I concur: THOMPSON, J.

COLLIER, Justice pro tem. I concur in the judgment of affirmance. "It has been held by this court that there is a material difference between the *rendition* and the *entry* of a judgment. A judgment is rendered when it is announced by the court. It is entered when it is actually entered in the judgment book." *Schurtz v. Romer*, 81 Cal. 244, 247, 22 P. 657.

"The enforcement of a judgment does not depend upon its entry or docketing. These are merely ministerial acts. * * *" *L. A. County Bank v. Raynor*, 61 Cal. 145, 147. See, also, *Otto v. Long*, 144 Cal. 144, 146, 77 P. 885, *Janes v. Ballard*, 107 Cal. 130, 132, 40 P. 108.

85 Cal. App. 475

BLACKLEDGE v. McINTOSH. (Civ. 5957.)

District Court of Appeal, First District, Division 2, California. Sept. 19, 1927.

Hearing Denied by Supreme Court
Nov. 17, 1927.

1. Appeal and error $\S$ 1011(1)—Trial court's finding on conflicting evidence on issue of sufficiency of delivery of deeds to pass title to defendants held conclusive on appeal.

In action for accounting and to cancel deeds, evidence that grantor after execution of deeds to daughter paid taxes, appeared in action involving one of pieces of property as legal owner, and made repairs and improvements upon another piece of property, and made returns for assessment purposes as legal owner, was not conclusive evidence that she retained title, but merely raised conflict of evidence on the issue of the sufficiency of delivery of deeds to pass title to defendants, as to which trial court's finding supported by evidence was conclusive on appeal.

2. Deeds $\S$ 208(3)—Evidence that mother gave daughter deeds held to show delivery thereof with intent to pass title.

In action for accounting and to cancel deeds, evidence that mother gave daughter deeds held to justify finding that there was sufficient delivery to pass title.

3. Appeal and error $\S$ 842(8)—Intent of grantor in executing and giving deeds to daughter held question for trial court.

In action for accounting and to cancel deeds, intent of grantor in executing and giving deeds to daughter was question of fact for trial court sitting without jury.

4. Deeds $\S$ 200—Testimony of son that deeds were in mother's possession at death held admissible only to assist court in determining mother's intention in giving deeds to daughter.

In action for accounting and to cancel deeds, testimony of son that deeds were in mother's possession at her death was only admissible to assist court, sitting as jury, in determining intention of mother at time she handed deeds to daughter, grantee therein.

5. Deeds $\S$ 179—Redelivery to grantor does not affect title by previous delivery.

Evidence of possession by grantor of deeds at time of her death could not defeat title conveyed if deeds had been effectively delivered.

6. Deeds $\S$ 60—Grantor's delivery of deed, absolute in form, to grantee personally, vests absolute title in grantee (Civ. Code, $\S$ 1056).

Under Civ. Code, $\S$ 1056, delivery by grantor of deed, absolute in form, to grantee personally, vests title in grantee, discharged of any condition.

7. Deeds $\S$ 60—Oral agreement that absolute deeds by mother to daughter should not be recorded until after mother's death, or that daughter should only have rents or income, held not to affect delivery (Civ. Code, $\S$ 1056).

Under Civ. Code, $\S$ 1056, any oral agreement or understanding of mother that her deeds, absolute in form, delivered to daughter, should not be recorded until after mother's death, or that daughter should only have rents or income of property so long as she remained single and was in need thereof, was immaterial as to effect upon delivery of deeds.

8. Evidence $\S$ 417(17)—Testimony of son that absolute deeds from mother to daughter were in mother's possession at her death held inadmissible to affect delivery (Civ. Code, $\S$ 1056).

Under Civ. Code, $\S$ 1056, oral testimony of son that at mother's death deeds, absolute in form, executed and delivered by her to daughter, were in mother's possession, was improperly admitted, it having effect of varying expressed terms of deeds.

9. Evidence $\S$ 385—Except as to showing consideration for deed, legal effect of written instrument cannot be varied by parol evidence (Code Civ. Proc. $\S$ 1962, subd. 2).

Legal effect of written instrument cannot be varied or defeated in whole or part by parol evidence, except that parol evidence, under Code Civ. Proc. $\S$ 1962, subd. 2, is admissible to show true consideration of deed.

10. Deeds $\S$ 82—Deed, absolute in form, from mother to daughter, held to pass title without recording (Civ. Code, $\S$ 1213, 1217).

Since recordation of deed has no other function than notice to world, and, under Civ. Code, $\S$ 1213, 1217, unrecorded deed is valid as between parties thereto and those with notice, deeds, absolute in form, from mother to daughter, delivered to daughter, would pass title without recording.

11. Deeds $\S$ 124(1)—Deeds, absolute in form, from mother to daughter, passed fee-simple title, giving daughter absolute right to rents and profits (Civ. Code, $\S$ 697, 762, 1105).

Under Civ. Code, $\S$ 697, 762, 1105, deeds, absolute in form, from mother to daughter, delivered to daughter personally, passed fee-simple title, giving daughter absolute right to all rents and profits of property conveyed.

12. Appeal and error ⇐927(3)—In action for accounting as to personal property, in absence of showing disposition of such property, and appellant's complaint granting nonsuit will be assumed proper on appeal.

In action for accounting as to personal property and for cancellation of deeds, where appellant made no contention as to correctness of order granting nonsuit as to personal property, and no evidence appeared in record touching disposition of personal property, rule granting nonsuit will be assumed correct on appeal.

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Two actions by Gertrude R. Blackledge, plaintiff, as administratrix of the estate of Ellen M. McIntosh, deceased, against May J. McIntosh, to cancel deeds and for an accounting, tried together. From a judgment of nonsuit as to accounting for personal property and for defendant as to the validity of the deeds, plaintiff appeals. Affirmed.

John E. Carson and Munson T. Case, both of Los Angeles, for appellant.

Milton M. Cohen and Jerome H. Kann, both of Los Angeles, for respondent.

PRESTON, Justice pro tem. Two appeals are here presented under one record, an appeal by plaintiff from a judgment of nonsuit in one case, and from a judgment in favor of defendant in the other.

Plaintiff brought one action as administratrix of the estate of her mother, Ellen M. McIntosh, deceased, to cancel certain deeds made by her mother to her sister, May J. McIntosh, the defendant. Plaintiff also brought another action, in the same capacity, against defendant for an accounting for certain personal property and the proceeds of the sale of certain other real property, which plaintiff alleged belonged to the estate of her mother, Ellen M. McIntosh, which had been sold by defendant and the proceeds retained by defendant.

The two cases were tried together by the court, sitting without a jury, with the result above mentioned.

This appeal involves the delivery of four deeds signed and acknowledged by Ellen M. McIntosh, as grantor, to May J. McIntosh, as grantee. The facts are briefly these: Ellen M. McIntosh was a widow, and since the death of her husband, which occurred some time prior to November, 1912, had lived with her unmarried daughter, May J. McIntosh, the defendant, and grantee in the deeds in question, in the city of Los Angeles. Ellen M. McIntosh owned several pieces of real property in the city of Los Angeles and one piece of real property in the city of Redlands, all of which she acquired by deed from her husband. She also owned an automobile, household furniture, and had some money in a savings bank.

Mrs. McIntosh had two other daughters, Gertrude R. Blackledge, the plaintiff herein, and Nettie A. Hewitt, and a son, Carl McIntosh. These three children were all married and resided in different places in southern California, outside the city of Los Angeles. Mrs. McIntosh was at all times on intimate and friendly relations with all of her children. All the children, likewise, had great love and respect for their mother. The children were also on intimate and friendly relations with one another. Mrs. McIntosh was greatly affected by the death of her husband and seemed to worry a great deal for fear she would have to live alone the balance of her life. All her children had married and left her home, except her daughter, May J. McIntosh, the defendant. Mrs. McIntosh stated to defendant within a week or two after her husband's death that if she (defendant) would remain single and live with her as long as she lived she would give her the property. Mrs. McIntosh made the same or similar statements to defendant on several other occasions, and she also stated to one or two of her intimate friends that she was going to deed the property to defendant. She also stated to another friend that she had deeded the home in which she and defendant were residing to defendant.

On the 8th of November, 1912, Mrs. McIntosh signed and acknowledged, before a notary public by the name of Schneider, three grant deeds to her daughter, May J. McIntosh, the defendant, purporting to convey to said May J. McIntosh three separate parcels of real estate in the city of Los Angeles. At the same time and before the same notary public, Mrs. McIntosh also signed and acknowledged a grant deed to her daughter, Nettie A. Hewitt, conveying to her the Redlands property.

The only testimony in the record relative to the actual manual tradition of these three deeds by Ellen M. McIntosh to the defendant is the testimony of said May J. McIntosh. She testified as follows:

"My mother brought them home (the three deeds) from Mr. Schneider's office. She said, 'Here, May, are the deeds that I promised you, and I want you to look them over.' I looked them over, and she said, 'What about them?' I said, 'They look all right to me.' Then I said, 'What shall I do with them?' And she said, 'Take good care of them, and on my death I want you to record them.' She handed them to me. * * * She had promised me these very soon after my father's death, within a week or two, and I think she was afraid she might be left all alone because she told me that if I cared to stay with her that she would give me deeds to the property. * * * I don't remember the time of day she gave me these papers, but I think it was around noon. I put them in the desk drawer, the desk that was in the living room. * * * It was a regular roll top desk. The drawer in which I put the papers was what

we sort of used as a business drawer; I had mining stock and return checks and a few letters in that drawer. My mother did not tell me to deposit these deeds in any particular drawer or in any particular place. She says, 'It doesn't matter where you put them just so you take care of them.' We were living then at 4500 Melbourne avenue. The deeds remained there until I told my brother to take them out after her death. We lived in the Melbourne avenue property about nine months after the date on which I say I got the deeds from my mother. From there we went to 1030 Hyperion avenue. * * * When we moved to 1030 Hyperion avenue we moved the desk into Mamma's bedroom. * * * It remained there until after her death."

On June 5, 1913, Mrs. McIntosh signed and acknowledged another grant deed before the same notary public, purporting to convey to May J. McIntosh another piece of property in the city of Los Angeles. This last deed covered the home in which she and the defendant were at that time living, and with reference to the actual manual tradition of this deed defendant was also the only witness and her testimony was as follows:

"Several months later (meaning after she received the other deeds), she (her mother) came home with another one and she gave it to me and told me to put it with the other."

This testimony given by defendant concerning delivery of the deeds in question was corroborated to some extent by the witness Glen Williams, a friend and neighbor of Mrs. McIntosh. He testified that he had two different conversations with Mrs. Ellen M. McIntosh. In one of them Mrs. McIntosh said to him:

"I suppose that a lot of friends and neighbors are wondering why May does not get married, I am really responsible for May not getting married. I told May that if she would stay single as long as I lived that I would provide further."

In the other conversation Mr. Williams stated to Mrs. McIntosh that she had "a nice home," and Mrs. McIntosh replied:

"Yes; don't you think May ought to be happy with this? I have deeded it to her."

Ruth B. Hall, a friend and acquaintance of Mrs. McIntosh, testified to having several conversations with Mrs. McIntosh with reference to the property and with reference to the defendant. In one of these conversations, which took place about a year before Mrs. McIntosh died, Mrs. McIntosh stated to Miss Hall that "she felt responsible for having made Miss McIntosh (the defendant) dependent upon her for a living, and she had made arrangements so that she (May McIntosh) would not be dependent on others."

Nettie A. Hewitt, a daughter of Mrs. McIntosh, testified that she had a conversation with her mother prior to 1919, in which her mother stated:

"I don't know why I am telling you this Nettie, but I have just been to Mr. Schneider and made a deed to the Redlands property to you. The other deeds are in May's name and I have talked the matter over thoroughly with Carl."

Carl McIntosh, the son of Ellen M. McIntosh, deceased, was a witness for plaintiff and testified as follows:

"The signing or execution of these deeds first came to my knowledge about 18 months previous to my mother's death. * * * My mother said to me, 'Sonny, if anything should happen to me take those deeds and record them. I want May to have the income from these different properties. So long as she needs it and remains single and so long as she lives. * * * These deeds came into my possession on the occasion of my mother's death. * * * I would say 3 or 4 days thereafter. I got them out of the drawer of the desk in her own private room. I knew they were there, because she had previously told me they were there. She told me this from time to time back as far as 18 months previous to her death and right down to within a very few weeks, possibly 2 or 3 weeks, immediately before her death. * * * I took the deeds from this drawer, in which my mother had indicated they were, and proceeded to place them in escrow with the Title Insurance Company in Los Angeles, with instructions to record the deeds. * * *"

The evidence in this case also shows that Mrs. McIntosh, after the execution of these deeds, paid the taxes upon the property herself and appeared in an action involving one of the pieces of property as legal owner thereof; collected rents from some of the properties; made repairs and improvements upon another piece of the property; made returns to the assessor for assessment purposes as the legal owner of the property, etc.

[1] All these facts, while tending to show a continuing claim of title by Mrs. McIntosh to the property theretofore conveyed to defendant, were merely circumstances to be weighed by the trial court against the affirmative evidence of delivery given by defendant. These facts, taken with the other facts testified to by defendant and her witnesses, did no more than raise a conflict of evidence on the vital issue of the sufficiency of the delivery of the deeds to pass title to the defendant, and, the trial court having resolved that conflict in favor of the defendant, such a finding will not be disturbed by this court where there is any substantial evidence to support it. *Hotaling v. Hotaling*, 193 Cal. 368, 224 P. 455; *McCarthy v. Security Trust*, etc., Bank, 188 Cal. 233, 204 P. 818; *Follmer v. Rohrer*, 158 Cal. 757, 112 P. 544; *Avery v. Avery*, 42 Cal. App. 101, 183 P. 453.

The legal requirements to effect a valid delivery of a deed has often been stated by the Supreme Court of this state. In *Williams v. Kidd*, 170 Cal. 638, 151 P. 3 (Ann. Cas. 1916E, 703), the Supreme Court states the rule as follows:

"It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title, and the true test under which delivery is to be determined is in ascertaining whether in parting with the possession of the conveyance the grantor intended thereby to divest himself of title. If he did, there was an effective delivery of the deed. If not, there was no delivery. The solution of this question is grounded entirely on the intention of the grantor, and this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question."

See, also, *Bury v. Young*, 98 Cal. 451, 33 P. 338, 35 Am. St. Rep. 186; *Kenniff v. Caulfield*, 140 Cal. 34, 73 P. 503; *Estate of Cornelius*, 151 Cal. 552, 91 P. 329; *Follmer v. Rohrer*, 158 Cal. 757, 112 P. 544; *Reed v. Smith*, 125 Cal. 491, 58 P. 139; *Black v. Sharkey*, 104 Cal. 279, 37 P. 939; *Hibberd v. Smith*, 67 Cal. 547, 4 P. 473, 8 P. 46, 56 Am. Rep. 726; *Denis v. Velati*, 96 Cal. 223, 31 P. 1; *Hotaling v. Hotaling*, 193 Cal. 382, 224 P. 455.

[2-6] We think the evidence in this case meets all the requirements of the law and that it amply justifies the finding of the trial court, that there was a sufficient delivery of the deeds to pass title to defendant, when all the facts and circumstances of the case are considered. What the intent of Ellen M. McIntosh was in handing over the executed deeds to her daughter was a question of fact for the trial court under all the circumstances of the transaction, and the finding of the trial court that it was the intent of Mrs. McIntosh to pass an absolute title was a fair inference from all the facts. Appellant places great reliance on the testimony of Carl McIntosh to establish a want of intention on the part of Mrs. McIntosh to convey an absolute title to the property to May J. McIntosh. In the first place, the testimony of Carl McIntosh that the deeds were in the possession of his mother at the time of her death is flatly contradicted by the defendant. In the second place, Carl McIntosh never knew that his mother had made the deeds until about 18 months before her death, which was more than 6 years after they were executed and given to defendant. This evidence could only be admissible for the purpose of assisting the trial court in determining the intention of Ellen M. McIntosh at the very time she handed the deeds to defendant, and could in no way vary or defeat the title conveyed, if the deeds had theretofore been effectively delivered. The law is well settled, where a deed, absolute in form, is delivered by the grantor to the grantee personally, title vests in the grantee, discharged of any condition on which the delivery was made. Section 1056 of the Civil Code provides:

"A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as

such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made."

In *Mowry v. Heney*, 86 Cal. 471, 25 P. 17, the court said:

"Here was an absolute deed to the property delivered to the grantee. Its legal effect was to vest in the plaintiff the title to the property, free from any conditions."

In *Devlin on Deeds*, section 314, it is said:

"A deed cannot be delivered to the grantee as an escrow. If it be delivered to him it becomes an operative deed, freed from any condition not expressed in the deed. It is and will vest the title in him, although this may be contrary to the intention of the parties."

See, also, *Hammond v. McCollough*, 159 Cal. 639, 115 P. 216; *Bias v. Reed*, 169 Cal. 33, 145 P. 516; *Elliott v. Merchants' Bank & Trust Co.*, 21 Cal. App. 536, 132 P. 280; *Lewis v. Brown*, 22 Cal. App. 38, 133 P. 331; *Riley v. North Star Mining Co.*, 152 Cal. 549, 93 P. 194; *Avery v. Avery*, *supra*.

[7-11] The foregoing decisions afford ample authority for the holding that any oral agreement or understanding that Mrs. McIntosh may have had with her daughter that the deeds should not be recorded until after her death, or that the daughter should only have the rents or income from the property so long as she remains single and was in need of such income, is immaterial and could have no effect upon the delivery, because the deeds were absolute in form and could not be delivered to the grantee conditionally. Delivery to her is necessarily absolute, and the instruments took effect immediately, discharged of any condition on which delivery was made, not expressed in the instruments themselves. The effect of the evidence of Carl McIntosh would be to vary the express terms of the deeds by parol evidence. Evidence of this character cannot be allowed for any such purpose. The legal effect of a written instrument cannot be varied or defeated in whole or in part by parol evidence (*Hendrick v. Crowley*, 31 Cal. 475; *Mowry v. Heney*, *supra*; *Winchester v. Winchester*, 175 Cal. 391, 165 P. 965), except, of course, that parol evidence is admissible to show the true consideration in a deed (section 1962, Code Civ. Proc. subd. 2).

The above evidence, however, was not offered for the purpose of showing the true consideration. The deeds would pass title without recording. Recordation has no other function than that of notice to the world; and an unrecorded deed is valid as between the parties thereto and those who have notice thereof. Sections 1213 and 1217, Civ. Code; *Burkett v. Doty*, 32 Cal. App. 337, 162 P. 1042; *Avery v. Avery*, *supra*; *Lewis v. Brown*, *supra*. Therefore there is no merit in the contention of appellant that Mrs. McIntosh only intended that her daughter acquire

a qualified estate in the property. No such intention is expressed in the deeds, and we have seen the deeds were grant deeds absolute in form and delivered by the grantor to the grantee personally. The legal effect of such a delivery is to pass a fee-simple title to the grantee. Sections 697, 762, and 1105, Civ. Code. With this fee-simple estate passed also the present absolute right to all the rents and profits of the property conveyed, free from any claim of the grantor thereto.

The cases relied upon by appellant only reaffirm the well-established rule that a deed must be delivered with the intention on the part of the grantor to pass a present irrevocable title to the property conveyed to be an effective delivery and whether such intention was shown depends upon all the facts and circumstances of the particular case.

We do not deem it necessary to discuss in detail the further circumstances pointed out by appellant, which she claims support her contention that Mrs. McIntosh never intended to convey to her daughter an absolute title to the property. As we have already pointed out, these were mere circumstances to be weighed by the trial court against the affirmative evidence of delivery.

[12] No contention is made by appellant as to the correctness of the trial court's order in granting the nonsuit as to the personal property, and we are unable to find any evidence in the record touching the disposition of the personal property in question, so we must assume that the court's ruling granting the nonsuit was correct.

We think the judgment in both cases should be affirmed, and it is so ordered.

We concur: KOFORD, P. J.; STURTEVANT, J.

85 Cal. App. 440

CRINELLA v. NORTHWESTERN PAC. R. CO. (Civ. 5836.)

District Court of Appeal, First District, Division 2, California, Sept. 14, 1927.

1. Carriers $\S$ 134—That no claim was filed held not to affect rule that showing delivery to carrier in good condition and to consignee in deteriorated condition constitutes prima facie case (Bills of Lading Act [49 USCA §§ 81-124]; Carmack Amendment, as amended by Cummins' Amendment [49 USCA § 20, pars. 11, 12]).

Provisions in bill of lading provided for or permitted by Bills of Lading Act (49 USCA §§ 31-124 [U. S. Comp. St. §§ 8604aaa-8604w]), and Carmack Amendment, as amended by Cummins' Amendment (49 USCA § 20, pars. 11, 12 [U. S. Comp. St. §§ 8604a, 8604aa]), held not to imply that the fact that no claim was filed for damage to a shipment changes the rule that showing delivery to the carrier in good condi-

tion and delivery by the carrier to the consignee in a deteriorated condition constitutes a prima facie case.

2. Evidence $\S$ 159—Asking shipper if he had filed claim held not to call for secondary evidence.

In action against railroad for damage to shipment, asking shipper if he had filed claim held not to call for secondary evidence, since it was not the contents of the claim which were desired, but merely whether or not one had been filed.

3. Appeal and error $\S$ 882(21)—Appellant cannot claim record lacks material evidence erroneously kept out by his objection.

Appellant cannot claim that the record is deficient in lacking material evidence which had been erroneously kept out by his objection on the ground that it was immaterial, irrelevant, and incompetent.

4. Appeal and error $\S$ 231(1)—Objections must be specific, especially where they may be obviated.

Objections must be specific, especially where they are of such a nature that they may be obviated when attention is called to the defective nature of the testimony offered.

5. Appeal and error $\S$ 232(2)—Where appellant objected to evidence because it was immaterial, irrelevant, and incompetent, he cannot argue on appeal it was inadmissible because secondary evidence.

Where appellant had objected to a question because he claimed it called for evidence which was immaterial, irrelevant, and incompetent, he cannot argue on appeal that such evidence was inadmissible because it was secondary evidence, since objection to offer of secondary evidence must be specific.

6. Carriers $\S$ 136—Whether shipment of grapes was unreasonably delayed held for jury.

In action against carrier for damage to shipment of grapes, whether there was unreasonable delay held for jury.

7. Carriers $\S$ 136—Whether shipment of grapes was properly iced held for jury.

In action against carrier for damage to shipment of grapes, whether the refrigerator cars in which they were shipped were properly iced held for jury.

8. Evidence $\S$ 67(3)—Condition of shipment of grapes at time of arrival held inferable from condition on third day following.

Condition of a shipment of grapes of a highly perishable nature at the time of arrival at destination could be inferred from its condition on the third day following.

9. Carriers $\S$ 89—That goods are partially damaged does not justify consignee in refusing delivery.

Consignee must accept delivery of goods, which are partially damaged, in order to minimize the damage.

10. Carriers ⇐89—Where shipment is damaged to extent that it is practically valueless, consignee may reject.

Where a shipment is damaged to the extent that it is practically valueless, considering the expense of acceptance and use and the purpose for which it was intended, the consignee may reject.

11. Carriers ⇐86—Where shipment offered consignee was apparently damaged, but from outward appearances extent of damage could not be known, consignee had right of inspection.

Where a shipment of grapes offered for delivery by the carrier to the consignee was apparently damaged, but from outward appearances it was impossible to know the extent of the damage, *held*, that the consignee was entitled to inspect the goods before accepting or rejecting them.

12. Carriers ⇐114—Where tendered delivery without inspection was insufficient discharge of carrier's obligation, its liability as common carrier continued until inspection.

Where the tendered delivery to the consignee of a carload of grapes without inspection was an insufficient discharge of the carrier's obligation, its liability thereafter until inspection continues as that of a common carrier, and not merely as that of a bailee.

13. Carriers ⇐86, 87—Duties of carrier to deliver and of consignee to accept shipment are reciprocal (Bills of Lading Act, § 8 [49 USCA § 88]).

The duty of a carrier to deliver a shipment and the duty of the consignee to accept are reciprocal, notwithstanding that Bills of Lading Act, § 8 (49 USCA § 88 [U. S. Comp. St. § 8604dd]), has no provisions concerning consignee's duty to accept.

14. Carriers ⇐86—That shipper and consignee of grapes were joint adventurers held not to affect consignee's right to inspect.

Fact that shipper and consignee were interested in a shipment of grapes as joint adventurers *held* not to make consignee's rights different than rights of ordinary consignee in respect to right of inspection.

15. Carriers ⇐137—Modification of instruction, that if consignee refused delivery carrier was not liable for resulting damage, by adding "without lawful reason" after "refused delivery," held not indefinite (Bills of Lading Act, § 8 [49 USCA § 88]).

Modification of instruction offered by carrier, that if consignee refused delivery carrier was not liable for resulting damage, by adding "without lawful reason" after the expression "refused to accept delivery," *held* not abstract and indefinite, notwithstanding there was no further instruction as to what constituted a lawful reason, especially where language followed words of Bills of Lading Act, § 8 (49 USCA § 88 [U. S. Comp. St. § 8604dd]), concerning carrier's duty to deliver in absence of "some lawful excuse."

16. Carriers ⇐136—Market value of shipment of grapes at point of destination held for jury.

In action against railroad for damage to a shipment of grapes, market value of the grapes at point of destination *held* question for jury.

17. Trial ⇐260(1)—Where refused requested instruction was given in substance, there was no error.

Where refused requested instruction was covered, in substance, by instruction given, there was no error.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Peter Crinella against the Northwestern Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Stanley Moore and R. W. Palmer, both of San Francisco, and Geary & Geary, of Santa Rosa, for appellant.

Emmett I. Donohue, of Challis, Idaho, and G. P. Hall, of Petaluma, for respondent.

KOFORD, P. J. This is an action by a shipper against a common carrier for damages for negligence in transporting two carloads of grapes from Fulton, Cal., to Buhl, Minn. The negligence alleged in the complaint was unusual delay and failure to properly ice the cars in transit, resulting in decay of the shipments. The trial was had by a jury. The verdict was for the plaintiff for \$356.44 on the first car, and \$1,800.13 on the second car. The defendant appeals from the judgment.

The main contention of appellant is that plaintiff failed to prove that he filed a claim against the common carrier for the damage before bringing this action. It contends that where no claim for loss or damage has been filed, the usual presumption of negligence upon the part of the carrier does not exist, and from this (confusing presumption and inference, as it seems to us) it argues that the inference of the carrier's negligence and liability is not to be made merely from the proof of the shipment of the grapes in good condition and the arrival in bad condition, together with unreasonable delay, and that respondent must actually prove the negligent acts causing the damage. We quote from appellant's brief as follows:

"It is conceded that had respondent proved the filing of a claim with appellant covering the cars comprising the subject-matter of his action, there would have been incumbent upon him to prove: (1) That he delivered the grapes to the carrier in good condition; and (2) that they were delivered by the carrier to the consignee in a deteriorated condition. It would then have been the burden of the appellant to have proved that it had not been guilty of negligence in the transport of the cars, but that any damage thereto was attributable to

either of the following causes: (1) The act of God. (2) The public enemy. (3) Public authority. (4) Inherent nature of the goods. However, by the failure of respondent to prove that he had filed a claim with appellant for damages to cars Nos. 1 and 2, the usual presumption of negligence upon the part of the carrier does not exist, and had no proper place in the consideration by court or jury of the instant case."

[1] It is not the appellant's contention that the shipper lost his right of action entirely by a failure to file a claim in writing, but that where no claim is filed the requirements of plaintiff's proof are different; and that here, in the absence of a claim filed, the plaintiff's evidence was insufficient to support a finding of negligence and, also, that the court's instructions given to the jury concerning a prima facie case were erroneous. These contentions are founded upon language used in the case of *Barrett v. Van Pelt*, 268 U. S. 85, 45 S. Ct. 437, 69 L. Ed. 857, interpreting language "similar to the provisions of section 2b of the bill of lading or shipping receipt issued to the plaintiff herein. The section of the bill of lading referred to provides that claims for loss, damage or injury to property must be made within certain specified times, "provided that, if such loss, damage or injury was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of the claim or filing of claims shall be required as a condition precedent to recovery." These provisions of the bill of lading are provided for or permitted by acts of Congress and amendments thereto. *Cummins' Amendment* amending part of section 7 of *Carmack Amendment*, U. S. Stats. at Large, vol. 38, p. 1196; *Carmack Amendment* to the Act to Regulate Commerce, U. S. Stats. at Large, vol. 34, pp. 584, 595 (49 USCA § 20, pars. 11, 12; U. S. Comp. St. §§ 8604a, 8604aa); *Bills of Lading Act*, U. S. Stats. at Large, vol. 39, p. 538 (49 USCA §§ 81-124; U. S. Comp. St. §§ 8604aaa-8604w).

This provision of the bill of lading and the law providing for it received interpretation in *Barrett v. Van Pelt*, supra, the effect of which was to eliminate the comma after the word "unloaded" and to strike out the final *d* in the word damaged, thereby clarifying the doubtful grammatical meaning of the proviso. The court thus held this proviso to mean that, in case the claim was based upon carelessness or negligence in respect to any of the things mentioned in the proviso, then no claim need be filed as a condition precedent to an action of damages against the carrier.

The authority relied upon by appellant does not have the sweeping effect for which it contends. While it may have the effect of holding that where no claim has been filed, an action against a carrier based upon negligence does not enjoy the benefit of presumed

negligence, or liability without proved negligence, nevertheless, it does not purport to change the rule concerning what constitutes a prima facie case against a carrier in case of actual negligence. This question received further consideration by the United States Supreme Court in *Chesapeake & Ohio R. Co. v. Thompson Manufacturing Co.*, 270 U. S. 416, 46 S. Ct. 318, 70 L. Ed. 659. What is there said disposes of the greater part of the appellant's contentions herein. We quote:

"It is sometimes said that the basis of the carrier's liability for loss of goods or for their damage in transit is 'presumed negligence.' *Hall & Long v. Railroad Companies* (80 U. S.) 13 Wall. 367, 372 (20 L. Ed. 594). But the so-called presumption is not a true presumption, since it cannot be rebutted, and the statement itself is only another way of stating the rule of substantive law that a carrier is liable for a failure to transport safely goods intrusted to its care, unless the loss or damage was due to one of the specified causes [citing authorities]. * * *

"There is no language in the statute from which a purpose may be inferred to vary or limit the common-law rules governing proof of negligence as a fact in issue, and the shipper may follow these rules when he seeks to show that no notice of claim was necessary.

"The respondent therefore had the burden of proving the carrier's negligence as one of the facts essential to recovery. When he introduced evidence to show delivery of the shipment to the carrier in good condition and its delivery to the consignee in bad condition, the petitioner became subject to the rule applicable to all bailees, that such evidence makes out a prima facie case of negligence. *Miles v. International Hotel Co.*, 289 Ill. 320 [124 N. E. 599]; *Miller v. Miloslawsky*, 153 Iowa, 135 [133 N. W. 357]; *Dinsmore v. Abbott*, 89 Me. 373 [36 A. 621]; *Railroad Co. v. Hughes*, 94 Miss. 242, 246 [47 So. 662, 22 L. R. A. (N. S.) 975]; *Hildebrand v. Carroll*, 106 Wis. 324 [82 N. W. 145, 80 Am. St. Rep. 29]. The effect of the respondent's evidence was, we think, to make a prima facie case for the jury."

The instructions complained of by appellant are supported by authority and are not contrary to the doctrine of *Barrett v. Van Pelt*, supra. These instructions were to the effect that proof of damage in transit and unusual delay in transit, or either, shifted the burden of proof to defendant to show its freedom from negligence, and also to the effect that it was incumbent upon the carrier to meet plaintiff's proof of injury in transit by showing that the injury resulted from one of the causes of liability expressly excepted in the shipping receipt.

[2-5] Moreover, the record is not clear that the plaintiff did not file a claim. In this case the plaintiff, while a witness, was asked if he had filed a claim against the defendant. He answered "Yes" before the objection was made. The objection was this—"immaterial, irrelevant, and incompetent." This objection was sustained by the court, although it

should have been overruled. The question, as put, did not call for secondary evidence as would be the case if the question had called for the contents of the claim instead of only a response as to whether or not one had been filed. The objection was made by counsel for the defendant and appellant, and it would be unjust to allow appellant to claim that the evidence which he objected to as immaterial is now material, or to claim the record is deficient in lacking what it kept out by this objection. Upon this point appellant attempts to justify the court in sustaining this objection by urging that the question was objectionable as calling for secondary evidence in the absence of preliminary proof showing that the best evidence was not available. We are not able to agree with this. Objections must be specific. Especially so where they are of such a nature that they may be obviated when attention is called to the defective nature of the testimony offered. This question with respect to the offer of secondary evidence against a general objection has been frequently passed upon. *Eversdon v. Mayhew*, 85 Cal. 1, 21 P. 431, 24 P. 382; *St. Vincent's Institution, etc., v. Davis*, 129 Cal. 20, 61 P. 477; *People v. Louie Foo*, 112 Cal. 23, 44 P. 453; *Banister v. Campbell*, 138 Cal. 460, 71 P. 504, 703; *Root v. Conlin*, 65 Cal. App. 241, 223 P. 1023.

[6] The questions raised by appellant relating to the insufficiency of the evidence to prove negligent icing or unreasonable delay in transit are perhaps sufficiently disposed of by what we have already said, but respondent, instead of relying on what is said in the quoted case to constitute a *prima facie* case, went much further in proving his case. In producing his testimony, he substantially assumed the same character of burden of proof contended for by appellant. The first car took 13 days and 20 hours to arrive, and the second 17 days and 17 hours to arrive at destination. The testimony concerning the customary or usual time consumed in this trip varied. Most witnesses put it around 13 days, but some put it as low as 10 or 11 days. There was sufficient evidence to entitle the jury to find that there had been an unreasonable delay.

[7] Negligence was also predicated upon the failure of the appellant to properly ice the refrigerator cars in which the grapes were shipped, independently of the alleged delay. Negligence in respect to either delay or icing alone would support the verdict. The testimony would support the inference that each of the cars went either 4 or 5 days without icing. Expert testimony was received of the probable effect of the failure to ice under different conditions. The appellant's car record showing a record of the transit of the cars from place to place on their journey, and also appellant's icing record, which purported to show the times, places, and manner of the re-icing of the cars were

received in evidence. A comparison of these two records showed glaring discrepancies, indicating, in at least one instance, that a car was said to have been iced at a station through which it did not pass. The cars were not iced at all regular icing stations as provided in the bill of lading.

Appellant claims error by reason of the following facts: Upon the arrival at destination of the second car of grapes, the consignee rejected it. At the trial he gave two reasons for this. First, that he was not permitted to inspect the contents of the car by the local agent of the carrier; second, because he believed from his experience with the first carload of grapes received, and on account of the long delay in the arrival of this second carload, that the shipment would be too much deteriorated for use. On the third day after the arrival of this car at destination the agent, having communicated with his superiors or with the station where the shipment originated, did give permission to the consignee to inspect. Thereupon the consignee inspected and again rejected the shipment, this time signing a written rejection. Appellant claims that the testimony therefore does not establish that the grapes were spoiled at the very time they arrived at destination, or at the time delivery was offered without inspection. About 12 days from date of arrival at destination the shipment was sold at public auction for \$450. The proceeds of the sale were applied upon the freight bill on the shipment, which was \$675.73. The sale was apparently made by the carrier, as permitted in case of rejected perishable goods by sections 4c and 4d of the Bill of Lading. It does not appear why this sale was not made sooner.

[8] The shipment being of a highly perishable nature, its condition at least, if not its value at the time of arrival at destination, could be a matter of inference based upon its condition on the third day following particularly so in view of the length of time occupied in transporting the shipment to destination. However, if the tendered delivery without inspection was an insufficient discharge of the carrier's obligation, its liability thereafter until inspection by the consignee continued as that of a common carrier and not merely as a bailee as contended for by appellant.

Appellant offered an instruction to the effect that if the consignee refused to accept the shipment, the damages resulting thereafter could not be charged to the carrier. The court gave this instruction, but modified it by adding the clause "without lawful reason," following the expression "if the consignee refused to accept delivery."

[9-11] That goods are damaged in part does not justify the consignee in refusing to accept delivery. It is his duty to accept delivery in order to minimize the damage. Where a shipment, however, is damaged to the extent that it is practically valueless having regard to

the expense of acceptance and use and to the purpose for which the shipment was intended, the consignee may reject. Where the shipment offered for delivery is apparently in a damaged condition but from outward appearances it is impossible to tell the extent of the damage, then the consignee is entitled to inspect the goods before determining whether he will accept or reject them. *Brand v. Weir*, 27 Misc. Rep. 212, 57 N. Y. S. 731; *Berger-Critenden Co. v. Chicago, etc.*, R. Co., 159 Wis. 256, 150 N. W. 496; *McGrath v. Charleston & W. C. R.*, 91 S. C. 552, 75 S. E. 44, 42 L. R. A. (N. S.) 782, Ann. Cas. 1914A, 64 and 66; 2 *Hutchinson on Carriers* (3d Ed.) § 733; 4 R. C. L. § 285; 4 *Elliott on Railroads*, § 2299, note 98, and cases cited; 10 Corp. Jur. 253; *Southern Cal. Com. Co. v. Alberti*, 58 Cal. App. 84, 207 P. 1023.

[12] We hold, therefore, that the liability of the defendant continued to be that of a common carrier after the arrival of the shipment at destination, and until the consignee was permitted to inspect the same. The circumstances surrounding the arrival of the shipment were of a character to indicate that the grapes were damaged, and the consignee was entitled to inspect before determining whether he should accept or reject. If we are correct in this conclusion, it is not necessary to determine the precise value of the shipment on the date of arrival and determine again the same thing as of the date when the consignee formally inspected and formally rejected the shipment. It is sufficient that the evidence shows the grapes were apparently spoiled upon arrival at destination, entitling the consignee to inspect.

[13] The expression "without lawful reason," used by the trial court in modifying appellant's requested instruction, is criticized as too abstract and indefinite without further instruction as to what constitutes a lawful reason. Section 8 of the Bills of Lading Act (U. S. Statutes at Large, vol. 39, p. 538 [49 USCA § 88; U. S. Comp. St. § 8604dd]), states that the carrier is bound to deliver the shipment under specified normal conditions, in the absence of "some lawful excuse." Nothing is expressly stated in the act concerning the duty of the consignee to accept, but his duty and that of the carrier must, in the nature of things, be reciprocal.

[14, 15] If the use of the expression is not justified by the use of substantially the same words in the statute, we find no conflict in the evidence of the reasons for rejection. Respondent, as a witness at the trial, gave his reasons for his rejection as we have indicated. Appellant has not pointed out any lawful excuse for its refusal to allow inspection. The payment of freight was guaranteed by bond. The fact that shipper and consignee were both interested in the grapes as joint adventurers does not make the consignee's rights

different from other consignees' rights in respect of the right of inspection. The bill of lading as to this car did not prohibit inspection, but on the contrary implied that inspection was permissible. Section 7, Bill of Lading. In view of this record we cannot say that the modification of the instruction was error, or that it resulted in prejudice to the rights of appellant.

The evidence does not sustain the defense of act of God with respect to the delay of the second car. The evidence tended to show that some part of the delay would come under this defense, but such part was inconsiderable in comparison with the whole delay and had little, if anything, to do with the icing issue. The jury's implied finding against this defense is supported by the testimony.

[16] The sufficiency of the opinion testimony on the market value of the grapes at the point of destination was also a question for the jury. The testimony of the witnesses Cupoletti, Arko, and Burnett was sufficient to permit the jury to arrive at its conclusion upon this issue. Most of this opinion testimony seems to relate to the Zinfandel grapes, but the Petite Syrrah grapes were compared with the Zinfandels by some of the witnesses, who stated that they were worth more than the Zinfandels. There was other testimony to indicate that this difference was about \$30 a ton. Damages for the more expensive variety, however, were apparently based upon the assumption that their value was the same as the less expensive variety. We cannot say that there is a failure of evidence upon this point.

[17] Defendant's requested instruction No. 1 was given in substance by instruction No. 6, and no error can be predicated upon the court's refusal to give this instruction twice.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

SCOTT v. BECK. (L. A. No. 8103).★

Supreme Court of California. Sept. 29, 1927.

Rehearing Granted Oct. 27, 1927.

1. Quietting title ☞44(4)—Evidence of possession by plaintiff's vendor at time of transfer held sufficient prima facie to establish plaintiff's ownership.

In action to quiet title, evidence as to actual possession by plaintiff's vendor at time of transfer held sufficient prima facie to establish ownership in plaintiff.

2. Taxation ☞679(1) — Law applicable when property was sold for delinquent taxes follows through all proceedings dependent thereon.

The law as it was at time when property was sold for delinquent taxes to state follows through all the proceedings dependent upon that sale.

3. Taxation ☞734(7)—Attempted tax sale without listing property as delinquent for previous year, nor naming owner in either delinquent or addenda list and tax deed, held void (Pol Code, §§ 3764, 3771, 3785b; § 3786, subd. 5).

Under Pol. Code, §§ 3764, 3771, 3785b, and section 3786, subd. 5, relative to sale of property for delinquent taxes, attempted sale wherein property was not contained in delinquent list for preceding year, and was in addenda list of property previously sold to the state as property assessed to another, was void and tax deed pursuant thereto invalid.

In Bank.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by Georgia E. Scott against S. Beck. Judgment for plaintiff, and defendant appeals. Affirmed.

Superseding judgment of District Court of Appeal, 254 P. 637, reversing the superior court.

Earl P. Thompson, McKenna & McKenna, Hood & Riley, Catherine A. McKenna, and J. Irving McKenna, all of Los Angeles, for appellant.

Andreani & Haines, John L. Bisher, Jr., Frank E. Carleton, Clara Shortridge Foltz, and Elliott H. Barrett, all of Los Angeles, for respondent.

Emmet H. Wilson, of Los Angeles, amicus curiæ.

CONREY, Justice pro tem. Action to quiet title to lot 93 in tract No. 909, situated in the city of Los Angeles. The statement of the case, as here quoted, is taken from the decision of the First District Court of Appeal, Division 1, rendered prior to the order for hearing in this court, and is adopted as part of this decision.

"The complaint alleged title in the plaintiff with right to possession. The averments of the complaint were denied by defendant, who

alleged title in himself through a tax deed from the state of California. Neither of the parties to the action was in actual possession of the lot, which was unimproved. Judgment was entered for the plaintiff, from which the defendant appeals on the ground that the evidence was insufficient to sustain the allegations of the complaint and the conclusion of the trial court that defendant had no title to the property.

[1] "The, plaintiff in support of her complaint, introduced in evidence a deed dated October 16, 1911, executed by Clara G. Spring et al., which in terms transferred the tract mentioned to Lizzie J. Brent, a deed from the latter and her husband to Brent Investment Company, a corporation, conveying the same property, together with a deed from the corporation to plaintiff of the lot in question, the latter transfer being dated April 3, 1913. The testimony of an officer of the corporation sufficiently shows that Lizzie J. Brent was in actual possession of the entire tract, and that the corporation likewise was in possession at the time of the transfer to the plaintiff. This evidence was sufficient prima facie to establish ownership in the plaintiff. *Holthoff v. Freudenthal*, 22 N. M. 377, 162 P. 173; *Mitchell v. Titus*, 33 Colo. 385, 80 P. 1042; *Rockey v. Vieux*, 179 Cal. 681, 178 P. 712; *Pearson v. Hellman Commercial L. & S. Bank*, 199 Cal. 305, 249 P. 10; *Kilfoil v. Warden*, 46 Cal. App. 502, 189 P. 303.

"Defendant claims title as grantee under a tax deed dated August 4, 1919, executed by the tax collector of Los Angeles county. The deed recited that the lot described was duly assessed for taxation in the year 1913 to Lizzie J. Brent, and was thereafter, on the 3d day of July, 1919, duly sold to S. Beck by W. O. Welch, tax collector of the county of Los Angeles, for non-payment of delinquent taxes which had been legally levied in the year 1913 and were a lien thereon; further stating the total amount for which the same was sold, and that all taxes levied and assessed against the property prior to the year 1919 had been paid and discharged. * * *

"It appears from the evidence that the lot was assessed to the plaintiff in the years 1916 and 1920, inclusive, and that the taxes levied thereon after the year 1913 to and including the first installment of the year 1921 were paid by her with the exception of the second installment of 1919, which became delinquent, and the lot was again sold to the state in 1920. Defendant redeemed the property from the latter sale, and after the year 1920 the taxes levied thereon, with the exception of the first installment of 1921, were paid by him. The proceedings leading to the sale to defendant on July 3, 1919, were conducted under the provisions of sections 3764 and 3771 of the Political Code, as amended in 1913 (*Stats. 1913*, pp. 556, 557). In the addenda attached to the published tax list and notice of sale appeared the name of Lizzie J. Brent, the person to whom the lot which was therein described was assessed for the delinquent taxes of 1913. The name of the plaintiff, who was the record owner in the years 1918 and 1919, and to whom the property was last assessed next before the sale in question, did not appear in the list or in the notice mentioned above. Furthermore, it was not directly shown at the trial that the tax collector complied with

the provisions of section 3771 of the Political Code by mailing a copy of the list or publication to the last known post office address of the plaintiff. It is contended by the plaintiff that it was essential to the validity of the published notice that her name, as the owner and the person to whom the property was last assessed next before the sale, be inserted therein, and that the evidence was insufficient to show a compliance with the statutory requirement of notice by mailing.

"It was provided by section 3764 of the Political Code (Stats. 1913, p. 556) that on or before the 5th day of June each year the tax collector must publish the delinquent list, which must contain, among other things, 'the names of persons and a description of the property delinquent,' and that before its publication the tax collector and auditor should jointly arrange the list so as to designate in some particular manner the property contained in the list which was sold to the state five years previous, under the provisions of section 3771 of the Political Code.

"It was provided by section 3771 of the Political Code (Stats. 1913, p. 557) that the property contained in the advertised list, as provided by section 3764 of the Political Code, which had not been redeemed from the previous sale to the state, be sold by the tax collector at public auction, and further that within five days after the first publication of the list the tax collector should mail a copy of the list or publication, postage prepaid thereon and registered, to the party to whom the land was last assessed next before such sale at his last known post office address. It was further provided by section 3785b of the Political Code (Stats. 1913, p. 558) that the tax collector should execute to the purchaser a deed to the property sold, this deed to contain certain recitals, those here material being as follows: That the property was duly assessed for taxation, the year assessed and the name of the person to whom assessed being stated, and was thereafter, on the date of the sale, duly sold by the tax collector to the grantee named for nonpayment of the delinquent taxes which had been legally levied in the year first mentioned, and were a lien on the property, no provision being made for a recital of the name of the owner or of the person to whom the property was last assessed next before the sale. It was also provided that no matters other than those stated in the section need be recited in the deed, which by subdivision 5 of section 3786 of the Political Code (Stats. 1911, p. 1102) was made primary evidence that 'at a proper time and place the property was sold as prescribed by law, and by the proper officer.'"

[2] It must be kept in mind that we are dealing with the law as it was in July, 1914, when the sale of this property was made to the state for delinquent taxes of 1913. That law follows through all proceedings dependent upon that sale. *Biaggi v. Ramont*, 189 Cal. 675, 679, 209 P. 892.

The provisions of section 3764, Political Code, for the publication of a delinquent list, primarily refer to the unpaid taxes of the immediately preceding tax year. Stats. 1913, p. 556. The reference therein to property sold to the state "five years previous under the provisions of section 3771 of this Code,"

etc., are incidental to the tax sale procedure that is to result from the current delinquency. This fact is rendered still more clear by reading section 3771 (Stats. 1913, p. 557), which, after first providing by general rule that the sales for delinquent taxes shall be made to the state, qualifies that rule by the proviso that any property "contained in the advertised list" as provided for in section 3764, "which has not been redeemed from the sale made to the state five years previously, shall be sold at public auction to the highest bidder. * * *" But the sale itself is authorized only as a sale of property contained in the advertised list, and for the then delinquent taxes for which no sale had been made before.

This is manifest from the further provisions that no bid shall be accepted for less than the amounts due "as shown in said advertised list," and that the purchaser is allowed 30 days within which to make redemption as provided in section 3785b, which section (Stats. 1913, p. 558) requires that no deed shall be delivered by the tax collector "until redemption has been made of such property and all taxes, penalties, interest, and charges have been paid which may have been accrued by reason of any *previous tax sale* or delinquency."

Briefly summarized, these provisions of the law are intended to provide a method by which, in cases of repeated delinquency in payment of taxes against the same property, the sale for the last delinquency shall be made to any purchaser who will buy, and who shall settle the state's claims in full by paying off all other tax liens outstanding against that property.

In the case at bar, the tax deed under which the defendant claims title shows on its face that it was issued pursuant to an attempted sale in the year 1919, for and on account of the taxes of the year 1913; and the deed was executed pursuant to sale so made at a time when the taxes of the year 1918 (assessed to the plaintiff and paid by her) were not delinquent. The property was not contained in the 1918 delinquent list, nor was the plaintiff's name shown therein. The property was, indeed, mentioned in the "addenda list" of property previously sold to the state, and is there given as property assessed to Lizzie J. Brent. The name of the plaintiff, to whom the property was last assessed (i. e., for the year 1918) is not found in the delinquent list, nor in said "addenda list."

[3] On the record thus shown, and even if the notice of sale had been mailed to the plaintiff, the tax collector was without any right to make the sale to defendant. Therefore the sale was void and the tax deed was void. Our decision on this point renders it unnecessary to discuss any other objections to the deed.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

202 Cal. 258

In re GRAVES' ESTATE.

LEVITT v. BLACK.

(L. A. 9529.)

Supreme Court of California. Oct. 3, 1927.

1. Wills $\S$ 166(1), 324(3)—Proponent held required to present evidence of volition of testatrix, and undue influence was for jury, in view of circumstances surrounding execution of will.

Where proponent's relations with decedent offered opportunity to control testamentary act, decedent's condition permitted subversion of her freedom of will, and proponent, who unduly profited as beneficiary, was active in procuring instrument to be executed, proponent had obligation of presenting evidence of volition, and question of undue influence was for jury, though none of such circumstances standing alone creates presumption against validity of instrument.

2. Wills $\S$ 166(7)—Proof of opportunity to influence testatrix, though coupled with interest, will not alone sustain finding of undue influence.

Mere proof of opportunity to influence mind of testatrix, even though coupled with interest or motive to do so, does not sustain finding of undue influence, in absence of testimony showing that there was pressure operating directly on testamentary act.

3. Wills $\S$ 163(2)—One profiting unduly as beneficiary and occupying confidential relation to testator, who participated in procuring execution of will, must show it was not induced by coercion or fraud.

Where one who unduly profits by will as beneficiary thereunder sustains confidential relation to testator, and has actually participated in procuring execution of will, burden is on him to show that will was not induced by coercion or fraud.

4. Wills $\S$ 163(2)—Presumption of undue influence arises from confidential relation between testator and beneficiary unduly profiting by will, coupled with latter's activity in preparing it.

Presumption of undue influence arises from proof of confidential relation between testator and beneficiary unduly profiting by will, coupled with activity on part of such beneficiary in preparation of will.

5. Wills $\S$ 166(2)—Evidence held to support finding of undue influence in execution of will in favor of one in confidential relation with testatrix.

In action for revocation of probate of will, evidence held to support finding of jury that will was result of undue influence by proponent, who stood in confidential relation to testatrix, pro-

ceded unduly by will, and participated in procuring execution of will.

6. Wills $\S$ 278—Will contestant may plead relative to execution of will by third person, whose affairs were interrelated with those of proponent and testatrix.

In action for revocation of probate of will on ground of undue influence, it was proper for contestant to plead relative to execution of will by another, where affairs of such other, decedent, and proponent, were interrelated.

7. Wills $\S$ 278—Facts constituting undue influence must be alleged in will contest.

Where ground of will contest is undue influence, it is insufficient for pleader to merely allege legal conclusion of undue influence, but facts must be pleaded from which court may determine as matter of law whether such facts constituted undue influence.

In Bank.

Appeal from Superior Court, Los Angeles County; Benjamin F. Bledsoe, Judge.

In the matter of the estate of Anna M. Graves, deceased. Action for revocation of probate of will by Maud Wilson Levitt, contestant, opposed by John R. Black, proponent. From a judgment for contestant, and an order denying a new trial, proponent appeals. Affirmed.

William J. Hanlon and Clarke & Bowker, all of Los Angeles, for appellant.

Edward T. Sherer and Welburn Mayock, both of Los Angeles, for respondent.

WASTE, C. J. Maud Wilson Levitt, respondent here, a niece of Anna M. Graves, deceased, and her only heir, filed a contest, after probate of the will of the decedent, alleging unsoundness of mind of the testatrix at the time of the execution of the document, and that the will was procured by the undue influence of John R. Black, appellant, to whom the decedent bequeathed practically her entire estate. After due trial on the issues tendered by the answer of Black, the jury found that Mrs. Graves was of sound mind at the date of the execution of the will, but that it was procured through the undue influence of appellant. Judgment was entered in accordance with the findings of the jury, and motion for a new trial, interposed by Black, was denied. While an appeal was taken from the whole of the judgment, and from the order denying the motion, appellant is urging only that the judgment and the findings of the jury that Anna M. Graves was acting under the undue influence of John R. Black at the time she executed the will are erroneous.

Anna M. Graves was, at the time the will in question was made, 75 years of age. For 13 years she had been housekeeper for Augustus A. Harris, an old man about 5 years her senior. They lived in a house owned by them in common, and, together, were worth

about \$40,000. Near by John R. Black, a real estate agent, had his office, where Harris frequently visited him. In December, 1923, Harris had a stroke of paralysis, from which he never recovered. He died in February, 1924. The evidence establishes that, during that interval of about two months, Black was very active in the affairs of Harris and Anna M. Graves. He sold their home for \$20,000, introduced his attorney to them, and advised that they make their wills, which were prepared by the attorney and witnessed by Black himself and one of his real estate salesmen. In both wills Black was named executor without bonds. Anna M. Graves was named as the principal beneficiary in the will of Harris, and Harris was made sole beneficiary in her will, with the provision that, in the event of his death prior to that of the testatrix, the estate should go to Black's grandson. When the home property was sold, the old people lived for a time with Charles Harris, the brother of Augustus, where the latter passed away.

The evidence indicates that during all of this time Mrs. Graves was a very sick woman, and occasionally "did queer things." According to the testimony, when 100 feet away from the house, she could not find her way back. On one occasion, partly clad, she wandered into the road, where she fell, and had to be picked up and taken into the house. At another time she built a fire in a pan in the middle of the room. The surroundings in the home of Charles Harris, to which the old people had been taken, were not pleasant or comfortable, and, on the death of Augustus Harris, Black, taking two doctors and his attorney with him, caused Mrs. Graves to be removed to a hospital, where she was examined. She was found to be suffering with bronchial pneumonia, and her condition was very grave. On the tenth day after her admission to the hospital her condition appears to have become very serious. In the afternoon of that day Black caused her removal to an apartment over the garage in the rear of his own house, where she lived until her death, some three months later, and where she was attended by doctors and nurses chosen by Black. On March 29, 1924, Mrs. Graves executed another will, the one here in question. Immediately prior to its signing, and at the apparent suggestion of Black, the doctors subjected her to a mental examination, and one of them and the attending nurse acted as witnesses. Other than Black, no other persons were present. He had previously discussed the will with the testatrix, and it had been prepared by his attorney. He was made the sole beneficiary (other than a provision in the will that if Mrs. Graves had any living heirs she gave unto each of them the sum of \$100) and was named as executor without bonds.

In support of the contention of the respondent that the will was procured by the

undue influence of Black, evidence of the foregoing and many other facts relating to Mrs. Graves' condition, personality, her age, health, and strength were admitted in minute detail. The circumstances attending the execution of the will were fully shown, and the situation of the parties to the transaction was placed before the jury. The appellant claims that his activity in the affairs of Harris and Mrs. Graves was brought about by the fact that during the illness of Harris the latter was in such condition that he could do nothing for himself, and refused to have doctors and nurses attend him; that he (appellant) daily cared for him, and performed the most menial tasks; that at the time of the death of Harris, which occurred at the home of his brother, conditions were bad, filthy, and unsanitary, and that Mrs. Graves had been neglected and poorly attended, and for that reason he saw that she was properly cared for, and in the manner already indicated. The further contention of the appellant is that respondent and Mrs. Graves had never corresponded, and did not know each other, and that Mrs. Graves was of the opinion, as expressed in her will, that she had no living heirs. He contends, in view of these facts and because of the kindnesses he had shown to the testatrix, that he "was therefore the person to whom naturally Mrs. Graves would desire to leave such property as she might have at the time of her death; * * * that in this respect the will was not unnatural, but that [he] was the natural object of her bounty." He contends that the testimony "is absolutely silent that this will was not the free and voluntary act of the decedent."

[1-5] We deem further statement or discussion of the detailed testimony unnecessary. Three well-established facts, among others, which are recognized as being indicative of undue influence, or a subversion of a decedent's volition, stand out clearly in the record: The relations between appellant and the decedent afforded to appellant an opportunity to control the testamentary act; the decedent's condition was such as to permit of a subversion of her freedom of will; the appellant was active in procuring the instrument to be executed. In addition, appellant unduly profited as beneficiary under the will. While none of these circumstances, standing alone, has the effect of creating a presumption against the validity of the instrument, their probative force, in combination, is to impose upon the proponent the obligation of presenting evidence of volition, and to make the question as to undue influence one of fact for the jury's determination. 26 Cal. Jur. pp. 647, 648. Appellant correctly contends that mere proof of opportunity to influence the mind of the testatrix, even though shown to be coupled with interest, or a motive to do so, does not sustain a finding of undue influence, in the

absence of testimony showing that there was pressure operating directly on her testamentary act. Estate of Morcel, 162 Cal. 188, 194, 121 P. 733. But in this case it clearly appears that the appellant took an active part in securing the execution of the will at a time when there existed a confidential relation between himself and Mrs. Graves. The rule is well settled that:

"Where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud' (Estate of Baird, 176 Cal. 381, 384 [168 P. 561]; Estate of Nutt, 181 Cal. 522, 528 [185 P. 393]), and that 'a presumption of undue influence arises from proof of the existence of a confidential relation between the testator and such a beneficiary, coupled with activity on the part of the latter in the preparation of the will' (Estate of Higgins, 156 Cal. 261 [104 P. 61])." Estate of Reiph, 192 Cal. 451, 465, 221 P. 361, 367.

Appellant did not sustain the burden cast upon him in the lower court, and has not satisfied us that the finding of the jury, and the consequent judgment revoking the will, are incorrect as matters of law. In view of the surroundings in which the testatrix was placed, prior to and after making the will, we deem of little moment the fact that she lived about two months after its execution.

[6, 7] The respondent, in her amended contest filed in the court below, set out in some detail the circumstances under which appellant "gradually became the confidant and business advisor" of Augustus A. Harris and Mrs. Graves, by reason of which he prevailed upon Harris to make the will in favor of Mrs. Graves, and to appoint Black executor without bonds. Appellant demurred and moved to strike out the portion relating to the execution of the will by Augustus A. Harris, claiming that the relations between appellant and Harris were not material or relevant to the issue whether or not Mrs. Graves was under the undue influence of appellant at the time she made her will. The affairs of the three were, however, so inter-related that it was proper for the pleader to set them out. Where the ground of a contest of a will is undue influence, it is not sufficient for the pleader to merely allege the legal conclusion of undue influence, but facts must be pleaded from which the court may determine as a matter of law whether the facts so pleaded constitute the alleged undue influence. Estate of Bixler, 194 Cal. 585, 589, 229 P. 704. The allegations here are, in effect, practically identical with those considered in the Bixler case, and of which it was said (page 590 [229 P. 706]) the allegations "clearly and sufficiently, without resort to conclusions of law, allege the ultimate fact that the will was the product

of the undue influence of the person charged." The demurrer was properly overruled, and the motion to strike out was properly denied.

The trial court instructed the jury in the language of section 2235 of the Civil Code, that:

"All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence."

Appellant contends that the instruction has no application to the present case, for the reason that he was in no sense a trustee of an express trust, but only a trustee as executor of the last will of Augustus A. Harris, deceased, to handle, under direction of the court, the affairs of the estate in which Mrs. Graves was sole beneficiary. He does not further press his contention, and fails to point out the injury, if any, caused by the giving of the instruction. In answer to other contentions of appellant, it may be said that the trial court correctly instructed the jury at length, and with a great attention to detail.

The judgment and order appealed from are affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

202 Cal. 179

SUTTER BUTTE CANAL CO. v. RAILROAD COMMISSION OF CALIFORNIA. ★
(S. F. 12070.)

Supreme Court of California. Sept. 26, 1927.

Rehearing Denied Oct. 26, 1927.

1. Constitutional law ☞81—Police power is attribute of state sovereignty, operating on property and property rights to extent necessary for protection of public health, safety, morals, and welfare.

The police power is one of the attributes of state sovereignty, and cannot be limited by contract, which operates on property and property rights, including contracts, to extent necessary for protection of public health, safety, morals, and welfare.

2. Public service commissions ☞6—Constitution commits execution of police power over public utilities to Railroad Commission (Const. art. 12, § 23; Public Utilities Act, §§ 31, 32, 67).

To the Railroad Commission has been committed execution of police power over public utilities in California, in view of Const. art. 12, § 23, and Public Utilities Act, §§ 31, 32, 67 (Deering's Gen. Laws 1923, p. 2702).

3. Waters and water courses ☞257(1)—Railroad Commission may remove discrimination between contract consumers and new consumers of water for irrigation.

Railroad Commission *held* authorized in fixing water rates to remove discrimination between consumers operating under continuous contracts and new consumers by paving way for release of contract consumers from their contracts.

4. Waters and water courses ☞257(1)—Contract consumer of water for irrigation, availing himself of status of noncontract consumer, held not entitled to return to former status if company protests.

Contract consumer of water for irrigation, who elects to avail himself of status of noncontract consumer under ruling of Railroad Commission, *held* not entitled to return to former status under contract if canal company properly protests.

5. Waters and water courses ☞249—Where dedication of water service was made for lands, duty to serve held not affected by consumers' contracts.

Where dedication of water service was made for certain lands, corresponding duty to serve resting on canal company is neither greater nor less by reason of contracts for water held by certain consumers.

6. Waters and water courses ☞257(1)—Where evidence sustains Railroad Commission's exclusion of item from water rate base, court cannot interfere.

Where evidence was sufficient to sustain order of Railroad Commission excluding certain sum from rate base in fixing water rate, it is not within power of court to interfere.

7. Waters and water courses ☞257(1)—Railroad Commission held authorized to determine it could base no conclusion as to reproduction cost on uncertain testimony in water rate case.

Railroad Commission *held* within its authority in determining it could base no conclusion as to reproduction cost in water rate-fixing order on testimony of witness who admittedly used a number of uncertain assumptions which would render estimate inaccurate.

8. Waters and water courses ☞257(1)—Railroad Commission, finding evidence insufficient, cannot be said to have arbitrarily refused to consider reproduction cost in water rate case.

It cannot be said that Railroad Commission arbitrarily refused to consider reproduction cost in rate-fixing order for canal company, where it considered evidence and found it insufficient on which to predicate action.

9. Waters and water courses ☞257(2)—5.28 per cent. held not, as matter of law, so low as to be confiscatory water rate.

5.28 per cent. rate of return on valuation fixed for canal company *held* not, as matter of law, so low as to be confiscatory, in view of many complications inhering in system of operation of particular utility.

In Bank.

Application for certiorari by the Sutter Butte Canal Company to review an order of the Railroad Commission of the State of California fixing water rates. Order affirmed.

Isaac Frohman and Devlin & Brookman, all of San Francisco, W. H. Carlin, of Marysville, and Henry Ingram, of Gridley, for petitioner.

Carl I. Wheat and Reginald L. Vaughan, both of San Francisco, Arthur T. George, of Los Angeles, and Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for Sutter Butte Water Users Ass'n.

PRESTON, J. By this proceeding petitioner seeks to have reviewed and annulled a decision and order of the Railroad Commission, designated decision No. 16289, made on March 20, 1926, relating to its water rates, complaint being made of the valuation of its property for rate-fixing purposes, the rate of return thereon, and the modification and practical abrogation of certain continuous contracts for the furnishing of water held by it with a certain class of consumers.

In previous decisions this court has had occasion to outline the history of petitioner as a public utility engaged in the business of appropriating water from the Feather river and selling and distributing the same for irrigation purposes in Butte and Sutter counties, in this state, and reference is made to the statements of fact set forth therein. Butte County Water Users' Ass'n v. Railroad Com., 185 Cal. 218, 196 P. 265; King v. Railroad Com., 190 Cal. 321, 212 P. 200; and Live Oak Water Users' Ass'n v. Railroad Com., 192 Cal. 132, 219 P. 65.

Petitioner, a public utility, admittedly subject to the power of the Railroad Commission, is in possession of a water right dedicated to the public use. Its consumers are divided into two classes—contract consumers and noncontract consumers. Water was originally furnished to the contract consumers under so-called "water right contracts," or continuous supply contracts, whereby the consumer paid an initial amount, usually \$10 per acre, for the privilege of obtaining the contract, and agreed to pay a stipulated rate for irrigation water service each year thereafter upon the total acreage covered by the contract, and the company on its part agreed to furnish water as required for all of the acres covered thereby. Noncontract consumers or applicants, pursuant to order of the commission made in March, 1918, were served upon the basis only of applications for water made from year to year. This dual situation has existed since 1918, and the Railroad Commission has attempted to solve the problem presented by these two classes of consumers by various orders and decisions, the last two of which, the one here involved and the one

prior thereto, may be briefly described as follows:

Decision No. 14422, rendered on December 31, 1924, after application by petitioner for a further increase in the water rates, increased the 1922 rates and abolished the differential in rates between contract and noncontract holders. It established a standby or service charge of \$1.25 per acre, payable by both classes, effective as to noncontract holders for all of their lands covered by their applications during such time as they should continue on thereunder, and in any event for not less than three years, and to be continuously effective as to contract holders for all of the lands covered by their contracts, provided, however, by rule 3, that if such contract holder does not desire to use in any year the whole or any of said water which he is so entitled to receive, and "files with the company on or before February 1st of that year notice in writing of what he does desire in respect to the nonservice of water, he shall then be obligated to pay in that year, and in each year thereafter in which said notice remains in effect, on or before February 1st thereof, the service charge of \$1.25 per acre of the land for which no water is desired as specified in said notice, and, as to the remainder of his land, such rates or charges based upon the extent and character of use of the water which he desires to use, as are in effect."

Thereafter, and in 1925, the proceeding which resulted in decision 16289, the validity of which is here involved, was "instituted on the commission's own motion for the purpose of making a complete and new investigation of the rates, charges, classifications, contracts, rules, regulations, and service of the Sutter Butte Canal Company, in view of the development of considerable protest and dissatisfaction following the fixing of rates on the Sutter Butte Canal Company system by this commission in decision No. 14422, dated December 31, 1924."

Said decision modified the previous rules so as to give to each continuous contract holder the right, at his option, either (1) to obtain water under applications for so much of his land as he desired to irrigate, similarly with applicants generally who were not holders of continuous contracts; or (2) to obtain water under his continuous contract, provided that if he so elects, he may still, by notifying petitioner that he does not desire "to use in any year the whole or any of the water which he is so entitled to receive, and files with the company on or before February 1st of that year notice in writing of what he does desire in respect to the nonservice of water, he shall then be obligated in that year, and in the next succeeding year thereafter, but for no further period in which said notice remains in effect, to pay, on or before February 1st thereof, the service charge of \$1.25 per acre of the land for which no water is desired, as speci-

fied in said notice; * * *" or (3) to release himself from any obligation to pay any charge to petitioner under his continuous contract by giving notice that he does not desire any water for his land in any year, or to neither give notice nor use the water.

The substance of the order here under consideration is to pave the way for the release of all contract consumers. It is true that the contracts may be retained at the election of the consumer, but the whole plan is in reality, when stripped of its complications, an effort by the Railroad Commission to abolish all distinction between the two classes of consumers and to put them upon a parity in order that there may be removed from the controversy this source of friction and trouble.

The commission in this behalf, among other things, said:

"Rates fixed herein will therefore be on the basis that all service be charged for under a uniform schedule of rates and under application forms which will exclude any consideration of the continuous contract and preclude the making of charges for unirrigated lands under said contracts, as such."

[1, 2] The controlling question in the proceeding is, therefore, the extent of the power that may be exerted by the Railroad Commission upon the contracts between petitioner and the contract consumers. The police power is one of the attributes of state sovereignty and cannot be limited by contract. It operates upon property and property rights, including contracts, to the extent necessary for the protection of the public health, safety, morals, and welfare. To the Railroad Commission has been committed the execution of this power over public utilities in California. The scope of this power is defined in the state Constitution as follows:

Section 23, art. 12: "Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any * * * canal, pipe line, plant, or equipment, or any part of such * * * canal, pipe line, plant, or equipment within this state, * * * for the production, generation, transmission, delivery or furnishing of heat, light, water or power * * * either directly or indirectly, to or for the public * * * is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the legislature to be public utilities shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be

plenary and to be unlimited by any provision of this Constitution. * * *

The powers conferred are more specifically set forth in sections 31 and 32 of the Public Utilities Act (Deering's Gen. Laws of 1923, p. 2702).

The exercise of the power thus conferred upon the Railroad Commission may be reviewed only in the manner specified by the statute, which is in brief as follows:

"* * * The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the state of California. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. * * *" Public Utilities Act, supra, § 67.

[3] The covenants of the contract here to be tested for the operation of the police power are as follows: That the canal company furnish water at the rate of one cubic foot per second for each 160 acres of land described in each contract for the purpose of irrigating the land. In cases where water is desired by the landowner, at his option, to be furnished by the canal company for producing rice, the contracts provide for the furnishing of water at the rate of 3 cubic feet per second for each 160 acres of land, and at a higher charge per acre than is provided for water furnished for the production of crops other than rice.

That the water covered by the contract shall be and become appurtenant to the land therein described, and can only be conveyed by and with a conveyance of the land; that all the covenants and conditions of the contract shall run with the land; that the use of the water must be confined to said land.

That the landowner shall construct and maintain a ditch from the company's ditch to his land, which at the option of the canal company may be taken over and operated by it; that the landowner grants to the canal company a right of way through his land; that the landowner shall pay to the canal company the specified rate for each acre annually on September 1 of each and every year; that all sums due or to become due to the canal company under the contract shall be and become a lien on the lands described therein and may be foreclosed as any other lien; that the heirs, successors and assigns of the respective parties are forever bound by the contract; that in case of water shortage each

landowner is to be entitled only to a proportional share of the water available; that it is understood that the canal company will contract for the delivery of 1,000 cubic feet of water per second. Where a lump sum was provided to be paid annually by the landowner, such sum was computed by multiplying the rate per acre by the number of acres described in the contract.

The power to increase the charges for service has been twice exercised by the Railroad Commission at the behest of petitioner, as hereinabove pointed out. The times and terms of payment under said contracts have been changed by the same power. As far as the petitioner is concerned, its privileges and emoluments under the contracts have been greatly increased. So far as the consumer is concerned, however, the contract has slight, if any, benefit to him left in it. The only privilege he has apparently is to sit by and see the eleventh hour consumer, who has no contract, served with water upon less onerous terms than he who has borne the burden during the trying periods of earlier days. For the contract consumer must pay a service charge on the whole acreage under contract for all lands described therein upon which water is not used in a given season, while the new consumer only has to apply for water for lands which he intends to irrigate and only has to pay the service charge thereon for the acreage which he does not actually irrigate. And he may satisfy all demands against him in three years, if not sooner, and be completely released.

In other words, the new consumer has a chance for the exercise of his judgment and discretion upon the situation as it arises, whereas without the order in question the contract holder is firmly bound, not for a space of time but perpetually, without a single opportunity to exercise judgment or discretion in his efforts to better his condition. He is condemned to pay, and that forever, the charge annually accruing, which is a lien upon his inheritance. If the commission may not relieve this discrimination, then it must follow that since 1918 every new consumer has been illegally admitted to water service as such consumer was not required to sign a contract for perpetual service. For if the commission may allow a dedication of service to a new consumer without demanding of him a perpetual obligation, then it must follow that it has the power to remove discrimination thus created between the two classes of consumers. The legality of this dual classification has already been sustained by this court. *King v. Railroad Com.*, supra; *Live Oak, etc., Ass'n v. Railroad Com.*, supra. In these causes petitioner appeared and espoused the orders of the Railroad Commission. In fact, by a process originating in keen paternal interest, the commission has heretofore devised many plans to aid petitioner, all of which have been

executed at the expense of the contract consumer. The order here in question is the only one to which petitioner has or could have objected.

The power of the Railroad Commission is little indeed, if it may not intervene to remove such palpable discrimination. The commission has found that the time has arrived for this action. Practically the only provision of the contracts not modified already by this court is the one changing the duration of the contract. But it must follow that if, in fixing rates, or in removing discrimination, the duration of the contract relationship is encountered, it must yield to the regulatory power lodged by the Constitution in the commission even to the extent of out and out termination or release of such contract.

Moreover, petitioner is in no position to urge that this conclusion is not correct, for it has on previous occasions successfully urged the commission to fix constructive periods of time for which noncontract consumers must obligate themselves to pay in order to get water service. Three years is the period mentioned as to them in the order here under review. If it is within the power of the commission to require a consumer to sign an agreement to pay for three years' service in order to get water for his present year's needs, it must surely be true that the power to add a constructive period to the obligation implies the power to curtail an indefinite period and thus place the two classes of consumers of the same utility on an equal basis. In other words, it is clear that it is well within the regulatory power of the commission to disregard altogether the contracts in so far as they provide for periods of future service and fix a present rate for water actually consumed, and disregard all paternalistic provisions in favor of petitioner at the expense of either class of consumers. It follows logically then that the order under review is not open to the criticism that it violates any of petitioner's constitutional rights under the contracts. Any language found in the case of *Live Oak, etc., Ass'n v. Railroad Com.*, supra, which may seem to be at variance with these views, must be read in connection with the issue there involved, which was the validity of this dual classification among consumers of this utility and the right to charge against contract holders the service fee on the lands not irrigated. The power of the commission to disregard the duration period of said contracts was not there involved.

The holding we here make as to the power to modify or abrogate said contracts in the manner done by the order under consideration has been clearly foreshadowed in the following cases: *Southern Pacific Co. v. Spring Valley Water Co.*, 173 Cal. 291, 298, 159 P. 865, L. R. A. 1917E, 680; *Limoneira Co. v. Railroad Com.*, 174 Cal. 232, 237, 238,

162 P. 1033; *Live Oak, etc., Ass'n v. Railroad Com.*, supra; *Leavitt v. Lassen Irr. Co.*, 157 Cal. 82, 93, 106 P. 404, 29 L. R. A. (N. S.) 213; *Traber v. Railroad Com.*, 183 Cal. 304, 312, 191 P. 366; *Law v. Railroad Com.*, 184 Cal. 737, 740, 195 P. 423, 14 A. L. R. 249. Indeed, this identical question was before the Supreme Court of the state of Washington in the case of *Raymond Lumber Co. v. Raymond Light & Water Co.*, 92 Wash. 330, 159 P. 133, 135-137, L. R. A. 1917C, 574, and the power of the commission so to abrogate said contracts between the utility and its consumers was upheld.

In *Law v. Railroad Com.*, supra, at page 740 (195 P. 424), it is said:

"If the service contracted for was devoted to public use (*Allen v. Railroad Com.*, 179 Cal. 68, 175 P. 466, 8 A. L. R. 249), the contract for the service was subject to the exercise of the police power and, the state having elected to confer upon the commission the power to prescribe uniform rates for the service, petitioner cannot complain if the exercise of this power results in the practical annulment of his private contract fixing compensation for a public service (*Producers' Transp. Co. v. Railroad Com.*, 251 U. S. 228, 40 S. Ct. 131, 64 L. Ed. 239)."

In *Manigault v. Springs*, 199 U. S. 473, 26 S. Ct. 127, 50 L. Ed. 274, this principle is stated as follows:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

In *Market St. Ry. Co. v. Pacific Gas & Electric Co.* (D. C.) 6 F.(2d) 633, 635, it is said:

"On the question of the power of the state to regulate the contracts of its public utilities with their consumers the law is now well settled. The courts hold that all contracts relating to public service, entered into between the corporation operating a public utility and the private consumer, contain from the very nature of their subject-matter an implied reservation of the right of the state to lawfully exercise its police power for the general welfare, and that there is no impairment of the obligations of contract within the guaranties of the state or federal Constitution, even though said contract is thereby rendered partially or wholly invalid." In *re Guilford Water Company's Service Rates*, 118 Me. 367, 108 A. 446, 450; *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 376, 39 S. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420; *Producers' Transportation Co. v. Railroad Commission of the State of California*, 251 U. S. 228,

232, 40 S. Ct. 131, 64 L. Ed. 239; *Arkansas Natural Gas Co. v. Arkansas Railroad Commission*, 261 U. S. 379, 382, 43 S. Ct. 387, 67 L. Ed. 705; *Ogden Portland Cement Co. v. Public Utilities Commission of Utah*, 258 U. S. 609, 42 S. Ct. 381, 66 L. Ed. 788."

In *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, 39 S. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420, Mr. Justice Clarke, speaking for the court, concluded his examination of this subject with this observation:

"These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state.
* * *

[4, 5] It is no answer to this contention to say that the contracts still bind the petitioner, and it must as to these contract holders stand ready to serve the whole acreage therein mentioned and may not safely take on additional consumers for that reason. It is not for this court to say how much strength, if any, remains in these pacts, but one thing we may say, and that is that any contract consumer who elects to avail himself of the status of a noncontract consumer may not, if petitioner properly protests, return to his former status under the contract. *Law v. Railroad Com.*, supra, at page 741 (195 P. 424). But a still more satisfactory answer to this contention of petitioner is the fact that, contract or no contract, dedication of water service has been made for these lands and the corresponding duty to serve is neither greater nor less by reason of the contracts. *Leavitt v. Lassen Irr. Co.*, supra, at page 89 (106 P. 407); *Byington v. Sacramento Valley, etc., Co.*, 170 Cal. 124, 133, 148 P. 791.

[6] Petitioner also complains that the Railroad Commission excluded from the rate base an item of \$309,000 donated by landowners towards the cost of what is known as the Sutter County Extension. Where there is sufficient legal evidence found in the record to sustain the commission's order, it is not within the power of the court to interfere. *Williamson v. Railroad Com.*, 193 Cal. 22, 35, 222 P. 803. This situation is best described in the language of the commission:

"The effect of the construction of the Sutter County extension by the company on the rates of the Sutter Butte Canal Company has been the subject of much controversy. It has been the belief of many of the landowners in Butte county that this extension was entirely unjustified, and that it has resulted in an extra and unreasonable burden on the water users in that county. Much testimony was introduced relative to this matter. It appears that in 1918 certain landowners of Sutter county negotiated with this company for a supply of water. In 1919, an agreement was entered into for the service of 14,400 acres by the construction

of distribution laterals and the utilization of the Live Oak slough for the conveying of water to this general territory. The cost of the construction was to be paid in full by the landowners, and later to be refunded on the basis of one-seventh of the annual revenue received. In 1920, it was found necessary to extend the main canal to this district and discontinue the use of the Live Oak slough. A new contract was entered into whereby the landowners were required to advance \$20 per acre, while the company agreed to complete the construction and install a pumping plant on Feather river. The total cost of the project was approximately \$835,000, and the company's investment slightly over \$526,000. This work was done at the peak of prices and, in addition, was rushed so that without question the cost exceeded a reasonable cost under present conditions and some additional cost over normal construction occurred at the time of the development. In past decisions, the amount of the rate base for this extension has been the amount invested by the company."

The commission for the reasons indicated above excluded the item and allowed only the investment by the company. There is no contention that the evidence does not warrant the observations above quoted. We see no ground upon which this court may intervene in such a situation. The fact that the item has been consistently excluded in previous orders to which the petitioner made no protest convinces us that it has placed its chief reliance upon the questions above discussed and not upon this action of the commission.

[7] As to the further contention that the commission arbitrarily refused to consider reproduction cost in its rate-fixing order, an examination of the record discloses that the commission only had before it on that subject the testimony of the witness Ryan, who had admittedly used a number of uncertain assumptions which would render his estimate inaccurate, and the commission was well within its authority in determining that it could base no conclusion upon this testimony. Of it the commission said:

"An estimate of reproduction cost new totaling \$2,676,118 was presented through Mr. Ryan. This was based on the appraisal by Mr. Ware, applying price ratios with a view to determining the probable reproduction cost new under 1924 price conditions. This appraisal was of a very general nature and the evidence indicates a failure on the part of Mr. Ryan to take into consideration changes in the art of construction and the use by him of other general assumptions which would tend to give a figure in excess of reasonable." 27 C. R. C. 765, 773.

[8] The witness concerning his own testimony said:

"This is not an attempt to make a reproduction valuation of the property, or show the cost of reproducing it, but only to convert the investment actually made into terms of dollars of 1925 levels."

It is not a fair characterization to say the commission arbitrarily refused to consider this factor. On the contrary, the commission did consider the item of evidence and found it insufficient upon which to predicate action. The legality of the system of valuation employed is therefore not raised on this record.

[9] Complaint is also made that the estimated rate of return on the valuation fixed is only 5.28 per cent. We are pointed to no figures which show this estimate to be above question as to its accuracy. Moreover, no consideration of the value of the service to the consumers is taken into account. Much proof was introduced to show that existing rates were in excess of the value of such service. In view of the many complications inhering in the system of operation of this utility, we are unable to say, as a matter of law, that the rate of return is so low as to be confiscatory.

It would seem that the commission has been jealous of the rights of the petitioner, and that the order in question may go far toward forming a better basis for solving the problems of all concerned, and if discrimination results at any point from it, rectification by the commission will, no doubt, ensue.

The order is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

202 Cal. 165

PEOPLE v. SUPERIOR COURT IN AND
FOR ALAMEDA COUNTY et al.
(S. F. 12417.)

Supreme Court of California. Sept. 23, 1927.

1. Homicide $\S$ 139—Indictment and Information $\S$ 189(8)—Information alleging defendant willfully and of malice aforethought murdered deceased held to charge murder in first degree and to include all subdivisions of murder, lesser degrees thereof, and manslaughter.

Information alleging that on specified date defendant "did then and there unlawfully, willfully, feloniously and of his malice aforethought kill and murder" deceased, held to charge murder in the first degree and to include all subdivisions of murder and lesser degrees thereof and manslaughter.

2. Homicide $\S$ 350—Where verdict was murder in first degree carrying penalty of death, court had no power to render judgment of murder in second degree carrying penalty of imprisonment (Pen. Code, §§ 190, 1157, 1385).

Where verdict found defendant guilty of murder in the first degree carrying with it the penalty of death, court was bound either to impose penalty of death or to grant new trial, and had no power to find that evidence did not sustain verdict of murder in first degree but

did sustain verdict of murder in second degree, and thereupon adjudge defendant guilty of murder in the second degree with penalty of imprisonment, under Pen. Code, § 190, providing that every person guilty of murder in the first degree shall suffer death or imprisonment for life at discretion of jury, and section 1157, providing that jury must find degree of crime, in view of sections 1118 and 1238 and notwithstanding section 1385.

3. Homicide $\S$ 350—Punishment fixed by jury for murder in first degree cannot be increased nor mitigated (Pen. Code, § 190).

Verdict of jury fixing penalty for murder in the first degree is supreme, and punishment fixed cannot be increased nor mitigated, under Pen. Code, § 190, providing that every person guilty of murder in the first degree shall suffer death or life imprisonment at discretion of jury.

4. Homicide $\S$ 350—Verdict of guilty of murder in first degree not fixing penalty, carries penalty of death (Pen. Code, § 190).

Where jury returns verdict finding defendant guilty of murder in the first degree without fixing the penalty to be imposed under Pen. Code, § 190, the law fixes the penalty at death.

5. Criminal law $\S$ 992—Statute authorizing court to dismiss action in furtherance of justice does not authorize it to pronounce sentence not responding to verdict (Pen. Code, § 1385).

Pen. Code, § 1385, providing that the court may of its own motion or upon application of district attorney and in furtherance of justice order an action or indictment dismissed, does not authorize court to pronounce sentence not responding to verdict.

6. Indictment and Information $\S$ 141—Indictment cannot be dismissed as to one or more degrees therein and jurisdiction retained as to other degrees (Pen. Code, § 1385).

Law does not authorize splitting of cause of action, and indictment may not be dismissed under Pen. Code, § 1385, or otherwise, as to one or more degrees included in it and jurisdiction retained as to the other degrees.

7. Mandamus $\S$ 3(1)—State seeking mandate to compel court to render judgment of murder in first degree with death penalty in accordance with verdict held without plain, speedy, or adequate remedy (Code Civ. Proc. § 1068).

In proceeding by state for writ of mandate to be directed to court and judge thereof annulling judgment of murder in the second degree and requiring rendition of judgment of murder in the first degree with death penalty, where it appeared that court refused to recognize verdict finding defendant guilty of murder in the first degree or to take any steps thereon, state held without plain, adequate, and speedy remedy, in view of Code Civ. Proc. § 1068.

In Bank.

Application by the People for writ of mandate to be directed to the Superior Court in and for the County of Alameda and the

judge thereof, annulling a judgment of said court imposing a sentence for murder in the second degree and requiring the imposition of a sentence for murder in the first degree in accordance with the verdict. Peremptory writ granted.

U. S. Webb, Atty. Gen., Wm. F. Cleary, Deputy Atty. Gen., Earle Warren, Dist. Atty., and J. Paul St. Sure, Asst. Dist. Atty., both of Oakland, for the People.

Fred G. Athearn, of San Francisco, amicus curiae, for respondents.

SEAWELL, J. [1] By an information filed in the superior court of Alameda county, Jesus Prudencio was charged with the crime of murder committed October 14, 1926, as follows:

"* * * That he did then and there unlawfully, willfully, feloniously and of his malice aforethought, kill and murder one Antonio Garcia."

The foregoing was an allegation of murder of the first degree and included all the subdivisions and lesser degrees of murder and also manslaughter.

[2] Upon trial had the jury, on January 12, 1927, returned its verdict finding the defendant guilty of "murder of the first degree, as charged in the information." In its charge the trial court specially instructed the jury in case it found the defendant guilty of murder of the first degree that—

"Then whether this defendant shall suffer death, or confinement in the state's prison for life is a matter committed solely to your discretion and conscience. If you determine that the death penalty shall not be inflicted, it will be necessary to expressly declare in your verdict that his punishment shall be by imprisonment in the state's prison for life; otherwise he shall suffer the extreme penalty of the law."

Four forms of verdict were prepared by the court, read to the jury, and taken by it to the jury room. The first was in the simple form, which, if returned, carried with it the death penalty as explained by the court. Stripped of formal verbiage, it read:

"We the jury find the defendant guilty of murder of the first degree, as charged in the information."

The second read:

"We the jury find the defendant guilty of murder of the first degree as charged in the information and fix the punishment at confinement in the state's prison for life."

The third read:

"We the jury find the defendant guilty of murder of the second degree, as charged in the information."

And the fourth was the simple form of "not guilty." Upon returning the first form

of verdict into court properly signed by its foreman, the jury was polled and affirmed its verdict of murder in the first degree, which was duly recorded by the clerk.

Under the foregoing circumstances of trial and conviction upon the charge of murder of the first degree, the defendant was brought into court at the time fixed for pronouncing judgment, and in keeping with the usual procedure he responded to the interrogatory as to whether there existed any legal cause why judgment should not be pronounced upon him by a motion for a new trial upon all of the statutory grounds and also in arrest of judgment. After argument by counsel the court proceeded to and did pronounce a judgment not founded or based upon the verdict of murder of the first degree as returned by the jury, but assumed that there was a verdict before it finding the defendant guilty of murder of the second degree, and thereupon adjudged the defendant to be guilty of murder of the second degree upon said assumed verdict and sentenced him to imprisonment in the state's prison as by the statute prescribed in such cases. Incontrovertibly no such verdict was rendered in the case. In denying the motion for a new trial (the conviction having been obtained under an information charging murder in the first degree and the verdict rendered responding precisely to the charge), the court caused the following order to be made and entered:

"Thereupon the court finds and decides that there is no evidence to sustain a verdict of and defendant is not guilty of murder of the first degree, but that the evidence does sustain and that the verdict does find the defendant guilty of murder of the second degree as charged in the information, and that a new trial upon said charge of murder in the second degree be and the same is hereby denied, and that the defendant be arraigned for judgment. * * *"

It then pronounced the following judgment:

"The defendant, who, with his counsel, J. J. Rose, Myron Harris, and L. A. Sullivan, was personally present in court, was duly informed of the information filed against him on November 29, 1926, for the crime of felony, to wit, murder, committed on or about the 14th day of October, 1926, and of his arraignment and plea of 'not guilty' to the said information, of his trial and the verdict and finding against him rendered by the jury on January 12, 1927, and of the decision of the court that the evidence sustains and that the verdict finds that the defendant is guilty of murder of the second degree in the commission of a felony, to wit, an assault with a deadly weapon by means likely to produce death or great bodily injury as charged in the information; and that his motion for a new trial for murder of the second degree was denied.

"The defendant was then asked whether he had any legal cause to show why judgment should not be pronounced against him, and the defendant makes and submits a motion in ar-

rest of judgment and the same is by the court denied.

"No sufficient cause being alleged or appearing to the court why judgment should not be pronounced, the court thereupon rendered judgment and ordered and adjudged that whereas the defendant Jesus Prudencio had been duly convicted in this court of the crime of felony, to wit, murder of the second degree, that he therefore be confined in the state prison of the state of California at San Quentin as prescribed by law, and that he be remanded to the custody of the sheriff of the county of Alameda and be by him taken and delivered to the warden of the state prison of the state of California at San Quentin."

Thereupon the defendant announced an appeal from the orders denying his motion for a new trial and in arrest of judgment, respectively, and from the judgment of conviction. At the same time the people appealed from the judgment. Upon the petition of the people an alternative writ was issued out of this court directed to respondent judge, commanding him to show cause why the judgment pronounced by him in said cause, entitled "In the Superior Court of the State of California, in and for the County of Alameda, the People of the State of California, Plaintiff, v. Jesus Prudencio, Defendant," adjudging said Jesus Prudencio guilty of murder of the second degree should not be annulled and set aside as being in excess of jurisdiction and further commanding him to show cause why a peremptory writ of mandamus should not issue commanding him to pronounce judgment imposing the death penalty against said Jesus Prudencio as provided by law in such cases.

[3] No substantial grounds exist upon which the judgment as entered may be sustained. It is clearly without authority of law and does not purport to respond to any verdict rendered by the jury. The defendant was before the court for the purpose of receiving the sentence imposed by law. It was the legal duty of the court either to pronounce judgment upon the verdict as rendered in obedience to the law's mandate or grant a new trial, if so advised. The verdict of the jury adjudging the punishment which the accused shall suffer in first degree murder cases is supreme and cannot be increased or mitigated by the court in the slightest degree. Pen. Code, § 190. This principle or rule of law has been uniformly accepted by this court as a major premise in its consideration of a long line of cases in which the question here presented was necessarily involved. A partial list of such cases includes *People v. Hall*, 199 Cal. 451, 249 P. 859; *People v. Arnold and Sayer*, 199 Cal. 471, 250 P. 168; *People v. Craig*, 196 Cal. 19, 235 P. 721; *People v. Wolfgang*, 192 Cal. 754, 221 P. 907; *People v. Connelly*, 195 Cal. 584, 234 P. 374; *People v. Cascade*, 194 Cal. 679, 230 P. 9; *People v. Perry*, 195 Cal. 623, 234 P. 890;

People v. Lee Yune Chong, 94 Cal. 379, 29 P. 776; *People v. Campbell*, 40 Cal. 129; *People v. Marquis*, 15 Cal. 38. In *People v. Leary*, 105 Cal. 486, 39 P. 24, this court recognized the exclusive power of the jury to fix the penalty in first degree murder cases. It said:

"The law submits to the jury, under the instruction of the court, the question as to the degree of murder, if any, of which the defendant is guilty in any instance, and section 190 of the Penal Code further provides that one found guilty of murder in the first degree 'shall suffer death or confinement in the state prison for life, at the discretion of the jury.'

"Whatever may have been the actuating consideration in the minds of the Legislature in enacting section 190, whether because they believed there are instances of murder falling within the definition of murder of the first degree, which, because characterized by a less degree of atrocity or other mitigating circumstance, call for a milder punishment than that of death, or whether their reason was something else, the fact remains that they have confided the power to affix the punishment within these two alternatives to the absolute discretion of the jury, with no power reserved to the court to review their action in that respect."

The decisions of this court could be no other way if the provisions of section 1157, Penal Code, are to be at all regarded. It provides:

"Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

In *People v. Arnold and Sayer*, supra, as in other cases, in warning trial courts against encroaching in the smallest degree upon the exclusive statutory right and duty imposed upon the jury by section 190, Penal Code, to assess the penalty that an accused should suffer as a punishment of first degree murder, we not only recognized the right of affixing penalties in murder cases as being the exclusive prerogative of the jury unrestrained by judicial intimation, but we cautioned trial courts against giving instructions that might have a tendency to influence or hamper a jury in the exercise of its discretion as to the degree or quantum of punishment that might appear to the court to be appropriate in the case. If the court, as respondent contends, may totally disregard the verdict of the jury and determine for itself the punishment that should be imposed in murder cases the statute and the numerous decisions of this court that have been rendered in construing the law would be held at naught and the court, if such a course be sustainable, might well instruct a jury that all that is required of it, in case it believe the defendant guilty of murder, is to render a simple verdict of murder and the court will assume the responsibility of determining whether the penalty should be death or life imprisonment, or,

indeed, do as the court attempted here to do, acquit the defendant of first degree murder in the face of a verdict finding the defendant guilty of a higher degree of crime.

[4] The law on this subject was early stated in an instruction given in *People v. Iams*, 57 Cal. 115, in the following language:

"Should the jury find the defendant guilty of murder in the first degree, without affixing the [death] penalty, the law in such cases adjudges the penalty, and that penalty is death."

The above instruction is substantially like the instruction given in the instant case and has for many years been consistently recognized as a correct statement of the law by all the courts of this state. Prior to the amendment of section 190, Penal Code, adopted March 28, 1874 (Amendments to the Codes 1873-74, p. 457), murder was punishable by death. No discretion was theretofore reposed in the jury to relieve the accused of the extreme penalty of the law upon a verdict finding the accused guilty of murder of the first degree. All murder of the first degree was punishable with death. The court was powerless to reduce the penalty. The only way the death penalty could be avoided was by returning a verdict in the second degree. The amendment of 1874 was adopted to give the jury—not the court—the discretion of relieving the defendant of the extreme penalty formerly made mandatory by the statute. Section 190, *supra*, amended to its present form, reads:

"Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same. * * *

The Legislature has clearly made it the arbiter as to the punishment that shall be meted out to persons guilty of murder in the first degree. No decision of this court can be found holding a contrary view.

The question before the court for determination was whether the evidence as a matter of law supported the verdict. If it did it had no alternative but to pronounce the sentence of the law. The people's right to proceed against the defendant for the crime charged cannot be defeated by the court substituting its verdict for the verdict of the jury. Its duty was to first pass upon the motion for a new trial. If it was advised that the evidence was insufficient to support the verdict and for that reason granted a new trial, the people would have had the right to appeal directly from the order. (Section 1238, Pen. Code.) In the view of the trial court there was neither conviction had of murder in the first degree or judgment pronounced upon such a conviction. If this view be correct then the people's right of appeal may be defeated by a failure or refusal on the part of the court to comply with the mandatory provisions of the statute.

Under such a procedure the defendant would be secure against a new trial which if granted, as it should be if the evidence is insufficient to sustain the verdict, would again place him upon his trial at the risk of having the case against him strengthened by new or additional evidence to the degree that a verdict carrying with it the death penalty would be impregnable to assault. This precise contingency happened as related in *People v. Grill*, 151 Cal. 592, 91 P. 515. Upon his first trial Grill was found guilty of murder in the first degree with punishment fixed at life imprisonment. Upon appeal taken he was granted a new trial, and upon the trial granted the jury returned a verdict of murder in the first degree, in consequence of which the death penalty was inflicted upon him. A person charged with murder is not acquitted of a higher degree until a valid conviction obtained in the law's form has become final. It is true that a conviction of manslaughter has been held to be an acquittal of murder. But in no case has it been held that a conviction of murder in the second degree, or in the first degree punishable with life imprisonment, upon a new trial granted, bars a conviction of murder carrying with it the death penalty. So zealous are the people that the prerogative of a jury shall not be invaded by courts in the determination of questions of fact that the Legislature has provided as follows:

"If, at any time after the evidence on either side has closed, the court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice." (Pen. Code, § 1118.)

[5] Respondent has attempted to bring to its aid section 1385, Penal Code, which provides that—

"The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes."

This procedural section manifestly does not give the court the right to disregard the verdict of a jury and pronounce a sentence that does not respond to the verdict as rendered. The chapter under which said section is found shows that it has no relevancy to the question of the court's refusal to act upon the verdict in the manner provided in the Code. The dismissal of an action or indictment goes to the indictment as a whole, which may include a number of degrees of the crime pleaded.

[6] There has not been brought to this court's attention, and doubtless no such cases can be found, where a dismissal of the indictment as to one or more degrees included therein has been made and jurisdiction retained as to the other degrees. Such is not

the system of this state and there is no authority of law for splitting up causes in this way. It would bring about confusion, but what is more important, such a procedure can have, under the Code, which specially prescribes the powers and duty of courts and juries with respect to verdicts rendered in criminal cases, no application whatsoever.

The case of *People v. Sugarman and Passarello* (Cal. App.) 251 P. 949, is cited as a precedent sustaining respondent's contention. In that case the defendants were charged with burglary. The jury found them guilty of burglary of the first degree, but the court "decided that the offense was burglary of the second degree, and sentenced them accordingly." No California case was cited sustaining the court's decision. A petition for a hearing by this court was not requested. That case presented an appeal taken from the judgment pronouncing the defendants guilty of the lesser offense. No writ, as here, was sought directing the court to act upon the verdict before it. Had such a remedy been invoked, we do not see how the trial court could have avoided the force of the statute. However, murder is placed in a class by itself. Those who deliberately take human life must answer as to the degree of crime and the punishment that shall be imposed upon them to a jury of their peers. Section 190, Pen. Code. The authorities are so uniform and numerous in this state sustaining the view we have taken of the main questions presented that we deem it unnecessary to review the authorities from other jurisdictions which, it is claimed, support respondent.

[7] The defendant in the instant case has not been arraigned for sentence upon the verdict rendered by the jury convicting him. Neither has sentence nor judgment been pronounced by the court upon said verdict. The court positively refuses to recognize the verdict received by it or to pronounce judgment thereon or take any steps whatever upon the verdict rendered, as shown by the return herein. The court was without jurisdiction to pronounce judgment upon an assumed verdict of murder in the second degree and the judgment so pronounced must be annulled. We are of the opinion that petitioner has no plain, speedy, or adequate relief in the premises. Section 1068, Code Civ. Proc. It appearing that the court without any lawful cause refuses to pronounce judgment upon the verdict of the jury as rendered, or to take other legal or appropriate action thereunder or perform acts which the law specially enjoins upon said judge and court as a duty resulting from the office which said judge occupies, it is ordered that a writ of mandate issue out of this court commanding said Hon. Fred V. Wood, as judge of the superior court of the county of Alameda, to arraign said Jesus Prudencio, defendant

in said action pending in said court, for judgment under and by virtue of the verdict returned against him, to wit, conviction of murder in the first degree as charged in the information, and to hear and determine such motions as may properly come before him and to take such proceedings therein as are meet and proper in the premises and as by law provided.

The peremptory writ will issue.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

202 Cal. 215

LEFROOTH v. PRENTICE et al.
(L. A. 7848.)

Supreme Court of California. Sept. 27, 1927.

1. Husband and wife $\Leftrightarrow$ 49½(8)—Wife's testimony that she received bonds and had joint access to safe deposit box with husband will justify finding of intention to give, delivery, and acceptance of securities.

Testimony of wife that she received bonds from husband and actually had them in her custody, and that she had joint access to safe deposit box with husband, will justify finding that there was intention to give, delivery, and acceptance of securities.

2. Fraudulent conveyances $\Leftrightarrow$ 96(2)—Gifts $\Leftrightarrow$ 49(6)—Evidence held not to show gift of securities to children, so that father's subsequent use thereof was not consideration for transfer of land to children (Civ. Code, §§ 1146, 1147).

Evidence held to show that there had been no gift of securities from father to children where there was no delivery, under Civ. Code, §§ 1146, 1147, so that father's use of such securities could not be consideration for subsequent transfer of land to children.

3. Gifts $\Leftrightarrow$ 2—Whether transaction constituted gift so as to show consideration for father's conveyance to children in another state depends on law of state where gift transaction was made.

Where question whether conveyance of land to children in California was supported by consideration depends on gift transaction in another state, whether latter transaction accomplished completed gift depends on law of such other state.

4. Evidence $\Leftrightarrow$ 80(1)—In absence of showing as to what law of another state is, court must presume rule same as in state where action is brought.

Where law of Connecticut governs phase of case in California, and there is no showing as to what law of Connecticut is, courts must indulge presumption that rule there is same as rule in California.

5. Gifts ¶22—"Delivery" of gift may be symbolical, such as written instrument on which delivery might be compelled.

"Delivery" of gift may be symbolical, such as delivery of written instrument without physical delivery of securities, so long as instrument is one on which delivery might be compelled.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deliver—Delivery.]

6. Gifts ¶28(2)—Where donor failed to surrender dominion over securities, delivery was ineffective to pass title.

Where donor failed to surrender complete dominion or any dominion over securities, delivery was incomplete and ineffective to pass title.

7. Trusts ¶44(1)—Evidence held insufficient to show creation of trust in certain securities, where purpose of trust and name of trustee cannot be ascertained.

Evidence held insufficient to show creation of trust in certain securities in favor of children as beneficiaries, where purpose of trust and name of trustee cannot be ascertained.

8. Trusts ¶17, 18(2), 44(3)—Trusts in personality may be created verbally and proved by clear and unequivocal oral evidence.

Trusts in personality may be created, declared, or admitted verbally and may be proved by parol evidence, but such evidence must at all times be clear and unequivocal.

9. Fraudulent conveyances ¶169—Transfer without consideration by insolvent party is void as to existing creditors regardless of whether grantee had fraudulent intent; "fraudulent conveyance" (Civ. Code, § 3442).

Transfer or incumbrance of property made voluntarily or without valuable consideration by party while insolvent or in contemplation of insolvency is fraudulent and void as to existing creditors, under Civ. Code, § 3442, regardless of whether there is fraudulent intent on part of grantee.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraudulent Conveyance.]

10. Fraudulent conveyances ¶298(1)—Evidence held insufficient to support finding that deed without consideration was not executed in contemplation of insolvency.

Evidence held insufficient to support finding that deed without consideration transferring land from father to wife and children was not executed and delivered in contemplation of insolvency.

11. Appeal and error ¶1011(1)—Finding on "conflicting evidence" will not be disturbed.

Finding of trial court on conflicting evidence will not be disturbed, but evidence to raise conflict must be such as to present fair and reasonable ground for difference of opinion.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Conflicting Evidence.]

12. Fraudulent conveyances ¶286(1)—In action to subject real property transferred by defendant to satisfaction of judgment, exclusion of testimony concerning business relations with son not made grantee held error.

In action to subject real property transferred by defendant to wife and three children to satisfaction of judgment, exclusion of cross-examination of defendant debtor concerning business relations with son, who was not made grantee in deed, held error.

In Bank.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by L. M. Lefrooth against George G. Prentice and others. Judgment for defendants was affirmed by the District Court of Appeal, Second District, Division 1, and plaintiff appeals. Reversed.

Wright & McKee and C. M. Monroe, all of San Diego, for appellant.

Sweet, Stearns & Forward, of San Diego, for respondents.

PRESTON, J. This is an appeal from judgment in favor of defendants in an action, under sections 3439 and 3442 of the Civil Code, to subject certain real property to the payment of a judgment obtained by appellant against defendant George G. Prentice.

In 1916 said defendant opened a general brokerage office in San Diego under the name of "George G. Prentice & Co.," his son, Gordon Prentice, being associated with him, and through a connection with the brokerage house of Logan & Bryan he bought and sold stocks and bonds on the leading exchanges of the country. In August of that year appellant opened an account with him, dealing in stocks and grain, buying and selling securities outright, and also operating on margin. She claims that in the early part of 1917 she became somewhat uneasy and suspicious of the status of her account, and thereafter had a number of interviews with Mr. Prentice, extending into late August and early September, at the last of which she insisted that he make good the losses he had caused her and threatened court action. She actually did bring suit against him on August 26, 1919, as a result of which on April 24, 1922, she obtained the above-mentioned judgment for \$46,848.12, with costs.

On September 14, 1917, but a week or two subsequent to appellant's alleged threat of court action, said defendant conveyed to his wife and three of his children a large ranch situate in San Diego county, Cal. It is this conveyance which appellant alleges in her complaint herein was made without consideration, for the purpose of hindering, delaying, and defrauding defendant's creditors, particularly herself, and in contemplation of insolvency. Defendants, on the other hand, claim

that the conveyance was made in good faith and for a valuable consideration. The evidence is without substantial conflict, as the facts and circumstances surrounding the transaction were within the private knowledge of defendant and his family. It is admitted that at the time of making said deed on September 14, 1917, no immediate consideration passed to defendant George G. Prentice from his codefendants, but the circumstances relating to his alleged indebtedness to his family concerning a gift transaction in securities in the year 1911, in satisfaction of which they claim said deed was executed, are hereinafter set forth.

In 1911 the Prentice family moved from New Haven, Conn., to San Diego, Cal., where Mr. Prentice engaged in extensive and unfortunate speculations upon the stock market. In the spring of 1912 he purchased the ranch property in question for the sum of \$105,000, although its present value is probably more than double that amount. He continued to speculate extensively and to lose money and used in his speculations certain bonds and securities alleged to have been given to his wife and children as hereinafter set forth. At the time the deed to the ranch was executed, Mrs. Prentice was visiting in the east and her first knowledge of it was when she received it through the mail. Her husband never parted with possession of the ranch property, but maintained his control thereof, and collected and used the proceeds from it, without an accounting of any kind to his wife or children. In 1921, however, he did open a new bank account in the name of "Prentice Ranch," to which he transferred the balance from his own account, and thereafter instead of signing checks in his own name, he signed them in the name of "Prentice Ranch," by himself as manager thereof. Some two months after said conveyance, defendant and his wife executed a deed purporting to grant to the San Diego Gas & Electric Company an 80-foot easement over said ranch property, and received the consideration therefor. The children did not join in this deed and received none of the proceeds from it. Apparently there has been no attempt to fix the undivided interests to which it is claimed they are entitled. Although the oldest daughter reached her majority and married, she received no accounting of her interest, nor did she receive any of the revenues from nor was she charged with any part of the expenses of said ranch. The same is true of the second daughter, who reached her majority in 1920. Subsequent to the conveyance defendant was appointed guardian for the minor son, Hillyer, but no accounting was ever made of the alleged interest of said minor son in the ranch. It will also be noted that the oldest son, Gordon Prentice, was omitted from the conveyance. Yet it appears that certain securities were also set aside for him by his father in 1911.

The trial court refused to receive evidence as to what became of them, but the record does show that they were no longer in the possession of the Prentice family at the time of the conveyance.

Appellant, through her counsel, makes earnest and spirited attack upon the judgment upon two general grounds, to wit, the insufficiency of the evidence to support the findings in essential particulars, and errors of law in the exclusion of certain testimony. Under the first ground it is contended that at least as to the children of said defendant George G. Prentice the transaction represented by the deed was voluntary and without a valuable consideration to support it, the findings of the court to the contrary notwithstanding. And further, conceding the soundness of the above contention, she contends that the evidence shows without substantial conflict that said defendant was, if not actually insolvent, certainly acting in contemplation thereof in making the deed in question, also the findings of the court to the contrary notwithstanding. She further asserts that we may look at the facts existing and the events occurring shortly before and after the making of the deed in considering this contention. The testimony, the exclusion of which is complained of, was cross-examination of said defendant debtor concerning his business relations with his son, Gordon, who, as above pointed out, was not made a grantee under the deed before us.

After a careful study of the record of the case in the light of the principles applicable thereto we are constrained to uphold appellant in each of the above positions.

[1] In so far as the transaction between the husband and the wife is concerned, the wife testified that she actually received the bonds herself and actually had them in her custody; that she had joint access to the safe deposit box with her husband. This testimony under our decisions would justify the finding of the court that as to her there was an intention to give, a delivery, and lastly an acceptance of the securities by her. See *Hynes v. White*, 47 Cal. App. 549, 553, 190 P. 836, where a large number of decisions are reviewed, and where rehearing was denied by this court. This would form a sufficient basis for a transfer in exchange for the value of such securities.

[2] The only evidence in the record, from which it is claimed that the valuable consideration for such deed as to the three children of said Prentice is revealed, is that as to the so-called gift transaction in New Haven, Conn., about 1911 or 1912 above adverted to. This transaction may be partially stated in the language of the attorneys for defendant debtor:

"The testimony shows that Mr. and Mrs. Prentice and at least the two older children went to the office of a broker in New Haven where the bonds were purchased. That after

the purchase the bonds were put in a safety deposit box in the Union-New Haven Trust Company with instructions to collect the coupons and credit the interest to the account of the children, each child having a separate account, George G. Prentice, trustee."

The evidence further shows that Prentice's instructions were carried out and the bonds remained in the Trust Company for three or four years. That during all that time the Trust Company collected the coupons and deposited the money in the respective children's names. A large number of statements of account were rendered from time to time by the Trust Company showing "Helen Sheldon Prentice, in account with the Union & New Haven Trust Company," and "Janet Elizabeth Prentice, Geo. G. Prentice, Trustee, in account with the Union & New Haven Trust Company," and "Janet Elizabeth Prentice, in account with the Union & New Haven Trust Company." The moneys in these accounts were used to pay for the schooling and current expenses of the children. It further appears that at the time of depositing the bonds a memorandum was made out by George G. Prentice in the case of each of the three children, which, in each instance, was substantially the same except as to name of the child. Taking Defendants' Exhibit B as an instance, such memorandum reads:

"Memorandum: Deposited to Hillyer Prentice in the Union & New Haven Trust Company, New Haven, December 25, 1912, held in trust the following: 10 Seattle Electric bonds; 10 Union Electric Light bonds; 10 Northern Texas bonds; 10 East Ohio Gas bonds. These memoranda were deposited with the Trust Company and remained there until the bonds were taken out—in the case of Hillyer Prentice, until March 25, 1916. They were then mailed to the children in San Diego, where the Prentice family was then residing, as shown by the envelopes in the various cases, the Hillyer Prentice memorandum being addressed to Hillyer Prentice, George G. Prentice, Trustee, 305 Spreckels Building, San Diego, Cal."

It will be noted that we are not here concerned with the deposits to the credit of the children other than what may be shown therefrom concerning the securities themselves. To the above testimony, however, should be added the fact that the safe deposit box referred to was the safe deposit box of said George G. Prentice, to which his wife had access, and to which it must be inferred that the bank also had access. So far as said children are concerned, there is no evidence that they had then or ever had access to the box, or that they ever had physical custody of any of the securities in question. There is no evidence whatsoever from which it may be found that said Trust Company received from said Prentice any instructions as to the custody, control, or disposition of the said securities themselves other than as to the coupons above referred to. The memorandum refer-

red to was not delivered to the Trust Company, but was on a wrapper containing the securities and left, of course, with them in the safe deposit box.

There is no evidence from which it could be inferred that said Trust Company acted or agreed to act as the agent or trustee of the donees in connection with the securities. The testimony of Prentice himself in this connection may be profitably quoted here:

"Q. You kept the control of those bonds, did you? A. They were put in trust in the Trust Company, New Haven Trust Company. I was trustee.

"Q. They never went out of your control, did they? A. No.

"Q. Did you draw up any document appointing yourself as trustee? A. No; only notified the Trust Company. * * *

"Q. And then there was never any evidence of this transfer of the bonds to your children other than that you deposited them in the bank for safe-keeping, and had them credit the interest to the account of each one of these children and check out as trustee by you? A. That is the substance of it."

It is nowhere shown or contended that the father ever surrendered actually or symbolically the dominion or control of any of the securities at any time. This is further evidenced by the fact that without the consent of the Trust Company, the alleged donees, or any one else, he sold said securities and used the proceeds for his own personal benefit.

[3, 4] In reality to test the efficacy of said transaction to accomplish a completed gift the law of Connecticut should be expounded, as such law would control the transaction. In the absence of a showing as to what the law of Connecticut is, we are required to indulge the presumption that the rule there pertaining to such transaction is the same as the rule in this state.

Section 1146 of the Civil Code provides:

"A gift is a transfer of personal property, made voluntarily, and without consideration."

Section 1147 provides:

"A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee."

The rule announced by these sections has obtained without modification throughout all our decisions and may still be pointed to as correct. Another statement of the rule may be found in 28 Corpus Juris, 634, § 23, as follows:

"In order to constitute an effectual delivery, the donor must not only have parted with the possession of the property, but he must also have relinquished to the donee all present and future dominion and control over it, beyond any power on his part to recall. The surrender must be so full and complete that, if the donor resumes control over the property with-

out the consent of the donee, he will be answerable in damages as a trespasser. The retaining of control in the hands of the donor over the subject of the gift, or the reservation by the donor of any right to retake the property or appropriate it to other purposes, avoids the gift."

[5] For the purposes of this case it may be assumed that George G. Prentice intended to make a gift of these securities to his children and also that, they being minors, of ages ranging from 14 to 4 years of age, the law would accept the benefits of the gift in their behalf. The real question presented is, Was there within the limitations set by the law a delivery of such intended gift? There is likewise no question but that delivery may be symbolical such as delivery of a written instrument without physical delivery of the securities themselves so long as the instrument is one upon which delivery might be compelled. "The interest intended to be transferred is, under section 1054 of the Civil Code, vested in the transferee upon the donor's delivery of the grant." *Burkett v. Doty*, 176 Cal. 89, 92, 167 P. 518, 520. But here we have no evidence upon which to base the contention that there was a written instrument. The memoranda on the wrappers, while in the handwriting of the alleged donor, contained no signature, nor did they contain any words purporting to be a grant or transfer.

The case of *Giselman v. Starr*, 106 Cal. 651, 656, 657, 40 P. 8, 9, is instructive in this discussion. There S. C. Hastings doubtless had a bona fide intention of making a gift to his daughter, Ella, who was incompetent. So apparent is this intention that it appears that he had himself appointed a guardian of the estate of his said daughter. In the inventory of her estate, which was duly verified by him, the note and mortgage in question were entered as the property of the incompetent. The note was exhibited to the appraisers by him and by them appraised at a valuation suggested by him. The testimony showed further that he expressed sympathy and anxiety for his afflicted child and said he was making provision for her and desired to make such provision while he was living. "He said he had not yet turned over anything, but expressed his desire to do so." Speaking of that transaction, the court said:

"This array of facts and circumstances makes a strong presentation of the intent of Hastings to give the note and mortgage to his daughter. It is established that upon one occasion, under oath, he declared them to be her property. But such a declaration, however binding in good morals, is not of itself sufficient to establish a gift. No legal duty was imposed upon Hastings to give this particular property to his daughter, and, if the intended donation lacked anything of consummation, the promises or declarations were but nudum pactum and not enforceable. It is not here a question of acceptance of the gift by the incompetent which, the

gift being advantageous to her, the law would presume; but the question is whether the gift was so completely made as to enable the law to presume its acceptance. To every gift delivery is essential. Says Chancellor Kent, speaking of negotiable instruments: 'Delivery in this, as in every other case, must be according to the nature of the thing. * * * It must be the true and effectual way of obtaining the command and dominion of the subject. * * * If the thing given be a chose in action the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed.' The Civil Code declares that 'a verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee.' Civil Code, § 1147. Hastings' attempted or intended gift fell short of these requirements. Lacking his indorsement of the note, his possession remained a possession in his personal and not in his representative character, and the gift failed of completion."

In the case of *Edwards v. Guaranty Trust, etc., Bank*, 47 Cal. App. 86, 89, 190 P. 57, 59, after citing with approval the doctrine of *Provident Institution for Savings v. Sisters of the Poor, etc.*, 87 N. J. Eq. 424, 100 A. 894, the court said:

"To constitute a valid gift *inter vivos*, the purpose of the donor to make the gift must be clearly and satisfactorily established, and the gift must be complete by actual, constructive or symbolical delivery, without power of revocation.' 20 Cyc. 1193. In order to accomplish this, 'there must be a parting by the donor with all present and future legal power and dominion over the property.' 20 Cyc. 1196; *Tracy v. Alvord*, 118 Cal. 654, 50 P. 757; *Pullen v. Placer County Bank*, 138 Cal. 169, 66 P. 740, 71 P. 83, 94 Am. St. Rep. 19; *Simmons v. Savings Society*, 31 Ohio [St.] 457, 27 Am. Rep. 521; [*Matthews v. Hanson*, 145 Va. 614, 134 S. E. 568]. That the law of this state is as stated in the *Provident Case*, *supra*, will be seen by a perusal of that and the other cases cited therein, citing and quoting from the California cases at length."

[6] A rehearing in this case was denied by the Supreme Court. A careful examination of many cases reveals no exception to the rule announced in the above authorities. There is no different rule applicable to minors of tender years in a transaction with their parents than applies to a transaction between adults for as far as the legal steps are concerned they are in the two cases identical. In *re Acken's Estate*, 144 Iowa, 519, 123 N. W. 187, Ann. Cas. 1912A, 1166. The irresistible conclusion is that the father either did not intend to complete the gift or else, in attempting to execute his intention fell short of making a delivery of the securities as he failed utterly to surrender complete dominion or any dominion over the same. The delivery of the securities was therefore incomplete and ineffective to pass title.

It is difficult to gather clearly from the contention of respondent whether it is that the gift was completed by the donor constituting the bank the agent or trustee of the donees, or whether he contends that he, as the father, became the trustee of the property donated by him to his children. We have not only examined the transaction in testing it for the legal requirements of a gift, but also in order to ascertain whether or not it can be considered a declaration of trust in personal property in which the father may be considered the trustee for said children. The requirements of a voluntary trust are specified in section 2221 of the Civil Code as follows:

"* * * A voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty: (1) An intention on the part of the trustor to create a trust; and, (2) the subject, purpose, and beneficiary of the trust."

It is, of course, admitted that in personal property this trust relationship if existing, may be established by parol testimony, but the evidence above quoted including the testimony of George G. Prentice, fixes the limitations upon the transaction. It will be noted that, in addition to the testimony quoted above, he was asked the following questions and gave the following answers:

"Q. Did you draw up any document appointing yourself as trustee? A. No; only notified the Trust Company.

"Q. You put those bonds in the Trust Company under your name as trustee? A. No; under their names.

"Q. In the Trust Company's name as trustee? A. Under the individual child's name, and they collected the interest and credited the same to their account."

[7] From this testimony it is impossible to say whether the witness intended to constitute himself as trustee, or whether he intended the Trust Company as trustee, and if the latter, the trust relationship, at most, extended no further than the collection of the interest and the crediting it to the account of the respective child for which it was intended. But in any event taking the memoranda and all the facts surrounding the transaction, it is impossible to say that a valid trust in said securities in favor of said children as beneficiaries was created. Not only can it not be told who, if any one, was to be the trustee, but it cannot be ascertained from the evidence what the purpose of the so-called trust was. In other words, the duration of the estate granted, the nature and quantity of interest which the beneficiaries were to have, and the manner in which the trust was to be performed are undeclared and too uncertain to be called an estate of any kind in the said children.

[8] It is a cardinal rule that trusts in personality may be created, declared, or admitted

verbally and may be proved by parol evidence, but the authorities are uniform to the effect that such evidence must at all times be clear and unequivocal. *Silvey v. Hodgdon*, 52 Cal. 363; *Sheehan v. Sullivan*, 126 Cal. 189, 58 P. 543; *Barker v. Hurley*, 132 Cal. 21, 63 P. 1071, 164 P. 480. Mr. Pomeroy, in *Equity Jurisprudence* (4th Ed.) § 1009, states the rule as follows:

"The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject-matter or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interests which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail."

See, to the same effect, *Wittfield v. Forster*, 124 Cal. 418, 421, 57 P. 219, 221, from which we quote the following:

"If we apply the statutory declaration above quoted [section 2221, Civ. Code], and the principle found in the above language of Pomeroy, we see that the language employed in the instrument is entirely too vague and uncertain to constitute a valid trust. The duration of the estate attempted to be granted to the trustee, the nature and quantity of interest which the beneficiaries are to have, and the manner in which the trust is to be performed, are all left undeclared and without any reasonable certainty; and, of course, there is no statement of any of the purposes for which under section 857 an express trust may be declared. And this uncertainty also makes the attempted trust as to the personal property void."

See, also, *Barker v. Hurley*, supra, at page 28 (63 P. 1071, 164 P. 480); *Estate of Budd*, 166 Cal. 286, 291, 135 P. 1131; *Estate of Webb*, 49 Cal. 541; *Noble v. Learned*, 153 Cal. 245, 250, 94 P. 1047. The facts in the case at bar make fairly applicable the language of *Govin v. De Miranda*, 76 Hun, 414, 419, 27 N. Y. S. 1049, 1052:

"In no case has it ever been held as yet that a party may, by transferring his property from one pocket to another, make himself a trustee."

Having reached the conclusion that upon no theory can the evidence be held sufficient to sustain a finding that the deed in question was based upon a valuable consideration as to the three children of said Prentice, we pass next to a consideration of appellant's contention that the evidence is without substantial conflict that said deed was executed and delivered by said George G. Prentice in contemplation of insolvency.

[9] It must be borne in mind that, under section 3442 of the Civil Code:

"Any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent

or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors."

Under such a showing, the fraudulent intent on the part of the grantee of such transfer is immaterial. *Tobias v. Adams* (Cal. Sup.) 258 P. 588; *Chalmers v. Sheehy*, 132 Cal. 459, 64 P. 709, 84 Am. St. Rep. 62; *Judson v. Lyford*, 84 Cal. 505, 24 P. 286; *Knox v. Blanckenburg*, 28 Cal. App. 298, 152 P. 59. It is also true that in such case the intent to defraud creditors is not required. See *Atkinson v. Western D. Syndicate*, 170 Cal. 503, 506, 150 P. 360, 361, where we said:

"If these conditions, to wit, a grant made without consideration by a person insolvent or in contemplation of insolvency, are present, the intent of the grantor is immaterial and the transfer, regardless of the actual intent, is void as to creditors."

[10] The court found that respondent did not at the time of making said deed of September 14, 1917, anticipate that he would be insolvent with the property described in said deed gone, and also that said deed was not made for the purpose of placing said property out of reach of his creditors, particularly appellant; that it was not executed in contemplation of insolvency, but that said George G. Prentice was thoroughly solvent and abundantly able, out of other properties than the property covered by said deed, to pay all of his indebtedness.

The court also found in this connection that said George G. Prentice did not know he was indebted to appellant, nor, if he was indebted to her, the amount thereof. However, significant facts concerning this matter are contained in a previous finding as follows:

"That although defendant George G. Prentice well knew of his liability and duty to so account to plaintiff throughout all of the time heretofore mentioned during which said relationship existed, the said defendant George G. Prentice failed, refused, and neglected to so account to plaintiff, but concealed from her during all of said time the actual status of their mutual accounts and concealed from her profits made in the transactions hereinbefore mentioned, and concealed from her the fact that he was indebted to her in various amounts growing out of the transactions covering all of said period and aggregating the sum aforesaid."

It is impossible to reconcile the fact that the court found that said respondent Prentice concealed from appellant, during the whole period of her transactions with him, the status of her account and concealed from her the profits made in transactions for her and concealed from her the fact that he was indebted to her in various sums, aggregating \$39,145.29, with the finding that he did not know whether or not he was indebted to her at all. Indeed, the whole finding as to the good faith and lawful intent and noncontemplation of insolvency of respondent Prentice

is colored, if not discredited, by the finding that he was thoroughly cognizant of and was unlawfully concealing from appellant his indebtedness to her and had been so concealing it from her from the inception of their transactions together, and yet, "not knowing that he was indebted to said plaintiff in a large sum of money, and not knowing that he was indebted to said plaintiff at all, for a good, valuable, sufficient, and adequate consideration to him in hand paid by the other defendants in said action, did make, execute, and deliver and place of record a good and sufficient deed of conveyance," etc.

With a conflict in the findings directly reflecting upon the question as to whether or not defendant Prentice was contemplating insolvency in the execution of the deed, we approach the evidence on that question. It is true that at the time he made the deed, September 14, 1917, he was in the brokerage business, and that complete collapse and admitted insolvency did not overtake him until some time in 1919. It is also true that on the date said deed was made he had a measure of credit at the banks and in the stores. But it must be borne in mind that he had lost \$250,000 in stock speculations just prior to 1916, the opening date of said brokerage business. After 1916 he continued to speculate in stocks and, presumably at least, to lose money therein. At the time in question he was also conducting a fast losing business as a brokerage house. The court in announcing its decision stated that said defendant had assets of \$51,500 and debts to the amount of from \$40,000 to \$45,000. But counsel for appellant, with many grounds therefor, insists that the evidence shows only \$46,500 in assets, as one item of \$5,000 was duplicated in the court's footings of the schedule.

But whether it be the one amount or the other, the further facts are that within less than 30 days after making of the deed, complete insolvency occurred when said defendant used \$10,000 of the amount on hand and borrowed an additional \$5,000 to pay losses in the said business, a part of which, at least, must have existed on the day the deed was made. In less than four months these assets were reduced to something like \$25,000 or \$30,000, a state of hopeless insolvency. The property covered by the deed was 2,300 acres of valuable land for which defendant had paid some years previously \$105,000, and which was valued by him at the time of trial at about \$290,000. With this situation, including the facts detailed above, with plaintiff suspicious of him to the extent that she had closed her account with his company, and with his wife and children in the east and the wife "panicky" about her bonds, he made, executed and recorded said deed and mailed it to them. This deed presumably removed from legal process the only piece of property that was not easily convertible. Under these

facts, can it be said that the finding that the debtor did not contemplate insolvency is supported by any competent evidence? What, pray, was he thinking about that so forcibly reminded him of the obligation to his wife and children that had for so many years been dormant? It is stretching credulity beyond the breaking point to say that substantial grounds exist for different conclusions from this evidence. The fact that bankers and merchants did not know of defendant's condition, or, if they did, that they still trusted him, does not point to a different conclusion as to what defendant had in contemplation when he made this deed.

[11] We are aware of and by no means intend to do violence to our rule that, as to a finding of the court below on conflicting evidence, the conclusion of the lower court will not be disturbed. In *Tobias v. Adams*, supra, 258 P. 591, we said:

"For, if a man keeps his bank account in the name of another, admittedly to prevent his creditor from reaching it by legal process, and then takes his entire estate, and either puts it in his wife's name, or deposits it in the name of his secretary, knowing that the judgments are in existence, his mere ipse dixit that it is not to defraud his creditor would hardly create a bona fide conflict in the testimony. 'While a finding will not be disturbed on appeal if there is a substantial conflict in the evidence from which it springs, "the evidence, in order to raise a conflict, must be such as to present a fair and reasonable ground for a difference of opinion." *Field v. Shorb*, 99 Cal. 661, 34 P. 504; *Felsenthal v. Warring*, 40 Cal. App. 119, 180 P. 67.' *White v. Greenwood*, 52 Cal. App. 737, 742, 199 P. 1095, 1098."

Cases similar to the one under consideration and where a similar holding was made are *Judson v. Lyford*, supra, at page 509 (24 P. 286), and *Daugherty v. Daugherty*, 104 Cal. 221, 223, 37 P. 889.

[12] Lastly, on cross-examination of said defendant Prentice, the following occurred:

"Q. Now at the time you made this disposition of these bonds, in trust, as you say, did you give any bonds to Gordon Prentice? A. Yes, sir.

"Q. He had none left at the time of making this deed.

"Mr. Stearns: That is objected to as incompetent, irrelevant, and immaterial.

"The Court: Objection sustained. (Plaintiff relies on exception.)

"Q. Gordon Prentice, your son, was manager of your business, was he? A. Yes.

"Q. During, and about the time of the transfer of this property? A. Yes, sir.

"Q. Did you have any property in your hands, bonds, which you placed in trust for Gordon Prentice at the time of the transfer of this deed?

"Mr. Stearns: We object to that as incompetent, irrelevant, and immaterial, and not within any issues in this case.

"The Court: Objection sustained. (Plaintiff relies on exception.)"

The testimony was surely material. Gordon Prentice, the oldest son, was manager of the brokerage business and as such might have been liable to appellant for her losses therein. Moreover, the transaction with this son was material as to the bona fides of the transaction with the other children and the wife and the intent with which the deed was made as this son was not mentioned therein. Still further, if the defendant was indebted to this son in an amount comparable with the indebtedness admitted to the wife (he being of age and capable of receiving his quota of the bonds direct), then the defendant was insolvent beyond question at the time of the execution of the deed. This error is prejudicial and permeates the whole judgment.

Defendant at the time of the trial of this action was in the possession and enjoyment of this large estate in practically the same way as before the deed was made, enjoying a large and valuable property while his judgment creditor was denied relief on an indebtedness which he had for several years concealed from her and then refused to honor. The law, as we conceive it to be, as well as justice which should, if possible, accompany it, requires a reversal of the judgment in this cause, and it is so ordered.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

85 Cal. App. 567

(259 P.)

BEVERLY v. FAIRMONT HOTEL et al.*
(Civ. 5864.)

District Court of Appeal, First District, Division 1, California. Sept. 26, 1927.

Hearing Denied by Supreme Court Nov. 23, 1927.

1. Master and servant $\S$ 419—Application for compensation for new disability from former injury, filed more than 262 weeks thereafter, held barred by limitation (Workmen's Compensation Act 1917, $\S$ 11(c)).

Employee's application for compensation, on the ground that an injury for which compensation had already been received had caused a new and further disability, filed more than 262 weeks after the original injury occurred, *held* barred by Workmen's Compensation Act (St. 1917, p. 841) $\S$ 11(c).

2. Master and servant $\S$ 419—Running of limitations against claim for additional compensation held not tolled by treatment received (Workmen's Compensation Act 1917, $\S$ 11(c)).

Under Workmen's Compensation Act (St. 1917, p. 841) $\S$ 11(c), physician's furnishing of services to injured employee without compensation or expectation of financial reward, though done at request of employer, *held* not to toll running of limitations against claim for additional compensation, particularly where the employee was not "totally disabled or bedridden," as required by statute.

Proceeding under Workmen's Compensation Act by H. M. Beverly, opposed by the Fairmont Hotel, employer, and the State Compensation Insurance Fund, insurance carriers. To review an award of the Industrial Accident Commission, denying compensation, employee applies for certiorari. Award affirmed.

Sloss & Ackerman, of San Francisco, for petitioner.

George C. Faulkner and Frank J. Creede, both of San Francisco, for respondents.

KNIGHT, J. Petitioner brought this proceeding in certiorari to have annulled an award made by the Industrial Accident Commission, denying his application for compensation upon the ground that the same was barred by the provisions of section 11 of the Workmen's Compensation Act of 1917 (Stats. 1917, p. 841).

[1] The record discloses the following facts: Petitioner on February 8, 1921, while employed as a stationary engineer at the Fairmont Hotel in San Francisco, sustained an injury to his back by falling from a tank. The State Compensation Insurance Fund was at that time the insurance carrier for said hotel and it immediately assumed liability, furnished petitioner with medical treatment, and paid him compensation until he was discharged from further medical treatment on April 30, 1921. Petitioner continued in the employ of said hotel, but for some time pre-

vious to October 28, 1925, complained of the condition of his back. On that date the paymaster of said hotel, named Bishop, sent him to Dr. S. N. Jacobs for medical treatment. The latter had no connection with the State Compensation Insurance Fund, which had ceased to be the insurance carrier for said hotel, but was in the employ of the company then carrying the insurance for said hotel. In response to the request made by Bishop, Dr. Jacobs treated petitioner several times a month, and during the course thereof, to wit, on February 23, 1926, petitioner filed the present application with said commission for an adjustment of his claim, at the same time continuing in the employ of the hotel until March, 1926, when he voluntarily quit because of his physical condition. He remained under the care of Dr. Jacobs, however, until June, 1926.

Petitioner's application for compensation is based upon the ground that the original injury had caused new and further disability. Section 11 (c) of said Workmen's Compensation Act provides in effect that such an application shall, in any event, except where the employee is "totally disabled and bedridden as a result of his injury," be filed by the injured employee and acted upon by the commission within 245 weeks after the happening of the original injury. Said section in this respect reads as follows:

"* * * Nothing contained in this section shall be construed to bar the right of any injured employee to institute proceedings for the collection of compensation within two hundred forty-five weeks after the date of the injury upon the grounds that the original injury has caused new and further disability; and the jurisdiction of the commission, in such cases, shall be a continuing jurisdiction at all times within such period."

As shown by the undisputed facts above set forth, petitioner's application was filed more than 262 weeks after the original injury occurred, which was more than 17 weeks after the expiration of the period of time fixed by the statute within which the commission is empowered to act. It is apparent, therefore, that the commission was barred from entertaining jurisdiction thereof.

[2] Petitioner contends, however, that commencing on October 28, 1925, his employer furnished him with medical treatment for several months, and that, therefore, the statute of limitations was tolled for a period of six months under another provision of said section 11 (c) of said act, which reads:

"The payment of compensation, or any part thereof, or agreement thereof, shall have the effect of extending the period within which proceedings for its collection may be commenced, six months from the date of the agreement or last payment of such compensation, or any part thereof, or the expiration of the period covered by any such payment."

As to whether or not petitioner's employer, the Fairmont Hotel, in fact furnished the medical treatment received by petitioner from Dr. Jacobs, is, however, a disputed question. It appears from the evidence, as petitioner contends, that Mr. Bishop, the paymaster, whose duty it was to provide injured employees with medical treatment, requested Dr. Jacobs to treat the petitioner, but it is made clear by the testimony of Dr. Jacobs, who, as before stated, was not connected with the State Compensation Insurance Fund, but was in the employ of the company succeeding the former as the insurance carrier for said hotel, that in giving petitioner medical treatment he was not acting for the Fairmont Hotel, but agreed to and did treat petitioner as a personal favor to Mr. Bishop, with the understanding that it was not an insurance case or a case for which either the Fairmont Hotel or the State Compensation Insurance Fund would be liable; that his services were rendered without compensation or expectation of financial reward; and that consequently he gave no notice of such treatment to said State Compensation Insurance Fund. We are, therefore, of the opinion that the testimony of Dr. Jacobs is sufficient to support the commission's conclusion that the medical treatment which petitioner received was not furnished, as petitioner claims, at the instance and request of his employer, the Fairmont Hotel, but was rendered by Dr. Jacobs as a personal favor to Mr. Bishop.

Assuming, however, that under the circumstances a contrary construction could be placed upon the evidence, and it could be held that the treatment was furnished by petitioner's employer, the Fairmont Hotel, the situation would not be altered, because under the provisions of said section 11 of said act above quoted, since petitioner was neither "totally disabled and bedridden as a result of his injury," the statute could not in any event be tolled beyond the 245 weeks' limitation fixed therein for the continuation of jurisdiction of said commission, and, furthermore, as stated in 27 California Jurisprudence, at page 461:

"Benefits furnished by an employer after an insurance carrier has assumed liability and the employee has accepted the benefits paid by it by reason of such assumption (which was the case here) are not effectual to prevent the running of the statute of limitations against any claim which the employee might have against the insurance carrier."

The latter rule is apparently based upon the legal proposition that the assumption of liability by the insurance carrier subrogates it to all of the rights of the employer.

We do not deem the case of United States Fidelity & Guaranty Co. v. Industrial Accident Commission, 195 Cal. 577, 234 P. 369, cited and relied upon by petitioner, in point,

because there the insurance carrier denied liability from the beginning, and, furthermore, the application for compensation was filed well within the period of 245 weeks from the date of the original injury.

For the reasons stated, we conclude that the commission's decision herein that petitioner's claim was not filed within the period of time allowed by the statute, and that consequently the commission was without legal authority to entertain or pass upon the same, must be sustained.

The award is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

85 Cal. App. 486

In re ENGLAND'S ESTATE.

ENGLAND et al. v. BRYSON, Public Adm'r,
et al.

(Civ. 5838.)

District Court of Appeal, Second District, Division 1, California. Sept. 19, 1927.

1. Wills ⚡130—Absence of period at end of concluding paragraph held, in absence of other punctuation, not to indicate that holographic will was incomplete.

Where testatrix did not use any periods in closing paragraphs and sentences in holographic will, fact that no period appeared at end of concluding paragraph held not to show that document was incomplete.

2. Wills ⚡133—Testatrix's signature at head of holographic will held sufficient.

Where holographic will appeared complete and showed testatrix's intention to make it her will, her signature appearing at head thereof in clause "last will of A. E." was sufficient.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

In the matter of the estate of Anna England, also known as Mrs. I. W. England, deceased. Will contest by L. E. England and others against Frank Bryson, Public Administrator of Los Angeles County, administrator with the will annexed, and others. From a judgment admitting an alleged will to probate, and denying the contest, the contestants appeal. Affirmed.

Page, Nolan, Rohe & Freston and Hurt & Howard, all of Los Angeles, for appellants.

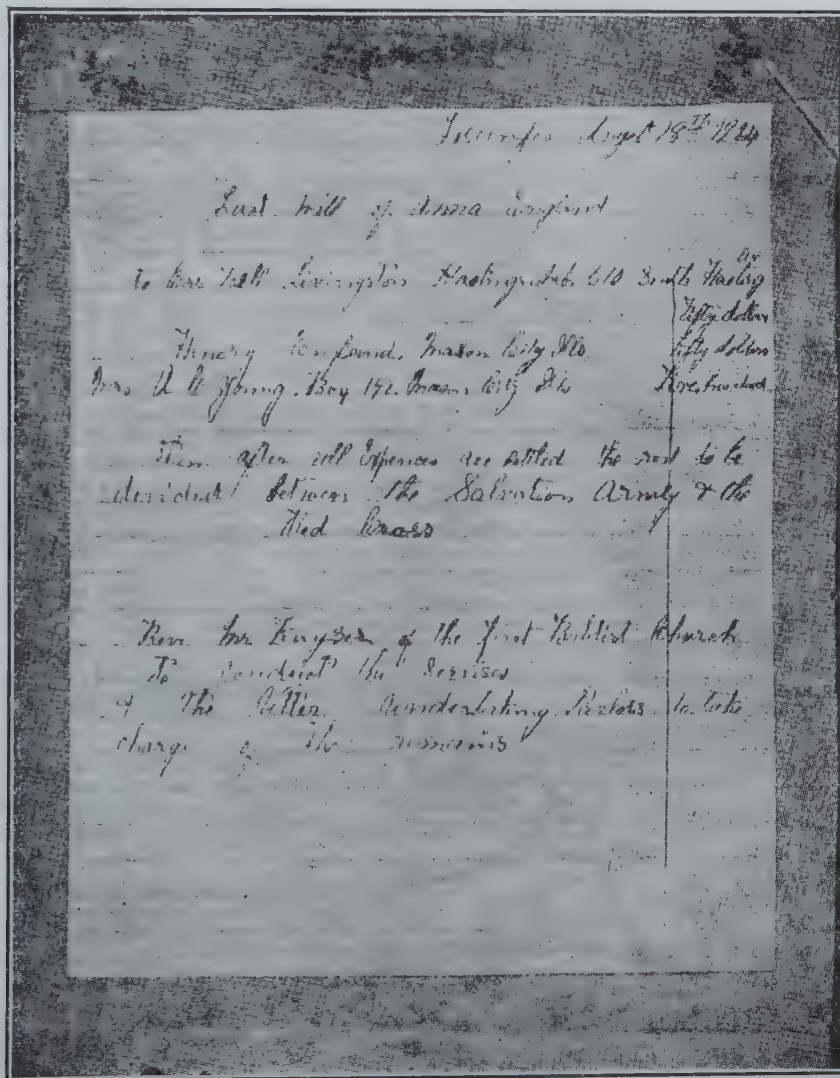
John J. McMahon, William Fleet Palmer, and Clyde E. Holley, all of Los Angeles, for respondent.

McLUCAS, Justice pro tem. Letters of administration with the will annexed were issued to the proponent. Appellants filed a contest of the will, and appeal from the judgment declaring the will to be valid and denying the contest.

The ground of the contest is that the will

was not entirely written, dated, and signed by the hand of the testatrix, Anna England. No signature appears at the end of the document, which it is conceded by appellant is entirely in the handwriting of the decedent. The name "Anna England" appears in the caption only, and the question before this court on appeal is whether the decedent by writing her name in said place thereby "signed" the will. A photostatic copy of the document is here produced.

not in the customary place at the end of the instrument. The conclusion reached and adhered to in the decisions is that it must be established upon the face of the offered instrument that it is a complete and executed document; that notwithstanding that the usual place of signing, and so of evidencing due execution and completeness, is at the end of the instrument, the signature of a testator found elsewhere than at the end may be, if circumstances warrant it, a signature of execution, but that the only evidence which will warrant this conclusion must be found in and



The decision of this case is controlled by a recent decision of a very similar case (Estate of Morgan [Cal. Sup.] 253 P. 702), wherein it is said, at page 703:

"This court has, upon a number of occasions very recently, been called upon to consider the nature of the evidence permissible and sufficient to establish the due execution of an olographic will, where the signing thereof by the testator is

on the instrument itself. Estate of McMahon, 174 Cal. 423, 163 P. 669, L. R. A. 1917D, 778. As stated in another case: "The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears.

If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document itself that the signature was so placed with the intent that it should there serve as a token of execution. If such inference thus appears, the execution may be considered as proven by such signature.' Estate of Manchester, 174 Cal. 417, 421, 163 P. 358. * * * See, also, Estate of Streeton, 183 Cal. 284, 288, 191 P. 16; Estate of Bernard, 197 Cal. 36, 38, 239 P. 404; Estate of Devlin, 198 Cal. 721, 247 P. 577."

[1, 2] As in the foregoing case, so in the present case, the will in question makes complete disposition of the property. It in all respects appears to be a completed document. It lacks punctuation throughout, and the fact that no period appears at the end of the concluding paragraph does not indicate that the document was incomplete, since the testatrix did not use periods in closing other paragraphs and sentences in the will. If the words "last will of Anna England" appeared at the end of the will, all doubt that the signature was intended to be and was adopted as the final executing signature in authentication of and in execution of the document as a completed testamentary act would be removed. Viewing the instrument as a whole, we are of the opinion that, by the use of these words in the beginning of the instrument, it was the intention of the testatrix to thereby execute the document as a will. We are satisfied that the finding of the probate court that the signing of the document by the deceased at the beginning was intended as a signature, and that the said instrument was valid, is sustained by the inferences arising from an inspection of the document itself.

Judgment is affirmed.

We concur: HOUSER, J., Acting P. J.; YORK, J.

85 Cal. App. 535

SMITH v. HOLLANDER et ux. (Civ. 5797.)★

District Court of Appeal, First District, Division 2, California. Sept. 22, 1927.

Hearing Denied by Supreme Court Nov. 21, 1927.

1. Municipal corporations ☞706(6)—Driver's negligence in not giving suitable warning signal held for jury, where automobile struck pedestrian on sidewalk.

In pedestrian's action for injuries sustained when defendant's automobile ran onto sidewalk and struck him, evidence held sufficient to take case to jury on question whether defendant was negligent in not giving suitable warning signal.

2. Municipal corporations ☞706(3)—Res ipsa loquitur doctrine applies when automobile runs on sidewalk and strikes pedestrian.

When automobile leaves its accustomed place of travel in street, runs on sidewalk, and strikes pedestrian, doctrine of res ipsa loquitur is applicable.

3. Municipal corporations ☞706(6)—Negligence in driving skidding automobile on sidewalk, causing injury to pedestrian, held for jury.

In action by pedestrian for injuries sustained when automobile ran upon sidewalk and struck him, whether defendant came upon sidewalk with automobile as result of negligence or of unavoidable skidding held for jury.

4. Negligence ☞138(2)—Instruction on res ipsa loquitur doctrine is proper, where explanation leaves it doubtful whether ultimate cause of injury is negligence of party charged.

Where defendant's explanation in personal injury action leaves it doubtful as to whether ultimate cause of injury is negligence of party charged, it is proper to instruct as to res ipsa loquitur doctrine.

5. Negligence ☞138(2)—Refusal of instructions on presumption of defendant's freedom from negligence held proper, where res ipsa loquitur instruction was authorized.

Where it was proper to instruct on res ipsa loquitur doctrine in personal injury action, it was proper for court to refuse defendant's requested instructions on presumption of defendant's freedom from negligence.

6. Trial ☞228(3)—Interchange of expressions "burden of proof" and "burden of producing evidence" in instruction held not error.

Though "burden of proof" and "burden of producing evidence" are not the same, use of one expression instead of the other in instruction held not error.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Burden of Proof.]

7. Negligence ☞134(1)—Defendant overcomes plaintiff's prima facie case when she balances it evenly without proving absence of negligence.

In personal injury action, defendant meets and therefore overcomes plaintiff's prima facie case when she balances it evenly without proving absence of negligence by preponderance of evidence.

8. Trial ☞260(8)—In personal injury action, refusal of instruction on unavoidable accident and of instruction requiring defendant only to balance evenly plaintiff's proof held not prejudicial, in view of other instructions.

In personal injury action, refusal of instruction that defendant was only required to balance evenly plaintiff's proof and of instruction on unavoidable accident held not to result in miscarriage of justice, in view of defendant's weak explanation of accident and of other instructions defining burden of proof, though such refused instructions could properly have been given.

9. Trial ☞192—Assumption in instruction of undisputed fact is not error.

Where fact assumed in instruction can be said to be undisputed in evidence, such assumption is not error.

10. Trial $\hookrightarrow$ 296(9)—Assumptions of fact in instructions which are indirect or inferential and grammatically doubtful or based on undisputed facts are cured by instructions leaving question to jury.

Where claimed assumptions of fact in instructions are grammatically doubtful or based on undisputed facts, and are indirect or inferential only, they are reconcilable with, and cured by, other instructions properly leaving question to jury.

11. Appeal and error $\hookrightarrow$ 719(7)—Where error in instruction is not advanced as ground of appeal, reviewing court need not pass on it.

Where appellant has not advanced error in certain instruction as ground of appeal, it is not necessary to pass on such instruction, notwithstanding that respondent on rehearing presents authority and argument to show it was not erroneous.

12. Trial $\hookrightarrow$ 296(3)—Instructions on degree of care required held to cure any error in instructions using expression "proper care" and "due care."

In personal injury action, any objection to instruction for use of expression "proper care" and "due care" held overcome by other instructions on degree of care required.

13. Pleading $\hookrightarrow$ 18—Demurrer for uncertainty lies for what is said with uncertain meaning and not for what is omitted.

Demurrer for uncertainty lies for what is said with uncertain meaning and not for what is omitted, since in personal injury action no description of injuries could be so complete that nothing more could be added.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by F. H. Smith against Arthur Hollander and wife, in which named defendant was granted a nonsuit. Judgment for plaintiff, and defendant Hattie Hollander appeals. Affirmed.

See, also, 257 P. 577.

Cooley & Gallagher, of San Francisco, for appellant.

Henry Eickhoff, Jr., and Gregory A. Harrison, both of San Francisco, for respondent.

KOFORD, P. J. Appellant, Hattie Hollander, appeals from a judgment awarding damages for personal injuries sustained by plaintiff in being struck by said appellant's automobile. Her codefendant, Arthur Hollander, was granted a nonsuit.

The proof offered by the plaintiff was as follows: While walking westerly on the south sidewalk of Post street, plaintiff was struck and injured by appellant's automobile, which ran up onto the sidewalk unawares from behind him. He did not see it approach nor hear any horn or warning signal. The only eyewitness for the plaintiff testified:

"I saw (the) automobile coming down Post street going west, and I saw it suddenly skid completely around and go right on the sidewalk and knock (plaintiff) down, and back up across the street and go on the other sidewalk and stop. A building stopped it. * * * The street was wet."

[1] Plaintiff's wife testified to a telephone conversation with appellant, in which the latter said that she had lost control of her machine from Van Ness avenue to Buchanan street. This was all the testimony offered by plaintiff in chief concerning the manner of the accident. A motion for a nonsuit by appellant was denied. Apart from the application of the doctrine of *res ipsa loquitur*, the evidence warranted the submission of the case to the jury upon the question of whether defendant was negligent in not giving a suitable warning signal.

Defendant Arthur Hollander testified on behalf of appellant and himself that a misty rain had fallen for a period of about 15 minutes, and that the street was still wet at the time of the accident; that appellant's automobile was traveling on Post street from Van Ness avenue at a speed of not more than 15 miles per hour in a straight course and in second gear; that about 100 feet east of Buchanan street the forward end of the automobile suddenly skidded towards the left, ran up onto the south or his left-hand sidewalk, and struck the plaintiff. Appellant's testimony was substantially the same. She was the driver, and testified that, when the skidding commenced, there was nothing for her to do to bring the car back into control; that all she did was to hold onto the steering wheel. This was all the testimony for the defendants and appellant concerning the cause of the accident. There is therefore, no direct proof of what particular act or omission on the part of the appellant, driver of the car, caused it to skid and run upon the sidewalk.

[2] No contributory negligence was pleaded. Negligence was pleaded generally. The complaint alleged that the defendant negligently operated, handled, and drove an automobile, causing it to run upon the sidewalk and strike and knock plaintiff down from behind, and that plaintiff had no warning of any kind or knowledge of his danger prior to said collision. The plaintiff relied on the doctrine of *res ipsa loquitur*. Some of the instructions given, when read together, inform the jury that it may infer negligence without knowing the specific act or omission which constituted the negligence, if it should find from the evidence that defendant's automobile ran upon the sidewalk and struck plaintiff unawares from behind. When an automobile leaves its accustomed place of travel in the street, runs upon the sidewalk, and there strikes a pedestrian, the doctrine of *res*

ipsa loquitur has been generally held to apply. *Berry on Automobiles* (4th Ed.) § 405; *Huddy on Automobiles* (7th Ed.) § 512. In such case all the elements necessary for the application of the doctrine are present. The injured person is not in a position to know the cause of the mishap. The one in control of the instrumentality causing the injury is or should be in a position to know. Such an occurrence does not usually happen in the absence of negligence on the part of the one in control of the automobile. In *Scheuermann v. Kuetemeyer*, 186 Cal. 225, 199 P. 13, the Supreme Court held facts similar in principle to those proven in this case, omitting skidding, to constitute a *prima facie* case, and to warrant, in the absence of any explanation or denial, an inference of negligence on the part of the driver of the car. Appellant urges that, conceding the doctrine to apply where the automobile runs upon the sidewalk, nevertheless we have here the additional fact of skidding on a wet street, which appears both from the case as a whole and from plaintiff's testimony in chief. It is said that skidding may or may not be negligent, and for that reason skidding in and by itself furnishes no evidence of negligence or at least that the fact of skidding is a sufficient explanation for running upon the sidewalk to take the case out of the doctrine of *res ipsa loquitur*.

[3-5] At most, it was for the jury to decide whether to infer negligence of the appellant from the fact that she came upon the sidewalk with her automobile, or whether to decide that the proof of the skidding of the automobile under the circumstances and in the manner testified to by the witnesses was a sufficient explanation to justify it in deciding that she was not negligent in the operation of her automobile. "Where the explanation leaves it doubtful as to whether or not the ultimate cause of the injury is the negligence of the party charged, it is proper to instruct the jury as to the *res ipsa loquitur* doctrine." *Connor v. Atchison, etc., Ry. Co.*, 189 Cal. 1, 6, 207 P. 378, 380 (26 A. L. R. 1462). See, also, *Seney v. Pickwick Stages*, 52 Cal. App. Dec. 951. Where it was proper to instruct on this doctrine, it was proper for the court to refuse defendant's requested instructions VIII and IX upon the presumption of defendant's freedom from negligence.

[6-8] Instruction XV requires the defendant to "overcome" plaintiff's *prima facie* case, and XXI states that, after proof of plaintiff's *prima facie* case, the burden then shifts to the defendant to show that she was not guilty of negligence. "Burden of proof" and "burden of producing evidence" are not the same, but the use of the one expression instead of the other has been held not to be error. *Cody v. Market Street Ry. Co.*, 148 Cal. 90, 82 P. 666; *Worden v. Central Fireproof Bldg. Co.*, 172 Cal. 94, 155 P. 839. The defendant meets, and therefore over-

comes, plaintiff's *prima facie* case when she balances it evenly without proving absence of negligence by a preponderance of the evidence. *Rathbun v. White*, 157 Cal. 252, 107 P. 309; *Scarborough v. Urgo*, 191 Cal. 346, 347, 216 P. 584. One way for defendant to meet plaintiff's *prima facie* case is to offer evidence tending to show that plaintiff's injuries were the result of an unavoidable accident. Defendant's requested instruction III, that the defendant was only required to balance evenly the plaintiff's proof, and requested instruction V upon unavoidable accident, could properly have been given, but we are unable to see that the refusal to give them resulted in a miscarriage of justice, in view of the weak explanation of the accident offered on behalf of the appellant and in view of other instructions given properly defining burden of proof.

The instructions contain several indirect assumptions of fact which are assigned as error. This arises from expressions used without conditional qualification, such as the usual "if any." One such expression is "caused by the negligence of the defendant," in instruction XXII, and several such assumptions of fact are used in instruction XXIII, where the jury is instructed that—

"Such damages include:

"Subdivision 1. The pain and suffering endured by the plaintiff, etc.

"Subdivision 2. Any loss sustained by plaintiff by reason of the fact that he has been unable to work up to the present time.

"Subdivision 3. All charges incurred and paid by the plaintiff by reason of the injury; * * * and as well as such charges certain to be reasonably incurred in the future by reason of said injuries.

"Subdivision 6. The mental worry endured by the plaintiff up to the present time, due to his reasonable apprehension of future disability, which reasonable apprehension was the proximate result of his injuries.

"Subdivision 7. The permanent disability or lack of capacity for work in the future of the said plaintiff sustained by reason of his said injuries."

[9] Where the fact can be said to be undisputed in the evidence, such assumption has been held not to constitute error. 24 Cal. Jur. § 101, p. 843, cases cited in notes 18 and 19. In several decisions it has been held that, where the assumption of fact is indirect and inferential, it may be considered as cured by other instructions properly leaving the question to the jury. *Ingalls v. Monte Cristo Oil Co.*, 23 Cal. App. 652, 656, 139 P. 97; *Dawson v. Pacific Electric Ry. Co.*, 177 Cal. 268, 170 P. 603; *Anderson v. Seropian*, 147 Cal. 201, 216, 81 P. 521.

[10] The language used follows the wording of the instruction in *Storrs v. Los Angeles Traction Co.*, 134 Cal. 91, 66 P. 72, although nothing is there said concerning assumption of facts. Some of the claimed as-

sumptions of fact in these instructions are grammatically doubtful. Some of them are upon undisputed facts. All of them are indirect or inferential only, so that they are reconcilable with, and cured by, other instructions. On petition for rehearing, respondent has called attention to such curative instructions, one of which is:

"You will distinctly understand that in this charge the court in no manner or form is expressing or desiring to express any opinion on the weight of the evidence or any part of it, or on the truth or falsity of any witnesses' testimony, or that any alleged fact in the case is or is not proved."

[11] We conclude that, notwithstanding the inaccuracies in these instructions, the charge, taken as a whole, did not invade the province of the jury upon any disputed fact in the evidence. Upon rehearing, respondent has presented authority and argument to show that instruction XXIII was not erroneous for lacking the element of certainty of future incapacity for work. Inasmuch as appellant has not advanced this as one of her grounds of appeal, it is not necessary to pass upon the point.

[12] Some of the instructions use the expression "proper care" and "due care," but the instructions elsewhere, XII and XIV, instruct on the degree of care required of defendant, and this overcomes the objection.

There was sufficient foundation for the telephone conversation with defendant. *Union Const. Co. v. Western Union Tel. Co.*, 163 Cal. 298, 125 P. 242; 22 Corp. Jur. § 336, p. 302.

[13] Defendant's demurrer to the complaint was properly overruled. The injuries detailed in the complaint were specific and detailed enough to advise the defendant of the character of proof to expect. *Kuhns v. Marshall*, 44 Cal. App. 588, 186 P. 632. A demurrer for uncertainty lies for what is said with an uncertain meaning and not for what is omitted. *Callahan v. Broderick*, 124 Cal. 83, 56 P. 732. No description of injuries can be so complete that nothing more can be added.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

85 Cal. App. 648

PEOPLE v. THORNTON et al. (Cr. 1476.)

District Court of Appeal, Second District, Division 1, California. Sept. 27, 1927.

I. Arson §12—Proof that fires in house, started during night while boy was there, were incendiary made case of first degree arson (Pen. Code, §§ 452, 454).

Under Pen. Code, §§ 452, 454, proof that fires, started in house at some time during the

night while boy was there, were of incendiary origin held to make out a case of arson in the first degree.

2. Criminal law §507(1)—In prosecution for arson and burning insured property, witness testifying that she lighted fires held accomplice, under statute prohibiting conviction on testimony of accomplice alone (Pen. Code, § 1111).

In prosecution for arson and for burning insured property with intent to defraud an insurance company, witness testifying that she had procured gasoline and started fires in the house during the night while defendant's grandson was there and mailed faked letters, purporting to be threats to defendant that her property would be burned, held an accomplice, under Pen. Code, § 1111, prohibiting conviction on testimony of an accomplice without corroboration.

3. Criminal law §511(1)—Evidence held to corroborate testimony of accomplice and support conviction for first degree arson and burning insured property.

In prosecution for first degree arson and burning insured property with intent to defraud an insurance company, evidence held sufficient to corroborate testimony of accomplice and support conviction.

4. Criminal law §433—In prosecution for arson and burning insured property, letters threatening arson, which evidence tended to show were faked, held material.

In prosecution for arson and burning insured property, letters purporting to threaten arson, which the evidence tended to show defendant and her accomplice had faked, held material in connection with defendant's conduct in reference to them.

5. Criminal law §1036(1)—Where defendant did not object to admission of evidence at trial, she could not object on appeal.

In prosecution for arson and burning insured property, where defendant did not object at the trial to the admission of letters purporting to threaten arson, which the evidence tended to show she and her accomplice had faked, she could not object on appeal to their admission.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Agnes Thornton was convicted of arson in the first degree and of burning insured property with intent to defraud an insurance company, and she appeals. Affirmed.

Laurence D. Carter, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. L. Flynn, Deputy Atty. Gen., for the People.

SHAW, Justice pro tem. The appellant, Mrs. Agnes Thornton, was tried upon an information containing two counts, the first charging her and one Bobby Clark with arson, and the second charging the same persons with burning insured property with intent to defraud an insurance company. The

arson charged in the first count was the burning of a dwelling house at 3615 Paloma street, in the city of Los Angeles, and the second count charged the burning of the same dwelling house and the contents thereof, all upon the 27th day of July, 1926. At the trial the information was dismissed as to Bobby Clark, and she testified for the prosecution. Appellant was convicted upon both counts, the verdict specifying that the arson was of the first degree, and she appeals from the judgment. No briefs have been filed by either side, and we are dependent for information as to the grounds of appeal upon the oral argument and appellant's written application to the trial court for a transcript.

The evidence shows that appellant was the owner of the house referred to in the information, and of its contents, and that it was occupied as a residence by appellant, by Bobby Clark, and by appellant's two year old grandson, and at times by other persons. There is no question that a fire occurred at this house, to which the Los Angeles fire department was called early in the morning of Tuesday, July 27, 1926.

Several officers of the fire department were called as witnesses, and from their testimony it appeared that the first fire unit arrived at the house at 5:09 a. m. The fireman who first arrived saw smoke coming from the front part of the house, the front door open, and a man standing in the door with a garden hose. He looked in and saw in the living room a davenport and a chair, partly consumed and still burning. Within a few minutes several firemen arrived and examined the building carefully, and from their testimony the following facts appear: Fires or preparations for fire were found in five different places, of which only two were burning, and none of them had any connection with any other. In the living room the rug had been burned through and the floor deeply charred. In the back bedroom a fire was burning and had been burning for some time in a closet. This fire had charred the walls and the door on the inside of the closet, burned through the floor at the back and up through the ceiling, and had burned some clothes except a few fragments remaining on the floor. A screen at the bottom of the kitchen cooler had been broken loose and some newspapers thrust down through the opening, and these were found partly burned. Testifying from their experience as firemen and the appearance of the ashes, two witnesses said these papers had been burned from six to twelve hours before their examination was made. Two lath ventilators covering openings to the space under the house had been torn off, and piles of paper had been placed under the house opposite them. One of these piles, which was under the back bedroom, had been partly burned; the other pile, which was under the front bedroom, had not been burned,

but one witness detected the odor of coal oil on it. None of the fires under the house had taken effect upon the building. Two of these witnesses also saw the remains of a fire in the dining room, where the carpet had been charred, and one of them saw a burned match and detected a strong odor of gasoline or coal oil at this point. One of the firemen, who arrived at 5:25 a. m., went to the front bedroom and found there appellant, who was in bed, Bobby Clark, and a small boy about two years old. A neighbor who left home for work about 4:30 a. m., testified that as he went out of the house he saw a dim light in the living room of appellant's house, but did not see or smell any smoke or fire, and the light did not flicker.

Thomas S. Brown testified that he was an insurance broker for Employers' Fire Insurance Company of Boston, Mass.; that on July 23 or 24, 1926, he went to appellant's house at 3615 Paloma street, at the request of a Mr. Tate, and spoke with appellant, who said she wanted insurance on the house, and after some discussion directed him to write a policy of \$5,000 on the house, \$1,000 on the contents, and \$150 on the garage. She told him she had no ready money to pay the premium, but did not owe any money. He wrote the policy accordingly, and it was mailed to appellant on July 27th and received by her after the fire. The policy was introduced in evidence and proved to be a fire insurance policy dated July 22, 1926. Brown explained this date by saying that the policy was written to cover the property from the date of the application for insurance, which was before he inspected the property. The issuance of another policy on the house, with loss payable to a mortgage company, and payment of the premium thereon by that company, were also proved, but it was not certainly shown that appellant had knowledge of it.

Bobby Clark testified that she had no interest in the house, or its contents, or anything insured therein; that at the time of the fire she lived there with appellant and had lived there for a month or more, doing the work and caring for appellant, who was sick part of the time; that appellant's son and her grandson also lived there; that on the Sunday before the fire appellant suggested to the witness that they burn the house in order to get money to get the boy (meaning her son) out of trouble and pay debts; and that appellant directed the witness to go the next day and get some gasoline. This witness also testified that she was present at the placing of the insurance policy for \$6,150 on the place with Mr. Brown on the Friday before the fire; that on Monday, July 26th, she got some gasoline and brought it to the house; that about 9 p. m. on Monday night the witness put some papers, which appellant handed to her for that purpose, under the house at the places where they were found by the fire-

men, and poured gasoline on them; that about 11 p. m. of that night appellant said it was time to light the fires, and the witness lighted the fires under the rear bedroom and the kitchen cooler, but did not light the papers she had put under the front bedroom, where she, appellant and appellant's grandson slept that night; that appellant started the other fires; that later the fires did not seem to be burning and appellant got up twice, took an umbrella and went into the front room to start the fire so it would blaze up; that about daylight the witness opened the door from the bedroom into the living-room and found the latter full of smoke, and becoming alarmed, got out of a bedroom window and went next door to call the fire department. Bobby Clark also testified that under appellant's direction she wrote two letters, charred the edges of their envelopes and addressed and mailed them to appellant, who told the witness the charred edges were a sign of arson. The first of these she mailed about two weeks before the fire, and the second was written on the Sunday before, and received by appellant on July 27th.

Appellant herself took the stand, denying her guilt in general and Bobby Clark's testimony in particular, and stated that she had not the least idea how the fire started; that she and Bobby Clark and her grandson were in the house, and her grandson was in bed with her all the night of the fire; that she heard no one in the house but Bobby Clark, but heard a noise outside, on that night.

[1] Appellant contends that as she was the owner of the house she could not be guilty of arson in burning her own property, and also that under the circumstances shown by the foregoing evidence she and Bobby Clark were equally guilty, and, as held in *People v. Abrams*, 174 Cal. 172, 162 P. 395, in order to make a case of arson in the first degree the building must be occupied by some one other than the persons concerned in the crime. These arguments are sufficiently answered by a reference to sections 452 and 454 of the Penal Code, and a brief consideration of the testimony already stated. From this testimony the jury must have found that appellant's grandson spent the night in the house, and that the fires were of incendiary origin and were started at some time during the night and while the boy was in the house. These conclusions may be reached without considering the testimony of Bobby Clark, and make out a case of arson.

[2] Appellant also argues that Bobby Clark was an accomplice, and that her testimony was not corroborated as required by section 1111 of the Penal Code. There can be no doubt that Bobby Clark was an accomplice as defined by this section. As we have already stated, the commission of the offense charged in the first count by some person is sufficiently shown without considering her testimony.

Upon the second count, an intent to defraud or prejudice an insurance company is a material element of the offense. It has been held that such intent may be inferred from the facts that the defendant owned the property burned, that he burned it, and that at the time of burning it was insured against loss by fire (*People v. Vasalo*, 120 Cal. 168, 52 P. 305), to which, according to a later decision, must be added the fact that defendant knew of the insurance, before the inference can be drawn (*People v. Rose*, 38 Cal. App. 493, 176 P. 694). The evidence we have already stated other than that of Bobby Clark shows that the fire was of incendiary origin; that the property was owned by and insured in the name of appellant, and that she knew of the insurance, but does not show that she burned the building, and it is therefore insufficient as a basis for any inference of intent to defraud the insurance company. There is, however, other evidence in the case. Since the fact which is lacking on this point would also tend to corroborate Bobby Clark on both counts by showing defendant's connection with the fire, these two points may be discussed together.

The evidence corroborating Bobby Clark is not strong, but there are several circumstances tending to connect appellant with the commission of the offense. Mrs. Sadie Ford lived next door to appellant, and testified that before the fire department arrived she went to turn the hose on the house, and appellant forbade her to do so. Norman A. Danskin, an investigator for the fire department, testified that he had a conversation with appellant on the morning of the fire, in which she said she had no idea what caused the fire, but that no one had been in the building during the night other than herself, her grandson, and Bobby Clark; that she was a very sick woman and had not been up during the night; that she was the owner of the property; that her insurance had run out about six months before and she had renewed it because she had received a threatening letter about three weeks before, but she was not sure the policy was in effect; that one end of this letter was burned off and she was under the impression that some one was going to burn the house, and called an insurance man, whose name and address she did not know, the next day after receiving the letter.

Paul T. Wolfe, another investigator for the fire department, testified to several talks with appellant. The first one occurred about 9 a. m. of July 27th, at which appellant said she had slept in the house that night, but heard nothing unusual and did not know how the fire started; that she had not been up during the night, as the doctor had given her something to make her sleep; and that she had had this doctor's services for three weeks, but did not know his name. Just after this a Dr. Robinson came into the room,

and in answer to questions by Wolfe said in appellant's presence that he, the doctor, had given appellant nothing to make her sleep, but had given her some quinine and atropin, and that appellant was able to get up without any bad effect if she did not stay on her feet any considerable length of time, to all of which appellant made no reply or objection. At this conversation appellant also said to Wolfe that her insurance on the building and contents had run out several months previous, and she had not renewed it; that there were no debts against the place; that she owed a few little bills, but they did not amount to anything; that she had received a threatening letter; and that enemies had started the fire, but she did not name anybody, though asked to do so. On July 28th, Wolfe had another talk with appellant, in which appellant said she had mentioned insurance to a friend named Tate, who would send an insurance man to see her or place the insurance himself, but she had never heard from Tate or the insurance company and did not know whether any insurance was placed. She also told Wolfe she had received another black hand letter and gave it to him. He tried to read it, but could not on account of the smallness of the writing, and Bobby Clark stood behind him and read it. Wolfe also got the first threatening letter from appellant's attorney.

These letters were introduced in evidence. The first was dated July 5, 1926, and the second July ———, 1926, and both were signed "Revenge." The first letter threatened death to appellant, and the second, while rather vague, can be construed as referring to the fire and threatening further mischief. Testimony was given by a handwriting expert that he had compared the handwriting in these two letters with specimens written by Bobby Clark, and that both were written by the same person.

Wolfe further testified that on the nights of July 29th and 30th he watched the house from 8 to 12 o'clock to see if any one was molesting the place, and saw no one; that about midnight on the second night he went to appellant's house and knocked at the door, and appellant answered, when he told her not to be alarmed as he was watching the house; that previous to that everything was as still as could be, but after he made this statement appellant seemed to be in considerable pain, and he heard her groaning a considerable part of the time; that he stayed there about 30 minutes after seeing appellant. He further testified that on August 15th he met appellant at the office of an insurance broker and asked her what she was doing there, and asked her if she had any insurance, to which she replied, "No." He then stepped out of the office and appellant followed him into the hall and said, "I lied to you in there, I have insurance; just a few hundred dollars, \$1,000 on my furniture." On September 7th,

Wolfe again saw appellant at her house, asked her if she had found any more insurance and she said "No." He asked her if she had a lot of liens against the place, which she at first denied, but then admitted there were a considerable number of liens secured against the property, and that the same was true of the furniture.

[3] From the evidence the jury could have found that a fire was built, but not lighted, under the room occupied by appellant; that she forbade a neighbor to attempt to put the fire out; that appellant made false statements in order to show that she could not have been out of bed on the night of the fire; that she stated to investigators that she did not know whether she had any insurance and had not seen an insurance man, although in fact she seen one and placed insurance with him three or four days before; that when she learned the house was being watched by a fire department investigator she began to groan and act sick, although she had not done so before; that she denied having any debts or incumbrances on the house, but later admitted them; that she referred to the threatening letters for an explanation of her effort to get insurance, although these letters had been written by her household assistant, Bobby Clark; that she gave the same explanation to the investigator of the meaning of the burned edges of the letters as, according to Bobby Clark's testimony, she had given to the latter; that although attributing the fire to enemies appellant was unable to name or identify them; that she was in fact in debt and in need of money; and that these various false statements were made in an attempt to mislead the investigator and divert suspicion from herself. Perhaps no one of these facts, if standing alone, would be sufficient to uphold the verdict, but taking them all together we are unable to say that there is no substantial evidence tending to connect appellant with the commission of the offense charged. *People v. Woo*, 181 Cal. 315, 328, 184 P. 389.

[4, 5] Appellant also claimed upon the argument that the court committed error in admitting in evidence the two letters above referred to. We think they were material in connection with appellant's conduct in reference to them, but appellant is in no position to raise this point now, for no objection was made to these letters at the trial.

The foregoing are all the points made in support of the appeal at the argument, but in view of the fact that no briefs were filed and that appellant's attorney stated at the argument that he was not well prepared therefor because he had been expecting that other counsel would be substituted for him in this court, we have examined the entire record and find no prejudicial error.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

85 Cal. App. 468

SHASTA LUMBER CO. v. McCOY, Sheriff.
(Civ. 3293.)

District Court of Appeal, Third District, California. Sept. 17, 1927.

1. **Fraudulent conveyances** ⇨308(2)—Sale of 123,326 feet of lumber by sawmill company to company in business of buying and selling lumber is not, as matter of law, within statute respecting bulk sales; "ordinary course of trade;" "regular and usual practice and method of business;" "stock in trade" (Civ. Code, § 3440).

Sale of 123,326 feet of lumber by sawmill company to company engaged in business of buying and selling lumber is not, as a matter of law, out of the "ordinary course of trade" or the "regular and usual practice and method of business of the vendor," within Civ. Code, § 3440, providing that bulk sale of stock in trade so made will be conclusively presumed fraudulent as against existing creditors of vendor, unless specified notice of intended sale is given, in view of term "stock in trade" meaning "stock of merchandise."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Stock in Trade.]

2. **Fraudulent conveyances** ⇨300(1)—Finding that sale of lumber was for value, and not fraud on creditors, held sustained by evidence (Civ. Code, § 3442).

In action against sheriff for attachment and sale of lumber, evidence held sufficient to sustain finding that bank, authorized to sell debtor's lumber and to apply proceeds on its debt, sold lumber for valuable consideration, and that sale was not void as to creditors, under Civ. Code, § 3442.

3. **Sheriffs and constables** ⇨138(3)—In action against sheriff for attaching and selling lumber, finding that bank sold lumber for debtor before attachment held sustained by evidence (Civ. Code, § 1140).

In action against sheriff for value of lumber attached by him and sold, evidence held sufficient to sustain finding that bank, authorized to sell debtor's lumber and to apply proceeds on its debt, had sold the lumber prior to the levy of the attachment, under Civ. Code, § 1140, providing that title to personal property passes when parties agree on present transfer and thing is identified.

4. **Fraudulent conveyances** ⇨297—Evidence held not to show insolvency of partnership or contemplation of insolvency, within statute respecting fraudulent conveyances (Civ. Code, § 3442).

Testimony that bank officer told partner that partnership business was in very poor condition and that the partners should go through insolvency held not to establish that partnership was insolvent, or that subsequent sale of lumber was in contemplation of insolvency, so as to make applicable Civ. Code, § 3442, declaring certain transfers void as to creditors.

5. **Fraudulent conveyances** ⇨121, 122(1)—In absence of statute, debtor may prefer creditors by payment or security (Civ. Code, § 3432).

In absence of express statutory provisions to the contrary, a debtor, though insolvent or in failing circumstances, may validly prefer one or more of his creditors by making payments in money or other property, or by giving security, in view of Civ. Code, § 3432.

6. **Appeal and error** ⇨1058(2)—Excluding questions held not prejudicial, where witness answered in other parts of testimony.

Sustaining objections to questions on cross-examination held not prejudicial error in instances where witness fully answered question put to him in other parts of his testimony.

7. **Appeal and error** ⇨205—Excluding question held not ground for complaint because matter would have developed rendering it proper, where record did not indicate development would have appeared and counsel did not suggest it at trial.

Sustaining objection to defendant's question held not ground for complaint by defendant on the ground that if the question had been permitted a matter would have soon developed which would have rendered it proper, where nothing in the record showed that the development suggested would have appeared, and no suggestion thereof was made to the trial court or any explanation of the purpose of the question, but the matter was immediately dropped after objection was sustained.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action to recover the value of lumber sold, brought by the Shasta Lumber Company against Chas. J. McCoy, Sheriff of the County of Yuba. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Dozier, Kimball & Dozier, of San Francisco, for appellant.

W. H. Carlin and Richard Belcher, both of Marysville, for respondent.

FINCH, P. J. In an action prosecuted by the Chicago Lumber Company against Leal & Sons Lumber Company, a writ of attachment was duly issued and placed in the hands of the defendant, who, pursuant to the authority thereof, seized certain lumber claimed by and in the possession of the plaintiff herein. Judgment in that action was rendered in favor of the plaintiff therein, and the defendant herein sold the lumber to satisfy the judgment. This action was thereafter commenced to recover the value of the lumber so sold. Judgment was entered in favor of the plaintiff, and the defendant has appealed.

There is evidence to show the following facts: Leal & Sons Lumber Company is a copartnership composed of Manuel Leal and his sons, George and Edward, and was engaged, at the times herein mentioned, in the business of operating a sawmill at Browns-

ville, Yuba county, and selling the output of the mill. In the early part of the year 1924 the company was indebted in the sum of more than \$20,000 to the Rideout Branch of the Bank of Italy. It was also indebted to the Chicago Lumber Company and probably to others. The plaintiff owned and was operating a lumber yard in Marysville, where it had been engaged for many years in the business of buying and selling lumber. Early in May, 1924, the plaintiff purchased certain lumber, not involved in this action, from Leal & Sons Lumber Company, and about the same time the latter company entered into an arrangement with the bank and the plaintiff to the effect that Leal & Sons Lumber Company would deliver certain lumber at plaintiff's lumber yard, the bill of lading, or tag, of each truck load to be indorsed, "Sold to Bank of Italy. Delivered at Shasta Lumber Co." The plaintiff was to sell the lumber "for the benefit of the Bank of Italy and Leal & Sons Lumber Company jointly," the latter to be given credit therefor by the bank. The bank acted as the agent of Leal & Sons Lumber Company in selling the lumber. The plaintiff was given no commission for its services, but was paid the cost of labor in handling the lumber. George Leal testified that in the early part of May, 1924, J. C. Dooley, a representative of the bank, directed the immediate delivery of the lumber, saying:

"We want it hauled out of here so nobody can come up here and put an attachment on it."

The witness further testified that:

Dooley "instructed me how to mark the tags, 'Sold to the Bank of Italy.' * * * I said this lumber wasn't sold to the Bank of Italy. He said, 'We want it marked that way so nobody can put any attachment on the lumber down in Marysville.'"

It does not appear that this testimony was directly contradicted, but W. B. Swayne, assistant vice president of the bank, who had charge of the matter, testified that he instructed Dooley to direct Leal & Sons Lumber Company to ship the lumber, but did not direct him to state to that company "that they should ship that lumber down right away so it wouldn't be attached by creditors of Leal & Sons Lumber Company," and that "we told the Leals we wanted the lumber brought down here where it could be handled. They were not able to sell it or move it."

A large quantity of lumber was delivered under this arrangement at the plaintiff's lumber yard and, after a part thereof had been sold, the bank asked the plaintiff to make an offer for the purchase of the remainder thereof. June 28, 1924, the plaintiff gave the bank a detailed statement of the remainder of the lumber, amounting to 123,326 feet, and offered to purchase the same at \$45 per thousand. The offer was oral, the only memorandum thereof in writing being a pencil nota-

tion on said statement, substantially as follows: "123,326 ft. @ \$45 per M. \$5,549.67." Swayne "said it was all right with the bank but he would rather have the Leals confirm it and he would send them down." Swayne testified that thereafter, on the same day, "all three" of the Leals appeared at the bank, and "I showed them the offer * * * made by Mr. Bryan (plaintiff's manager). I told them I would like them to go down and talk to Mr. Bryan and look over the lumber, see the grading and pricing he had made on it. They said they didn't care to go down, that the lumber belonged to the bank; the bank could do as it pleased with it. I said, 'I would like you to go down,' and they did go down at my request." The Leals then went to the plaintiff's place of business and said to Bryan that "it was the Bank of Italy's lumber, they could do as they pleased about it." The Leals did not report back to the bank. Swayne testified that on June 30, 1924, "Mr. Bryan reported to me that the Leals came down and they were satisfied with the grading and price, so I told him the lumber was his." The plaintiff made an entry in its ledger, crediting the bank with the purchase price of the lumber, \$5,549.67. This entry "was either made on June 30th or the following day." The lumber was attached, as stated, July 8, 1924, and, of course the plaintiff had notice of the attachment. July 10, 1924, the bank made and delivered to the plaintiff a bill for the lumber so purchased, dating the bill "June 30, 1924." August 19, 1924, plaintiff gave its promissory note to the bank for the amount of this purchase and other indebtedness to the bank. August 21, 1924, the bank gave Leal & Sons Lumber Company credit for the amount of the sale made to the plaintiff. No record of the sale was made by either the plaintiff or the bank prior to the execution of such promissory note, except as herein stated.

The evidence shows without conflict that Leal & Sons Lumber Company authorized the bank to sell the lumber in question and apply the proceeds to the company's indebtedness to the bank, and the important question here is whether the bank made a valid sale to the plaintiff prior to the levy of the attachment. There is sufficient evidence to support a finding either way on that issue. Had the attachment been levied prior to June 30, it would undoubtedly have taken precedence over the sale to the plaintiff. The lumber was already in the possession of the plaintiff, and therefore no question as to its delivery is presented. "The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not." Civ. Code, § 1140. Of course, the provisions of this section are subject to the rules relating to fraudulent transfers.

[1] Appellant contends that the sale is void

under the bulk-sales provisions of section 3440 of the Civil Code, to the effect that the sale "of a stock in trade, in bulk, or a substantial part thereof otherwise than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor * * * will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor," unless prior notice of the intended sale be given as therein prescribed. Admittedly, no such notice was given of the sale in question. The evidence does not show what other lumber, if any, Leal & Sons Lumber Company had at the time of the sale. It cannot be said, as a matter of law, that the sale of 123,326 feet of lumber by a sawmill company to a company engaged in the business of buying and selling lumber is out of "the ordinary course of trade" or "the regular and usual practice and method of business of the vendor." It has been held generally that statutes substantially in the terms of section 3440 do not apply to vendors of articles manufactured by themselves. 27 C. J. 878; *Connecticut Steam Brown Stone Co. v. Lewis*, 86 Conn. 386, 85 A. 534, 45 L. R. A. (N. S.) 495; *Cooney, Eckstein & Co. v. Sweat*, 133 Ga. 511, 66 S. E. 257, 25 L. R. A. (N. S.) 758. The case last cited involved a sale of lumber by the operator of a sawmill. The term "stock in trade" appearing in section 3440 was doubtless used as the equivalent of "stock of merchandise." In *Swift & Co. v. Tempelos*, 178 N. C. 487, 101 S. E. 8, 7 A. L. R. 1581, it is said:

"The words, 'stock of merchandise,' in our statute are used in the common and ordinary acceptance of those terms, and mean the goods or chattels which a merchant holds for sale, and are equivalent to 'stock in trade,' as ordinarily used and understood among merchants and tradesmen."

In *Phillips v. Byers*, 189 Cal. 665, 671, 209 P. 557, 559, it is said:

"One who simply manufactures an article and sells it is not a merchant and * * * although a manufacturer may also be a merchant if he buys and sells goods, he does not become one by disposing of the goods he has produced, at a manufacturer's profit."

[2-4] Appellant next contends that the transfer to plaintiff "was voluntary and without a valuable consideration and made by said copartnership while insolvent or in contemplation of insolvency, and was therefore fraudulent and void as to existing creditors," and that there is no evidence that the sale to the plaintiff was consummated prior to the levy of the attachment. A mere reading of the evidence herein set out is a sufficient answer to these contentions except as to the question of the company's insolvency. The evidence upon which appellant relies to show that the copartnership was insolvent or contemplated insolvency

proceedings was given by Edward Leal as follows:

"Q. What, if anything, did Mr. Swayne say concerning a trust deed? A. He said that our business was in very poor condition, the best thing we could do was to go through insolvency."

The witness testified that this conversation took place June 28, 1924. Such evidence is insufficient to show either that the copartnership was insolvent or that the transfer was made in contemplation of insolvency. The provision of section 3442 of the Civil Code "that any transfer or incumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent and void as to existing creditors," has no application to the facts of this case, because the transfer was not voluntary, but was made for a valuable consideration.

[5] "It is well settled that in the absence of express statutory provisions to the contrary, a debtor, although insolvent or in failing circumstances, may prefer one or more of his creditors by payment in money or other property or by giving security for the debt, and that the preference thus given will be valid, notwithstanding the claims of other creditors will thereby be delayed or defeated." 27 C. J. 613. "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." Civ. Code, § 3432.

[6, 7] Complaint is made of certain rulings by which the court sustained objections to questions asked witnesses for plaintiff on their cross-examination by counsel for defendant. In each instance, however, with one exception, the witness fully answered the question in other parts of his testimony. In the excepted instance Swayne was asked:

"Upon what theory were you ordering Leal & Sons Lumber Company to ship the lumber?"

In appellant's opening brief it is said:

"It is apparent that if the question had been permitted it would have soon developed that the lumber was shipped down for the sole purpose of preventing the attachment thereof by the existing creditors of the copartnership."

There is nothing in the record to show that the suggested development would have appeared. This suggestion was not made to the trial court, nor was any explanation given of the purpose of the question, but the subject was immediately dropped upon the sustaining of the objection. Under such circumstances, appellant cannot be heard in this court to complain of the ruling.

The judgment is affirmed.

We concur: PLUMMER, J.; GLENN, Justice pro tem.

85 Cal. App. 571

PHILLIPS v. PICKWICK STAGES, NORTH-EARN DIVISION, Inc. STOCKS v. SAME. CROTHERS v. SAME. (Civ. 5934.)★

District Court of Appeal, First District, Division 2, California. Sept. 26, 1927.

Hearing Denied by Supreme Court Nov. 23, 1927.

1. Municipal corporations ⇨706(6)—Evidence relative to proper brakes, on autostage striking pedestrian, and negligent operation, held for jury (Motor Vehicle Act 1923, § 94).

In action for injury to pedestrian struck by autostage, evidence as to automobile's being equipped with proper brakes, as required by Motor Vehicle Act 1923, § 94 (St. 1923, p. 545), together with question of negligent operation, held sufficient for jury.

2. Municipal corporations ⇨706(5)—Evidence held to sustain finding of negligence as to pedestrian struck by autostage.

Evidence, in action for injury to pedestrian struck by autostage, held sufficient to sustain finding of negligence.

3. Appeal and error ⇨1064(1)—Defendant, in action for injuries to pedestrian struck by autostage, held not prejudiced by instruction on contributory negligence.

In action for injury to pedestrian struck by autostage, instruction on contributory negligence held not prejudicial to defendant, particularly since it was clearly pointed out that instructions were only applicable to issue of contributory negligence set up as a separate defense in defendant's answer.

4. Trial ⇨285—Instructions are to be determined, not alone by pleadings, but also by evidence in support of issues.

Instructions in a particular case are to be determined, not alone by pleadings therein, but also by evidence in support of issues.

5. Appeal and error ⇨1066—Injury must result from instruction without basis in evidence, in order to warrant reversal.

In order to warrant reversal because of giving instruction without basis in evidence, it must appear that injury resulted therefrom.

Appeals from Superior Court, Ventura County; Merle J. Rogers, Judge.

Separate actions by George W. Phillips, Tina Stocks, and Mary M. Crothers against the Pickwick Stages, Northern Division, Inc. Judgments for plaintiffs, and defendant appeals; the appeals being consolidated. Affirmed in each case.

Saran & Thompson, of Riverside, and Joe Crider, Jr., and B. P. Gibbs, both of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondents.

WARNE, Justice pro tem. The above-entitled actions were brought to recover damages for personal injuries alleged to have been suffered by each of the plaintiffs by

reason of the alleged negligence of the defendant in the operation of one of its autostages, in the city of Ventura. Having grown out of the same accident and having involved the same facts relative to the accident, the actions were by stipulation tried together on the same evidence. The cases were tried before a jury. The plaintiffs recovered judgment in each case, and the defendant appeals. The appeals have been consolidated, and the grounds of appeal are the same in each case.

Briefly, the facts are as follows: On the morning of July 4, 1924, the American Legion were having a parade in the city of Ventura, which was proceeding along Main street in an easterly direction to California street, thence southerly down California street on the west side of the street. The intersection of the street was crowded with people, among whom were the plaintiffs, and the street was closed to traffic at this point by reason of the people extending out into the street. But east of this corner, and on the south side of the street up as far as Chestnut street, the street was open to traffic.

On the morning in question, appellant was operating one of its stages from Los Angeles to Santa Barbara, and a part of its route extended through the city of Ventura. Coming into Ventura, when the stage reached the corner of Main and Chestnut streets, which is 400 feet east from California street, the point of the accident, the driver turned down Main street, traveling at a rate of speed not exceeding 10 miles an hour towards the line of parade. It is a down grade from Chestnut to California street. Shortly thereafter the driver saw the crowd of people lined across California street at the corner, and, knowing he was going to be obliged to stop, he put the stage in low gear and rolled down the hill. Shortly thereafter he started to stop the stage by means of the use of the foot brake, and in so doing the foot pedal which operated that set of brakes suddenly broke, rendering it useless. The driver headed the stage for a lamp post on the south side of the street, but before reaching it a child stepped out into the street between the lamp post and the stage, and he turned the stage in order to avoid hitting the child and proceeded towards the crowd. The driver was not able to stop the car by use of the emergency brake and the three plaintiffs, who were standing out more or less in the street with their backs to the direction of the autostage intently watching the parade, were struck by the stage and injured. The driver did not sound his horn either before or after the foot brake pedal broke. Automobiles were standing in three rows and occupying the right half of Main street for most of the block immediately east of the point of accident. The left side was unobstructed.

The first point raised by appellant is that the verdict is contrary to law in this: "That the proof discloses no negligence on the part

of the defendant." Appellant contends that the accident was caused solely by the sudden breaking of the foot pedal, due to a latent defect therein, not known to defendant and not discoverable upon a most careful inspection, and that there was no negligence upon the part of the defendant. Concededly, if the sole proximate cause of the accident was due to the breaking of the foot pedal due to a latent defect which could not have been discovered upon a careful examination and inspection, appellant would not be liable. *Lawrence v. Green*, 70 Cal. 417, 11 P. 750, 59 Am. Rep. 428; *McCall v. Pacific Mail S. S. Co.*, 123 Cal. 42, 55 P. 706; *Roberts v. Sierra Ry. Co.*, 14 Cal. App. 180, 111 P. 519, 527; *McKeon v. Lissner*, 193 Cal. 297, 223 P. 965.

The complaint alleges as follows:

"That said accident was caused alone by the negligence of the defendant (a) in the operation, management, and control of said autobus; and (b) in negligently operating said autobus with defective brakes thereon."

The answer denies negligence upon the part of the defendant, and as a separate and affirmative defense alleges that the accident was unavoidable by reason of the fact that the brake foot pedal suddenly broke while being used to stop said stage at the time and place of the accident, and that the breaking of said brake foot pedal was caused by a latent defect in said brake foot pedal, which was unknown to defendant under constant use and careful inspection.

[1, 2] Both questions thus mentioned were issues of fact, and, if there is substantial evidence to sustain either, the verdict will stand. *Worley v. Spreckels Bros.*, 163 Cal. 60, 124 P. 697; *Bergen v. Tulare, etc., Co.*, 173 Cal. 714, 161 P. 269. We think the question as to whether the autobus was equipped with brakes adequate to promptly check its speed and stop it, as required by section 94 of the Motor Vehicle Act of 1923 (St. 1923, p. 545), was a question for the jury to decide under all the facts and circumstances, as was also the question of negligent operation of the motorbus. The autostage in question, as is universally the custom to-day, was equipped with two sets of brakes; that is, the customary foot brakes operated by means of a foot pedal and a so-called emergency brake operated by means of a hand lever. Upon the breaking of the foot pedal, it was not possible to operate the foot brake, and according to the testimony of the driver of the autostage, the emergency brake was not adequate

at the time to stop the car, due to it not being in "prime condition." It is apparent that, if the emergency brake had been in prime condition the autostage could have been brought to a stop and the accident avoided. However this may be, there is still the question as to whether the driver was negligent in failing to sound his horn at the time and also the manner in which he was operating the autostage. The jury believed that the defendant was negligent in some respect, and, there being substantial evidence to warrant the finding, it is not for us to say to the contrary.

[3-5] It is next contended that the court erred in instructing the jury upon the question of contributory negligence. The defendant as a separate defense set up in its answer contributory negligence upon the part of the plaintiffs. It is claimed the appellant abandoned this defense at the trial by not having offered any evidence to support this plea, and therefore the court should not have instructed the jury upon this question. While instructions in a particular case are to be determined, not alone by the pleadings therein, but also by the evidence in support of the issues between the parties, and, even though an issue is raised by the pleadings, it is not proper to give an instruction thereon, although it may be abstractly correct, where there is no basis for it in the evidence (14 R. C. L. 786), still it must appear that injury resulted therefrom in order to warrant a reversal (2 Cal. Jur. 1027; *Estate of Clark*, 180 Cal. 395, 181 P. 639; *George v. Los Angeles Ry. Co.*, 126 Cal. 361, 58 P. 819, 46 L. R. A. 829, 77 Am. St. Rep. 184). We do not see where injury resulted to the appellant by the giving of said instructions. It was clearly pointed out to the jury that these instructions were only applicable to the issue of contributory negligence, and we fail to see wherein the jury was misled. It appears to us that, if any one was prejudiced by the giving of these instructions, it was the plaintiff.

Lastly, it is contended the court erred in refusing to give certain instructions requested by appellant. It will suffice to say that we have examined the record in the case, together with all the instructions given, and are of the opinion that the jury were fully instructed in the premises, and therefore the court did not err in refusing to give the offered instructions.

The judgment is affirmed in each case.

We concur: KOFORD, P. J.; NOURSE, J.

85 Cal. App. 507

MARSHALL v. WILLIAMS, City Auditor.
(Civ. 5985.)

District Court of Appeal, First District, Division 1, California, Sept. 21, 1927.

1. Statutes $\S$ 206—Different sections of an act should be so construed as to harmonize and give effect to each.

Different sections or provisions of an act should be so construed as to harmonize and give effect to each.

2. Statutes $\S$ 181(1)—In construing statutes, courts must give effect to intent of framers of instrument and seek for that intent in every legitimate way.

It is duty of courts, in construing statute, to give effect to intent of framers of instrument and seek for that intent in every legitimate way.

3. Statutes $\S$ 190—Where provisions of statute are clear, intention of lawmaking power thus indicated will prevail.

Statute itself furnishes best means of its exposition, and, if its provisions are clear, intent of lawmaking power thus indicated will prevail.

4. Statutes $\S$ 194—Where general intention is expressed in act and also particular intention incompatible therewith, particular intention must be considered as exception, and both must have effect in their respective spheres.

When general intention is expressed in an act and also a particular intention incompatible with general intention, particular intention is to be considered in nature of an exception, and both are to have effect in their respective spheres.

5. Municipal corporations $\S$ 182—Oakland charter held to show intention to exempt office of chief of police from civil service provisions.

Provisions of charter of city of Oakland, when construed together so as to produce harmonious whole, held to show intention of framers of charter to exempt office of chief of police from any and all civil service provisions thereof.

6. Municipal corporations $\S$ 182—Under Oakland charter, chief of police may be selected from police department.

Under provision of charter of city of Oakland providing that council may consolidate and place in charge of one chief official functions and duties of two or more such chief officials, which makes any chief official, irrespective of age or other civil service requirement, eligible to office of chief of police, a chief of police may be selected from out the police department, indicating that civil service restrictions should not control in the manner of his appointment.

7. Municipal corporations $\S$ 184(2)—Charter provisions prescribing qualifications for members of police department held controlled by express civil service provisions (Charter of City of Oakland, arts. 13, 14, $\S$ 87-89).

Charter of City of Oakland, art. 14, $\S$ 87-89, prescribing qualifications of members of police

department, are limited and controlled by express civil service provisions contained in article 13 of the charter.

8. Municipal corporations $\S$ 139—Courts cannot ignore plainly expressed civil service provisions in charter and by unreasonable construction defeat expressed intention.

Where civil service provisions were plainly expressed in charter of city of Oakland, and intent of framers of charter was clear, courts have no power to ignore such express provisions and by forced or unreasonable construction defeat clearly expressed intention of lawmaking power.

9. Municipal corporations $\S$ 182—General provisions of Oakland charter relating to organization of police department held to apply to permanent members only and not to chief of police.

General provisions of charter of city of Oakland relating to organization of police department held to apply to permanent members of that department only and not to office of chief of police.

10. Mandamus $\S$ 101—Chief of police held entitled to writ of mandate against city auditor directing auditor to allow salary demand approved by council.

Chief of police of city of Oakland held entitled to writ of mandate directing city auditor to allow salary demand approved by city council, where petitioner was properly appointed and was eligible for said office and had qualified.

Petition by Donald L. Marshall for writ of mandate to be directed to Harry G. Williams as Auditor of the City of Oakland, to require him to approve salary demand of petitioner as Chief of Police. Writ granted.

Raymond Benjamin, of San Francisco, and M. C. Chapman, of Oakland, for petitioner.

Preston Higgins, City Atty., and John W. Collier, Deputy City Atty., both of Oakland, for respondent.

Snook, Snook & Chase, of Oakland, amici curiæ.

TYLER, P. J. Application for writ of mandate, prayed to be directed to the auditor of the city of Oakland to approve a salary demand. Upon the filing of the petition, an alternative writ issued from this court commanding respondent to allow said demand or show cause to the contrary. In response thereto, he has appeared and demurred to the petition. The facts and legal contentions in reference thereto are as follows: The city of Oakland is a municipal corporation existing under and by virtue of a freeholders' charter, duly enacted by the people of said city and approved by the Legislature of the state of California. Respondent Harry G. Williams is its duly elected, qualified, and acting city auditor. On the 11th day of July, 1927, at a regular meeting of the council of said city, petitioner, Donald L. Marshall, was appointed chief of police by the commission-

er of public health and safety, which appointment was, on said day, duly and regularly confirmed by the unanimous vote of the council. At the time of his appointment and confirmation as chief of police, petitioner was a citizen of the United States, of the age of 37 years, and it is alleged that he possessed all the qualifications required by law and said charter to render him eligible for said office. Immediately after his appointment Marshall qualified as chief of police by subscribing to the prescribed oath and filing the same with the city clerk. On the 29th day of July, the council of the city considered and approved his demand for salary on the treasurer in the sum of \$304.84, which demand was drawn on the proper fund in favor of petitioner; the amount thereof representing the sum he was entitled to from the date of his appointment to and including the 31st of July, 1927. The demand as approved was thereupon presented to respondent, as auditor, for his allowance as prescribed by the charter, but was rejected by him upon the ground that, in his opinion, petitioner was ineligible to the office to which he was appointed, for the reason that he had passed the age requirement provided for in the charter for members of the police department and had never passed a civil service examination, for which reasons his appointment was without authority. Accordingly, it is here claimed by respondent that the chief of police is a member of the Oakland police department, and in common with other members of such department must have passed a satisfactory civil service examination before his appointment, unless he was previously a member of the department, and that to become such a member he must have, at the time of his appointment, been not more than 35 years of age. It is admitted that petitioner was not a member of the department before his appointment, and that he was over 35 years of age at that time, and had never passed a civil service examination to become such a member. It is petitioner's claim that the civil service requirements for members of the police department do not apply to the office of chief of police, as such office is specially excluded from the operation of the charter provisions.

It is apparent that the solution of the question depends upon the proper construction to be given to the various charter provisions relating to the subject. Article 14, § 87, of that instrument provides, in substance, that the police department shall consist of a chief of police, captain of inspectors, who shall act as chief of police in the absence of the chief, and such captains, inspectors, sergeants, corporals, and bailiffs as in the judgment of the council the needs of the service may require. Section 88 provides that no person shall become a member of the department unless he shall be a citizen of the United States, a resident of the city of Oakland for a stated period, and be not less than 25 nor more than

35 years of age, and before his appointment pass a satisfactory examination under such rules and regulations as may be prescribed by the civil service board. Section 89 provides, among other things, that the chief of police, captains of inspectors, sergeants, corporals, bailiffs, patrolmen, and all other officers and members shall be appointed by the commissioner of public health and safety, subject to the civil service provisions of the charter, and the appointment of the chief of police shall be subject to confirmation by the council. The civil service requirements referred to in the foregoing provisions are found in article 13 of the charter. Section 80 of that article declares that its provisions shall apply to all appointed officers and employees of the city in and under any of the departments enumerated in section 72 of the charter, except the chief officials of the city enumerated in article 7, § 30, of that instrument. Section 30 defines the chief officials to be the city attorney, treasurer, who shall be ex-officio tax collector, city clerk, city engineer, chief of police, chief of fire department, street superintendent, health officer, and superintendent of electrical department. This section further provides that the council shall by ordinance prescribe the duties of all the chief officials, and may, by an affirmative vote of four members, consolidate and place in charge of one such chief official the functions and duties of two or more such chief officials. The council is also given the power under the section to remove from office any of the chief officials of the city. The qualifications of certain of the chief officials are also there prescribed, but there are none with reference to the chief of police, who, together with the chief of the fire department and health officer, are appointed by the commissioner of health and safety, subject to confirmation by the council, and they are assigned to that department. In addition to these chief officials, article 13, § 80, further exempt from the civil service provisions, "the building inspector, the city wharfinger, license inspector, bacteriologist, city chemist, sanitary inspector, the market and food inspector, the plumbing inspector, mayor's secretary, assistant city attorneys, the members of the board of library directors, board of play ground directors and board of park directors," and certain other persons not necessary to here enumerate.

[1-5] It will be noticed that, while the provisions of the charter relating to the organization of the police department declare it shall consist of a chief of police and certain other officers (article 14, § 87, supra), and that no person shall become a member of the department unless he shall have passed a civil service examination, and be not less than 25 nor more than 35 years of age (article 14, § 88), the civil service provisions expressly exempt the chief of police and certain other officers from the operation thereof (article 13,

§ 80, supra). It is this seeming conflict that we are asked to interpret. The different sections or provisions of an act should be so construed as to harmonize and give effect to each. The propriety and necessity of so construing them are imperative when the purpose is to harmonize one part of an act with another in accord with its general intent. It is the duty of courts, in construing statutes, to give effect to the intent of the framers of the instrument and seek for that intent in every legitimate way. The statute itself furnishes the best means of its own exposition; and, if its provisions are clear, the intention of the lawmaking power thus indicated will prevail. When a general intention is expressed in an act and also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception, and both are to have effect in their respective spheres. A statute is passed as a whole and not in parts or sections, and is animated by one general purpose and intent. Consequently, each part of a section should be construed in connection with every other part or section and so as to produce a harmonious whole. So construed, we are of the opinion that it was the intention of the framers of the charter to exempt the office of chief of police from any and all of the civil service provisions thereof. Any other construction would result in the entire emasculation of the civil service provisions which expressly exempt the officers there enumerated from their operation. The provisions exempting these officers are clear and unambiguous, and mean just what they declare, or they mean nothing. That this is so, there can be no question.

[6-10] A civil service employee acquires his standing through the possession of certain qualifications, and the passing of an examination, and his removal is subject to a hearing which is provided for. Article 13, § 82. The chief of police, on the contrary, is expressly declared to be one of the chief officials of the city, as they called, and these officers, together with others, are by express civil service provisions exempt from any civil service requirements. In both appointment and removal, therefore, the chief of police is distinguished from other members of the department. Some of the officials must possess certain prescribed qualifications to hold their office, but none are expressly imposed by the charter under its civil service provisions for the office of chief of police. The only qualifications he is required to possess, therefore, are such which the general law imposes upon persons holding public office. He is appointed in a manner different from all other members of the police department. They are appointed under civil service provisions, and their tenure of office is of a permanent character. His appointment, on the contrary, is made by the commissioner of public health and safety, and his removal is not subject to

civil service provisions; the city council having the power by the affirmative vote of three of its members to retire him from office with or without cause. Then again, by article 7, § 30, the council may, at any time, through four of its members, consolidate and place in charge of one chief official the functions and duties of two or more such chief officials. By virtue of this provision any chief official, irrespective of his age or other civil service requirement, is eligible to the office of chief of police. This provision indicates not only that the chief of police may be selected from out the police department, but also that it never was intended that the civil service restrictions should control in the manner and mode of his appointment. The matter is one that is left entirely to the sound discretion of the appointing power. When appointed, the chief of police is assigned to the department of public health and safety of which the police department is a part. In a broad sense he thus becomes a member of the police department, but he is not such a member as is contemplated in the general provisions relating to the organization of that department, which require all members to possess the qualifications that it is here claimed the chief of police should possess. Sections 87, 88, and 89 of article 14, which prescribe these qualifications, are limited and controlled by the express civil service provisions contained in article 13 of the charter hereinabove recited, which specially relate to the office in question, and which provisions, as we have pointed out, are incompatible with respondent's contention, as they expressly negative any such purpose. We do not consider further discussion to be necessary. To our minds the civil service provisions are plainly expressed, and the intent of the framers of the charter is clear, and there is little or no room for interpretation. Under these circumstances, courts have no power to ignore express provisions of an act and by any forced or unreasonable construction defeat the clearly expressed intention of the lawmaking power.

We conclude, therefore, that the general provisions of the charter relating to the organization of the police department apply to the permanent members of that department only, and do not, and were never intended to, apply to the office of chief of police, who acquires his office contrary to those provisions, and the tenure of which is in no manner controlled thereby, but may be terminated in a manner not countenanced by civil service requirements.

For the reasons given, petitioner is entitled to, and it is hereby ordered that, a writ of mandate issue directing respondent as auditor of the city of Oakland to allow said demand so approved by the council in favor of petitioner.

We concur: CASHIN, J.; KNIGHT, J.

YOUNG v. VALLEJO ELECTRIC LIGHT & POWER CO. (Civ. 3276.)★

District Court of Appeal, Third District, California. Sept. 29, 1927.

Hearing Granted by Supreme Court Nov. 28, 1927.

1. Trial ⚡105(2)—Hearsay evidence, admitted without objection, held to show notice of position of electric light wires.

In action against electric light company for destruction of house by fire, hearsay evidence, on cross-examination of plaintiff's witnesses, that he stated, several months before fire, while roof was being shingled, that he had notified defendant to remove wires resting thereon, held sufficient to show that defendant had notice of position of wires at such time, though it would have been error to admit such evidence over objection.

2. Electricity ⚡19(5)—Evidence held to show fire was caused by electric wires resting on roof of house.

In action against electric light company for destruction of house by fire, evidence held to show that fire was caused by current carried through wires resting on roof.

3. Electricity ⚡19(6)—Nonsuit held properly denied, in view of uncontradicted evidence of negligence in transmitting electricity through wires resting on roof of house.

In action against electric light company for destruction of house by fire, defendant's motion for nonsuit was properly denied, where evidence showed without contradiction that defendant was grossly negligent in transmitting electricity through service wires for five or six months, with actual notice that such wires were resting on roof of house.

4. Electricity ⚡19(12)—Negligence in building house with roof in contact with insulated electric light wires held for jury.

Whether one, suing electric light company for destruction of house by fire, was negligent in so building house as to place roof in contact with insulated wires crossing lot, under assumption that defendant would perform its duty to remove them within reasonable time before destruction of insulation by friction, held for jury.

5. Electricity ⚡19(3)—Electric light company's right to maintain wires over another's lot, to exclusion of building thereon, cannot be presumed.

Though it may be presumed that electric light company was not a trespasser in maintaining service wires over another's vacant lot, it cannot be presumed, contrary to common experience, that it had right to maintain wires in their present position, to exclusion of any building erected on lot by owner.

6. Electricity ⚡16(5)—Electric light company, notified of erection of building on lot, held bound to change location of wires, so as to avoid contact with roof.

On notice of erection of building on lot, across which electric light company maintained

service wires, it became its duty to so change location of wires as to avoid contact with roof of building.

7. Appeal and error ⚡1064(1)—Errors in instructions on contributory negligence held harmless, in view of uncontradicted testimony that act complained of would lessen danger.

In absence of evidence contradicting testimony of plaintiff's witness that placing of piece of rubber hose around electric light wires resting on roof of plaintiff's house would lessen danger from fire, any errors in instructions as to plaintiff's contributory negligence in so doing were harmless.

8. Electricity ⚡19(3)—Burden was on electric light company, sued for destruction of house by fire, to prove contributory negligence.

In action against electric light company for destruction of house by fire, burden was on defendant to prove contributory negligence in inclosing service wires resting on plaintiff's house in piece of rubber hose.

9. Electricity ⚡16(7)—Electric light company's transmission of current through wires resting on roof of house held sole proximate cause of fire.

Electric light company's continuous transmission of electricity through service wires, resting on roof of house, for five months or more before fire, with knowledge of situation, held sole proximate cause of fire, even if owner of house was negligence in so erecting it as to place roof in contact with wires and in not removing them.

10. Negligence ⚡80—Instructions that contributory negligence is defense only against ordinary negligence held erroneous.

In action against electric light company for destruction of house by fire, due to destruction of insulation by friction between roof and service wires resting thereon, instructions that contributory negligence is defense only as against any ordinary negligence of defendant held erroneous.

11. Appeal and error ⚡1064(1)—Erroneous instructions on contributory negligence held not prejudicial, in absence of proof of such negligence.

In action against electric light company for destruction of house by fire, due to destruction of insulation by friction between roof and service wires resting thereon, error in instructions that contributory negligence is defense only as against any ordinary negligence of defendant held not prejudicial, in absence of proof of contributory negligence.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Carrie S. Young against the Vallejo Electric Light & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank E. Powers, of San Francisco, and Joseph M. Raines, of Fairfield, for appellant, Clarence N. Riggins, of Napa, and Francis McInnis, of Fairfield, for respondent.

FINCH, P. J. The complaint alleges that William S. S. Young, being in possession under a contract of purchase of a certain vacant city lot, over and across which the defendant maintained two service wires for the purpose of furnishing light, heat, and power to the occupants of a house on another lot, erected a one-story frame building on his said lot, "and said house was so placed upon the said premises that when the same was erected the said electric wires rested upon its roof"; that during the course of construction of the building Young "called the attention of defendant's officers and agents to the said wires upon his premises and requested them to remove the same, but the said defendant and its officers, agents, and employees carelessly and negligently failed and neglected to remove said wires, and carelessly and negligently maintained the same * * * upon his roof until the fire which burned said house as hereinafter alleged, and the defendant and its officers, agents, and employees well knew at all of said times that its wires were stretched over the premises of said Young and upon the roof of his house, and that their maintenance in said position was dangerous to his property and willfully, wantonly, carelessly, and negligently maintained the same thereat; * * * that by reason of said willful, wanton, careless and negligent acts on the part of said defendant, and its officers, agents, and employees, and on or about the 20th day of July, 1920, the electric current conveyed by said wires caused the said house of said Young to ignite and take fire at or about the place where said wires rested upon its roof, and that the said house, together with its contents, was burned and entirely destroyed by said fire," to his damage in the amount of the value thereof; and that the plaintiff has succeeded to Young's claim against the defendant for such damages.

The answer denies all alleged acts of negligence and, as a separate defense, alleges:

"That, prior to the destruction of the aforesaid house by fire on or about July 20, 1920, said William S. S. Young negligently inclosed two of defendant's live electric wires in a piece of rubber hose about 3 feet in length, about $3\frac{1}{4}$ inches in circumference, about $\frac{3}{4}$ of an inch in diameter and about $\frac{1}{8}$ of an inch thick, and negligently caused said two electric wires so inclosed in said rubber hose to come in contact with and to rest upon the roof of said house at points on said house, and that, if the fire which destroyed said house as aforesaid was in any way the result of the contact of said two electric wires so inclosed in said rubber hose with the roof of said house, then and in that event the said negligence of said William S. S. Young as in this paragraph alleged directly and proximately caused or contributed to the destruction of said house by said fire."

The jury returned a verdict in favor of the plaintiff, and the defendant has appealed from the judgment entered thereon.

[1] It appears from the evidence without conflict that the service wires of the defendant, one a No. 10 wire and the other a No. 8, both being insulated and carrying 110 volts of electricity, rested upon the roof of the Young house, as alleged in the complaint, and that the fire started at or near the point of contact of the wires with the roof. On cross-examination of a witness for the plaintiff, the defendant proved that Young stated, five or six months before the fire, while the roof was being shingled, that he had notified the defendant to remove the wires. Similar proof was made by defendant on the cross-examination of the other witnesses. This hearsay evidence introduced by defendant, although it would have been error to admit it over objection, is sufficient to establish the fact that the defendant had notice of the position of the wires at the time stated. The plaintiff testified that, about six weeks before the fire, she heard Young notify William Aden, the defendant's superintendent of construction, that "he wanted the wires taken off of the house because he was afraid of fire." Aden was a witness for the defendant at the trial, but he did not deny the plaintiff's said testimony. Young died prior to the trial. Several weeks before the fire Young inclosed the wires, at their point of contact with the roof, in a piece of ordinary garden hose about four feet in length. He "slit the hose and then inclosed the two wires in it."

[2] C. R. Otterson, fire chief of the city of Napa for eighteen years, testified:

"The movement of those wires on the shingled roof, caused by the wind, if there was any, would wear the insulation out, and if it wore off the insulation and then the wires happened to swing together, it would create an arc. The pair of wires marked Plaintiff's Exhibit No. 5 (taken from the service wires in question) shows evidence of a short; they show that they have been making and breaking, making an arc, causing the wires to burn. * * * Pitting on one of these wires indicates a short. A short created and shown by that pitting might have caused the fire. * * * A piece of garden hose about one-quarter of an inch in thickness is a good insulator if it is solid. If a short was created within the interior of the four-foot piece of rubber hose around the wires, the hose would be burned if the arc created by that short was heavy enough. * * * The placing of a hose around the wires would lessen the danger from fire."

Another witness testified:

"Both of the wires touched the roof, up here near the peak along the south side of the back gable; they were resting on the roof, so that they patted on the roof; they rested on the roof for several months prior to the fire. When I first saw the fire * * * the south end of the house, up towards the roof, was afire. The fire was directly under the wires, and the top of the house above the screen was all afire up to the top of the gable. There was no fire below the screen when I saw it. * * * The

fire was above the screen, at the top of the roof, when I first saw it."

Much testimony to the same effect was given by other witnesses. The house was completed immediately before the fire, and it had not yet been occupied. There were no live wires about the building, except the two service wires mentioned. The only reasonable inference from the evidence is that the fire was caused by the current carried through those wires. There is no evidence tending in the slightest degree to show that the fire had its origin in any other cause.

Appellant contends that the court erred in overruling its general demurrer to the complaint. It is unnecessary to discuss separately the objections here urged against the complaint, because such objections are disposed of by what is said in respect to other contentions of the appellant. It may be stated further that the case was tried upon the theory that proper issues were raised by the pleadings.

[3, 4] The court properly denied defendant's motion for a nonsuit. The evidence shows without contradiction that the defendant was grossly negligent in transmitting electricity through its service wires for five or six months, during all of which time it had actual notice that such wires were resting on the roof of Young's house. Whether or not Young was negligent in placing his roof in contact with the insulated wires, under the assumption that the defendant would perform its duty of removing them within a reasonable time, and before the destruction of the insulation thereof by friction with the roof, was a question of fact for the determination of the jury; but the uncontroverted facts show that the defendant was guilty of negligence as a matter of law.

[5, 6] It does not appear by what right the defendant maintained its service wires over the Young lot prior to the erection of the building, and it may be presumed that it was not a trespasser; but it cannot be presumed, contrary to common experience, that the defendant had the right to maintain the wires in their then position to the exclusion of any building which the owner of the lot might see fit to erect thereon. Upon notice of the erection of the building in question, it became the duty of the defendant to so change the location of its wires as not to interfere therewith.

[7, 8] The remainder of the alleged errors relied on by appellant relate to the giving and refusing of instructions. In both the opening and the reply briefs of appellant it is repeatedly said:

"Charles Otterson, a witness for plaintiff, testified that the placing of a piece of rubber hose around the wires would lessen danger from fire. No evidence to the contrary was given; hence there was no evidence upon which to base a finding by the jury that the inclosing of de-

fendant's wires in a piece of garden hose contributed to any danger from fire."

The burden being on defendant to prove contributory negligence, the foregoing statement is correct. This eliminates from the case the only contributory negligence alleged in the answer, and renders harmless any errors in the instructions relating to such alleged negligence.

[9] Appellant contends, however, that the allegations of the complaint and the evidence introduced by the plaintiff show that Young was guilty of contributory negligence in placing the building in contact with the wires, and in not himself removing the wires, and that, since such negligence is so made to appear, the defendant may avail itself thereof as a defense without pleading it. If Young was negligent in so erecting the building, it does not appear that such negligence was the proximate cause of the fire. He had the right to erect the building upon his lot, and it was the defendant's duty to remove the wires, over which it had complete control. Young's negligence, if any, ceased when the roof was completed, five months or more before the fire. He certainly was not required, in the exercise of ordinary care, to remove the building in order to avoid the danger, or, as appellant contends, to cut the wires, thereby injuring the defendant's property. Can it be said that by reason of Young's original act of negligence, if such it was, he was forever barred from recovery of damages caused by the defendant's continuous subsequent wrongful conduct and negligence? The presence of the wires on the roof constituted a situation which became dangerous only when a current of electricity was passed through them. The situation was created by the combined acts of Young and the defendant; but the danger was created solely by the defendant's act of transmitting electricity through the wires. This it did continuously for a long period of time and with full knowledge of the situation. The only rational inference to be drawn from the evidence is that such negligence on the part of the defendant was the sole proximate cause of the fire.

[10, 11] Appellant sets out some 25 instructions, either given or refused, and contends that the action of the court in relation thereto constituted error. In several of them the court stated that contributory negligence is a defense only "as against any ordinary negligence of the defendant." This was error. *Tucker v. United Railroads*, 171 Cal. 702, 704, 154 P. 835. There being no proof, however, of contributory negligence, the error was not prejudicial.

The other instructions of which complaint is made are too numerous to be discussed in detail. It is deemed sufficient to say that they have been carefully examined, and that no prejudicial error has been discovered in any of them. None of such instructions have

any bearing upon the issue as to whether the fire was caused by electricity carried through the wires, and therefore could not have influenced the implied finding of the jury that it was so caused. With that finding as a basis, it appears from the uncontradicted evidence, as a matter of law, that the fire was caused by the defendant's negligence, and that no negligence of the plaintiff contributed thereto. From an examination of the whole cause it appears, not only that the errors complained of have not resulted in a miscarriage of justice, but that any other verdict than that returned by the jury would have been a miscarriage of justice.

The judgment is affirmed.

We concur: GLENN, Justice pro tem.; PLUMMER, J.

85 Cal. App. 607

JONES et al. v. ALAMEDA. (Civ. 3310.)★

District Court of Appeal, Third District, California. Sept. 26, 1927.

Rehearing Denied Oct. 26, 1927.

1. Marriage ⚭69(6)—Complaint to annul marriage on ground of minority held to state cause of action (Civ. Code, § 83, subd. 1).

In action by father and daughter to annul marriage of daughter on ground of minority, brought under Civ. Code, § 83, subd. 1, complaint alleging that plaintiffs were residents of county, that daughter was 15 years old, that father had been appointed her guardian ad litem, that daughter married defendant on specified day within state while she was residing with her parents, without their consent, and that daughter at time of marriage, and at present time, was under parents' custody, *held* to state a cause of action.

2. Parties ⚭54—Additional plaintiff may be brought in by amended complaint.

One may properly bring in an additional party plaintiff by means of an amended complaint.

3. Appeal and error ⚭170(3)—Where demurrer to complaint was sustained with general leave to amend, permitting plaintiff to bring in additional plaintiff by amended complaint without special permission, if error, was harmless (Const. art. 6, § 4½).

Where court sustained demurrer to complaint to annul marriage with general leave to amend, denying motion to strike amended complaint which brought in additional plaintiff, made on ground that special permission was necessary to bring in an additional plaintiff, if error, was not reversible, under Const. art. 6, § 4½, forbidding reversal for error of pleading or procedure in absence of miscarriage of justice.

4. Action ⚭50(3)—Action to annul marriage because girl was under age of consent does not improperly join two causes of action because both girl and father are plaintiffs (Civ. Code, § 83, subd. 1).

Persons who may maintain action to annul a given marriage for minority, under Civ. Code,

§ 83, subd. 1, have but one cause of action, and hence an action to annul a marriage on the ground that the girl was under the age of consent and did not secure the consent of her parents to the marriage does not improperly join two causes of action because it is brought by both the girl and her father.

5. Marriage ⚭60(5)—In action to annul marriage because party thereto was under age of consent, both minor and his parent are proper plaintiffs (Civ. Code, § 83, subd. 1).

While an action to annul a marriage brought under Civ. Code, § 83, subd. 1, on the ground that one party thereto was under the age of consent, and did not have the consent of his parents to the marriage, may be prosecuted either by the minor or by his parent, both are proper parties plaintiff.

6. Appeal and error ⚭1039(4)—That complaint did not allege that one appointed plaintiff's guardian ad litem continued as such held not reversible error, where judgment rendered was proper (Civ. Code, § 83, subd. 1).

In action to annul marriage brought by girl by her guardian ad litem and another, under Civ. Code, § 83, subd. 1, on ground that girl was under age of consent, that complaint alleged merely that a designated person was appointed the girl's guardian for the purposes of the action, and did not allege that he continued to be guardian ad litem, *held* not ground for reversing the judgment, where evidence showed that no other judgment could be rendered.

7. Appeal and error ⚭909(1)—Appellate court might presume that guardian ad litem took oath of office, if oath was necessary, where record was silent.

Appellate court might presume, in support of judgment, that guardian ad litem of minor took oath of office, if oath of office was necessary, where record presented to court was silent as to whether he took oath, and contained only papers brought up by appellant.

8. Pleading ⚭125—Answer denying that named person was, by order "duly" made, appointed guardian ad litem, did not raise issue.

Where answer denied that, on specified day or at any other time, at specified place, or at any other place, named person was by order duly given and made appointed guardian ad litem of minor for purposes of action, it raised no issue as to fact of appointment, in view of use of word "duly."

9. Appeal and error ⚭1073(3)—That action was brought by minor and parent and judgment went for minor only was not reversible error, where complaint stated cause of action as to each.

Where action to annul minor's marriage was brought by both minor and her parent, fact that judgment was rendered in favor of minor only, was not ground for reversal, where the complaint set forth a cause of action good as to each plaintiff.

10. Appeal and error $\S$ 1036(3)—Making minor an additional plaintiff to marriage annulment action without order held not reversible error, in view of statute permitting intervention.

If minor was erroneously brought into action to annul her marriage as additional party plaintiff, without order authorizing it, this was not reversible error, in view of Code Civ. Proc. $\S$ 387, permitting her to intervene.

11. Action $\S$ 50(3)—Where complaint to annul minor's marriage was filed by her father alone, amended complaint making minor a party plaintiff did not state additional cause of action (Civ. Code, $\S$ 83, subd. 1).

Where original complaint to annul marriage of minor girl was filed by her father alone, under Civ. Code, $\S$ 83, subd. 1, amended complaint making the girl by her guardian ad litem a party plaintiff did not state a new cause of action arising after the filing of the original complaint; there being but one cause of action which either of the two plaintiffs could maintain, and petition for appointment of guardian being made by minor and complying in all respects with Code Civ. Proc. $\S$ 373.

12. Constitutional law $\S$ 42—Constitutionality of statute permitting parent as well as minor child to sue to annul marriage of child could not be raised, where both were plaintiffs (Civ. Code, $\S$ 83, subd. 1).

Question whether Civ. Code, $\S$ 83, subd. 1, was constitutional in so far as it purported to authorize a parent as well as his minor child to sue to annul child's marriage, could not be raised by defendant, where both parent and child were parties plaintiff.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action to annul a marriage, brought by J. M. Jones against Joseph Alameda. Alice Jones Alameda, by J. M. Jones, her guardian ad litem, was made a party plaintiff by an amended complaint. From a judgment annulling the marriage, defendant appeals. Affirmed.

Louttit, Stewart & Louttit, of Stockton, for appellant.

R. C. Pardoe, of Stockton, for respondents.

PLUMMER, J. Judgment annulling marriage of Alice Jones Alameda to Joseph Alameda was entered in this case, and from this judgment the defendant appeals.

The original complaint filed in this action was by J. M. Jones, the father of the minor, Alice Jones Alameda. A demurrer to this complaint was sustained with leave to amend. Thereafter an amended complaint was filed, joining Alice Jones Alameda, a minor, as party plaintiff; the minor appearing by her guardian ad litem. The defendant demurred to the final amended complaint filed by the plaintiffs, and also interposed a motion to strike out the amended complaint. The motion was directed also to particular para-

graphs of the amended complaint. The defendant's motion was denied, his demurrer overruled, and thereupon the defendant answered plaintiffs' final amended complaint. Certain extraneous matters were set forth in the defendant's answer which need not be considered herein. The points made for reversal herein are that the minor could not be brought in as a party plaintiff by an amended complaint, that the amended complaint does not state sufficient facts to constitute a cause of action, and that there was no proof introduced of the appointment of J. M. Jones as guardian ad litem of the minor.

[1] The amended complaint contains the following allegations, which we will epitomize: That the plaintiffs appeared by leave of the court first had and obtained and filed their amended complaint, and alleged, first, that the plaintiffs are residents of the county of San Joaquin, state of California; second, that Alice M. Jones Alameda is under the age of 18 years, to wit, of the age of fifteen years; third, that on the 29th day of July, 1925, at Stockton, the above-named J. M. Jones was, by order duly given and made by the superior court of the state of California, in and for the county of San Joaquin, appointed the guardian ad litem of the above-named Alice Jones Alameda, for the purposes of this action; fourth, that on the 29th day of May, 1925, at the city of Columbia, county of Tuolumne, state of California, the said Alice Jones Alameda intermarried with the defendant, Joseph Alameda; fifth, that at the time of her said marriage the said Alice Jones Alameda was residing with her parents near Ripon, in the county of San Joaquin, state of California, that at the time of her marriage she was under the age of 16 years, to wit, of the age of 15 years, and that her said marriage was contracted and consummated without the consent and against the will of her parents; sixth, that the said J. M. Jones is the father of Alice Jones Alameda, plaintiff above named, and joins with her as a parent and as guardian ad litem in maintaining this action, and that until the time of her marriage as above stated, the said Alice Jones Alameda resided with, and has been under the care, custody, and charge of, her said parents, and still is under the care, custody, and charge of her said parents. The prayer of the complaint asks a decree of the court annulling said marriage on the ground of the minority of the said Alice Jones Alameda.

[2] The defendant's motion, as set forth in the transcript, asks the court to strike out all of the various six paragraphs, moving the court for the striking out of each one of them separately, or as separately specified. A reading of the amended complaint leads inevitably to the conclusion that the motion was properly denied. The complaint sets

forth all the substantial facts necessary to show a cause of action. The motion is also made to strike out the complaint on the ground that it is improper to bring in an additional plaintiff by way of an amended complaint; also on the further ground that leave had not been obtained to file an amended complaint bringing in an additional party plaintiff. The demurrer goes to the sufficiency of the complaint in stating a cause of action, and objection is also made that two causes of action are improperly joined.

Whatever the rule may formerly have been under the old common-law practice and under the strict rules of pleading as laid down in some of the early cases, the contention of the appellant as to bringing in an additional party plaintiff by an amended complaint is squarely answered by the cases cited in support of the rule stated in section 34, 20 California Jurisprudence, p. 537. It is there said:

"New parties may also be brought in by amended and supplemental proceedings after order of the court therefor. Where the plaintiff obtains leave to amend generally, he may join a proper party defendant without any special permission so to do. And it is held the court may allow the complaint to be amended by adding the name of another party plaintiff after the close of plaintiff's evidence if the substantial rights of the parties are not affected"—citing a number of authorities.

[3] General permission was given to amend in this case, and, whether permission was or was not given, in so many words, to the plaintiff to bring into the action as a coplaintiff the minor, Alice Jones Alameda, by her guardian ad litem, we think is a technical error, if error at all, which is abundantly covered by section 4½ of article 6 of the state Constitution, where it is said:

"No judgment shall be set aside, * * * for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The testimony in this case shows beyond peradventure that Alice Jones Alameda was only 15 years of age at the time of the marriage referred to, and that it was entered into between said minor and said defendant without the consent and against the will of the parents of said minor.

[4, 5] Appellant's contention that two causes of action have been improperly joined is likewise without merit. Section 83 of the Civil Code sets forth in subdivision 1 the causes of action for which an annulment proceeding may be prosecuted, and also the person or parties who may prosecute such an action, and the time within which such action must be prosecuted. It is only one cause of action which may be prosecuted by any one of the persons mentioned in subdivision 1 of section

83 of the Civil Code. In other words, two parties have a right to maintain the same cause of action; not that two causes of action may be prosecuted by two different persons. The cause of action and the object to be attained is the annulment of the marriage; simply that and nothing more. While either the minor or the parent may prosecute the action, both are proper parties, and we think the reasonable construction of the subdivision of the section to which we are referring is that the minor and the parent are proper parties plaintiff in the prosecution of any such action, as the action has for its purpose the accomplishment of one end to which and in which both the minor and the parent are interested.

[6, 7] Appellant makes the further objection that the amended complaint does not show that the said J. M. Jones was the guardian ad litem of Alice Jones Alameda at the time of filing the amended complaint, in that paragraph III of said complaint simply states that on the 29th day of July, 1925, at Stockton, the above-named J. M. Jones was, by order duly given and made by the superior court of the state of California, in and for the county of San Joaquin, appointed the guardian ad litem of the above-named Alice Jones Alameda for the purposes of this action. Such complaints usually do contain the words or allege that the plaintiff was appointed and now is the duly appointed and acting guardian ad litem. This objection reaches the extreme of technicality, and, as no possible prejudice could have been suffered by the defendant by reason of the lack of the words "now is," etc., in the complaint, we think a judgment, which the evidence shows is the only one that could be entered, ought not to be disturbed for such a trifling defect in the pleadings. It is likewise urged that there is no showing that J. M. Jones took the oath of office as a guardian ad litem. No authorities are called to our attention requiring the guardian ad litem to take an oath of office, but, as the record is absolutely silent as to whether J. M. Jones did or did not take an oath of office, and also as the record shows that only the papers requested by the appellant are brought up for our consideration, we can only say that, if the taking of an oath was necessary, it will be presumed to have taken place.

[8] It is also urged that the appointment of a guardian ad litem is an issuable fact, and must be alleged and proved. The authorities seem to so hold. There is no testimony introduced in this case concerning the appointment of the guardian ad litem, although the judgment roll contains the petition for, and the order of appointment, but we will consider the case from the standpoint that evidence of the application and appointment was not introduced at the trial. But this does not affect the validity of the judgment.

The answer filed by the defendant, in so far as it attempts to raise the question of the appointment of the guardian ad litem, is in the following words:

"Denies that on the 29th day of July, 1925, or at any other time, at Stockton, or at any other place, that J. M. Jones was, by order *duly* given and made by the superior court of the state of California, in and for the county of San Joaquin, or by any other superior court of the state of California, or any other county, appointed the guardian ad litem of Alice Jones Alameda, for the purposes of the action herein."

By this denial the defendant did not raise any issue as to the appointment of the guardian ad litem, and therefore the allegations of the complaint as to the appointment must be taken as true and justify a finding by the court to that effect. By a careful reading of the defendant's answer, which we have above set forth, word for word, it will be seen that the defendant only denies that the order was "duly" given. This raises no issuable fact, and did not tender any question to the court as to the appointment. This has been squarely decided by the Supreme Court of this state, and one authority from this state only need be cited. In *Miles v. McDermott*, 31 Cal. 271, the court, in passing upon the use of the word "duly," as to raising an issuable fact, it is said:

"Probative facts have no place in a pleading, and will be stricken out on motion. Omit the word 'duly' from the allegation in question, and all cause for criticism is removed. Such words as 'duly,' 'wrongfully,' and 'unlawfully,' so frequently used in pleadings, might better be omitted. They tender no issue, and serve only to detract from that logical directness and simplicity of statement which ought always to be observed in a pleading. But while they do no good, and should not be used for the reason suggested, they do not vitiate the pleading, for they are but surplusage, and may be disregarded."

[9] Judgment in this action went for the minor only, and it has been definitely held in this state that, where there are two parties plaintiff and a cause of action in favor of each is set forth in the complaint, and the evidence admitted was relevant to both causes, reversible error is not shown by reason of the presence of a party plaintiff in whose favor no judgment is entered. *Harker et al. v. Sou. Cal. Edison Co.* (Cal. App.) 256 P. 848. Hearing of this case in the Supreme Court was denied. That a denial simply that anything was duly performed raises no issue. See, also, notes 33, 34, and 35, 19 C. J. p. 833, and cases there cited.

[10-12] It is further urged that there is no court order authorizing the coming in of the minor as a party plaintiff. While we have before touched upon this objection, it may be further stated that the minutes of the court are not presented to us, and we cannot determine whether there was or was not an

order of the court to such effect, but, assuming that there was no such order, we do not think it lays the foundation for any valid objection on the part of the defendant. The minor appeared, and there is no reasonable difference, so far as the defendant is concerned, between the minor appearing as a party plaintiff, or in appearing as an intervener under the terms of section 387 of the Code of Civil Procedure. Again, objection is further raised that the amended complaint states a cause of action arising after the filing of the original complaint. This, of course, loses sight of the fact that there is but one cause of action, and that an action for the annulment of the marriage. The appointment of a guardian ad litem does not create another cause of action or give rise to another cause of action. It is simply a method of procedure provided for the minor to join in maintaining the one cause of action. The record shows that the petition for the appointment of the guardian ad litem was made by the minor, and was in all respects according to the provisions of section 373 of the Code of Civil Procedure. However, as we have said, in failing to deny the appointment of the guardian ad litem, and confining his denial simply to the question that the appointment was not duly made, the defendant is not in a position to raise any of these questions. Again, the appellant urges that section 83, Civil Code, in so far as it purports to authorize a parent to maintain such an action as this, is unconstitutional. We do not see how this question can be raised because if it be admitted that a parent has no such right, and that the cause of action exists only in the minor, the defendant has no cause of complaint because the minor is a party to this action, and no harm has come to him by joining the father with the minor. The fact to be determined by the court was: Did the defendant contract a marriage with the minor while she was under age, to wit, of the age of 15 years, without the consent and against the will of the parents? This abundantly appears from the testimony, and is practically undenied.

A number of cases have been cited by the appellant, but, as none of them, when properly interpreted and applied, affect the conclusion reached by the trial court, we do not deem it necessary to extend this opinion in an analysis or consideration of the cases presented.

This appeal is founded entirely upon technical objections which do not affect any matter of substance tendered to the trial court for determination, and, as we have shown, the errors alleged, if errors, are covered by section 4½ of the state Constitution, it follows that the judgment of the trial court must be, and the same is hereby, affirmed.

We concur: FINCH, P. J.; BURROUGHS, Justice pro tem.

85 Cal. App. 691

In re MELVIN'S ESTATE.

MELVIN et al. v. SIMINGTON.

(Civ. 5839.)

District Court of Appeal, Second District,
Division 1, California. Sept. 29,
1927.

1. Wills ⚡384—Comment by judge in will contest, intimating testator was of sound mind, held prejudicial error.

Statement by judge in will contest, to jury returning from deliberation, that he did not think a judge would grant testator a divorce if latter was of uncertain mind, *held* prejudicial error, especially where will was executed and divorce granted on same date.

2. Appeal and error ⚡217—Objection for first time on appeal to remarks of trial judge is permissible, where record fails to show whether counsel were present.

A party is not precluded from objecting for first time on appeal to remarks of trial judge to jury returning for further instructions, where record does not show whether counsel were present.

3. Appeal and error ⚡217—Failure to object to judge's remark to jury returning for further instructions does not preclude raising them on appeal.

Failure to object to remarks of judge to jury returning for further instructions does not preclude party raising them on appeal, since all objections are deemed to be taken to instructions given to jury.

4. Witnesses ⚡240(4)—Sustaining objections to questions on ground they were "leading," held error, in view of answers (Code Civ. Proc. § 2048).

Sustaining objections to questions on ground that they were leading *held* error, in view of answers; question being "leading" under Code Civ. Proc. § 2048, when it suggests to witness answer which examining party desires.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Leading.]

5. Appeal and error ⚡1046(5) — Comments and prejudicial rulings of court, indicating hostile attitude, held to require new trial.

Comments of court on evidence and its value, constant interference, and prejudicial rulings, indicating court's hostile attitude, *held* to have resulted in miscarriage of justice, requiring new trial.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Petition by Martha E. Melvin and others for revocation of the probate of the will of M. E. Melvin, deceased, opposed by Mabel Melvin Simington, executrix of the last will and testament of M. E. Melvin, deceased. Judgment for proponent, and contestants appeal. Reversed.

Robert F. Shippee and Henry I. Broulett, both of Los Angeles, for appellants.

Lucian J. Clarke and Clarke & Wilson, all of Los Angeles, for respondent.

McLUCAS, Justice pro tem. This is an appeal taken from a judgment in favor of respondent on a petition for a revocation of probate of the will of M. E. Melvin, deceased. The contest was on three grounds: First, that the decedent was of unsound mind at the time of the execution of the will; second, that the purported will was not executed in the manner required by law, in that the purported will was not, in the form in which it now appears, signed by the decedent in the presence of the witnesses, nor signed by the witnesses in the presence of the deceased; third, that the execution of the purported will was procured by undue influence exercised upon the decedent by his daughter named executrix of the will, Mabel Melvin Simington, and a sister of the deceased, May Melvin. After the contestants had rested, the court granted respondent's motion for a nonsuit as to the second and third causes of action or grounds of contest, and denied the motion as to the first cause of action. Upon submission of the case, a verdict was returned that the deceased was of sound mind at the time of the execution of the will.

Appellants concede that the trial court properly granted a nonsuit as to the second ground of contest, but urge that the court erred in granting respondent's motion for a nonsuit on the third ground of contest, namely, that the will was executed under undue influence. Believing the case must be reversed upon other grounds, discussion of this point will be omitted.

[1] The will of the deceased was executed July 13, 1922. During the trial, for the purpose of showing that the surviving wife had no interest in the estate, respondent introduced in evidence certified copies of a decree of divorce granted by the district court of Marshall county, Iowa, on July 13, 1922, the same day the will was executed, wherein the plaintiff, M. E. Melvin, deceased, was divorced from Martha E. Melvin. The respondent also introduced a certified copy of the ruling of the Supreme Court of Iowa affirming the judgment of the lower court. The case was submitted to the jury upon the sole issue as to whether the testator was of sound mind at the date of execution of the will, July 13, 1922. After the jury had deliberated for an hour and three-quarters, the jury returned into court, and the following proceedings occurred (*italics ours*):

"The Court: I understand you have not agreed yet?"

"The Foreman: No, your honor. This lady wishes to ask a question.

"The Court: What is the question?"

"A Juror: Shall I ask it here or from the desk?

"The Court: Yes; ask it there.

"The Juror: *I wanted to ask if the fact that he was granted a divorce—does that prove that he was of sound mind?*

"The Court: That is for the jury to determine, whether it does or not. You have to consider that fact.

"The Juror: *They argue that that proved he was sound.*

"The Court: The fact that it appears from the testimony that he was there during all that trial, and also there was testimony as to whether the question of his soundness or unsoundness was raised at that time—it is for the jury to determine the effect that trial would have; how much proof that is. It is for the jury to determine from the facts, whether he was of sound or unsound mind, and the fact that he went through that trial is one of the facts. Any other questions?

"Another Juror: *I would like to ask a question. Would a judge in Iowa grant a decree of divorce to any one that was not in proper mental condition?*

"The Court: I cannot answer you that.

"The Juror: Did they have a jury trial?

"The Court: I don't know whether they did or not. I would not answer that, if I did know. *I will answer this, that a judge—I don't think that a judge would grant a divorce if he was satisfied he was of unsound mind. Any further I won't go. Is that all?*

"The Foreman: Yes."

It thus appears clearly that the jury was attempting to secure an opinion from the trial judge as to whether in his opinion the testator was of sound mind. They finally succeeded in getting an expression of an opinion as to what the Iowa court would do if satisfied the testator was of unsound mind.

The jury then retired and returned a verdict that deceased was of sound mind at the time of the execution of the will; the court having expressed his opinion on a question of fact that he did not think a judge would grant a divorce if he was satisfied that the plaintiff (testator) was of unsound mind. In our opinion, under the circumstances in this case, this was prejudicial error; the issue in the case being whether the testator was of sound mind at the date of the execution of the will, which date was identical with the date when the divorce was granted to the deceased.

[2, 3] The record does not show whether counsel for appellants were present when the foregoing remarks were made by the trial court. The respondent contends that a party cannot object for the first time on appeal to remarks of the trial judge which were allowed to pass at the time without objection. If counsel were not present, they had no opportunity to object. Moreover, these remarks were not made during the trial, but were made when the jury returned for further instruction, and all objections are deemed to be taken to instructions given to the jury. The testimony was in direct conflict; several

witnesses testifying that in their opinion the testator was of unsound mind, others that he was of sound mind, at the date of the execution of the will.

Certain remarks made by the court during the trial were prejudicial to the rights of contestants. Many of these are quoted in appellants' brief, but lack of space forbids their repetition here. For illustration, we quote from the record:

"Q. You say you did not say that the only thing you noticed was that he was excitable, that was all? A. No; I didn't say that.

"The Court: He did say just that.

"Mr. Anderson: Well, I say that is his answer."

Commenting on the evidence, the court says:

"The Court: Well, I think I will say, Mr. Anderson, right here, that for a real estate agent to go to anybody and try to get him to sell a house is not an indication of unsound mind.

"Mr. Anderson: I am inclined to agree with you, but I think that is a matter of argument.

"The Court: I don't care whether it is or not. It is a fact.

"Mr. Anderson: I will reserve an objection to the comment of the court on that."

Further comment by the court on the value of evidence appears:

"The Court: In all these cases, and in this case, Mr. Anderson, the testimony is offered of what was said, for the purpose of showing his unsoundness of mind, and then it is used for some other purpose; and I don't believe that testimony shows he was of unsound mind."

The court's rulings in sustaining objections to questions on the grounds that they were leading, when in fact they were not, frequently led to the exclusion of material and competent evidence. Among others to which reference is made by appellants, we quote:

"Q. How was he as to being able to carry on a connected conversation, whether he would talk about one thing connectedly straight through or whether he would branch off on other subjects? "That is objected to as leading.

"The Court: Objection sustained.

"Mr. Anderson: Very well. (The answer omitted is as follows: 'A. He always branched off on subjects about his family and his self.')

"Q. What is the fact as to whether she became apparently more devoted to him than she had prior to that time?

"That is objected to as leading, your honor.

"The Court: Objection sustained.

"Mr. Anderson: Very well. (The portion stricken out of the deposition is as follows: 'A. She said she left her housework and went to the courtroom because she expected him to die in the courtroom.')

"Q. What is the fact as to whether or not that seemed to be the chief topic on his mind when you would visit him?

"That is objected to as leading, your honor.

"The Court: Objection sustained."

"Q. In these several conversations, what is-

the fact as to whether or not he would repeat about the same line of conversation each time?

"Mr. Clarke: That is objected to as leading.

"The Court: Objection sustained."

"Mr. Anderson: The next question is: 'Q. What is the fact as to whether you noticed that same line of conduct on his part in later years?'"

"Mr. Clarke: That is objected to as leading.

"The Court: Objection sustained."

[4] A question is leading when it suggests to the witness the answer which the examining party desires. Code Civ. Proc. § 2048. Tested by this rule, we believe the court erred in sustaining objections to the questions propounded on the ground that they were leading.

[5] Frequent rulings were made by the court against the admissibility of evidence without any objection being made by respondent, as shown by appellant's brief. By constant interference and prejudicial rulings the hostile attitude of the court toward appellants must have been clear to the jury. In our opinion the conduct of the trial court was such that the appellants did not have a fair trial.

After examination of the entire cause, including the evidence, we are not prepared to say that the jury would have reached the same conclusion had these errors not been committed by the trial court, and we are of the opinion that the errors complained of resulted in a miscarriage of justice.

It is ordered that the judgment be reversed.

I concur: HOUSER, Acting P. J.

I concur in the conclusion: YORK, J.

85 Cal. App. 514

PEOPLE v. LEDBETTER. (Cr. 1387.)

District Court of Appeal, First District, Division 2, California. Sept. 21, 1927.

1. Criminal law § 369(5)—That evidence was also sufficient to prove other crime is of no consequence when supporting conviction for embezzlement (Pen. Code, § 508).

Where evidence in prosecution under Pen. Code, § 508, for embezzlement as an agent, was sufficient to support conviction, it is of no consequence that evidence on some other theory was sufficient to prove some other crime.

2. Embezzlement § 35—That evidence showed defendant received and appropriated smaller sum than that charged held immaterial (Pen. Code, §§ 508, 1131).

That evidence in prosecution under Pen. Code, § 508, for embezzlement as an agent, showed that defendant actually received and appropriated to his own use the sum of \$700, rather than the full sum of \$1,050, as charged in information, held immaterial, under Pen. Code, § 1131.

3. Embezzlement § 47—Evidence of defendant's agreement to sell automobile for prosecuting witness and invest proceeds held for jury (Pen. Code, § 508).

In prosecution under Pen. Code, § 508, for embezzlement as an agent of money received from sale of an automobile, evidence relative to defendant's agreement to sell automobile for prosecuting witness and invest proceeds held for jury.

4. Criminal law § 1129(3)—Appellate court need not consider alleged error in instructions on mere statement that some error occurred.

Where it is alleged on appeal that court misdirected jury in matters of law, with nothing further as to such errors, except mere statement that some errors occurred, appellate court need not consider such points.

5. Criminal law § 682—Testimony of defendant's false representations, while attempting to satisfy complaining witness that he had invested funds, held admissible, notwithstanding it anticipated defense.

In prosecution under Pen. Code, § 508, on embezzlement as an agent, testimony of false representations by defendant, while he was attempting to satisfy complaining witness, that he was investing funds in accordance with agreement, held admissible to meet defendant's claim that money was received as a loan, notwithstanding testimony was received in presentation of main case, thus anticipating defense.

6. Criminal law § 371(2)—Evidence of other acts of embezzlement of like character held admissible to show intent (Pen. Code, § 508).

In prosecution under Pen. Code, § 508, for embezzlement as an agent, evidence of other acts of embezzlement of a like character was admissible for purpose of showing intent of defendant in particular transaction.

7. Criminal law § 1130(2)—Appellate court need not consider points raised by statement that prejudicial statements were made in trial followed only by citations to reporter's transcript.

Appellate court need not consider point raised by statement in brief that inadmissible and prejudicial statements were made during course of trial followed by citations to numerous pages in reporter's transcript, but without attempt to show error or prejudice.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

D. S. Ledbetter was convicted of embezzlement as an agent, and he appeals. Affirmed.

Myron Harris, of Oakland, and Leo Sullivan, for appellant.

U. S. Webb, Atty. Gen., and E. F. Mitchell, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was tried upon an information charging a violation of section 508 of the Penal Code, covering the crime of embezzlement as an agent. From the judgment following the verdict of guilty

and from the order denying defendant's motion for a new trial he has appealed upon a typewritten record.

The defendant and the complaining witness were on very intimate terms during the early part of the year 1926 and were engaged to be married. While enjoying the confidence and trust of the complaining witness, the defendant persuaded her to transfer to his possession an automobile, which he agreed to sell for the sum of \$1,050 and agreed to invest the proceeds of that sale in stock of the National Ice Cream Company. Having obtained possession of the car and the written evidence of ownership for this purpose, the defendant sold the car for \$300 in money and a Ford coupé valued in the trade at \$450, which he later sold for the sum of \$350. All this money the defendant admittedly appropriated to his own use, while he continued to assure the complaining witness that he had received the full sum of \$1,050 with which he would purchase the stock of the ice cream company as soon as he could reach the manager of that concern. A short time thereafter the defendant obtained from the complaining witness the further sum of \$450 upon his representation to her that he would invest that amount in an automobile finance company. It developed at the trial that this company had not been incorporated, but in fact had been refused incorporation by the state commissioner of corporations, and the defendant appropriated this sum to his own use. About the time the automobile was transferred the defendant executed and delivered to the complaining witness his promissory note in the sum of \$1,050 bearing interest at 12 per cent. per annum. It was the theory of the state that this note was in the nature of a receipt given to the complaining witness to allay her fears caused by defendant's failure to deliver to her the stock in the ice cream company. The defendant, however, claimed that the note was given as evidence of a loan from the complaining witness of the money received from the sale of the automobile and that the difference of \$350 between the face of the note and proceeds of the sale was a bonus which the defendant voluntarily gave to the complaining witness for the use of this sum of \$700.

[1, 2] On this appeal it is argued that the verdict of the jury is contrary to law, in that the evidence discloses that the defendant was guilty of the crime of embezzling the automobile and that he could not therefore be guilty of the crime of embezzling the proceeds of the sale of the automobile as charged in the information. In support of the argument it is said that the evidence failed to show that the appellant ever received the sum of \$1,050 from the complaining witness, as charged in the information, but that it is conceded that he received no more than \$700 from the sale of the automobile, and that, if

he is guilty of any crime in relation to the disposition of the proceeds of the sale, it must be that of larceny or that of obtaining money by trick and device. It would serve no purpose to enter into a discussion of the fine distinctions drawn between the crimes of embezzlement, larceny, and obtaining money by trick and device. As is usual in cases of this character the appellant concedes on the appeal that he has been guilty of one of these crimes, but insists that it must be one other than that charged in the information. Section 508 of the Penal Code provides that every agent who fraudulently appropriates to his own use property of another which has come into his control or care by virtue of his employment as such agent is guilty of embezzlement. This is the charge upon which the appellant was tried and the evidence amply supports the verdict. It is of no consequence that under some other theory the evidence was also sufficient to prove some other crime. That the evidence showed that the appellant actually received and appropriated to his own use the sum of \$700 rather than the full sum of \$1,050 as charged in the information is likewise immaterial. Section 1131, Pen. Code; *People v. Gray*, 66 Cal. 271, 277, 5 P. 240.

[3] It is argued that the verdict of the jury is contrary to the evidence because the appellant testified that the transaction with the complaining witness was that of a loan only, as evidenced by the promissory note, and denied that he had agreed to invest the proceeds of the sale in stock of the ice cream company, and also because it appears that the complaining witness, though on very friendly terms with some of her friends who were called as witnesses, had not disclosed to them the agreement with the appellant to make such investment. The answer is that the complaining witness testified in plain terms that such an arrangement had been made with the appellant and it was for the jury to determine the truth of the transaction.

[4-6] It is argued that the court misdirected the jury in matters of law and erred in the decision of questions of law during the course of the trial. Nothing further is said as to errors in the instructions than the mere statement that some errors occurred. We are not required to consider points presented in this manner. *People v. McLean*, 135 Cal. 306, 309, 67 P. 770. In reference to the admission of testimony of the false representations made by the appellant while he was attempting to satisfy the complaining witness that he was investing her funds in accordance with his agreement, this evidence was admissible for the purpose of meeting the claim of the appellant that the money was received by him as a loan and that he had not agreed to invest it as claimed by the complaining witness. It is true that the testimony was re-

ceived in the presentation of the main case by the state and thus anticipated this defense, but during the course of the opening statement by the district attorney appellant's counsel set forth the defense upon which he would rely, and we therefore can see no prejudice in having this evidence come in out of order. The evidence of other acts of embezzlement of a like character was admissible for the purpose of showing the intent of the defendant in this transaction.

[7] The statement is made in appellant's brief:

"That many inadmissible and prejudicial statements were made during the course of the trial which prejudiced the minds of the jurors against the defendant and prevented him from having a fair and impartial trial."

This is followed by citations to numerous pages in the reporter's transcript, but without any attempt to show error or prejudice. We are not required to consider a point raised in this manner. *People v. McLean*, supra.

The judgment and order are affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

85 Cal. App. 683

SELIGMAN v. SELIGMAN. (Civ. 3284.)

District Court of Appeal, Third District, California. Sept. 28, 1927.

1. Husband and wife ⚭257—Profits of real estate owned by husband before marriage were his separate property, save as to portion attributable to his earnings after marriage (Civ. Code, § 163).

Rents, issues, and profits derived from real estate owned by husband before his marriage were his separate property, save as to portion thereof which was attributable to his earnings after marriage by reason of management, labor, or control, under Civ. Code, § 163.

2. Husband and wife ⚭258—Improvements made with community funds on lands constituting separate property of one spouse become his separate property.

Ordinarily improvements made with community funds on lands constituting the separate property of one of the spouses follow the character of the land and become his separate property.

3. Husband and wife ⚭262(1)—There is no presumption that money used in improving real estate was community property or separate property.

Court cannot presume that money used in improving real estate of one spouse was his separate property, nor can it presume that it was community property.

4. Husband and wife ⚭264—Finding that money used in improving husband's separate lands was his separate money rather than community money, and that improvements were his separate property, held sustained by evidence.

In action to quiet title to land owned by husband prior to his marriage, evidence held to show that improvements thereon were made with husband's separate money rather than with community money, that the improvements thereon were his separate property rather than community property.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action to quiet title, brought by Louis Seligman against Sadie Margaret Seligman. From a judgment quieting title in plaintiff, defendant appeals. Affirmed.

Vincent W. Hallinan, of San Francisco, and Russell & Heid, of Tulare, for appellant. Leroy G. Smith, of Dinuba, for respondent.

PLUMMER, J. Plaintiff had judgment in an action to quiet title to certain tracts of land lying and being in the county of Tulare; also to certain city lots in the town of Kingsburg, in the county of Fresno, and to an undivided one-half interest in a certain 10-acre tract in Springfield Colony, in the county of Fresno. From this judgment the defendant appeals.

The lands involved are described as the west half of the southwest quarter of section 8, in township 17 south of range 23 east, M. D. B. & M.; the northwest quarter of section 32, in township 17 south, range 26 east, M. D. B. & M.; an undivided one-half interest in lot 4 in block 35 of the city of Visalia; also lots 9, 10, 23, 24, and 25 in block C of the city of Kingsburg, Fresno county; and an undivided interest in the 10-acre tract above mentioned.

All this property was owned by the plaintiff to the extent of his ownership therein at the time of his marriage with the defendant, and had been owned by the plaintiff for a number of years previous to said marriage. Plaintiff also owned an interest in a general merchandise business conducted in the town of Dinuba, in the county of Tulare. The testimony is to the effect that the plaintiff had invested in said merchandise business, at the time of said marriage, the sum of at least \$26,000. The marriage of the plaintiff and the defendant took place during the year 1910. Since the marriage of the plaintiff and the defendant, the plaintiff has expended considerable sums of money in the improvement of certain portions of the property herein referred to. The testimony is to the effect that the plaintiff expended, during the three years preceding the commencement of this action, the sum of approximately \$43,000 on the 160-acre tract herein referred to,

and that he had expended the sum of \$1,200 on the city lots mentioned for his portion of the costs of macadamizing streets on which said lots abutted. The testimony also shows that, since the marriage of the plaintiff and the defendant, the plaintiff has expended the sum of \$4,000 at least in erecting a building on one of the lots situate in the town of Visalia. The money for this improvement, however, was borrowed from a building and loan association, and was repaid to said association out of the rents, issues, and profits derived from the building erected as aforesaid.

Upon this appeal the appellant contends that the money used by the plaintiff in improving his real property, subsequent to his marriage with the defendant, was community property, and that the money was acquired by reason of the personal character, energy, labor, and industry of the plaintiff in carrying on his business; that the money consisted of such earnings and profits acquired by the plaintiff from his business; that the plaintiff applied these profits and earnings, and expended them as improvements on the lands referred to; that the improvements placed on said real property greatly enhanced its value, and were and are permanent and substantial in their nature; that, by reason of these acts, the improvements became and are community property; and that the defendant acquired, and now owns, a community interest therein. On the part of the respondent, it is contended that the improvements were placed on the real property with money that was the separate property of the respondent, and that the appellant has no interest therein. The finding of the trial court is to the effect that all of the property mentioned in plaintiff's complaint was and is the separate property of the plaintiff. The real question to be determined is whether the finding of the court is supported by the testimony. In this particular the plaintiff, upon cross-examination, testified that since his marriage he had made improvements on 40 acres of the 160-acre tract referred to, and had expended thereon the sum of about \$18,000 in leveling the land, planting the same to vineyard, preparing it for irrigation, and installing an irrigation system; that he had paid \$1,200 expenses for macadamizing the streets on which the lots in the town of Kingsburg abutted. The plaintiff further testified that during the three years preceding the trial of this action he had expended between \$15,000 and \$16,000 "for my purposes," which we interpret as living expenses or household expenses, \$43,000 in improvements on the 160-acre tract herein referred to, and about \$10,000 in payment of expenses incurred while the plaintiff was ill. During this period of time the testimony also shows that the plaintiff withdrew from the capital investment

in the merchandise business to which we have referred the sum of \$26,000. The testimony further shows that there was associated with the plaintiff in the management and carrying on of the merchandise business in the town of Dinuba, a brother by the name of Emil, and we think the trial court was justified in coming to the conclusion, from the testimony set out in the transcript, that the brother Emil was in fact the manager of the merchandise business referred to, and that the plaintiff only exercised a secondary function in the conduct and management thereof. The record further shows that no salary was ever allotted to, drawn by, or paid from the merchandise business to either the plaintiff or his brother Emil, but that at the end of the year the profits, if any, were divided. The transcript further shows that all the receipts arising from the expenditures incurred upon the real estate by the plaintiff, to which we have referred, were carried into the same general account kept by the bookkeeper of the general merchandising store in which the plaintiff was interested. The record is silent as to whether the profits arising from the real estate belonging to the plaintiff during the period of time that has elapsed since his marriage with the defendant, were greater or less than the expenditures made thereon. So far as the record is concerned, it is absolutely silent upon the question of receipts from the agricultural lands owned by the plaintiff. The record does show something in relation to the receipts arising from the improvements made upon one of the city lots in Visalia. This improvement consisted of a moving picture theater building, and, as we have stated, the mortgage thereon was paid out of the rents, issues, and profits of the building. The record is also silent as to the reasonable earning capacity of the plaintiff in connection with the management of the merchandising business referred to, and also silent as to the reasonable value of his services. The appellant apparently bases her argument upon the theory that whatever was received by the plaintiff from his properties constituted community property. The argument of appellant is as follows:

"By reason of the foregoing premises we arrive at the following conclusions: That the profits of the business constituted community property, and that respondent improved certain parcels of his real property subsequent to his marriage with these earnings. We shall now proceed to show on what parcels of real property the community funds thus derived were expended," etc.

[1] This, of course, is not a correct statement of the law. The profits of the real estate and of the merchandise business being derived from real estate owned by the plaintiff before his marriage would be separate property, save and except as to that portion

thereof which might be attributed to the earning capacity or the ascertained earnings of the plaintiff by reason of his management, labor thereon, or control thereof. Not the profits of the business, but only the earnings of the plaintiff from his individual efforts, or what might be called his salary or wages, would be community property. The testimony of the plaintiff is further to the effect that his living expenses ran in the neighborhood of \$5,000 per annum. The argument is made by appellant that this sum is excessive, but, so far as we have been able to discover, there is no testimony in the record to the contrary. According to the testimony of Milton Seligman, the bookkeeper for the two brothers, who kept all the accounts of the merchandise business conducted by the plaintiff and his brother Emil, and also of the receipts and expenditures of the plaintiff, the profits of the merchandising business ranged all the way from \$112 per year for each partner up to \$5,000 a year for each partner, that the plaintiff, at the time of his marriage, had invested in the merchandising business the sum of \$26,000, and that during the last few years the plaintiff had withdrawn from his capital investment in the merchandising business practically all of his interest therein, and that at the time of the trial the plaintiff's capital investment had been reduced to the sum of about \$400. The bookkeeper testified that the sum withdrawn by the plaintiff was about \$26,000, and that this sum had been spent in the plaintiff's household expenses, his sickness, and in improving a certain 160 acres, being one of the tracts of land to which we have referred, that there was a sharp decline in the capital investment owned by the plaintiff in the merchandising business during the period of time he was improving the parcel of real estate to which we have referred. The testimony further shows that up to the time the plaintiff took sick he was accustomed to going down to the store and spending several hours there each day going over the books and otherwise taking an interest in the business, that the plaintiff, at the time of the trial, was between 73 and 74 years of age.

We find in appellant's brief an itemized statement or calculation which would indicate a community interest in the property to which we have referred, in the sum of \$120,000. This apparently includes all the improvements and all the enhancements in value of the properties referred to, but the estimate of the value of the lands is clearly beyond and largely in excess of the real value thereof even after making the improvements thereon. The contention of the appellant as to values is apparently based upon the testimony of the defendant that the plaintiff stated he would not take less than a certain sum for the property. Instead of any of the land being worth \$1,000 per acre, even

though improved, as argued by appellant, we think the reasonable value thereof is much more nearly approximated by the testimony of the witness Cross, a real estate dealer called on the part of the defendant. His testimony was to the effect that one of the tracts of land called the "Travers Place," including 80 acres, was worth about the sum of \$33.50 an acre; that 160-acre tract, 20 acres being in figs, was valued at about \$150 an acre; that 40 acres of the 160-acre tract, being planted in Malaga grapes, was worth about \$450 per acre, and that the remainder of the tract, being fairly level, was of the value of about \$150 per acre; that the improved portion or the portion in grapes, as bare land, was worth about \$80 per acre; that the 10 acres of land in which the defendant owned a half interest, was worth as a whole tract \$5,500. This witness also testified that the 40 acres of the improved portion of the 160-acre tract referred to was probably worth \$300 an acre more than bare land. This witness further testified that he had bought similar land, being land adjoining the quarter section belonging to Seligman, for \$95 an acre and sold the same for between \$110 and \$120 an acre.

[2] Irrespective of the value of the agricultural land, however, either before or after the improvement thereof, the record shows that at least \$26,000 of the capital investment in the commercial business in the city of Dinuba was withdrawn by the plaintiff and invested in improvements referred to. Under such circumstances, no part thereof can be considered as community property. The record is silent as to whether there was any income from the 245 acres of agricultural land owned by the plaintiff during the period of time elapsing between the marriage of the plaintiff and defendant and the institution of this action. It is likewise silent as to the source from which was obtained the difference between the \$43,000 testified to by the plaintiff as expended in improvements on the agricultural lands owned by him and the \$26,000 that came out of the capital investment in the store. Thus there is no basis whatever for an inference that any portion of the money expended in the improvement of the lands and premises owned by the plaintiff prior to his marriage was paid for by community property. It is simply a matter of surmise or guess, and, if any inference could be drawn in relation thereto, it was just as reasonable for the trial court to infer that it was paid out of that portion of the profits arising from plaintiff's property, whether agricultural or the mercantile business conducted by him in the city of Dinuba attributable to that portion which would be the plaintiff's separate property as the income properly allowable thereon, as to the portion attributable to his individual exertion. Under section 163 of the Civil Code, all

the rents, issues, and profits of the property in question would ordinarily be the separate property of the plaintiff. Likewise, ordinarily improvements made out of community funds on lands constituting the separate property of one of the spouses follows the character of the land and becomes separate property. 5 Cal. Jur. 298. This rule, of course, has its limitations. It cannot be applied where there is an agreement between the spouses to the contrary, nor where creditors establish that the money was put into such improvements for the purpose of defrauding them, nor where the improvements are made by the husband for the purpose of depriving the wife of her interest in the community property. So far as the record shows, none of the limitations are applicable to this case. The profits, if any, all came from separate property, and no question of fraudulent intent or purpose is presented to us for determination.

[3] Again, the increase in the value of the real estate does not necessarily show that any community property has been added thereto or that any portion of the increase in the value of the real estate should be considered and divided between the spouses as community property. So far as the record is concerned, the inquiry at the trial was directed solely to the amount of money that was expended in the way of improvements, and nothing further is presented to guide the trial court in determining how the ownership therein should be allocated further than that in some way it came out of the profits to some extent from the business, and to a considerable extent out of the capital investment. Under such circumstances we do not very well see how the case of *Pereira v Pereira*, 156 Cal. 1, 103 P. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107, and others following the same principle, can be considered as applicable. In the *Pereira* Case the court said, referring to the property in question:

"This capital was undoubtedly his separate estate. The fund remained in the business after marriage and was used by him in carrying it on. The separate property should have been credited with some amount as profit on this capital. It was not a losing business but a very profitable one. It is true that it was very clearly shown that the principal part of the large income was due to the personal character, energy, ability, and capacity of the husband. This share of the earnings was, of course, community property."

Nothing of this kind appears in this case. It is not shown that the principal part of the income was due to the personal character, energy, ability, or capacity of the husband, but it does appear that the principal sum of money invested in the way of improvements upon the agricultural lands referred to came from and was taken out of the capital investment in the commercial enterprise conducted by the plaintiff and his brother in

the city of Dinuba. It is also shown by the testimony of the bookkeeper that the money withdrawn by the plaintiff for his household expenses during a considerable portion of the time at least was in excess of the plaintiff's portion of the net income of the merchandise business. As said in *Thompson v. Davis*, 172 Cal. 491, 157 P. 595, there is no presumption as to the source from which the money came that entered into the improvement of the real estate, as the court cannot presume that use is made of the community property rather than of the separate property, and in this case, just as in the case of *Thompson v. Davis*, supra, the best that can be said is that the source of the money is left doubtful. Likewise, as is said in the *Estate of Gold*, 170 Cal. 621, 151 P. 12, where a business has been carried on a capital invested therein by a man before his marriage, the entire profits therefrom after marriage are not necessarily separate property of the husband, but a portion thereof is chargeable to his activity, ability, and capacity. And this would be true here if there was any testimony in the case upon which the trial court could say that the improvements made upon the real property was taken out of any portion of the profits of the business carried on by the plaintiff, reasonably classed as community property, and that the moneys withdrawn from the business for household purposes did not reasonably equal the earning capacity of the husband.

[4] Upon the whole case the findings of the trial court appear to be sufficiently supported.

The judgment is affirmed.

We concur: FINCH, P. J.; GLENN, Justice pro tem.

85 Cal. App. 596

COX et al. v. CENTRAL CALIFORNIA
TRACTION CO. (Civ. 3025.)★

District Court of Appeal, Third District, California. Sept. 26, 1927.

Rehearing Denied Oct. 26, 1927.

1. Carriers ⚡320(13)—Evidence of street railway's negligence, showing passenger caught ring on thread end of bolt on exit gate, held for jury.

Evidence of negligence of street railway company in that passenger alighting from street car caught her ring on the thread end of a projecting bolt on gate used to close exit held for jury; such bolts being placed on other cars with their heads toward passengers.

2. Negligence ⚡59—That accident has never happened before does not necessarily show it was not to be reasonably anticipated.

The mere fact that a particular accident has not been known to happen before does not, under all circumstances, show such accident one which might not reasonably have been anticipated.

Appeal from Superior Court, Sacramento County; H. D. Burroughs, Judge.

Action by Fannie M. Cox and another against the Central California Traction Company to recover for personal injuries. Judgment for plaintiffs, and defendant appeals. Affirmed.

Butler, Van Dyke & Desmond, of Sacramento, for appellant.

Mark L. Burns, of Sacramento, for respondents.

PLUMMER, J. The plaintiffs had judgment in the above-entitled action, and the defendant appeals.

[1] The record in this case discloses that on or about the 21st day of March, 1924, the plaintiff Fannie M. Cox was a passenger on a street car then owned and operated by the defendant in the city of Sacramento. That at the intersection of Eighth and K streets, in said city, the car in question came to a stop and the plaintiff prepared to alight, by using the exit and steps at the front end of the car. That the front end of the car was guarded by an iron gate which doubled back upon itself when placed in position for passengers to alight. The gate in question was controlled by hand lever operated by the motorman. While the gate was folded back and in a position for the plaintiff to alight, the plaintiff moved toward the steps of the car, and as she was doing so, was jostled a trifle by another passenger, also proceeding to alight, and when jostled, placed her left hand on the gate above referred to, and in so doing, a ring on one of her fingers caught upon the threads of a projecting bolt running through the crossbar constituting a portion of the material of which the gate was constructed. This bolt protruded through the nut about one-quarter of an inch.

The testimony further shows that on both sides of the exit were stanchions or handholds for the use of passengers, but that the plaintiff was prevented from using the same to steady herself by the presence of other passengers attempting to alight. That while plaintiff's left hand rested against said gate, it was moved by her somewhat and came in contact with the thread end of a projecting bolt on said gate, as above stated. The plaintiff's hand was severely injured, and no question is made as to the amount of recovery allowed by the jury.

The appellant, at the close of the trial, moved for a directed verdict. Also, for a verdict notwithstanding the judgment. These motions were denied by the trial court, as well as the defendant's motion for a new trial. Appellant's statement that the ring upon the hand of the plaintiff caught upon a bolt head used to fasten the hand lever to the gate is slightly inaccurate, as the record shows the ring did not catch upon a bolt

head, but upon the threads projecting through a nut on the nut end of the bolt. Upon this appeal it is insisted that there is absolutely nothing in the record which can in any way serve as a guide to the jury and authorize the holding that the defendant was guilty of any negligence. It is further contended that the verdict is the result of mere speculation, and that Mrs. Fannie M. Cox suffered an accident that was unavoidable and caused through no fault of the defendant.

In addition to what we have above stated as to how the accident occurred, and also as to what caused the accident, the record shows that during the course of the trial three photographs were introduced by the defendant of gates used by it on its cars to guard the places of entrance and exit. It may be here stated that the defendant maintains and operates upon its line in the city of Sacramento five cars of similar design; that the car in question was numbered 103, and was and is of the same design and pattern as the other four cars then used by the appellant. These photographs, used as exhibits, all show that the bolts used in holding the crossbar in place and used in the construction of the gate which we have described and mentioned are so placed that when the gate is closed the bolt heads on the crossbar are all toward the passengers when entering, and also when alighting from the car. The testimony on the part of the defendant is that the photographs introduced by the defendant and used as exhibits, and made a part of the transcript, show the standard equipment of the cars belonging to the appellant. Assuming that this testimony is correct, the standard equipment of the cars belonging to the appellant shows that no accident or injury could have occurred to the plaintiff as that alleged and set forth in plaintiff's complaint in this action if the car from which the plaintiff was then alighting had been so equipped. There seems to be no question but that car No. 103, on the 21st day of March, 1924, was equipped with a standard gate, as shown by the exhibits, but the manner of constructing the gate, or rather the manner of inserting the bolts in the standard gate, is shown by the testimony to have been exactly the opposite of that claimed by the witnesses for the defendant to be the standard manner of construction. The gate itself was not defective in the sense that it was either weak or inefficient in its operation, or not well calculated to prevent the exit of passengers while the car was in motion or until it had been folded back by the motorman to admit of either the ingress or egress of passengers.

The alleged negligence in this case is based upon the fact that in inserting three of the bolts in the crossbar referred to they had been inserted in such a way as to present the thread ends thereof to the passenger side of the gate. By the exhibits introduced, the

standard form or manner of construction shows six bolts used in the crossbar, the head ends of which are all toward the passenger side of the folded gate. The thread ends or rough ends of the bolts, upon which anything would likely be caught, are folded away from the passenger side of the gate. In other words, accepting the testimony of appellant's witnesses as to the exhibits being correct photographs of standard equipment, the testimony, in the transcript shows that the manner of inserting the bolts in question on car No. 102 departed from the standard form. Alleging that the facts which we have set forth do not show negligence, the appellant argues that it was necessary for the plaintiff to go further to prove negligence; that the facts in this case do not take it out of the general rule that negligence must be proved; it being further argued that the doctrine of *res ipsa loquitur* cannot be relied upon to sustain the respondents' cause. Before adverting to the rule of *res ipsa loquitur*, we will examine further as to whether the plaintiff produced any evidence upon which the verdict of the jury can properly be based, and in so doing we will analyze, somewhat, the authorities cited by the appellant in support of its contention that there is no such testimony.

The first case called to our attention by the appellant in this behalf is that of *Stebel v. Connecticut Co.*, 90 Conn. 24, 96 A. 171. It appears in this case that the plaintiff was injured by her dress catching and throwing her to the ground as she was stepping off the running board of an open trolley car after it had stopped. The evidence of negligence on the defendant's part consisted of photographs of the car which were admitted in evidence and showed that the running board used by passengers in getting on and off the car was constructed with a riser or toe board between the floor of the car and the back edge of the running board, which riser was made in three sections with openings between the sections. The testimony was that the plaintiff's skirt caught on or about one of these openings, but in what manner or for what reason it caught did not appear. Upon these facts the court held, quoting from the syllabus:

"That proof of the happening of the accident did not make a question for the jury under the doctrine of *res ipsa loquitur*, without showing that the running board was not an approved construction in general use, adequate, and, judged by previous experience, safe for its intended use, or that there was anything abnormal or unusual about its condition at the time of the accident, as defendant was not an insurer, but was only bound to exercise the highest degree of care in the selection, maintenance, inspection, and use of its cars and their appliances, and the facts did not indicate that it had not done so."

The crucial fact in that case was that there was nothing abnormal or unusual about the condition of the car at the time of the acci-

dent. In the case at bar there was something abnormal or unusual about the appliance of the car in question at the time of the accident. If the standard form used upon the gate, or, rather, the standard manner of construction of the gate, is to place the smooth or the head end of the bolts on the crossbar toward the passenger side of the folded gate so that nothing might catch thereon, then the insertion of three of the bolts on the crossbar on car No. 103, in a different manner, and in a manner so as to present the rough or thread ends of the bolts toward the passenger side of the folded gate, then the case of *Stebel v. Connecticut Co.*, *supra*, cited by appellant, would be an authority for the upholding of the verdict against the appellant.

In *Pendergrast v. Durham Traction Co.*, 163 N. C. 553, 79 S. E. 984, the Supreme Court of North Carolina had before it a case where a passenger had caught a very thin finger ring in a screw at the bottom of the handhold of a street car, the handhold being one intended for the use of passengers. This case is presented as being controlling here. An examination of the facts in that case, however, shows a distinguishing principle. The facts as set forth in the opinion of the court in that case are substantially as follows: As the street car, on which the plaintiff was a passenger, approached a certain point, plaintiff asked the conductor to slow up so that he could get off, and attempted to get off while the car was going some three or four miles per hour. In preparing to get off the plaintiff took hold of the grab-handle on the front platform of the car with his left hand, and as he attempted to alight, his left hand glided down the rod, and a ring on his little finger caught in the screw head which was projecting at the bottom of the rod, and the plaintiff was seriously injured. Just before the plaintiff got off, the motorman said to him:

"Mister, if you want to get off, wait a minute and I will stop the car."

The screw head upon which the plaintiff's ring was caught projected about one-sixteenth of an inch from the surface. Under these circumstances, the court held that negligence on the part of the company could not be regarded as the proximate cause of the injury. That case differs from this in that the plaintiff disregarded the precautionary advice given to him by the defendant's employee not to attempt to alight until the motorman had had an opportunity to stop the car. While not so expressly decided, it is evident the court had in mind that the plaintiff was guilty of contributory negligence barring recovery.

In *Keller v. Hestonville M. & F. Passenger R. Co.*, 149 Pa. 65, 24 A. 159, it appears that the plaintiff was nonsuited in an action where he was injured while riding on an open street car, called a "summer" street car, that had a step running along its full length on the side

13 inches below the floor of the car. Back of the step and resting on it was a board 4 inches wide, above this an open space 3¼ inches wide, and above the latter, another board 5¼ inches in width which extended to the car floor. It was held that the car was sufficiently safe and the company was not liable for injuries to a plaintiff, who, in passing from the step to the floor, got his foot caught in the open space between the two boards by stepping on the lower one. An examination of the facts of the case, as set forth in the opinion, indicates that the plaintiff was injured by reason of his foot giving way on account of the weight of his body, the plaintiff's testimony being:

"My foot gave way with the weight of my body, and it slipped forward."

The court, in its opinion, passing upon the claim of negligence stated:

"The car did not differ in construction from other summer cars in common use in the city, and there was no evidence of any defect in construction, or that any accident had before happened from a like cause. While it is the duty of the railway company to provide safe and reasonably convenient means of ingress to its cars, it is equally the duty of a passenger to use the means provided with reasonable circumspection and care."

Here the case under consideration by the Supreme Court of Pennsylvania differs from the one at bar in that the car with which we have to deal does differ in construction from the standard manner of inserting the bolts in the crossbars on the gates guarding the open end of the cars. It may be further stated that the language in the case just quoted indicates that the court was passing upon a question of fact which would be a question for the jury to decide in this state. The court there says:

"It is equally the duty of the passenger to use the means provided with reasonable circumspection and care."

To determine this and whether the passenger has so acted is a question of fact upon the testimony, and not simply a question of law for the court, unless it is a case where reasonable minds would not differ, which we cannot hold is the case at bar.

In the case of *Del. Lack. & W. R. R. Co. v. Napheys*, 90 Pa. 135, by a divided court, it was held that where a passenger, on stepping from the lowest step of the platform of one of the cars to the ground, a distance of 13 inches, slipped and fractured the kneecap, no presumption of negligence was raised by the fact of such occurrence. The facts as detailed are as follows: On stepping down from the lowest step of the car platform plaintiff advanced her left foot first to the ground, leaning her right foot upon the step, and while in that position, without any apparent cause,

her right kneecap snapped and was fractured. This case is so dissimilar in its facts that the mere statement thereof shows its inapplicability to any questions here presented.

In *Perkins v. Bay State R. R. Co.*, 223 Mass. 235, 111 N. E. 717, it was held that the plaintiff could not recover upon the following facts: The plaintiff was a passenger upon a street car, and in attempting to leave the car, caught the heel of her boot in the cleats or guides at the threshold of the door of the car, causing her to be thrown into the vestibule. The car was new, and no claim was made that it was defective or out of repair. The contention was made that the construction was unsafe. In passing upon these facts the court says:

"And in the absence of proof of information or of reasonable knowledge from experience that injury to passengers was likely to happen from their use, there is no evidence from which the jury could say the defendant should have foreseen, that, with everything plainly visible, passengers using the thresholds ordinarily might be expected to stumble and fall from contact with the cleats, or would be caught 'between the cleats and the floor of the car.' If the construction was not mechanically improper or defective, and no practicable method having been suggested of guarding against the use of such thresholds in the usual way except to discontinue the use of that kind of car, there was no positive evidence from which negligence could be found. The plaintiff's injury resulted from an accident under circumstances where the defendant had taken every reasonable precaution."

Here the facts differ from the *Perkins* Case in that there was presented to the jury evidence from which the jury might conclude that the construction, to wit, the manner in which the bolts were inserted through the crossbar of the folding gate, was mechanically improper, if not defective, as that word is usually employed. The evidence in this case shows that there is a practical method of obviating the danger which was presented to the plaintiff in the instant case. The standard construction, as shown by the photographs, differs from the method used upon car No. 103. We may here state that the transcript also shows that shortly after the accident the thread ends of the bolts to which we have referred were smoothed down and painted over by the defendant. There is no testimony in the record as to how long the bolts had been allowed to remain as they were on March 21, 1924. Therefore there can be no argument based upon continuous use without previous accident. A different adjustment of the bolts is presented from that found upon the other cars belonging to the appellant, and the error in the adjustment was corrected after the accident. We do not find anything in the case of *Cary v. L. A. R. R. Co.*, 157 Cal. 599, 108 P. 682, 27 L. R. A. (N. S.) 764, 21 Ann. Cas. 1329, which militates against the

plaintiff in this action. As cited by counsel, that case holds:

"A carrier of passengers is not obliged to proceed to provide against casualties which have not been known to occur before and which may not reasonably be anticipated. That which never happened before and which in its character is such as not naturally to occur to prudent men to guard against its happening at all, cannot, when in the course of years, it does happen, furnish good ground for charge of negligence in not foreseeing its happening and guarding against that remote contingency" (citing *Holt v. S. W. Mo. E. R. Co.*, 84 Mo. App. 443).

The cases cited by appellant show that practically just such an accident has happened before, where the plaintiff caught a finger ring upon a projecting screw on the handhold or grab bar, as it is sometimes called, and as we have stated, was not allowed to recover because of his contributory negligence in attempting to alight before the car had stopped, after having been cautioned not to alight. In other words, it is a case of history repeating itself, and not of an accident unknown to have previously happened. While not dwelt upon in the opinion, this court had before it in the recent case of *Szasz*, by His Guardian ad Litem, *v. Joyland Co.* (Cal. App.) 257 P. 871, an accident first of its kind, and it was there held that the plaintiff was entitled to recover.

[2] The language of the text-writer in 4 Cal. Juris. 935, § 88, is pertinent:

"It is not true, under all circumstances, however, that because a particular accident has not been known to happen before, such accident is not of the character of those casualties which may reasonably be anticipated in the sense that it is a duty to exercise reasonable care in guarding against their occurrence."

And further, in the same section:

"A carrier is bound to use the best precautions in known practical use to secure the safety of the passengers."

The testimony in this case shows that on the car in question the company had not used the best known means to insure the safety of its passengers, but had departed from the standard form of construction followed or used in the gates of other cars.

The questions which we are considering are not, however, exactly open ones in this state. In the case of *Sander v. L. A. R. R. Corp.*, 38 Cal. App. 222, 175 P. 90—a case not called to the attention of the court by counsel for either the appellant or respondent, and one where a hearing was denied by the Supreme Court—we have an almost parallel state of facts, and one, when applied to the circumstances which we are considering, absolutely conclusive. In the *Sander* Case the plaintiff, a passenger upon a street car belonging to the defendant, and at a time when the car had stopped to discharge passengers, was injured by her skirt catching upon a knob at

the exit provided for the discharge and receipt of passengers. The facts are thus stated by the court: As plaintiff reached the space opposite the steps, she had a package in her right hand and took hold of the hand guard with her left. As she stepped downward upon the steps, her skirt caught on a protruding knob affixed in the floor toward the left of the exit and she was thrown to the street, where she struck upon her back. In her complaint, the negligence charged against the defendant was that the knob was negligently placed in its position by the defendant, and so placed as to constitute a dangerous contrivance. This is similar to the allegations of the plaintiff's complaint in the case at bar, save and except that the pleading in the *Sander* Case is more direct. In that case, as in this, no question is made as to the damages awarded the plaintiff. The sole contention was that no negligence whatsoever was shown by reason of which the defendant could be chargeable with any amount of damages. The knob upon which plaintiff's skirt was caught was a small contrivance which served as a bumper to intercept the sliding iron gate which closed the exit. A glance at the drawing reproduced and shown on page 224 of the opinion (175 P. 901) demonstrates the applicability of that case to the case at bar. In the *Sander* Case, the knob, or catch, or contrivance, or bumper, or by whatever language it may be called, is shown at the lower part of the gate, where it would catch a skirt. The rough bolts in the crossbar were on the upper portion of the folding gate and on the opposite side, where the left hand of a passenger would reasonably be placed. In that case, as in this, it was argued that the defendant was not liable because no previous accident had occurred. In the *Sander* Case, however, the argument had a much stronger ground upon which to find a basis than in the case at bar. Here it is not shown how long the alleged defective appliance had been used, but in the *Sander* Case it was shown that cars having a similar bumper attachment had carried 88,236,273 passengers without any claim having been made of a similar injury or of any accident arising out of the manner in which the bumper was placed or used by the defendant. The court, in speaking of the doctrine of *res ipsa loquitur* as applied to that case, said:

"It is true enough that negligence will not be implied from the mere fact of injury, and it is also true that the plaintiff, at the time she rested her case, had furnished the trial court with no information as to the construction of the bumper, its character, or location upon the car. She did, however, show that she was injured through the catching of her skirt upon an appliance affixed to the car by the defendant, and we are inclined to the view that enough was supplied, under the rule adverted to as affecting the carriers of passengers, to entitle her to the presumption of negligence until the defendant had excused itself by evidence.

"In *Steele v. Pacific Electric Ry. Co.*, 168 Cal. 375, 143 P. 718, the court states that before negligence will be implied, 'it must first be shown that the injury came from the movement of the car by those in charge of it, or from something connected therewith, or in control of the defendant.' She did show that her skirt caught upon the bumper and that the bumper was an appliance connected with the car."

In speaking of the bumper, the court emphasizes the words "from something connected therewith, or in control of the defendant." The court in its opinion further adverted to the fact that a simple contrivance would have obviated the danger. This is true here. Placing the bolts through the crossbar in an opposite direction would have eliminated all danger or injury. The court in that case further holds that the contention of nonliability because of no previous similar accident was untenable and expresses itself in a quotation from the case of *Seller v. Market Street R. R. Co.*, 139 Cal. 268, 72 P. 1006, where contributory negligence was urged as a reason for taking the case from the jury:

"As a general rule, it is a question of fact for the jury, an inference to be deduced from the circumstances of each particular case, and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. This is true even where there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn therefrom. If the conceded facts are such that reasonable minds might differ upon the question as to whether or not one was negligent, the question is one of fact for the jury."

For the reasons which we have hereinbefore set forth, and especially upon the authority in the case of *Sander v. L. A. R. R. Co.*, supra, it must be held that the verdict of the jury is sustained.

Judgment affirmed.

We concur: FINCH, P. J.; HART, J.

85 Cal. App. 500

In re FRITZE'S ESTATE.

KINAHAN et al. v. MALONE.

(Civ. 5841.)

District Court of Appeal, Second District, Division 1, California. Sept. 20, 1927.

1. Wills §527—Will stating that relatives other than those mentioned should not share in estate did not make testatrix's sister named in will residuary legatee.

Paragraph of will reading, "It is my will and intent that not any of my relatives or heirs, other than as hereinbefore set forth, shall take or receive any share or portion of my estate," held not to make testatrix's sister named in will residuary legatee, since in no part thereof is intention of testatrix expressed that surplus of

estate shall be taken by person there designated.

2. Descent and distribution §48—Testator must make valid disposition of his property before heirs' right of succession can be cut off.

Testator must do more than show intention to disinherit before heirs' right of succession can be cut off; he must make valid disposition of his property.

3. Wills §440—In construing will, testator's intention as disclosed by words he has used must be ascertained (Civ. Code, § 1317).

Under Civ. Code, § 1317, in construction of will, testator's intention must be ascertained as disclosed by words he has used and not from undeclared purpose which may be supposed to have been in his mind.

4. Wills §435—Court cannot, under guise of construction, make will.

Court cannot, under guise of construction, make will for testatrix in place of one she has made.

5. Wills §435—That testatrix failed to anticipate every contingency furnishes no excuse for execution of will by judicial construction.

That testatrix did not anticipate every contingency does not furnish excuse for execution of a will by judicial construction.

6. Descent and distribution §48—Where no residuary legatee capable of receiving property willed was named, and gift to charities lapsed under statute, residue must be distributed to heirs, though testatrix had shown intention to disinherit certain sisters (Civ. Code, § 1313).

Where there was no residuary legatee capable of receiving property as to which lapse occurred because property bequeathed to charity amounted to more than one-third of estate in violation of Civ. Code, § 1313, sister of testatrix named in will could not claim lapsed gift, but residue had to be distributed under section 1313 to heirs or next of kin, although testatrix had shown intention to disinherit her other sisters.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Proceedings between Margaret Kinahan and another and Mary Malone, in the matter of the estate of Rose Fritze, deceased. From part of an order directing distribution of the estate, Margaret Kinahan and another appeal. Reversed.

Frank J. Barry, of Los Angeles, for appellants.

H. A. Massey and Meserve, Mumper, Hughes & Robertson, all of Los Angeles, for respondents.

McLUCAS, Justice pro tem. This is an appeal by Margaret Kinahan and Catherine Mongan from that part of the order of distribution in the matter of the estate of Rose

Fritze, deceased, which adjudges that said Margaret Kinahan and Catherine Mongan are not entitled to share in the distribution of the sum of \$3,766.56, the amount of said estate given by the will of said deceased to charity in excess of that allowed by law and not otherwise disposed of by said will, and which adjudges that Mary Malone, sister and legal heir of said deceased, is entitled to all of said \$3,766.56, to the exclusion of said Margaret Kinahan and Catherine Mongan.

Rose Fritze died in Los Angeles, Cal., on June 6, 1925, leaving her surviving as heirs at law and next of kin three sisters, Mary Malone, Margaret Kinahan, and Catherine Mongan. On March 27, 1925, the deceased executed her last will, the relevant sections of which are as follows:

"First: I hereby revoke all former wills by me made;

"Second: I declare that I am of the age of 74 years and that I am the widow of the late John Fritze;

"Third: I direct my executor hereinafter named, as soon as he has sufficient funds in his hands, to pay my funeral expenses and the expense of my last sickness and all just debts;

"Fourth: I give and bequeath all my clothing, household goods, furniture and furnishings to Saint Vincent de Paul Society of Los Angeles, California;

"Fifth: I give, devise and bequeath to my good friend, Jack E. Lundin, who resides with me, lot 18 and the west 10 feet of lot 19, in block C of the Estrella tract, in the city of Los Angeles, county of Los Angeles, state of California, as per map thereof recorded in book 59, page 86 of Miscellaneous Records of Los Angeles county, except so much thereof as I may have sold;

"Sixth: I hereby direct my executor, hereinafter named, to sell all other property owned by me and convert the same into cash; and the proceeds thereof I hereby give and bequeath:

"1. To my said good friend, Jack E. Lundin, the sum of one thousand (\$1,000.00) dollars;

"2. From the remainder, if any, to my good neighbor, Maggie Peery, the sum of two hundred (\$200.00) dollars;

"3. From the remainder, if any, to my dear sister, Mary Malone, residing at Dundalk, Ireland, provided she survive me, the sum of one thousand (\$1,000.00) dollars; and in the event she does not survive me, then the said one thousand (\$1,000.00) dollars to the parish priest of Saint Patrick's Church of Dundalk, Ireland, to be by him distributed to the poor of Dundalk;

"4. From the remainder, if any, to K. Nishio, I. Yasuda and Tom Sekigucki, my tenants on East First Street, Los Angeles, California, each the sum of two hundred (\$200.00) dollars; and

"5. Any and all remainder to the Little Sisters of the Poor, First and Mott streets, Los Angeles, California;

"Seventh: It is my will and intent that not any of my relatives or heirs, other than as hereinbefore set forth, shall take or receive any share or portion of my estate. I do not leave anything to my sisters, Margaret and Catherine, of Malden, Massachusetts, as each of them has plenty of this life's possessions."

The net value of the estate of the deceased is the sum of \$16,599.83. Of this amount the will of the deceased attempted to give to the St. Vincent de Paul Society of Los Angeles household furniture and furnishings of the appraised value of \$200, and to the Little Sisters of the Poor of Los Angeles the sum of \$9,099.83, making a total of \$9,299.83 left by said will to charity, and being \$3,766.56 in excess of the amount allowed by section 1313 of the Civil Code to be left to charitable institutions.

The appellant assigns as error, first, that the sum of \$3,766.56 being the excess given to charitable institutions constituted the intestate estate of deceased, and should have been distributed equally among the legal heirs of the deceased, there being no residuary legatees capable of receiving the same, and that it was error for the court to have distributed said \$3,766.56 to Mary Malone to the exclusion of Margaret Kinahan and Catherine Mongan; second, that the attempted disinheritance of Margaret Kinahan and Catherine Mongan did not have any effect, no disposition having been made of the lapsed legacy, and that the court erred in construing that the will gave said \$3,766.56 to Mary Malone, and denying the petition of said executor to have same distributed equally between Mary Malone, Margaret Kinahan, and Catherine Mongan, the legal heirs of said deceased.

The case resolves itself into two propositions, namely: (1) The status of property accruing from a lapsed legacy where there is no residuary legatee capable of receiving the same; (2) the effect of an attempted disinheritance of heirs in case of a lapsed legacy where there is no residuary legatee capable of receiving the property as to which the lapse occurs, and where no other disposition is made of said lapsed estate.

The statute governing this case is found in section 1313 of the Civil Code, which read as follows at the time of the death of testatrix:

"No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made, at least thirty days prior to such death, such devise or legacy and each of them shall be valid; provided, that no such devise or bequest shall collectively exceed one-third of the estate of the testator, leaving legal heirs, and in such case a pro rata deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law; and provided, further, that bequests and devises to the state, or to any state institution, * * * which is exempt from taxation under section one of article thirteen of the Constitution of the state of California, or for the use or benefit of any such educational institution, are excepted from the restrictions of this section; provided, however,

that nothing in this section contained shall apply to bequests or devises made by will executed at least six months prior to the death of a testator who leaves no parent, husband, wife, child or grandchild, or when all of such heirs shall have by writing, executed at least six months prior to his death, waived the restrictions contained herein."

Since the deceased was survived by legal heirs and her will was executed less than six months prior to her death, any charitable bequests made by her in excess of one-third of her estate were void and lapsed under the provisions of section 1313 of the Civil Code. Under the statute in question, the excess must be distributed either to the "residuary legatee or devisee, next of kin, or heirs according to law." The respondent contends that the first sentence of the seventh paragraph of the will is the general residuary clause of the will, and that it constituted Mary Malone the residuary legatee. The said sentence reads as follows:

"It is my will and intent that not any of my relatives or heirs, other than as hereinbefore set forth, shall take or receive any share or portion of my estate. * * *"

In paragraph 6, subd. 3, the testatrix's sister Mary Malone was mentioned, and no other relative or heir was mentioned in the will preceding paragraph 7 thereof. The other legatees and devisees mentioned in the will were either charitable institutions or strangers in blood to the testatrix. Respondent contends that the words, "any of my relatives or heirs other than as hereinbefore set forth," necessarily implies that the heir or heirs, if any, thereinbefore set forth should take or receive such portion of the estate as would fall into the residue thereof. It is argued by respondent that, if the testatrix had intended merely to evince an intention to disinherit, she would have omitted the first sentence of paragraph 7, since the words "I do not leave anything to my sisters Margaret and Catherine, * * *" are sufficient to evince an intention to disinherit the two sisters named. Respondent relies upon the rule laid down in *Estate of Upham*, 127 Cal. 90, 98, 59 P. 315, 318, which reads:

"No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient, if the intention of the testator be plainly expressed in the will, that the surplus of the estate, after payment of debts and legacies, shall be taken by a person there designated."

[1, 2] In our opinion paragraph 7 of the will does not meet the requirements of the foregoing rule. In no part thereof is the intention

of the testatrix expressed that the surplus of the estate shall be taken by a person there designated. A testator must do more than merely evince an intention to disinherit before the heir's right of succession can be cut off—he must make a valid disposition of his property. *Estate of Walkerly*, 108 Cal. 627, 41 P. 772, 49 Am. St. Rep. 97; *Campbell-Kawannanaka v. Campbell*, 152 Cal. 201, 207, 92 P. 184.

[3-5] The rules of construction to be applied in cases of this character are well settled. The primary purpose of all such rules is to ascertain the testator's intention (section 1317, Civ. Code), not some undeclared purpose which may be supposed to have been in his mind, but the intention disclosed by the words he has used. If the plan adopted by the testatrix cannot be given effect because it violates the rules of law, the court is not authorized to substitute for the illegal provisions some other which it may suppose would have been adopted by her if she had known that the directions actually given could not be carried out; in other words, the court cannot, under the guise of construction, make a will for the testatrix in place of the one she has made. *Estate of Spreckels*, 162 Cal. 559, 567, 123 P. 371; *Estate of Young*, 123 Cal. 337, 55 P. 1011. As in the case of innumerable wills, the testatrix did not anticipate the invalidity of her gift to charity and did not provide for the disposition of the lapsed gift in the event of such invalidity, which she could easily have done if she so desired. What her actual intent may have been in the event of the invalidity of such gift to charity we have no means of knowing. It cannot be assumed that she would have given all of this excess to her sister Mary Malone. She might have given it to Lundin, the favored beneficiary, or she might have divided it equally among all of the legatees, or given it to other persons not mentioned in her will at all, or she might perhaps have given it to her sisters Margaret and Catherine. The situation is one where, as in the *Estate of Hittell*, 141 Cal. 432, 75 P. 53, the testatrix did not anticipate every contingency. That she so failed furnishes no excuse for the execution of a will by judicial construction.

[6] It follows that Mary Malone cannot claim the lapsed gift under the residuary clause, and that the residue must be distributed under the provisions of section 1313 of the Civil Code to the heirs or next of kin.

Judgment is reversed.

We concur: HOUSE, Acting P. J.; YORK, J.

85 Cal. App. 558

(269 P.)

McMILLAN et al. v. GREER. (Civ. 5207; L. A. 8162.)★

District Court of Appeal, First District, Division 1, California. Sept. 24, 1927.

Application for Transfer to Supreme Court Denied Nov. 21, 1927.

1. Slaves ⇐25—Child of married slave parents, illegitimate in state of birth, held legitimate under California Inheritance Law.

Child born in Alabama of slave parents, who had been married by negro preacher, held legitimate under California Law of Inheritance (Civ. Code, § 1387), though such child was considered illegitimate under law of Alabama.

2. Attorney and client ⇐109—Where property of estate was properly distributed, no recovery may be had for attorney's negligence in representing those claiming interest.

There can be no recovery against attorney for negligence in representing those claiming an interest in estate, where property of estate was properly distributed.

3. Courts ⇐89—Supreme Court's denial of application for transfer of case decided by District Court of Appeal is not approval of statements of law involved.

Denial of application for transfer of case decided by District Court of Appeal is not to be taken as affirmative approval by Supreme Court of statements of any matter of law involved so as to bind appellate courts in succeeding cases.

Appeal from Superior Court, Los Angeles County; George H. Thompson, Judge.

Action by Luvenia McMillan and another against George L. Greer. Judgment for defendant, and plaintiffs appeal. Affirmed.

Scarborough, Forgy & Reinhaus, of Santa Ana, for appellants.

S. L. Carpenter, of Los Angeles, for respondent.

CAMPBELL, Justice pro tem. This is an action based upon the alleged negligence of respondent, who is an attorney at law practicing in Los Angeles. Respondent was retained by appellants to represent their interests in the estate of Russell Wayman, deceased, which estate at the time of respondent's employment was in the course of probate in the superior court of Los Angeles county, and this action was brought after the decree of distribution was made and entered in the Wayman estate alleging damage suffered by appellants by reason of the negligence of respondent as their attorney in representing their interests therein.

There is no conflict in the evidence, all of which, oral and documentary, was admitted without objection from either side. The evidence shows and the court found that one Martha Wayman, a negress and a slave, had two children. The elder was Taylor Christian, the son of a white man and unques-

tionably illegitimate. After the birth of Taylor Christian, Martha Wayman and a negro slave, Cyrus Wayman, were married by a negro preacher, and to them was born Russell Wayman. Prior to the birth of Russell Wayman and prior to the Civil War the master of Cyrus Wayman took him to Texas or Tennessee. Martha Wayman and Cyrus Wayman never saw each other again, and thereafter there was no cohabitation between them. Martha Wayman and Cyrus Wayman both died before Russell Wayman, Cyrus dying first. Taylor Christian predeceased Russell Wayman, and the latter resided in Alabama with his mother until 1900, when he moved to Los Angeles. Russell Wayman never married. The appellants are legitimate children of Taylor Christian.

The estate of Russell Wayman was distributed to Winnie Thompson and Callie Leah Lewis, sisters of Cyrus Wayman, deceased, the father of Russell Wayman. The court found that Russell W. Wayman mentioned in the pleadings died intestate, a resident of Los Angeles county, in June, 1920, leaving estate in said county; that petition for letters of administration was filed August 21, 1920, by the public administrator naming appellants next of kin and heirs of said deceased. Subsequently one Winnie Thompson and one Callie Leah Lewis claimed in said court the right of succession to said estate as heirs, and that on September 16, 1921, the estate was distributed to them. The court further found that after the exhibiting of the claims of heirship of Winnie Thompson and Callie Leah Lewis and while the administrator's final account and petition for distribution was pending, to wit, in the month of August, 1921, the defendant, an attorney at law, engaged in practice in the county of Los Angeles, was employed by plaintiffs to represent them in respect to their claim to succeed to said estate; that defendant did not enter his appearance for the plaintiffs in the administration proceedings, but on the day the matter of distribution was in the first instance set for hearing, viz., on September 15, 1921, took up the matter at chambers with the judge of the probate department and after a discussion of the facts of the case as shown by the depositions said judge expressed very decidedly the conclusion that the plaintiffs were without legal right to the estate. The hearing was continued until the following day, but the defendant, being convinced that the view expressed by the probate judge at the discussion in his chambers was correct, made no further efforts in plaintiffs' behalf, and the estate was distributed to the opposing claimants.

The court made no finding upon the question whether or not Russell Wayman was legitimate, although the effect of the finding is that he was legitimate; nor does the court find upon the question of the negligence of respondent, but finds in effect that

even though he were negligent appellants were not entitled to recover.

It is conceded by both respondent and appellants that there are but two questions for determination by this court: What was Russell Wayman's status in respect of legitimacy in the state of California? and, was respondent negligent?

[1] H. A. Bradshaw, whose deposition was introduced, testified he is an attorney at law residing in Florence, Ala., admitted to practice in all the courts of the state of Alabama and the federal courts, and had been engaged in the practice in Florence, Ala., for 17 years, and that he was familiar with the law of the state of Alabama regarding slave marriages and the issue of such marriages; that prior to the Civil War and the emancipation enactments the so-called marriages between slaves had no legal status; that prior to the enactment of the ordinances of the constitutional convention of 1865 slaves could not legally enter into the marriage state; children of such slaves were illegitimate—they had no legal status; as a matter of law Russell Wayman, being a child born prior to the Civil War of Cyrus Wayman, a slave, and Martha Wayman, who was a slave, was under the law of Alabama an illegitimate child; Cyrus Wayman several years prior to the civil war having been removed to Texas by his owner and having continued to live there until his death and not living together with Martha Wayman at the time of the enactment of the ordinances of the constitutional convention of 1865, Russell Wayman was an illegitimate child under the laws of Alabama.

[2] Appellant has cited us to the ordinances of the constitutional convention of Alabama and to several decisions of the Supreme Court of that state which were read into the record to establish the fact of the illegality of the marriage contracted between Martha Wayman and Cyrus Wayman and to the illegitimacy of their child Russell Wayman. Unquestionably the marriage contract entered into between Martha Wayman and Cyrus Wayman was null in law and under the law of Alabama Russell Wayman was an illegitimate child, but is he not in this state under section 1387 of the Civil Code relieved of the stain of bastardy? This is the determinative question presented by this appeal. If it be declared that he was a illegitimate child, the judgment must be reversed; but if it be declared that his status at the time of his death was that of a legitimate child, the judgment should be affirmed, for, notwithstanding respondent's negligence, if Russell Wayman was legitimate under the law of this state and the property of his estate was properly distributed, no recovery may be had.

Appellants urge that the question here presented is no longer an open question in this

state, that the illegitimacy of children born of slave marriages has been directly passed upon, and cites us to Estate of Campbell, 12 Cal. App. 707, 108 P. 669, 676, decided by the District Court of Appeal of the Third District, in which the same question was involved.

It appears from the record Wayman died in California in 1920, being at the time of his death and for several years prior thereto a resident of and domiciled in this state. He was the child of a slave marriage contracted in the state of Alabama before emancipation. The marriage was solemnized by a colored preacher, confirmed by subsequent cohabitation, and admittedly would have been a valid marriage except for the fact that under the laws of that state as they existed during the slavery period marriages between slaves were declared to be void for want of capacity of the parties to contract the same, and the children thereof were declared to be illegitimate. Ever since California was admitted to statehood, however, it has carried upon its statute books as a part of its law of inheritance a provision that "the issue of all marriages null in law * * * shall be legitimate." Stats. 1850, p. 219; Civ. Code, § 1387. The opinion in Estate of Campbell contains a very able and elaborate discussion by Mr. Presiding Justice Chipman of the effect of slave marriages in the states where contracted and of their legal standing under the laws of this state and in conclusion holds in effect that the issue of such marriages, if not legitimated by statutes enacted subsequently in the state wherein the marriage was contracted, are deemed to be illegitimate in this state. But nowhere in the opinion in that case does the author deal with the question of the application of the provisions of section 1387 to the status of the children born of such marriages nor of the purpose or meaning of that provision. In other words, the question of the application of the very provision of our statute which apparently was designed and intended to cover just such cases was not discussed or directly ruled upon therein.

[3] A petition for the transfer of that case was filed with the Supreme Court, but by a majority of the members thereof was denied. Mr. Justice Shaw dissented and in the concluding sentence of his dissenting opinion said: "I think it proper to add that the denial of a rehearing in this court does not necessarily mean an approval of the opinion of the district court. *People v. Davis*, 147 Cal. 350 [81 P. 718]."

People v. Davis, cited, establishes the following rule relating to the question of the conclusiveness of a decision of the District Court of Appeal after denial of a transfer by the Supreme Court:

"It is proper to add that the denial in any case of an application for the transfer of a case

decided by a District Court of Appeal is not to be taken as an expression of any opinion by this court, or as the equivalent thereof, in regard to any matter of law involved in the case and not stated in the opinion of that court, nor, indeed, as an affirmative approval by this court of the propositions of law laid down in such opinion. The course to be pursued by this court in the exercise of its power in any case is a matter in which the objects above stated are the controlling considerations, and it will not hold itself bound even where questions of law alone are involved, to order a transfer of the cause, after a decision of the district court, except where it shall appear necessary in order to carry out the above-stated purposes of securing uniformity of decision and the settlement of important questions of law. The significance of such refusal is no greater than this—that this court does not consider that the interests of justice, or the purposes for which the power was given, require its exercise in the particular case.”

The rule stated has never been repudiated, but, on the contrary, has been cited approvingly up to and including *In re Stevens*, 197 Cal. 424, 241 P. 88.

Assuming, therefore, that the Estate of Campbell may have involved the question of the application of the provisions of section 1387, it is apparent from the face of the opinion that such question was not considered, and, if so, was not expressly passed upon. Consequently, it would seem that the decision therein cannot be taken as an adjudication of the inapplication of the provisions of the section to the status of children born of slave marriages, which would preclude this court in the present case from giving full consideration to and passing directly upon that question.

If the question of legitimacy be dealt with as one of first impression, we are of the opinion that the provisions of the sections should be given full application to the situation herein presented for the following reasons: All of the cases cited and discussed by Mr. Presiding Justice Chipman in the Estate of Campbell holding that slave marriages were void and that the offspring thereof were illegitimate are grounded upon the legal principle that on account of statutory inhibitions existing in the slave states prior to emancipation slaves did not have legal capacity to enter into contracts of marriage. As early as 1852, however, the Supreme Court of this state expressly declared in the case of *Graham v. Bennet*, 2 Cal. 503, that the children of marriages which were void in law because of lack of capacity of the parties to contract the same were deemed to be legitimate within the meaning of the provisions now embodied in section 1387. In *Graham v. Bennet* the husband, having a lawful wife living, contracted a second marriage, as the result of which two children were born. When the second wife learned that the marriage was bigamous she took her children to an adjoining state, but they were subsequently returned to this state by

their father, and the question arose as to their care and custody. The determination of that question depended upon whether under the law of this state the children were deemed to be legitimate or illegitimate. The court said:

“The ceremony, therefore, which took place between the plaintiff and defendant, as shown by the complaint, was sufficient to constitute them man and wife, if there had been no legal disability. But with such disability existing, it would then come within the meaning of the act above quoted and is a ‘marriage deemed null in law.’ The results, however, of such invalidity, as they would affect the issue of the marriage at common law, are here provided against. The ceremony which was instituted by the parents, although illegal and void as to them, is declared sufficient to protect their offspring against the stain of bastardy, and its accompanying conditions. The law declares they shall be legitimate. They are, therefore, in relation to their father, the inheritors of his name, his heirs-apparent and entitled to look for, and demand of him his care, maintenance and protection. On the other hand, he has the unquestioned right to their custody, control, and obedience, to the same extent as if they were the issue of a valid marriage.”

The law as thus declared has never been overruled. *Estate of Baldwin*, 162 Cal. 471, 123 P. 267. We can see no difference in principle between that case and the present one. In each the marriage was void because of the lack of capacity of the parties to enter into the marriage contract. The statute itself does not differentiate between the kinds of void marriages. It includes “the issue of all marriages null in law”; and this latter term “marriages null in law” has been held to include void marriages other than those which may be annulled for the causes enumerated in section 82 of the Civil Code. *Estate of Shipp*, 168 Cal. 640, 144 P. 143. What logical reason then can be assigned for extending the humane provisions of section 1387 to the children of a void bigamous marriage and denying the same to the children of a void slave marriage? If such provision be held not to apply to children of slave marriages, then it is entirely meaningless.

Of course, if there had been no pretense of marriage, then a different case would be presented. A child born under such circumstances is not a child of a “marriage null in law” and could not claim to be legitimate under section 1387; its right of inheritance would be controlled by section 1388 of the Civil Code—but that is not this case. As said by Mr. Justice Shaw in his dissenting opinion:

“If there ever was a law which should be broadly and liberally construed, it must be admitted that this law [section 1387] is of that class when applied to a marriage which, in all respects except the capacity to enter into it, was as formally solemnized and as faithfully observed as that of free persons. I can conceive of no sound reason for refusing to apply this statute to the children of a marriage which

is null only because the man and woman who entered into the relation were slaves. The question is of little future importance, but I cannot allow a doctrine which I deem so repugnant to humanity to receive even the silent sanction of acquiescence without a protest."

We are of the opinion that the provision carried upon the statute books as a part of the law of inheritance since California was admitted to statehood that the issue of all marriages null in law are legitimate has application here, and therefore the judgment should be affirmed. It is accordingly so ordered.

We concur: KNIGHT, Acting P. J.; CAISHIN, J.

Opinion of Supreme Court in Bank, Denying Application for Transfer.

PER CURIAM. The application for transfer to this court after decision by the District Court of Appeal of the First Appellate District, Division 1, is denied.

The application is based, in part, on a conflict between this decision and the decision rendered by the District Court of Appeal of the Third Appellate District, in *Estate of Campbell*, 12 Cal. App. 707, 108 P. 669, 676. In so far as that case is inconsistent with the decision in the above-entitled case, the decision in *Estate of Campbell* is overruled.

85 Cal. App. 580

PEOPLE v. COAN. (Cr. 986.)

District Court of Appeal, Third District, California. Sept. 26, 1927.

1. Criminal law § 369(1)—Evidence of other disconnected crimes is inadmissible.

It is improper, on trial of defendant for one crime, to prove that he has committed other crimes having no connection with one under investigation.

2. Criminal law § 369(3)—Evidence that defendant struck stepdaughter years before held inadmissible in prosecution for killing wife.

In prosecution of defendant for killing wife, evidence that he had hit stepdaughter in face 7 or 8 years before, and after being struck on head with chair, held inadmissible.

3. Criminal law § 369(3)—Evidence of defendant's assault on another woman several years prior to marriage held inadmissible in prosecution for killing wife.

In prosecution of defendant for killing wife, evidence of assault, several years prior to his marriage with deceased, on another woman, who had previously illegally assumed with him relation of wife, held inadmissible.

4. Criminal law § 1186(4)—Admission of evidence of other crimes held reversible error in prosecution for killing wife, notwithstanding verdict of "involuntary manslaughter" (Const. art. 6, § 4½).

In prosecution for killing wife, admission of evidence of other crimes held reversible error,

under Const. art. 6, § 4½, notwithstanding that jury returned verdict of guilty of "involuntary manslaughter," which is killing of human being without malice, in commission of unlawful act not amounting to felony, or of legal act which might produce death in unlawful manner or without due caution and circumspection.

5. Witnesses § 277(4)—Cross-examination of defendant on subject not touched on in direct examination is improper.

In prosecution for murder, cross-examination of defendant on subject not touched on in direct examination, and not having any relation thereto or bearing on it, is improper.

6. Criminal law § 369(3)—Cross-examination of defendant as to previous bigamous relations held inadmissible in prosecution for killing wife.

In prosecution of defendant for murder of wife, cross-examination of defendant as to previous marriage with woman, who had another husband living at time of marriage to defendant, held improper.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Alfred G. Coan was convicted of involuntary manslaughter, and he appeals. Reversed and remanded.

W. E. Duncan, Jr., and Mrs. Alta Hengy, both of Oroville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. By an information filed on the 9th day of February, 1927, the defendant was accused of the crime of murder, in that the defendant did, on or about the 25th day of December, 1926, at the county of Butte, in the state of California, wrongfully, willfully, unlawfully, feloniously, and with malice aforethought kill and murder one Aleata Pearl Coan. Trial was had upon this information, and on the 26th day of March, 1927, the jury in said cause returned a verdict finding the defendant guilty of involuntary manslaughter. The defendant's motion for a new trial being denied, the defendant appeals therefrom and from the judgment entered upon the verdict returned, as above stated.

The transcript shows that the defendant and Aleata Pearl Coan were husband and wife. That for some period of time they had resided in the county of Butte, state of California. That on the evening of December 24, 1926, the defendant and his wife, Aleata, accompanied by Mr. and Mrs. Thomas Ford, made a visit to the home of Mrs. Lockerman, the mother of Mrs. Coan. That upon arriving there, they found also present Robert Childress and Francis Cory. Shortly thereafter a brother of Mrs. Coan's, Tyson Lockerman, arrived at the same residence. Tyson Lockerman invited the defendant and Thomas Ford to accompany him to a bootlegging "joint." Liquor was there procured and brought back by Lockerman to the Lockerman.

man residence where the party was assembled. After the return from the bootlegging "joint," some time was spent in games, singing, social conversation, and drinking. There does not appear to have been any quarreling or dissension. About 12:30 or 1 a. m. of December 25, 1926, the Coans and Fords started for their respective homes. When the Coans residence was reached, Ford and his wife stopped there, and some time was spent in listening to a radio. Then the Fords left and went to their own home. While the Fords were at the residence of the Coans, the defendant suggested to his wife, Aleata, that they open certain Christmas presents, but to this Aleata replied that she did not want them opened until Christmas Day. Left to themselves, after a short interval, the Coans retired for the night, Mrs. Coan going to bed first. After going to bed, Mrs. Coan called to her husband to come to bed. He did so, but forgot to put out the light. Mrs. Coan then said the last one to get into bed was the one to put out the light. Defendant, according to his statement, said it was her turn to put out the light. There is nothing to show that this conversation was other than friendly. Thereafter a scuffle ensued between the two, and the defendant pushed his wife partly out of bed with his feet. According to the defendant's statement, Aleata put her hand on the floor as her head was hanging over the side of the bed, and said, "Look out, you're hurting me." Thereupon the defendant pulled her back into the bed, placed himself across her chest, and taking her head between his hands, shook it from side to side; then placed his hand on her nose, rubbing her face. Defendant suddenly noticed that Mrs. Coan had ceased to struggle with him and had become white and still. Thereupon, he went to the kitchen, got water, and tried to revive her. His efforts to revive Aleata proving unavailing, he put on his clothing and went to the Lockerman home, a distance of about a quarter of a mile, for help, told Tyson Lockerman he had killed his wife, and begged him to come at once and help. He then left the Lockerman home; started back to his own residence. When Lockerman and Childress, who accompanied Lockerman, reached the Coan residence, they found that Aleata was dead. One of them telephoned to the sheriff, and thereafter the defendant was arrested.

Just what occurred at the time of the tragedy is disclosed only by the defendant's testimony which, as to that occurrence, is set here forth in full:

"And she went to bed and called me and after I got in bed, she said to put out the light, and I told her it was her turn, that she should put the light out; and when I did that I took my foot and started to push her out of the bed, and she said 'Look out, you are hurting me,' and she leaned her face over the bed. Her head was leaning over the bed, I mean, and I took

hold of her and pulled her back in the bed again; and she slapped me on the covers, on the arm; and then I got up and stood up, and I dropped down on to her with my knees, and then I sit astraddle of her and took her by the face and shook her head, and I shook her nose with my hand, rubbed her nose, and I looked at her and her—her face—her lips was white, and she looked white; her mouth; and I asked her what was the matter, and she never answered me; she had her eyes shut so I went and got some water and put the water on her face; and I talked to her, and she never said anything; she never answered me; and I put the water in her mouth—I don't know—I don't know what I done—I put my clothes on, and then I went for Ty, and I got up there, and I told Ty that I had killed Aleata and he—I don't know what Ty said, but he said 'All right' I guess or something like that, I guess—I don't know what he said; but anyhow I went back home; I started home, and when I got part way there Ty and Bob came along and put me in the automobile."

An examination of the deceased showed that death had resulted from the dislocation of a vertebra of the neck. The neck was not broken, nor was there any evidence that the deceased had been choked. There were no marks upon the body of the deceased indicating that any blow had been struck, although the defendant, in response to a question that night, stated that he must have struck her. The only mark or dislocation was the swelling on the neck of the deceased on the right side in the region of the dislocation. The defendant was a man accustomed to hard work and had rough or calloused hands. According to the testimony in the transcript, the deceased had an unusually long neck, and due to this fact, according to the testimony, a dislocation of this kind would be more easily produced than in a person of ordinary build.

During the course of the trial considerable testimony was introduced by way of cross-examination of the defendant as to his having gone through a marriage ceremony with a woman supposed to be a divorced woman, prior to his marriage with the deceased, and his separation from the first woman upon discovering that she was not a divorced person; also, there was testimony introduced as to certain offenses alleged to have been committed against the person of said woman known as Emma Ward, and also against Eva Ward, a daughter of Emma Ward by her legitimate husband. To the introduction of this testimony the defendant objected, and to the overruling of the defendant's objections and the admission of such testimony the appellant here assigns his reasons why a new trial should be granted. This testimony related to separate and distinct offenses alleged to have been committed long prior to the act for which the defendant was placed on trial. Under the theory that the testimony in question was admissible to show motive or intent,

the prosecution placed the witness Eva Ward upon the witness stand, and, over the objections of the defendant, the court permitted her to testify as follows:

"I reside in San Jose. I know the defendant. He lived with my mother about 10 years, I suppose. It was in Monterey county. We lived at the coal mine and on a homestead. I was about 14 or 15 years of age.

"Q. At that time and place do you remember any relations that you had with Mr. Coan? A. There was a pencil box, and it seems that Mr. Coan accused my brother of taking a pencil out of that box. We were all sitting around the table, and he accused her kid, and he swore and went into the room and brought out the pencil box and said to my mother, 'Now I will show you that that God damned kid of yours did take the pencil out of there,' and my mother caught him opening the pencil box, and he grabbed her by the neck and stood her against the wall, and I said, 'Let my mother alone,' and the children were all hollering, and he kept on, and I picked up a chair and hit him on the head with it, and he let my mother go and said, 'Here, you son of a bitch, take this,' and he hit me in the eye."

This alleged occurrence took place, if at all, 7 or 8 years prior to the commission of the offense for which the defendant was upon trial.

For a like purpose, and upon a similar theory, the prosecution was permitted by the court, over the objection of the defendant, to elicit from the witness Mrs. Emma Davis testimony concerning an event which took place some 4 years prior to the 24th day of December, 1926. After testifying that the defendant and the woman heretofore referred to with whom the defendant had lived as his wife were in the basement of the lodging house kept by the witness, the witness, in response to a question as to what happened there in her presence, testified as follows:

"Well, he had her down on the floor and was choking her, and she hollered for me, and I went to help her, and I saw him jerk her up from the floor, and she had black marks on her; she had black marks on her side, and he hurt her so that she was in bed for two weeks under the doctor's care. I heard her holler 'Mamma D,' and told him to quit that, and she screamed, and I went down there, and he jerked her up off the floor and was brushing the dirt off of her."

And in response to a question as to what the defendant said, the witness testified:

"He said, 'Oh, hell, why didn't you stay out of here?'"

There was further testimony indicating the illicit nature of the alleged assault. The testimony of the witness was further to the effect that the defendant and the woman with whom he had been living, and with whom the trouble is alleged to have occurred, had not then agreed to a separation on account of the fact that the woman had a husband living at the time of her purported marriage with the defendant.

So far as the record shows, the court made no ruling limiting the purpose for which his testimony was admitted, but the statement contained in the record of one of the prosecuting officers discloses what the prosecution had in mind. We quote from the language of Mr. White:

"I understand that one of the issues in this case is the motive or the intent of the defendant at the time of what he claims to be an accident. * * * And we have a right to show the defendant's inclination and the reasons and the way he treated other people and the offenses of a similar character with the people in the same relations with him, and it will give some light to the jury and will help them to understand why he acted as he did on Christmas Morning. Now, here is a case where the defendant has another wife and lived with her 10 years and had 4 children, and it was his privilege, as he claims, to attack them occasionally, and if he would attack his wife or his prior wife, it is reasonable to assume that he would attack any other wife that he had if he was in the mood for it. It would show his disposition in that direction. I understand that is the reason for the introduction of this testimony."

Further on the district attorney made the following statement:

"Now, this case resolves itself as follows: Mr. Coan admitted that he killed Aleata, but he never said whether he did it on purpose or not, or whether it was an accident, but the testimony that he put in goes to that effect. Now, every crime consists of two elements, the act itself and the intent. If the intent is lacking a man goes scot-free, because we have to assume that it was an accident, if so proved; but if it is not proved in the case either by the prosecution or the defense, then the law assumes a malicious intent and that he did it on purpose. But all the evidence that Mr. Duncan could get in to show that it was an accident would remove that malice and criminal intent, and we could not introduce other acts, as Mr. Duncan has said. * * * We could not put it on for that purpose because the defendant is entitled to be tried on this one charge—the murder of Aleata. We could not bring in a charge that he killed some one else to prove that he had killed Aleata, because he has admitted that he killed her; but we bring it in for the purpose of showing his bodily feeling, or his mental feeling, or what kind of a man he is with respect to the conditions that are shown up in the evidence."

So far as the transcript discloses, up to the time of the admission of this evidence, no claim had been made by the defendant one way or the other, save and except as the plea of not guilty had been entered by him, and the defendant had detailed the events of the night of December 24 and the morning of December 25, 1926. We assume, however, that the cause was argued to the jury by counsel for the defendant upon the hypothesis that no murder or serious bodily injury was intended.

[1] While there are some English cases to

the contrary, the unbroken line of decisions in this country and in this state is to the effect that it is improper, on the trial of a defendant for one crime, to prove that he has committed other crimes having no connection with the one under investigation. Admitting, generally, the correctness of this rule, respondent calls our attention to a few English cases holding to the contrary, and then cites certain California cases where evidence of other offenses has been admitted under the exception that evidence of other crimes is admissible when the intent accompanying the act is equivocal or where it otherwise becomes an issue in the trial, as where it is claimed that the act in question was free from a felonious intent or was the result of mistake, accident, or inadvertence.

In *People v. Sanders*, 114 Cal. 216, 46 P. 153, the first case relied upon by the respondent, the defendant Sanders was placed upon trial for forgery. The forgery consisted in simulating the name of one William Wootton, the charge being that Sanders had forged the name of said Wootton to a draft drawn upon Kutner-Goldstein Company of Fresno. For the purpose of showing the fact of forgery, certain evidence was introduced tending to show, and which in all reason did show, that William Wootton had been feloniously put out of the way by Sanders prior to the date of the alleged forgery, and as an occurrence or event leading up to the forgery in consummating a plan previously conceived by the defendant, and by him carried into execution in an attempt to secure for himself property belonging to the said William Wootton. Being part and parcel of the same transaction, the evidence was held admissible under the exceptions to the rule excluding evidence of other offenses than the one for which the defendant was being tried.

Again, in the case of *People v. Craig*, 111 Cal. 460, 44 P. 186, the defendant was placed on trial for killing his wife, a member of the Hunter family. The evidence showed that the defendant went to the home of the Hunters, where he found his wife, who was a daughter of the Hunters, and also a brother of his wife; that he, then and there, being armed with two revolvers, killed both of said persons. Upon the trial testimony was admitted that the defendant had made threats against the Hunter family and stated that something would happen. Being part and parcel of the same transaction, and the two persons killed being members of the Hunter family, such evidence was unquestionably admissible, irrespective of the exception which we are considering, excluding evidence of other crimes, and showed the purpose and intent, in common language, to "get" the Hunter family.

In *People v. Cook*, 148 Cal. 334, 83 P. 43, where the defendant was on trial for the mur-

der of one Kreiger, and claimed that the act was committed in defense of the honor of his daughter, the court permitted the prosecution to prove that the defendant had had incestuous relations with his daughter, and that defendant feared Kreiger knew of such acts or would succeed in winning the favor of the girl and discover his criminal relations with her. Thus a direct motive for the murder is shown, and, as stated by the court, evidence which is relevant to any material fact in issue in a criminal case cannot be excluded because it may prejudice the defendant by proving him guilty of some other crime than the one for which he is on trial, citing *People v. Walters*, 98 Cal. 141, 32 P. 864; *People v. Lane*, 101 Cal. 513, 36 P. 16; *People v. Wilson*, 117 Cal. 688, 49 P. 1054; *People v. Valiere*, 123 Cal. 576, 56 P. 433; *People v. Brown*, 130 Cal. 594, 62 P. 1072. The court in that case also further said:

"But in order to render evidence of this character admissible, it must have a direct tendency, in view of the surrounding circumstances, to prove the motive or intent or other material fact and whether it is relevant or not is a question for the court; and in several instances this court has reversed convictions for the admission of evidence of distinct offenses, upon the ground that such evidence had no tendency to prove the charge made in the information" (citing *People v. Lane*, 100 Cal. 379, 34 P. 856; *People v. Wright*, 144 Cal. 165, 77 P. 877).

In *People v. Argentos*, 156 Cal. 720, 106 P. 65, where the defendant was on trial charged with the crime of murder, the prosecution was allowed to prove certain facts showing that the deceased was upon the bond of the defendant, the defendant being out on bail; that the deceased was about to withdraw from the bond of the defendant, and the defendant started with the deceased to show him certain claimed mining property in order to induce the deceased not to withdraw from the defendant's bond. These claims, it appears, the defendant had agreed to convey to the deceased. No such claims existed. Evidence of these facts were admitted in connection with testimony showing that the deceased and the defendant had started to where the alleged mining property was said to be located—all showing motive. The statement of facts contained in the opinion showed that all the acts admitted in evidence were related and led up to the commission of the main offense for which the defendant was being tried.

In *People v. King*, 23 Cal. App. 259, 137 P. 1076, the principal case relied upon by the respondent, it appears that the defendant was on trial for embezzlement; that during the course of the trial a witness named Davila was permitted to testify that the defendant, as his agent, in the latter part of the year 1913, had misappropriated and embezzled a certain sum of money; and, further, that the prosecution was permitted to show

that in 1908, several years prior to the time of the commission of the offense charged for which the defendant was being tried, he had rented a horse and wagon which he failed to return to the owner, and that as a consequence the defendant was arrested and subsequently pleaded guilty to a charge of misdemeanor and embezzlement, and also permitted a witness named Faria to testify in effect that about a year previous to the trial then being had, the defendant had embezzled the sum of \$3 which had been intrusted to him by the witness for the purpose of making the first payment on the purchase price of a horse. According to the opinion of the appellate court, all the testimony just referred to was admitted by the trial court upon the theory that it tended to prove prior offenses similar in character to the crime charged in the information and for which the defendant was being tried, and was therefore admissible for the purpose of showing the guilty intent of the defendant in his dealings with the complaining witness. The appellate court then said:

"We are satisfied that the trial court erred, to the prejudice of the defendant, in admitting the testimony complained of."

The opinion of the appellate court in that case contains the following language, upon which the respondent places much stress in this case:

"It is a well-settled rule of evidence that proof of an offense distinct from and wholly disconnected with the particular crime charged against a defendant is not admissible in evidence. Unquestionably this general rule is subject to certain well-defined exceptions, one of which is that evidence of the commission of similar offenses, although separate and isolated from the crime charged, is admissible for the purpose of showing a guilty intent whenever in any given case the existence of such intent is material and either disputed or doubtful. For instance, in a case where a defendant admits the doing of the act charged in the information but defends upon the ground that such act is free from felonious intent, proof of the commission of precisely similar acts, even though they be independent and disconnected, and were committed either before or after the commission of the crime charged, is relevant and competent for the purpose of showing a guilty intent. Such evidence is admissible as an exception to the general rule upon the theory that if it be shown that a defendant has been repeatedly guilty of similar offenses, it may be reasonably and logically inferred that the act charged against him in the information was accomplished with felonious intent."

The language of the court here referred to, in order to be an accurate statement of the law, should have added thereto the following, which we quote from 8 California Jurisprudence, p. 64, supported by abundant authority:

"Furthermore, in order to render the evidence admissible, it must have a direct tendency, in

view of the surrounding circumstances, to prove the motive or intent or other material fact. It is true that it is not necessary that the collateral evidence, whether prior or subsequent, should conclusively prove the guilt of the accused of the offense for the commission of which he is being tried, in order to render it admissible in evidence; but as evidence of another distinct offense manifestly tends to his prejudice, there ought to be some clear connection between the two offenses by which it may be logically inferred that if guilty of one, he is of the other. For example, the shooting of one person by another cannot be proved to show the intent with which the latter shot a third person at a different time, and for a different cause, unless it is also established that the two shootings were so connected in time and place and circumstances as to make them part of one common plan or design. [For example] upon a prosecution for larceny or burglary, with intent to steal, evidence that the defendant had at another time stolen other property is inadmissible to show intent."

In *People v. Byrnes*, 27 Cal. App. 79, 148 P. 944, the rules which we have above stated covering the admission of such testimony were set forth, and the cause was reversed because of the admission of testimony tending to show the commission of similar offenses not connected with the offense for which the defendant was on trial.

[2, 3] Giving the exception to the rule excluding evidence of other offenses the broadest possible application, it nevertheless remains the law, as declared by all the decisions, that such testimony must have some relation to or bear upon some fact necessary to be established by the prosecution in order to warrant a conviction of the defendant upon the immediate charge pending before the court and upon which he is being tried. It is not sufficient that the defendant has, at some previous time, committed a similar offense. Measured by the rule set forth in the California cases relied upon by the respondent, we do not very well see how it can be logically concluded that the defendant on the night of the 24th of December, 1926, assaulted his wife with a malicious and willful intent to take her life simply because, at a period some 7 or 8 years antedating December 24, 1926, the defendant, after being struck upon the head with a chair, turned and hit his stepdaughter in the face. Nor do we very well perceive how it may be reasonably concluded that the defendant, on the night of the 24th of December, 1926, maliciously and willfully intended to kill his wife because several years prior to his marriage with his then wife he sought to have carnal relations with another woman who had previously thereto illegally assumed with the defendant the relation of wife. That such testimony may establish the all-around bad character of the defendant is clearly apparent, but that it leads or tends to lead to the conclusion that the defendant had any malicious intent to murder his legitimate wife,

whom he had married some years after these events, requires at least a higher degree of casuistry than has been accepted by any of the decisions of this country to which our attention has been called. The theory that the defendant intended to dislocate his wife's neck, because, at a time 7 or 8 years previous thereto, he slapped a girl in the face requires only to be stated in bald language in order to carry its own refutation. Nor does it bear in the least upon the question whether the dislocation of the wife's neck, on the night of the 24th of December, 1926, was or was not accidental in any particular whatever. The same is true of the alleged criminal assault upon another woman some 4 years previously. It seems scarcely necessary to cite authorities to show the inadmissibility of such testimony. However, we will review a few cases directly in point establishing the rule to the contrary. The most recent case upon this question is that of *People v. Anthony*, 185 Cal. 152, 196 P. 47, where the defendant was on trial charged with the offense of lewd and lascivious conduct upon the body of a female child under the age of 14 years. A reversal of this case was ordered because the prosecuting attorney repeatedly asked the defendant if he had not had illicit intercourse with other young girls. Here, no testimony as to such acts was in question, but simply the improper questioning of the defendant as to such occurrences was held sufficient, in an evenly balanced case, to compel a reversal of the judgment and the ordering of a new trial.

In the case of *People v. Glass*, 158 Cal. 650, 112 P. 281, the questions here presented were considered at length. The defendant was on trial for bribery. Testimony as to other similar, but disconnected offenses, was admitted, and the cause was ordered reversed on account of the error of the court in relation thereto.

In *People v. Cook*, 148 Cal. 334, 83 P. 43, the rule that we have stated, that there must be some connection between the two offenses in order to permit testimony as to the former, is thus stated. We quote from the syllabus:

"When some distinct offense is so connected with the crime charged in the indictment that proof of the former, in connection with other evidence, would sustain a probable inference of guilt as to the latter, such distinct offense may be proved to show a motive on the part of the defendant to commit the crime charged, or the intent with which an equivocal act was done."

Many cases are cited in the opinion in the *Cook Case*, all holding substantially as we have stated.

In *People v. Carpenter*, 136 Cal. 391, 68 P. 1027, the defendant was on trial charged with subornation of perjury. The prosecution was permitted, over the objections of the defendant, to introduce testimony tending to prove that the defendant, prior to the trial

of the cause referred to, was guilty of the crime of advising the same witness to conceal himself for the purpose of avoiding the service of a subpoena, and thus of persuading him from attending upon the trial. The court held that this was error, and said:

"Nothing is better settled or more rational than that an indictment for one crime cannot be supported by proof of another."

For this error the cause was reversed.

In the case of *People v. Elliott*, 119 Cal. 593, 51 P. 955, where the defendant was on trial upon an information on the charge that she willfully, unlawfully, etc., induced an unmarried female into a bawdy house, testimony of three other young girls was allowed to be introduced by the prosecution, over the objection of the defendant, that the defendant had asked each of them to go to her house for illicit purposes. This was held error, necessitating a reversal of the judgment. In the case just cited the alleged offenses were identical in character but not otherwise connected or bearing upon each other.

In *People v. Stewart*, 85 Cal. 174, 24 P. 722, the defendant was on trial charged with the crime of assault with intent to commit rape. Testimony as to lewd conduct by the defendant with other girls was admitted, over the objection of the defendant. The court held this action reversible error and said:

"The admission of this evidence was clearly reversible error. There is no general rule more firmly settled than that the prosecution cannot prove the commission by a defendant of other offenses, for the purpose of increasing the likelihood that he committed the particular offense with which he is charged."

Here it was necessary to make out the fact of intent before the defendant could be convicted of the offense with which he was charged and the court squarely held that testimony as to other like offenses could not be admitted under the rule because the separate offenses had no relation to or bearing upon each other. Had the different assaults been made upon the same person, then the exception would apply and testimony in relation thereto would be admissible. Likewise, where the offenses are committed in the carrying out of some connected plan or scheme, such testimony, the authorities hold, may be admitted. Without further citation of authorities we may here state that in a lengthy note appended to the case of *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, as reported in 62 L. R. A. beginning on page 193, the authorities, dealing with the questions we are here considering, are collected, and the rules which we have set forth clearly established.

[4] The jury found the defendant guilty of involuntary manslaughter, which offense is described as follows:

"The killing of a human being, without malice, in the commission of an unlawful act not amounting to a felony; or, in the commission

of a legal act which might produce death, in an unlawful manner, or without due caution and circumspection."

Thus the element of malicious intent has been excluded from this case by the verdict of the jury, and the question they had to decide under the evidence as measured by the offense of which the defendant was found guilty was whether the defendant and his wife had been engaged in a scuffle after having imbibed too freely of intoxicating liquors, or, to put it in other words, engaged in a drunken scuffle, or did the defendant commit what in fact and in law would constitute an assault upon the person of his wife, or was he engaged in some lawful act which might produce death in an unlawful manner, or was he acting without due caution and circumspection. Under such circumstances, was the inadmissible testimony to which we have referred prejudicial? We think this question really answers itself. To introduce to the jury testimony that the defendant was a rough, violent, uncouth, hard-handed man was very well calculated to induce the jury to believe that such a person would at all times act without due caution or circumspection, or without full appreciation of the consequences which might ensue. That conviction would more readily occur if the jury had before it a picture of the rough, uncouth conduct of the defendant previous to the commission of the offense upon which he was being tried, as well as the degraded character which the testimony all tended to establish, seems to us beyond controversy.

We do not need to review the cases or attempt any further explanation or interpretation of the meaning and intent of section 41½ of article 6 of the Constitution of this state. That is fully covered in the case of *People v. Adams*, 76 Cal. App. 178, 244 P. 106. Omitting the objectionable testimony, this case does not present one where we can say that the jury could not have reasonably found a verdict other than the one at which they arrived. Under the most favorable circumstances, the admission of such testimony tends to bring about the conviction of a defendant on the ground that such a person needs a good lesson, even though the testimony does not otherwise legally justify conviction upon the charge for which he is being tried.

[5] Appellant also urges that the court erred in permitting the cross-examination of the defendant as to his former marriage with the woman to whom we have referred in this opinion as having had a husband living at the time of her marriage to the defendant. As the cause must go back for retrial for other reasons, it is not necessary to go into this question at length and decide whether the contention of the appellant is or is not well taken as to such error being sufficient ground for reversal. So far as we have been able to ascertain, the cross-examination of the defendant referred to was upon a subject not touched upon in the direct examination of the defendant, or having any relation thereto or bearing upon the same, and the objections of the defendant should have been sustained.

[6] The recent case of *People v. Frank*, 75 Cal. App. 74, 241 P. 924, deals with the question of the court's examination of a defendant as permitted by section 1323 of the Penal Code, and the reasoning of the court in that case and the decisions cited sufficiently establish that the objections of the appellant should have been sustained. As conducted by the prosecution, the examination sought to show bigamous relations of the defendant and also of the woman passing as his wife. The record is utterly devoid of any testimony from which it could be concluded that there was any thought in the mind of the defendant of making away with his legitimate wife on the night of the 24th of December, 1926, on account of any bigamous or other illicit relations with the woman to whom we have referred. Such being the case, the testimony should have been excluded.

It is further urged that the district attorney was guilty of misconduct in his argument before the jury, but as such argument had relation principally to the testimony which we have held should have been excluded, it is not probable that a repetition of such argument will occur, and therefore need not be dwelt upon herein.

The order and judgment of the trial court are reversed and the cause remanded for a new trial.

We concur: FINCH, P. J.; BURROUGHS, Justice pro tem.

85 Cal. App. 575

(259 P.)

PEOPLE v. VASQUEZ. (Cr. 976.)

District Court of Appeal, Third District, California. Sept. 26, 1927.

1. Criminal law ☞24—One grossly and wantonly reckless in exposing others to danger is held to have intended natural consequences.

One grossly and wantonly reckless in exposing others to danger is held to have intended natural consequences of his act, and guilty of willful and intentional wrong.

2. Criminal law ☞24—That defendant convicted of assault, drove automobile on dark night without headlights held to justify finding that he intended natural and probable consequences (Vehicle Act, §§ 99, 100; Pen. Code, § 240).

In trial under Pen. Code, § 240, for assault with deadly weapon, uncontradicted evidence that defendant recklessly drove automobile on public highway on very dark night without headlights, in violation of Vehicle Act §§ 99, 100 (St. 1923, p. 546), held to justify jury's finding that he intended natural and probable consequences of such act.

3. Criminal law ☞1172(8)—Instructions as to felony charges held not prejudicial to defendant convicted of misdemeanor.

Instructions clearly relating to felony charges of assault with deadly weapon and involuntary manslaughter held not prejudicial to defendant, convicted of misdemeanor assault, if erroneous as not stating particular offense of which defendant should be found guilty.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Timoteo Vasquez was convicted of assault, and he appeals. Affirmed.

Ira B. Langdon, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURROUGHS, Justice pro tem. The defendant was charged by information with the crime of assault with a deadly weapon or instrument and by means and force likely to produce great bodily injury, and in a second count thereof with involuntary manslaughter; both alleged offenses growing out of the same transaction. The defendant entered a plea of "not guilty" on each count, the cause was tried, and the jury returned a verdict of "not guilty" on each one of the felony charges, but found the defendant guilty of assault. The court sentenced him to pay a fine of \$500 and to imprisonment in the county jail of Stanislaus county for the term of six months, and from this judgment defendant appeals.

Appellant contends that there is no evidence to sustain the verdict of guilty of assault, because there was no intent shown to commit the offense.

The facts are as follows: About 9 o'clock on the evening of July 30, 1926, the defend-

ant was driving a motorcar on a public highway of Stanislaus county. He was driving on the right-hand side of the road, but without headlights, and the evidence discloses that it was a dark night. About 500 feet west of the city limits of Modesto his car struck some object, and he stopped his car and got out to investigate. About 225 feet west from where the defendant stopped his car several state traffic officers were testing headlights. They heard the impact of the car against the object it had struck, and immediately ran to the scene, and, by the aid of flash lights discovered there was a man under the car. They immediately lifted the car from him and carried him to the side of the road. He was bleeding from a cut on the head and was unconscious. He was recognized by one of the traffic officers as one Clarence Knowles. While the officers were endeavoring to render aid to Knowles, another automobile approached them from the west, traveling at a high rate of speed, and, before the officers could move the unconscious man from its path, it struck him and dragged him about 13 feet, and, when the officers again reached him, he died before they could pick him up or render any assistance.

Defendant testified that his lights had gone out about three-quarters of an hour before he hit Knowles, and that he had tried to fix them, but was unable to do so, and he thereupon resumed driving, and was proceeding at the rate of about 8 or 10 miles an hour when his car struck Knowles.

The witness Randall testified that he had seen the defendant shortly before he struck Knowles, and he was driving without headlights, and the witness Morrison stated that defendant said his lights went out when he hit Knowles.

The crime of assault is defined by section 240 of the Penal Code, as follows:

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

The court instructed the jury that the necessary elements of the crime of assault are three: The intent to commit a violent injury on the person assaulted, a present ability to do so, and, in addition, the actual attempt to commit such injury.

[1] Counsel for appellant contends that no intent was shown by the evidence, and therefore one of the essential elements of the crime was lacking. This question, so far as we are advised, has not been before the Supreme or appellate courts of this state, where the alleged assault was committed with an automobile, but there are many decisions from other jurisdictions where it has been held that, where a party intentionally does an unlawful act, such as driving a car at a reckless rate of speed or at nighttime without

lights, or on the wrong side of the road, the party may be convicted of the crime of assault.

In *Bleiweiss v. State*, 188 Ind. 184, 119 N. E. 375, 122 N. E. 577, it is said:

"There can be no doubt that an assault and battery may be committed by striking another with an automobile (*Luther v. State* [1912] 177 Ind. 619, 624, 98 N. E. 640), although, of course, there must be some evidence of a criminal intent. 'But the intent may be inferred from circumstances which legitimately permit it. Intent to injure may not be implied from a lack of ordinary care. It may be from intentional acts, where the injury was the direct result of them, done under circumstances showing a reckless disregard for the safety of others, and a willingness to inflict the injury, or the commission of an unlawful act which leads directly * * * to the injury.' *Luther v. State*, supra, 177 Ind. 625, 98 N. E. 642."

And upon a rehearing (188 Ind. 186, 122 N. E. 577) the court applied to the defendant's conduct the well-recognized common-law rule "that the law holds him to have intended the natural and probable consequences of his unlawful and reckless acts."

In *Brimhall v. State*, 255 P. 165, the Supreme Court of Arizona said:

"Where a party intentionally does an unlawful act, such as driving his car at a reckless rate of speed, or at nighttime without headlights, or on the wrong side of the road, * * * and while so violating a positive law recklessly and wantonly, and without regard for the life and limb of others, runs into and injures another person, the rule seems to be that his conduct imputes to him * * * to do what in fact he does do; and, in such circumstances, the courts unhesitatingly hold such party guilty of manslaughter, and we see no good reason why he may not be held for the lesser offense of aggravated assault."

In *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594, it is said:

"The law is regardful of human life and personal safety, and if one is grossly and wantonly

reckless in exposing others to danger, it holds him to have intended the natural consequences of his act, and treats him as guilty of a willful and intentional wrong."

The foregoing rule has been sustained in *Shorter v. State*, 147 Tenn. 355, 247 S. W. 985; *State v. Lewis*, 4 Pennewill (Del.) 332, 55 A. 3, and *State v. Schutte*, 87 N. J. Law, 15, 93 A. 112.

[2] Applying the foregoing principle, which we believe is sound, to the facts of this case, the evidence shows without contradiction that the defendant, on a very dark night, on a public highway of this state, was driving an automobile without headlights, in violation of sections 99 and 100 of the California Vehicle Act (Stats. 1923, p. 517), and the jury were justified in holding that by such conduct on his part he intended the natural and probable consequences of his unlawful and reckless act.

Appellant further complains of certain instructions given by the court and of its failure to give other instructions offered by the defendant, but, as they all relate to the question of specific intent, the foregoing opinion answers the objections raised.

[3] Objection is also made that certain instructions given by the court are uncertain and misleading in that they conclude with the language, "you should find the defendant guilty," or similar expressions, and without stating of which particular offense the defendant should be found guilty. In our opinion the instructions are not subject to the criticism, but, conceding that counsel is correct in his view, the instructions clearly relate to the felony charges contained in the information, and, as defendant was convicted of the lower offense of misdemeanor, prejudicial error cannot be predicated thereon.

Judgment affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

85 Cal. App. 533

(259 P.)

HAGAR et al. v. HOME STORES, Inc.
(Civ. No. 5725.)

District Court of Appeal, First District, Division 1, California. Sept. 22, 1927.

1. Corporations ⇨425(5)—Corporation which went into possession of premises and paid rent for 6 months cannot defend action for rent by denying secretary's authority to execute lease.

In action against corporation to recover rentals under lease, defendant is estopped from raising defense that secretary executing lease was without authority to execute it, where company went into possession and paid rent for 6 months, since relation of landlord and tenant arose, irrespective of lease.

2. Appeal and error ⇨959(3)—Pleading ⇨236(3)—Allowance of amendment of answer in midst of trial is within trial court's discretion, which will not be disturbed unless abused.

Allowance or disallowance of amendment of answer in midst of trial is within sound discretion of trial court, and its ruling will not be disturbed unless such discretion has been clearly abused.

3. Pleading ⇨236(3)—Refusal to allow amendment of answer during midst of trial to set up defense of fraud in execution of lease held not abuse of discretion.

In action against corporation to recover rentals under written lease, refusal of trial court to allow defendant to amend answer in midst of trial so as to set up defense of fraud in execution of lease held not abuse of discretion.

Appeal from Superior Court, Alameda County; Stanley Murray, Judge.

Action by Gerald H. Hagar and another against the Home Stores, Inc. Judgment for plaintiffs, and defendant appeals. Affirmed.

Fabian D. Brown, of San Francisco, for appellant.

George M. Naus and Hugh Kenneth Forsman, both of Oakland, for respondents.

TYLER, P. J. [1-3] Action to recover certain rentals under a written lease entered into by appellant corporation, as lessee, and one J. A. Turgeon, as lessor, on May 1, 1925. The lease was for a term of 3 years from the date thereof and provided for a monthly rental of \$100. At the time it was entered into, the property therein described was owned by said lessor, but was subsequently transferred and conveyed by him to respondents herein. Appellant occupied the premises from the date of the execution of the lease until about December 1, 1925, when it vacated them and refused to pay any further rentals. At the time the action was commenced 5 months' rental had accrued and was unpaid, and be-

fore the action was brought to trial an additional 2 months' rental had accrued. A supplemental complaint was filed to recover for the additional term, making the total claim \$700 at the date of the trial. Plaintiff recovered judgment for this amount, from which judgment this appeal has been taken. The points urged for reversal are (1) that the evidence is insufficient to support the judgment, and (2) that the court erred in refusing to allow defendant to amend its answer so as to set up the defense of fraud in the execution of the lease. In support of the first contention it is claimed that as a necessary requisite to support the judgment it was incumbent upon respondents to have proved that the lease was executed by the corporation. It appeared at the trial that the lease was executed on the part of the company in the following manner: "Home Stores, Inc., by C. H. Brown, Secretary," with the corporation seal attached. It is appellant's claim that while this prima facie evidence was sufficient to prove the execution of the lease by defendant company, it became insufficient when such company offered indisputable evidence to the effect that the secretary of the corporation had no power, under the by-laws of the corporation, to execute instruments under seal.

The by-law which was introduced in evidence contained a provision that when any instrument was signed by the secretary it should be countersigned by the president or one of the vice presidents of the company. It also appeared in evidence, however, that the company occupied the premises and paid the rent from the date of the lease until the following November. Under these circumstances, the company is estopped from raising this defense. Assuming want of authority in the secretary to execute the lease on behalf of the company, the relation of landlord and tenant nevertheless arose, irrespective of the lease, when the company went into possession and enjoyed the use and occupation of the premises. *Newton v. Johnston Organ, etc., Co.*, 180 Cal. 185, 180 P. 7; *McQuaide v. Enterprise Brewing Co.*, 14 Cal. App. 315, 111 P. 927; 24 Cyc. 883. Nor is there any merit in the contention that the court erred in refusing to allow defendant to amend its answer at the trial.

The allowance or disallowance of an amendment in the midst of a trial is within the sound discretion of the trial court, and its ruling will not be disturbed unless it clearly appears that such discretion has been abused, and here there is no such showing. *Allen v. Los Molinos Land Co.*, 25 Cal. App. 206, 143 P. 253; *Milliken v. Valencia*, 47 Cal. App. 16, 189 P. 1049. There is no merit in the appeal. The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

85 Cal. App. 646

BORDEN et al. v. THOMAS, Marshal, et al.
(Civ. 5733.)

District Court of Appeal, Second District, Division 1, California. Sept. 27, 1927.

Courts ⇨472(7)—Los Angeles municipal court and Santa Monica justice court have concurrent jurisdiction of suit, involving under \$300, against residents of latter city (Const. art. 6, § 5; Municipal Court Act, § 29).

Under Const. art. 6, § 5, and Municipal Court Act (St. 1925, p. 658), § 29, Los Angeles municipal court and the justice court in Santa Monica, Los Angeles county, have concurrent jurisdiction of suit, involving less than \$300, against residents of latter city.

Application by Lewis E. Borden and another, individually and as copartners doing business under the firm name and style of the Peerless Dye Works, for a writ of prohibition to Charles R. Thomas, Marshal of the Municipal Court of the City of Los Angeles, and others. Writ discharged.

F. W. Shapleigh, of Santa Monica, and Charles E. Salisbury, of Los Angeles, for petitioners.

Everett W. Mattoon, County Counsel, and R. C. McAllister, Deputy County Counsel, both of Los Angeles, for respondents Municipal Court and Charles R. Thomas.

W. H. Thomas, of Los Angeles, for respondent Yale.

HOUSER, J. As disclosed by the prayer of the petition herein, the purpose of petitioners is to prohibit the respondent municipal court from proceeding in an action therein pending in which respondent Yale is the plaintiff and the petitioners herein are the defendants. From the petition it also appears that each of such defendants is a resident of the city of Santa Monica, of the county of Los Angeles, in which said city is located a justice court, and that the amount involved in such action is a sum less than \$300—of which amount, as well as of the subject-matter of the action, the justice court would have jurisdiction.

The ultimate point urged by petitioners is that the municipal court of the city of Los Angeles is without jurisdiction.

With one exception the identical points raised by petitioners herein were urged in the case of *Burge v. Municipal Court of the City*

of Los Angeles (Cal. App.) 258 P. 164, and therein adverse rulings were made as against each of petitioners' several contentions, including that of the constitutionality of the act in question. Among other things, it is there held in substance that in an action arising in the county of Los Angeles, where the amount involved is no more than \$1,000, the municipal court of the city of Los Angeles has jurisdiction.

In the *Burge* Case neither of the defendants was a resident of the city of Los Angeles; the action, as in the case at bar, was brought in the municipal court of the city of Los Angeles, and the amount involved therein was the sum of \$800. The only fact in the instant case which would differentiate it from the *Burge* Case is that the amount involved in the action upon which this proceeding is founded is less than \$300, and, consequently, that in ordinary circumstances the justice court would be presumed to have jurisdiction thereof.

Section 5 of article 6 of the Constitution provides in part that:

"The process of any municipal court shall extend to all parts of the county * * * in which the city is situated where such court is established."

Section 29 of the Municipal Court Act (Stats. 1925, p. 648) includes the following provisions:

"* * * Each municipal court shall have exclusive original jurisdiction of all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to \$1,000 or less. * * * Each municipal court shall have concurrent original jurisdiction with the superior court or the justices' courts of all such cases arising within the county in which such court is situated. * * *"

Assuming the correctness of the several rulings in the *Burge* Case, it would follow from the constitutional provision and the language of the statute to which reference has been had that the municipal court of the city of Los Angeles has concurrent jurisdiction with the justice court located within the city of Santa Monica, in the county of Los Angeles.

The writ should be discharged; it is so ordered.

We concur: **CONREY, P. J.; YORK, J.**

85 Cal. App. 697

(259 P.)

PEOPLE v. ROBERTS. (Cr. 983.)

District Court of Appeal, Third District, California. Sept. 29, 1927.

1. Embezzlement $\hookrightarrow$ 26—Indictment for embezzlement that on specified date defendant, as agent and bailee of corporation, feloniously appropriated its money to use not in lawful execution of his trust, held sufficient (Pen. Code, § 504).

Indictment for embezzlement, alleging that on specified date, defendant, as agent and bailee of named corporation, was intrusted with money of such corporation, and on day specified feloniously appropriated such money to use not in lawful execution of his trust, held sufficient under Pen. Code, § 504.

2. Embezzlement $\hookrightarrow$ 35—Proof of cashing of check held not at variance with allegation of embezzlement of money.

Proof in embezzlement prosecution, that defendant received checks and cashed them in usual course of business, held not at variance with allegation of indictment of embezzlement of money.

3. Criminal law $\hookrightarrow$ 369(5)—Evidence of prior embezzlements, held competent to show general shortage, where defendant used money to cover previous shortages.

Evidence of prior embezzlements held competent for purpose of showing a general shortage, where defendant used money alleged to have been embezzled to cover up previous shortages, and fact that previous shortages were barred by statute of limitations was immaterial.

4. Witnesses $\hookrightarrow$ 277(4)—Cross-examination as to embezzlements prior to date testified on direct examination held proper, where money was used to cover previous shortages.

Where defendant in embezzlement prosecution testified on direct examination that he had taken no money since certain date, cross-examination showing that sums had been taken prior to such date was proper, where evidence showed that money alleged to have been taken was used to cover up previous shortages.

5. Witnesses $\hookrightarrow$ 277(4)—Cross-examination on details of subject testified generally by defendant held proper as testing truth of defendant's statement in chief.

Where entire direct examination of defendant in embezzlement prosecution was statement that he had taken no money since specified date, thus testifying generally on subject, cross-examination as to prior embezzlement was proper as testing truth of defendant's statement in chief.

6. Criminal law $\hookrightarrow$ 1170½(5)—Cross-examination consisting of questions and answers carrying no meaning held not prejudicial.

Cross-examination of defendant, though beyond scope of direct, was not prejudicial where questions and answers carried no meaning.

7. Criminal law $\hookrightarrow$ 1186(4)—Cross-examination, though erroneous, held not to result in miscarriage of justice, in view of evidence of defendant's guilt (Const. art. 6, § 4½).

Though extending scope of cross-examination beyond that of direct was erroneous, no miscarriage of justice resulted under Const. art. 6, § 4½, in view of evidence of defendant's guilt.

Appeal from Superior Court, Placer County, J. B. Landis, Judge.

W. M. Roberts was convicted of embezzlement, and he appeals. Affirmed.

K. D. Robinson, of Auburn, and Wallace Shepard, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURROUGHS, Justice pro tem. The defendant, W. M. Roberts, was convicted on two charges of embezzlement, and was sentenced to imprisonment in the state prison. He appeals from the judgment of conviction and from the order denying his motion for a new trial. The charging part of the first count of the information is as follows:

"That the defendant 'was the agent and bailee of Pacific Gas & Electric Company, a private corporation organized under the laws of the state of California and doing business in Placer county, Cal., and by said corporation intrusted with and having in his possession and under his control the sum of \$6,498, lawful money of the United States, by virtue of his said trust, then and there the property of said Pacific Gas & Electric Company, a corporation, did then and there, to wit, on the 10th day of August, 1925, at Auburn, in the said county of Placer, state of California, willfully, unlawfully, feloniously, and fraudulently embezzle and appropriate said money to a use and purpose not in the due and lawful execution of his said trust, as such agent, bailee, and person intrusted with and having said money in his possession and under his control.'"

The second count is the same in substance as the first, except the crime is alleged to have been committed on October 12, 1925, and the amount alleged to have been embezzled the sum of \$1,885.50.

The evidence shows that the Pacific Gas & Electric Company is a California corporation, and at all the times herein mentioned was engaged in the business of furnishing water to the public for irrigation. We will hereafter refer to it as the water company.

The evidence further shows that at all of the times herein mentioned until January 6, 1926, the defendant was the division accountant for the water company, and as such officer in charge of its office at Auburn, Placer county, and in full charge of all the accounts for the irrigation water furnished by the water company to its consumers, and also the collection of the money therefor. The

method of handling these accounts was as follows: Prospective water users were sent blank applications to fill in for the number of inches of water they desired. On signing and returning these applications to the water company, they were entered by the latter in a book called "the Register of Irrigation Accounts," and there carried in dollars and cents as due from the consumer to the water company. The irrigation season was divided into five months from May to September, both inclusive, and the charge for water to the consumer was \$9 per inch per month.

The water company maintained another department called the "water department," where there was kept a record of all the water actually furnished the consumer, but this department was not under the charge of the defendant. In the due course of business, the water department furnished the accounting department each month a record of the number of inches of water actually furnished to each consumer. Among others, the water company furnished water to the Silva-Bergtholdt Company of Newcastle and to the Penryn Fruit Company of Penryn.

On August 7, 1925, the Silva-Bergtholdt Company issued and mailed to the water company, in payment of the May and June 1925, water account its check for \$6,498. The check was indorsed with the water company's name with a rubber stamp indorsement, and cleared through the Capital National Bank of Sacramento on August 12, 1925, and returned in due course to the Silva-Bergtholdt Company. The last-named company was not credited on the books of the water company with this amount, until in January, 1926, after the defendant was out of the employ of the water company.

On August 11, 1925, there was deposited in the Placer County Bank at Auburn to the credit of the water company \$6,129.85. There was also issued by the said bank at said time a draft in favor of the water company for \$368.15. The evidence also shows that the check of the Silva-Bergtholdt Company was given to the bank in payment of these amounts. On the last-named date four credit items appear on the books of the water company aggregating said sum of \$6,129.85; one of these items being a credit to the Newcastle Fruit Growers' Association in the sum of \$3,958 and another item is a credit to the Penryn Fruit Company in the sum of \$1,311. Both of these items appear on the books of the water company to be for payments for balance due to the water company for water furnished during the year 1924. But, as a matter of fact, both companies had paid their 1924 water bill in full long prior to the date on which they were given credit therefor on the books of the water company.

In support of the charge alleged in the second count, the evidence shows that the Penryn Fruit Company issued and mailed to the water company, on October 12, 1925,

its check for \$1,885.50, and that it was deposited to the credit of the water company on November 2, 1925, in the following form: Cash, \$582.49; a draft to the Pacific Fruit Company for \$342.16, the latter being given to the Pacific Fruit Company in payment of a debt by the water company to it. There was another draft issued at the same time to the water company for \$960.41. The Penryn Fruit Company had been furnished water to the amount of \$1,885.50, but was not given credit on the books of the company therefor until in January, 1926, after the defendant was out of the employ of the water company.

The evidence further discloses that it was the duty of the defendant upon the receipt of money to credit it on the books of the water company to the party paying and to deposit the amount to the credit of the water company in the bank.

Evidence was also received that during the years from 1918 to 1923, inclusive, except during the year 1921, a large number of payments, made to the water company for water furnished by it to its consumers, were embezzled by the defendant. These payments aggregate many thousands of dollars more than the items which are specifically charged by the indictment to have been embezzled by the defendant. None of these items, however, were within three years prior to the filing of the indictment.

On January 7, 1926, the defendant stated to H. E. Sheldon, the traveling auditor of the water company, that he had confessed to Mr. Cooper that he was short in his accounts and that he had also told Mr. Cooper that Mr. Sheldon knew all about it.

Mr. Cooper, division manager of the water company, testified that defendant had told him that there was something wrong, and he wanted him to know it. Defendant also stated to E. W. Hodges, general auditor of the water company, that there was a shortage and said that he would make restitution to the amount of his financial ability. He later gave Mr. Hodges a list of his financial assets, and did make transfers of his property to representatives of the water company.

The defendant became a witness in his own behalf, and testified in response to a question asked him by his counsel that he had never taken a dollar from the company since December 17, 1923.

[1] The appellant contends that the indictment is uncertain, and his demurrer thereto should have been sustained; the specific objection being that it does not state the conditions of the trust, nor the purpose for which the money came into the defendant's possession, nor to what purpose or use not in the due and lawful execution of his trust he appropriated it.

The indictment is framed under section 504 of the Penal Code, which so far as is material to this case, reads as follows:

"Every officer, director, trustee, clerk, servant or agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement."

Appellant cites in support of this point the case of *People v. McMahon*, 4 Cal. App. 225, 87 P. 404, but in that case the indictment does not set forth the crime either in the language of the statute, nor does it allege the facts necessary to show that the offense denounced by the statute had been committed.

In *People v. Terrill*, 127 Cal. 99, 59 P. 836, it is said:

"It is an elementary principle of criminal law that the indictment or information must state that a crime has been committed, either by direct and positive averment in the language of the statute or its equivalent, or by stating facts which show that such crime has been committed."

Viewing the indictment in the instant case in the light of the above section and of these decisions, both counts allege that on a specified date the defendant was the agent and bailee of a named private corporation and as such agent and bailee he was intrusted with a specific sum of money, being the property of said corporation, and that on the day specified he feloniously and fraudulently appropriated such money to a use and purpose not in the due and lawful execution of his said trust as such agent. This is sufficient to answer the requirements of the statute; the conditions of the trust, the purpose for which the money came into defendant's possession, and to what use he appropriated it, being matters of proof.

[2] It is also claimed that there is a material variance between the allegations of the indictment and the proof, in that the former alleges the embezzlement of money and the proof shows, if anything, the embezzlement of a check, but this contention has been directly answered in *People v. Whalen*, 154 Cal. 472, 98 P. 194. It is there held in a prosecution for obtaining money under false pretenses the fact that the money was obtained by the defendant is sufficiently shown to sustain a conviction, by evidence that the prosecuting witness gave a check therefor to the defendant, and further evidence indicating that such check had been cashed in the usual course of business.

In the case at bar, the defendant received the checks and thereafter cashed them in the usual course of business, and this is sufficient proof to sustain the allegations of the indictment, and does not constitute a variance.

[3] Objection is also made that the court erred in admitting evidence of other and dis-

tinct offenses than those charged in the indictment; the contention being that evidence of another crime is not admissible to prove the charge alleged, and for the further reason that all of the said offenses were barred by the statute of limitations. Respondent claims that such evidence was properly admitted to show a general shortage, and because the money which it is alleged was embezzled by the defendant had been used to cover up the previous shortages.

This case is similar in its facts to the cases of *People v. Rowland*, 12 Cal. App. 6, 106 P. 428, and *People v. Forman*, 67 Cal. App. 693, 228 P. 378.

Counsel for appellant undertakes to differentiate between these two cases and the one at bar because in the cases cited the indictments allege the secretion of the money embezzled, while in the instant case there is no allegation of secretion. But this contention is without merit and is answered in the *Rowland Case*, supra, in this language:

"So, as stated, if, in the case here, the money was either secreted within the meaning of the statute, or used to cover up other shortage or actually taken from the vaults of the bank and used in some transaction with which the bank had no connection, the crime is, in either event, proved."

This language is cited with approval in the *Forman Case*, supra. Further, in this case there is no attempt to either allege or prove the secretion of the money embezzled. The facts of the *Forman Case* are as follows: Forman was the cashier of a freight office of the Western Pacific Railroad Company, and received from a shipper a check in payment of certain specific freight charges. He receipted the original freight bills of the shipper and then and there deposited the checks in the bank to the credit of the railroad company, but, instead of making any entry in the cash book of the railroad company of the payment of said freight bills of said shipper, wrongfully carried those bills as being unpaid and credited the amount represented by the check to the payment of other freight bills of said shipper, which, in fact, had been previously paid, but upon which credit of payment had not been given, for the reason that the money which had been received by the railroad company in payment thereof had been previously embezzled by the said defendant. This was held to constitute the crime of embezzlement. The evidence of other embezzlements was competent for the purpose of showing a general shortage where, as in this case, the money wrongfully taken was used to cover up previous shortages. *People v. Rowland*, supra; *People v. Forman*, supra; *People v. Wardwell* (Cal. App.) 246 P. 97.

While it is true that no exact balance was struck showing a specific amount of the general shortage, the amount which was actually short was many thousands of dollars more

than the amount alleged in the indictment to have been embezzled. Nor does the fact that the previous shortages were barred by the statute of limitations make any difference, as the money used to cover up these previous defalcations was not barred by limitations. In the Forman Case, a somewhat similar contention was advanced, but the court negated the claim in the following language:

"The concluding point made by appellant is that, if the appellant was guilty of any crime at all, it was that of the embezzlement of the smaller amounts, which constituted a misdemeanor, part of which were repaid by the appellant out of the amount represented by the check in question, and that, since those smaller amounts were appropriated by the appellant more than a year prior to the date of the finding of the indictment, the misdemeanors resulting from said transactions were barred by the statute of limitations. It is obvious, we think, without discussion, and from what has already been said, that appellant was not charged with embezzlement of the smaller amounts, but with the misappropriation on November 5, 1923, of the sum of \$6,468.54, in lawful money of the United States; therefore there is no merit in the point last made."

[4-6] The last claim urged for a reversal is that the court committed prejudicial error in permitting counsel for the people to cross-examine the defendant as to matters which it is claimed he had not testified to in chief. On his direct examination his counsel asked the defendant the following question:

"Q. Will you state whether or not, at any time in three years, from and after December 17, 1923, you ever took a dollar of the money of the Pacific Gas & Electric Company? Ans. Not a dollar since December 17, 1923."

The foregoing was the entire direct examination of the defendant.

The appellant claims that the cross-ex-

amination of the defendant as to the acts which had taken place prior to December 17, 1923, was improper and prejudicial, but, the defendant having testified that he had taken no money from the company since December 17, 1923, it was proper to allow the district attorney to show what sums of money had been taken prior to that time, as the evidence already before the court showed that the money alleged in the indictment to have been taken was used to cover up these shortages, and that, having testified generally upon the subject, it was proper that the cross-examination should be permitted to go into the details as testing the truth of the defendant's statement in chief. Furthermore, a consideration of the questions asked on cross-examination, together with the answer elicited to the questions, could not have been prejudicial to the defendant, because those answers carried no meaning. As an example, a question was asked:

"I show you these check, * * * and will ask you if these checks didn't pay in full for the money set out on your books owing to the Pacific Gas & Electric Company by the Penryn Fruit Company?"

And the answer was:

"There is no way to determine."

[7] However, if error be conceded and that the scope of the cross-examination was broader than it should have been under a strict interpretation of the law, the evidence, which includes admissions of shortages made by the defendant, satisfies us that said examination did not result in a miscarriage of justice under the provisions of section 4½ of article 6 of the Constitution, and that the defendant was properly convicted.

No substantial error appearing in the record, the judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

85 Cal. App. 717

(259 P.)

SAFEWAY STORES, Inc., v. BUHLINGER.*
(Civ. 5385.)District Court of Appeals, Second District,
Division 2, California. Sept. 30, 1927.

Hearing Denied by Supreme Court Nov. 28, 1927.

1. Landlord and tenant §76(2)—Assignment by partner to copartner held not to violate covenant against assignment of lease.

Assignment by one partner and colessee of his interest in leasehold to his copartner on dissolution of partnership held not to violate covenant against assignment of lease or any part thereof.

2. Contracts §318—Deeds §155—One claiming forfeiture of rights under written instrument must show that such was intention of instrument.

One claiming that a forfeiture of rights under written instrument has occurred has burden of proving that such was unmistakable intention of instrument.

3. Deeds §155—Forfeiture of estates and restraints upon alienations will be enforced only when terms and conditions are plain and unmistakable.

Forfeiture of estates and restraints upon alienations will not be enforced except when terms and conditions are so plain as to be beyond province of construction.

Appeal from Superior Court, Los Angeles County; Frank H. Dunne, Judge.

Action by the Safeway Stores, Inc., against W. A. Buhlinger. Judgment for defendant, and plaintiff appeals. Affirmed.

I. W. Stewart and Arvin B. Shaw, Jr., both of Los Angeles, for appellant.

Henry G. Bodkin, of Los Angeles, for respondent.

CRAIG, J. On April 6, 1922, the appellant corporation (under the then name of "Sam Seelig Company") made and executed to George Helwig and W. A. Buhlinger a lease of certain floor space in appellant's store on Santa Monica boulevard, in the city of Los Angeles, for the period of 8 years from May 1, 1922. Paragraph 7 of said lease contained the following provision:

"This lease, or any part thereof, shall not be assigned, by operation of law, or otherwise; nor any part of said premises sublet, without the written consent of the lessor; * * * no waiver of a breach of any covenant, agreement or provision herein contained shall be construed as a waiver of any subsequent breach of the same or any other covenant, agreement or provision. * * *"

It is admitted that the respondent and Helwig were copartners, and that on or about November 1, 1922, respondent purchased Helwig's interest in the business and in the lease, and that the latter assigned all of his right, title, and interest therein to the

respondent. Thereafter Helwig had no interest in the business, nor in the leasehold, and he visited the store only occasionally, for the purpose of buying merchandise from his ex-partner.

The lease contained a common provision giving the lessor the right to declare the term ended and to re-enter the premises in case of default in the payment of rent or in the performance of any of its covenants or provisions. On March 10, 1925, the appellant notified respondent, in writing, as follows:

"* * * It has just come to the knowledge of the undersigned that a part of the lease hereinafter mentioned, to wit, the interest of George Helwig therein, has heretofore been assigned without the consent of the lessor and in violation of the terms of said lease, and that thereby said lease has been terminated, and you are hereby notified to quit said premises and to restore the possession of said premises to the undersigned. * * * You are hereby required to deliver over said premises to the undersigned within 3 days after the service upon you of this notice, and in default thereof action will be commenced to recover possession thereof, together with such damages as the undersigned will be entitled to recover."

Respondent continued in possession of the premises, and on April 4, 1925, appellant commenced this action for restitution, damages, attorney's fees and costs. Appellant alleged in its complaint that the assignment from Helwig to Buhlinger constituted a violation of the covenant against assignment or transfer of a part of the lease, that it was made without the plaintiff's consent in writing or otherwise, that the plaintiff had no knowledge of said assignment prior to March 9, 1925, and that the defendant unlawfully held and continued in possession, without the plaintiff's consent, all of which respondent denied in his answer. Upon a trial before the superior court without a jury, each of the allegations of the complaint last mentioned was found to be untrue, judgment was rendered in favor of the defendant, and the plaintiff appeals.

[1-3] The only question necessary for decision of this case is as to whether or not a breach of one of the conditions of the lease resulted from the assignment of Helwig's interest to respondent, without the consent of the lessor. That such was not the legal effect is clear from the principles laid down in *Spangler v. Spangler*, 11 Cal. App. 321, 104 P. 995, and *Randol v. Tatum*, 98 Cal. 390, 33 P. 433. But appellant insists that the lease here in question may be differentiated from those involved in the decisions mentioned, in that there the covenant was against assignment of any part of the lease. Language not distinguishable from this was employed in the lease passed upon in *Adelstein v. Greenberg* (Cal. App.) 247 P. 520, wherein it was provided that an assignment

"of this lease or any interest therein" was prohibited upon penalty of forfeiture, but the principle running through all of these cases is that an assignment by one joint lessee to another does not violate a covenant against assignment of the lease or an interest therein, because it requires the joint act of the colessee to effect an assignment, whereas in the case of one lessee assigning to the other the joint act does not occur. See, also, *Jameson v. Chanslor-Canfield Co.*, 176 Cal. 1, 167 P. 369. It follows that only where assignment is made to a stranger to the original agreement is the covenant against assignment violated.

Where there is a claim made that a forfeiture of rights under a written instrument has occurred, the burden of proof is upon the party making the point "to show that such was the unmistakable intention of the instrument" (*Quatman v. McCray*, 128 Cal. 285, 60 P. 855); "and that the courts tenaciously cling to the rule that forfeiture of estates and restraints upon alienations should not be enforced except when the terms of the conditions are so plain as to be beyond the province of construction" (*Stratford Co. v. Continental Mortg. Co.*, 74 Cal. App. 551, 241 P. 429). In the latter case a hearing in the Supreme Court was denied. The plaintiff has not brought itself within either branch of the rule above quoted, hence the judgment should be affirmed. Judgment affirmed.

We concur: **WORKS, P. J.; COLLIER**, Justice pro tem.

85 Cal. App. 675

In re MAHONEY'S ESTATE.

MAHONEY et al. v. CITIZENS' TRUST & SAVINGS BANK. (Civ. 5840.)

District Court of Appeal, Second District, Division 1, California. Sept. 28, 1927.

1. Wills §249—Husband's domicile held not that of wife suing for divorce, so as to give probate court at his domicile exclusive jurisdiction to probate wife's will (Civ. Code, § 129, as amended by St. 1925, p. 482; Rev. St. Tex. 1895, art. 2978).

In view of Civ. Code, § 129, as amended by St. 1925, p. 482, and Rev. St. Tex. 1895, art. 2978, domicile of wife, residing in Texas at time of her death while her divorce suit was pending therein, was not that of husband in Illinois, so as to give probate court of latter state original, primary, and exclusive jurisdiction to probate will, and preclude appointment of nominee of executors securing probate of will in Texas, as administrator with will annexed in California.

2. Executors and administrators §21(1)—Surviving spouse, being relative, can nominate administrator with will annexed, only if entitled to personal estate (Code Civ. Proc. §§ 1350a, 1365, subd. 1).

Surviving husband or wife being relative of deceased, within Code Civ. Proc. § 1365, subd. 1, is entitled to administer estate or nominate another to administer or apply for letters of administration with will annexed, under section 1350a, only when entitled to succeed to personal estate or portion thereof.

3. Executors and administrators §21(1)—Husband expressly excluded from succession by will of wife residing in another state, cannot nominate administrator with will annexed (Code Civ. Proc. §§ 1350a, 1365, subd. 1).

Surviving husband, expressly excluded from succession to any part of wife's estate by her will, could not assert his dower rights, under law of his domicile, to wife's property in another state, wherein she resided at time of death, nor in California, and hence could not administer estate or nominate administrator with will annexed, under Code Civ. Proc. §§ 1350a, 1365, subd. 1.

4. Executors and administrators §21(1)—Foreign executor's nominee may be appointed administrator with will annexed at court's discretion, in absence of application by one with prior right (Code Civ. Proc. §§ 1365, 1379).

Under Code Civ. Proc. § 1379, letters of administration with will annexed may be granted to competent appointee, not otherwise entitled thereto, on written request of foreign executor, at court's discretion, in absence of application by person with prior right under section 1365.

Appeal from Superior Court, Los Angeles County; **Frank R. Willis**, Judge.

Petitions by the Citizens' Trust & Savings Bank and by the Pacific-Southwest Trust & Savings Bank, as nominee of Joseph P. Mahoney, for letters of administration with the will of Nonie Boren Mahoney, deceased, annexed. From a judgment and orders admitting the will to probate, appointing the Citizens' Trust & Savings Bank as administrator, denying the contest of Joseph P. Mahoney, and overruling his objections to the probate of the will, he and the Pacific-Southwest Trust & Savings Bank appeal. Affirmed.

Hahn & Hahn, of Pasadena, for appellants.

Holland, Bartlett, Thornton & Chilton, of Dallas, Tex., and Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for respondent.

McLUCAS, Justice pro tem. The contestants appeal from the judgment and orders of the trial court admitting a foreign will to probate, appointing Citizens' Trust & Savings Bank administrator with the will annexed, denying the contest of Joseph P. Mahoney, and overruling his objections to probate of said foreign will.

On May 28, 1926, respondent, Citizens' Trust & Savings Bank, a corporation of Los Angeles, at the request of the executors, filed its petition for letters of administration with the will annexed, together with a copy of the will and an order admitting the same to probate in Dallas county, Tex., duly authenticated, as required by the provisions of section 1323 of the Code of Civil Procedure. On September 13, 1926, Joseph P. Mahoney, the surviving husband of the decedent, filed his amended special appearance for the purpose of objecting to the court's jurisdiction, and to the right of petitioner Citizens' Trust & Savings Bank to letters of administration with the will annexed, and alleging that Joseph P. Mahoney and decedent, Nonie Boren Mahoney, were husband and wife at the time of her death, and that they were domiciled in Chicago, Ill.; further alleging that on the 31st day of August, 1926, he had filed a petition with the probate court of Cook county, state of Illinois, requesting the probate of said will of the above-named decedent in said court; that said court had original and primary jurisdiction to order the probate of said will of said decedent; and that as soon as said letters were granted said petitioner would designate some proper person residing in Los Angeles county to petition the court for ancillary letters of administration with the will annexed. Citizens' Trust & Savings Bank filed an answer to said amended contest, denying the allegations therein, and alleging that Nonie Boren Mahoney was at the time of her death and for many years prior thereto permanently separated from the contestant Joseph P. Mahoney; that she had established and during all of said years had maintained her home and domicile upon property owned by her in her separate right and estate located in the city of Dallas, county of Dallas, state of Texas, that the said decedent voted in Dallas county, Tex., every year since women were given the franchise in Texas up to the date of her death, namely, from 1919 to 1926; that decedent filed suit in the district court of Dallas county, Tex., for a divorce against her husband, Joseph P. Mahoney, on April 6, 1921; that said case resulted in a mistrial, and that on September 29, 1923, the decedent dismissed said case; that on February 16, 1924, decedent filed in the district court of Dallas county, Tex., a second suit for divorce, and that said suit was pending at the time of the death of said decedent; and denying that Joseph P. Mahoney was entitled to succeed to a portion of the estate of said decedent; and alleging that by the express terms of the will decedent provided that no part of her estate should be permitted to pass into the hands of said Joseph P. Mahoney.

The issues raised by the petition for letters by the Citizens' Trust & Savings Bank and the amended contest of Joseph P. Mahoney were tried on the 14th day of September,

1926, and taken under advisement. On the 6th day of November, 1926, the Pacific-Southwest Trust & Savings Bank filed its petition as the nominee of Joseph P. Mahoney, husband of decedent, for letters of administration with the will annexed, together with an exemplified copy of the will and of the order admitting the will to probate in the probate court of Cook county, Ill., which were introduced in evidence, together with the nomination of the Pacific-Southwest Trust & Savings Bank, a corporation, by Joseph P. Mahoney, to act as the administrator with the will annexed, which was filed November 15, 1926. The court then had before it for consideration the petition of the Citizens' Trust & Savings Bank of Los Angeles as the nominee of the Texas executors of the will, and the petition of Pacific-Southwest Trust & Savings Bank as the nominee of Joseph P. Mahoney, husband of decedent. The court thereupon denied the petition of the Pacific-Southwest Trust & Savings Bank and granted the petition of the Citizens' Trust & Savings Bank. The court made its findings that Nonie Boren Mahoney died on the 20th day of March, 1920, in the county of Kaufman, state of Texas; that at the time of her death and for a long time prior thereto she was a resident of and domiciled in the county of Dallas, state of Texas; that said decedent left a written will with a codicil thereto; that said will and codicil were duly proved, allowed, and admitted to probate in the county court of the county of Dallas, state of Texas; that said court at the time of making said order was a court of competent jurisdiction and had jurisdiction of said matter and of all persons interested in the estate of said decedent; that said will was executed according to the laws of the state of Texas, in which state it was made and in conformity with the laws of the state of California; that a duly authenticated copy of the will and codicil and the probate thereof in the county court of the county of Dallas, state of Texas, was presented by the petitioner Citizens' Trust & Savings Bank and filed in the records and papers of said cause. The court further found, as to the contest of Joseph P. Mahoney, that he was the husband of said decedent, and a resident of the city of Chicago, county of Cook, state of Illinois; that said contestant was not entitled to succeed to any portion of the estate of said decedent which is situated in the state of California; that the county court of Dallas county, Tex., had jurisdiction to admit the last will of the said decedent to probate; and that the Citizens' Trust & Savings Bank is one of the persons enumerated in section 1365 of the Code of Civil Procedure who is entitled to letters of administration with the will annexed in the above-entitled matter.

It appears that Joseph P. Mahoney and the decedent were married at Dallas, Tex., on January 31, 1899, and soon thereafter took up

their residence in the city of Chicago. That Mrs. Mahoney first began to travel and stay away from home in 1904 or 1905. That beginning with the year 1910, and to and including 1919, she spent more than six months each year away from the home of her husband. The last time she was at her husband's home was in September, 1919. That during all of this time and until her death, March, 20, 1926, Mr. Mahoney always maintained a home in Chicago. He testified that he never informed his wife directly or indirectly that he desired her to live apart from him. On April 6, 1921, Mrs. Mahoney began an action for divorce against her husband in the district court of Dallas county, Tex. This action was dismissed September 29, 1923, after trial, which resulted in a disagreement on the part of the jury. A second action was filed by Mrs. Mahoney in the district court of Dallas county, Tex., February 16, 1924, and was thereafter dismissed. The decedent declared her domicile in the city and county of Dallas, Tex., by her will dated December 23, 1924, and in the codicil dated March 12, 1926. Contestant admitted that he had not contributed to her support since 1921. Several witnesses testified that Mrs. Mahoney lived on Browder street, in Dallas, Tex., for a period of many years before her death.

[1] The evidence is sufficient to support the finding of the trial court that the decedent resided in Dallas county, Tex., at the time of her death, but appellant contends that decedent was then domiciled in Chicago, Ill., by reason of the fact that the domicile of the husband is the domicile of the wife, and that according to the law of Texas the filing of a complaint for divorce by the wife is not in itself conclusive evidence of acquiring a separate domicile, and before she is entitled to acquire a separate domicile the cause must be tried and the court must find that her husband was guilty of the cause of separation, citing *Michael v. Michael*, 34 Tex. Civ. App. 630, 79 S. W. 74, where the court held that:

"It is a rule of law that the domicile of the husband is the domicile of the wife and would so remain so long as he was not guilty of the offense which is the cause of the separation."

The foregoing language may be regarded as obiter dictum, since the question at issue in the Texas case was whether the plaintiff had acquired a residence in Bexar county, Tex., while living therein for a period of three months only, while article 2978 of the Revised Statutes of 1895 of the state of Texas, as quoted in the *Michael Case* required a residence of six months in said county before filing of suit for divorce. Said article reads as follows:

"No suit for divorce from the bonds of matrimony shall be maintained in the courts unless the petitioner for such divorce shall, at the time of exhibiting his or her petition, be an actual bona fide inhabitant of the state, and shall

have resided in the county where the suit is filed six months next preceding the filing of the suit."

It thus appears that the statutes of Texas recognized the right of a wife to file a suit for divorce in Texas after residing in the county where the suit is filed six months next preceding the filing of the suit. *McGrew v. Mutual Life Insurance Co.*, 132 Cal. 85, 64 P. 103, 84 Am. St. Rep. 20, has settled the rule in California, where it is said:

"The theoretical unity of husband and wife dissolves in the presence of a legal proceeding, the direct and only purpose of which is to destroy that unity. This is admitted to be so where the wife brings the suit for divorce.
* * *

The principle is recognized by section 129 of the Civil Code, as amended by St. 1925, p. 482, which reads:

"In actions for divorce neither the domicile nor residence of the husband shall be deemed to be the domicile or residence of the wife. For the purpose of such an action each may have a separate domicile or residence depending upon proof of the fact and not upon legal presumptions."

We see no merit in appellant's first contention that at the time of her death decedent was domiciled in Chicago, Ill. Appellants' second and third points that the probate court of Cook county, Ill., had original, primary, and exclusive jurisdiction to order the will of decedent to be probated, and that the order admitting said will to probate in Dallas county, Tex., was ancillary, are necessarily disposed of by our decision on appellants' first point.

[2] Appellants claim that Joseph P. Mahoney, as the surviving husband of the decedent, was entitled to nominate some fit and proper person to act as administrator with the will annexed under the provisions of subdivision 1 of section 1365 of the Code of Civil Procedure, and that the court erred in refusing to appoint Pacific-Southwest Trust & Savings Bank as such nominee. This section reads:

"Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate or some portion thereof; and they are, respectively, entitled thereto in the following order:

"1. The surviving husband or wife, or some competent person whom he or she may request to have appointed. * * *

"10. Any person legally competent. * * *

[3] Section 1350a of the Code of Civil Procedure provides that, where an executor named in the will fails to apply for letters or appear and qualify, letters of administration with the will annexed must be issued as designated and provided for in granting of letters in cases of intestacy. Section 1365 of

the Code of Civil Procedure provides that relatives of the deceased are entitled to administer only when they are entitled to succeed to the estate or some portion thereof. The surviving husband or wife are relatives of the deceased within the meaning of said section and are entitled to administer only when they are entitled to succeed to the personal estate or some portion thereof. The rule applies equally to the nominee of such surviving husband or wife. *Estate of Crites*, 155 Cal. 392, 101 P. 316; *Estate of Cook*, 173 Cal. 465, 472, 160 P. 553. In the present case the husband, Joseph P. Mahoney, was not entitled to succeed to any portion thereof. Item IV of the will reads as follows:

"Item IV. I also direct that no part of this my estate shall ever be permitted to pass into the hands of Joseph P. Mahoney, of Chicago, Illinois, either in his individual, personal, or in any representative capacity, and I do direct that the court do not appoint him to any position of trust whatsoever in reference thereto."

[4] In view of the provisions of the will, and in view of the fact that the deceased had established a residence in Texas, as held both by the Texas court and the trial court, the husband, Joseph P. Mahoney, could not assert his dower rights under the Illinois law to property of the decedent situate either in the state of Texas or in the state of California, and therefore was not entitled to succeed to any portion of the estate of decedent. Under the terms of section 1379 of the Code of Civil Procedure administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court. Citizens' Trust & Savings Bank was appointed administrator with the will annexed at the request of the foreign executor. In such case letters may be granted at the discretion of the court in the absence of any application by a person with a prior right under section 1365 of the Code of Civil Procedure. *Estate of Meier*, 165 Cal. 456, 464, 132 P. 764, 48 L. R. A. (N. S.) 858, Ann. Cas. 1914D, 121.

It is ordered that the judgment and orders be affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

85 Cal. App. 714

TANNAHILL v. GREENING et al.
(Civ. 4601.)

District Court of Appeal, Second District, Division 2, California. Sept. 30, 1927.

1. Appeal and error $\hookrightarrow$ 712—Appellate court must rely upon copies of pleadings, findings, judgment of court, and bill of exceptions in transcript for statements of facts or evidence.

Appellate court is compelled to rely on copies of pleadings, findings, judgment of court,

and bill of exceptions shown in transcript for statements of facts or evidence.

2. Quieting title $\hookrightarrow$ 44(1)—In action to quiet title, wherein plaintiff claimed grantee's name was written in blank deed without authority, burden of proof was with plaintiff except as to his consent.

In action to quiet title, wherein plaintiff alleged that he was induced to make deeds with grantee's name in blank to the properties described in action, that deeds were placed in escrow, and that defendants' names were written in as grantees without his authority or consent and defendants claimed that plaintiff consented to insertion of name, burden of proof was with plaintiff, except as to his consent to insertion of name of grantee.

3. Deeds $\hookrightarrow$ 32—Grantor, not being present when grantee's name was inserted in deed placed in escrow, and his consent not being in writing, deed was void.

Where grantor made deed with grantee's name in blank, which he placed in escrow, and grantor was not present when grantee's name was inserted, and his consent was not in writing, deed was void.

4. Appeal and error $\hookrightarrow$ 731(5)—Specifications of insufficiency of evidence to warrant findings, referring to findings by number, are sufficient.

Specifications of insufficiency of evidence to warrant findings, which referred to findings by number, held sufficient.

5. Quieting title $\hookrightarrow$ 43—Where defendant, in action to quiet title, claims title through plaintiff, plaintiff need not prove his title.

In action to quiet title, where defendant claimed title and possession through plaintiff, it was not necessary for plaintiff to prove his title.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action to quiet title by J. M. Tannahill against F. S. Greening, alias Fanny S. Greening, and another. From the judgment, plaintiff appeals. Reversed.

J. R. Jaffray, of Los Angeles, for appellant.
Adair & Winder, of Riverside, for respondents.

PEAIRS, Justice pro tem. Plaintiff alleges that he was induced to make deeds, with grantee's name in blank, to properties described in this action, and that the deeds were placed in escrow with one Mollie L. Ramey; that the name of Mollie L. Ramey was later written in as grantee and then erased and the name of F. S. Greening written instead, all without his authority or consent. The defendants admit the filling in of grantee's name in the deeds, but allege that both plaintiff and his wife were present and consented to the insertion of the name of F. S. Greening as grantee. Bill of exceptions

does not show either presence of plaintiff or consent in writing.

The defendants also allege that plaintiff later signed an agreement to transfer a certificate of water stock running with the land described in said deeds. Defendants further allege that plaintiff, after expressing dissatisfaction with aforesaid deal, accepted, in full settlement of all claims against all defendants, conveyance to him of certain properties in Canada, California, and New Mexico.

[1] This court is compelled to rely upon the copies of pleadings, findings, judgment of the court, and bill of exceptions shown in the transcript for all statements of facts or evidence.

[2] The law places the burden of proof with the plaintiff except as to his consent to the insertion of the name of grantee.

There are three points indicated by this bill of exceptions to which the court will give attention: First, whether a deed in which the grantee's name has been inserted without plaintiff's consent in writing, or not in his presence, is valid; second, the failure of appellant to express in what respect the evidence was insufficient to warrant certain designated findings; and, third, plaintiff's title.

[3] In regard to the first point, as it does not appear that the plaintiff was present when the grantee's name was inserted, nor that his consent was in writing, we think the deed is unquestionably void. In this connection we cite the following California cases: *Videau v. Griffin et al.*, 21 Cal. 390, 392; *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266; *Wunderlin v. Cadogan et al.*, 50 Cal. 613; *Harris v. Barlow et al.*, 180 Cal. 142, 179 P. 682, and *Jones v. Coulter*, 75 Cal. App. 540, 243 P. 487.

[4] As to the second point, the insufficiency

of the evidence to warrant the findings, the specifications refer to the findings by number, and in *Harris v. Duarte*, 141 Cal. 497, 499, 75 P. 58, former Chief Justice Beatty says: "A specification is sufficient when it points to a particular finding. * * *" This is also stated by Justice Olney in *Mills v. Brady*, 185 Cal. 317, 320, 196 P. 776. In *Polkinghorn v. Riverside Portland Cement Co.*, 24 Cal. App. 615, at page 618 (142 P. 140) the correct rule is quoted, and again in *Calexico Lumber Co. v. Emerson*, 54 Cal. App. 239, at page 243 (201 P. 612, 614), Justice Works says:

"The moving party is required to set forth so much of the evidence (and no more) as may be necessary to explain the points specified in his statement or bill of exceptions; and when such statement or bill of exceptions is settled, it will be presumed that it contains all the evidence given in the cause, which was necessary to be stated in order to explain the points specified; and that it would not have presented a different case in respect to the specified points, had it contained also the omitted evidence. It is desirable that counsel shall consider this point as settled."

[5] The third point, defendant claims title and possession through plaintiff; therefore plaintiff need not prove his title. See *Strange v. Strange*, 23 Cal. App. 281, 137 P. 1104.

Taking into consideration that the evidence quoted in the bill of exceptions relates directly to the findings Nos. 1 and 2, and that under the California cases cited above the specifications of insufficiency of evidence to justify the findings are in accordance with the requirements of the Code, the appellant's contentions must be sustained.

Judgment reversed.

We concur: WORKS, P. J.; THOMPSON, J.

85 Cal. App. 670

PEOPLE v. FINLEY. (Cr. 1332.)

District Court of Appeal, First District, Division 2, California. Sept. 28, 1927.

1. Witnesses $\S$ 263—Witness testifying that defendant wore cap during robbery held properly permitted to resume stand and testify that he wore hat.

In robbery trial, there was no error in allowing one of two identifying witnesses to resume stand and testify that defendant wore a hat, at time of robbery, instead of a cap, as was first testified.

2. Criminal law $\S$ 1036(1), 1037(1), 1129(1)—Admission of robbery confession, and prosecutor's references to subsequent robbery attempt, by appellant's codefendant, held not available error, in absence of proper objection or assignment.

Admission of codefendant's confession, and district attorney's references to codefendant's attempted robbery of oil station, in trial for prior robbery of grocery store, held not available to appealing defendant, where not preserved by proper objection or assignment by either defendant.

3. Criminal law $\S$ 673(4), 730(13)—Admission of robbery confession, and prosecutor's references to subsequent robbery attempt, by appellant's codefendant, held not prejudicial, where limited to codefendant.

Admission of codefendant's confession, and district attorney's references to codefendant's attempted robbery of oil station, in trial for prior robbery of grocery store, held not injurious to appealing defendant, where limited to codefendant by objection and ruling.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

William Finley was convicted of robbery, and he appeals. Affirmed.

E. H. Lomasney, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KOFORD, P. J. This as an appeal from a judgment of conviction of the crime of robbery. The evidence showed that the appellant entered the grocery store of Salvatore

Turco in San Francisco and by means of threats with a gun robbed Turco's person and his cash drawer, and also the person of Charles A. Prince, who happened to be in the store at the time. Appellant's codefendant, Webb, sat in an automobile outside the store in aid of appellant during the robbery. Both defendants were jointly tried, and were both convicted, but only Finley has appealed. A few days after this robbery Special Police Officer Green saw Webb at an oil station with a gun in his hand. The circumstances indicated that he was about to commit robbery. After a violent struggle for possession of this gun, in which Webb was severely beaten, he was placed under arrest. From statements and a confession made by him the arrest of appellant followed.

[1] The prosecuting witnesses, Turco and Prince, identified appellant as the robber, first at the police headquarters, and later in court. One of the identifying witnesses, who at first testified that appellant wore a cap at the time of the robbery, was afterwards permitted to resume the witness stand and testify that it was a hat, and not a cap, that was worn. The other identifying witness testified that appellant wore a hat. There was no error in allowing the witness to correct or change his testimony. This was a matter for the jury to take into consideration. Evidently they were satisfied with the identification made of the appellant by the witnesses.

[2, 3] Testimony of Webb's statements and confession were received in evidence at the trial, but by objection and ruling were limited to defendant Webb alone. Appellant makes some strictures on the voluntary character of the confession, and upon the references made by the district attorney to Webb's attempted robbery of the oil station. These points were not preserved by proper objection or assignment by either defendant, and, even if they had been so preserved, and thus made available to defendant Webb, they were not in any event injurious to appellant, Finley.

The judgment and order denying a new trial are affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

85 Cal. App. 672

PEOPLE v. RUSSO. (Cr. 1385.)★

District Court of Appeal, First District, Division 2, California. Sept. 28, 1927.

Rehearing Denied Oct. 27, 1927.

1. Criminal law §1144(1/2)—Ruling will be assumed correct on appeal, when matter is not incorporated in record, nor its substance stated.

Ruling of trial court will be assumed correct on appeal, when appellant does not incorporate matter in record, nor state its substance.

2. Criminal law §1170(1)—Error in excluding question as to having seen others than defendant held not injurious, in view of identification of defendant by nearby eyewitnesses.

Error in sustaining objection to question as to whether witness had seen any one else but defendant running away after shooting held technical and not substantial or injurious, in view of nearby eyewitnesses and their identification of defendant.

3. Criminal law §1120(6)—Exclusion of question as to where letters of defendant were written held not error, where relevancy of matter was not shown.

Sustaining objection to question as to where letters written to defendant's mother were written from cannot be complained of, where no further questions or offer of testimony was made to show relevancy of matter inquired about.

4. Criminal law §787(2)—Unrequested instruction, that defendant's failure to take stand should not be held prejudicial, held proper (Pen. Code, § 1323).

Unrequested instruction, that fact that defendant did not take stand should not be held by jury to be prejudicial to any of his rights, being substantially in accord with Pen. Code, § 1323, held proper.

Appeal from Superior Court, City and County of San Francisco; Stanley Murray, Judge.

Rocco Russo was convicted of murder in the first degree, and he appeals. Affirmed.

Nathan C. Coghlan and Walter Duane, both of San Francisco (Austin W. Arnold, of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

KOFORD, P. J. Defendant appeals from a judgment of conviction of the crime of murder in the first degree. Upon recommendation of the jury, the sentence was imprisonment. The testimony shows that the defendant shot and killed Rosilina La Fata upon a public street in San Francisco on February 27, 1924. Defendant was identified by Witness Robert Lantz, who was standing within a few feet of the deceased at the time of the murder, and also by Witness Martin M. Armstrong, who heard the fatal shots fired and

saw the defendant fleeing the scene of the murder.

The assignments of error are certain rulings sustaining objections to evidence, and one instruction given.

[1, 2] On cross-examination, Witness Lantz was asked if he had any particular business that took him to the soft drink parlor which was in the neighborhood of the crime, where he had met the deceased. A general objection to this question was sustained. Appellant suggests several possible ways in which an answer to this question might be of benefit to the defendant, but they are not called for by the question. Also the record shows that the cross-examination of the witness did not restrict inquiry into the subject-matters now suggested by appellant. The defense was not permitted to ask this witness a question concerning a certain part of his testimony shown in the transcript of proceedings before the grand jury. The objection made was that it was not impeachment. Appellant has not incorporated this matter in the record, nor even stated its substance, and consequently we must assume that the ruling complained of was correct. An objection was sustained when this witness was asked, on cross-examination, whether he had seen any one else but the defendant "run down that way" after the shooting. This question could properly have been allowed as testing the witness' recollection in the discretion of the court, or as a part of the *res gestæ*, but the ruling does not appear to have been injurious. In view of the nearby eyewitnesses to the murder and their identification of the defendant, which in no way depended upon what happened after the shooting, this was not an important part of the *res gestæ*. The error was technical, and not substantial.

[3] The defendant's mother was permitted to testify that she had received letters from her son after about the middle of February, 1924. An objection was sustained to the question, "Do you know where those letters were written from?" Apparently the question called for the witness' opinion or conclusion. Upon this objection being sustained, no further proof was offered on the subject. If appellant sincerely desired to prove that defendant had written and mailed letters at a time and place indicating his absence from the place of the crime on February 27, 1924, he was not foreclosed by this ruling from putting proper questions and offering proper testimony upon that point.

[4] The appellant did not testify in his own behalf. He offered no instruction concerning this fact. The court instructed the jury, upon its own motion, that "the fact that he does not take the stand should in no sense be held by you to be prejudicial to any of his rights." This is substantially the same meaning as expressed in Penal Code, § 1323, by the expression "cannot in any manner prejudice him." The instruction given in *People v.*

Emmons, 13 Cal. App. 487, 492, 493, 110 P. 151, was different, for, as was pointed out in *People v. Ruef*, 14 Cal. App. 576, 610, 114 P. 48, 54, instead of stating that his failure to take the stand should not create a prejudice or unfavorable inference against him, it called the jury's attention to the fact that had the defendant been a witness he could have been cross-examined. The instruction here does not contain this objectionable part and was properly given.

The judgment and order appealed from are affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

85 Cal. App. 706

PULLEN v. GARRISON, County Auditor.*
(Civ. 5918.)

District Court of Appeal, First District, Division 1, California. Sept. 30, 1927.

Hearing Denied by Supreme Court Nov. 28, 1927.

1. Counties ⇐62—County supervisors held authorized to adopt system of civil service regulations for county offices pursuant to power given by charter (Const. art. 11, § 7½).

Where charter adopted by county pursuant to Const. art. 11, § 7½, clearly manifested intention to give supervisors power to regulate appointments to county offices by ordinance, such supervisors were authorized to adopt a system of civil service rules and regulations to determine fitness of those seeking appointments.

2. Counties ⇐62—Charter held to authorize county supervisors to require civil service commission to conduct examinations for candidates for appointment to county offices (Const. art. 11, § 7½).

Under provision of charter adopted by county pursuant to Const. art. 11, § 7½, requiring supervisors to provide by ordinance for creation of commissioners other than those required by Constitution and state laws, such supervisors were authorized to provide that civil service commission should prepare rules and regulations and hold examinations to determine fitness of candidates for county offices, and to provide that deputies should be appointed from eligible list to be created by commission.

3. Counties ⇐62—Charter provisions held not to contemplate that civil service positions should not take effect until passage of appropriation ordinance by county supervisors (Const. art. 11, § 7½).

Provisions of county charter adopted pursuant to Const. art. 11, § 7½, that classification of positions in civil service should not be final until approved by supervisors in annual appropriation ordinance, held not to contemplate that positions should not take effect until passage of such ordinance.

4. Counties ⇐62—County ordinance relating to civil service and appointment of deputies to county offices held valid and to supersede general law (Const. art. 11, § 7½).

Ordinance of supervisors of county which had adopted charter pursuant to Const. art. 11,

§ 7½, providing for civil service and method of appointing deputies for county offices, held valid, and to supersede provisions of general law.

Application by Robert E. Pullen for writ of mandate, prayed to be directed to E. F. Garrison, as auditor of the County of Alameda. Writ denied.

Snook, Snook & Chase, of Oakland, for petitioner.

Earle Warren, Dist. Atty., and Frank M. Ogden, Deputy Dist. Atty., both of Oakland, for respondent.

Everett W. Mattoon, County Counsel, and Homer I. Mitchell and R. C. McAllaster, Deputies County Counsel, all of Los Angeles, for intervener, County of Los Angeles.

John L. Reith, of Oakland, amicus curiæ.

CASHIN, J. A proceeding in mandamus to compel respondent, as auditor of the county of Alameda, to pay to petitioner compensation as a deputy sheriff of that county for the month of June, 1927. It was stipulated by the parties:

That at the general election held on November 2, 1926, a charter was adopted for the county of Alameda, which charter was ratified and approved by the Legislature on January 18, 1927; that on the latter date, and subsequent to the act of the Legislature, the board of supervisors of the county adopted two emergency ordinances, neither of which has been repealed, numbered 162 and 163, the first providing for a civil service for the county, and the second for the number and compensation of deputies employed in the offices and institutions of the county; that since January 19, 1927, Leon A. Clark, E. C. Lyon, and O. D. Hamlin have been and now are the appointed, qualified, and acting civil service commissioners of the county, and as such constitute the civil service commission thereof; that ever since January 3, 1927, B. F. Becker has been the duly elected, qualified, and acting sheriff of Alameda county; that on that date Robert E. Pullen, the petitioner herein, was appointed by the sheriff a deputy sheriff of the county and that he qualified and commenced his duties as such; that on January 18, 1927, and subsequent to the ratification of the charter and the adoption of the above ordinances, the sheriff again appointed petitioner to the position of deputy sheriff and at the same time appointed 17 other persons to like positions; that none of the persons so appointed had been an appointive officer or employee of the county or any subdivision thereof for six months prior to the taking effect of the charter; that the salary fixed for each of said 18 positions was and is the sum of \$180 per month, and that petitioner again on the last-mentioned date qualified as a deputy sheriff

and has continued to perform the duties of the office; that on April 16, 1927, the said civil service commission prepared and held an open competitive examination in order to test the relative fitness of all applicants for appointment to the position of deputy sheriff; that petitioner applied for appointment to one of the positions and as such applicant and candidate participated in said examination; that the positions to which said examination pertained included the 18 positions above mentioned; that of the number of applicants taking such examination 95 passed the examination with a rating of over 70 per cent.; that the rating of petitioner was 78.18 per cent.; that upon the grading of the 95 persons who passed the examination with a rating of over 70 per cent., commencing with the person who had the highest rating, followed by the remaining applicants in a uniformly descending scale of percentage, petitioner was the forty-fifth person appearing upon such list; that on May 10, 1927, the civil service commission created and adopted an eligible list for the said positions of deputy sheriff and that the name of petitioner appeared thereon; that on May 16, 1927, the civil service commission certified to B. F. Becker, as sheriff, a list of 20 names, to wit, the first 20 names appearing on said eligible list as eligible to appointment to 18 positions as deputy sheriff; that the name of petitioner did not appear on said list; that the sheriff has never notified the civil service commission that the 18 positions are to be filled, and subsequent to January 18, 1927, has never appointed as deputy sheriff any of the 20 persons whose names appear on the list last mentioned, or reappointed any of the 18 persons appointed on January 18, 1927; that since January 3, 1927, petitioner has continuously performed the duties of deputy sheriff in a manner satisfactory to the sheriff, has not been removed or discharged by any act of the latter, and has received from the county his salary in full to and including the month of May, 1927, but has received no salary or compensation for the month of June, 1927.

The charter was framed and adopted pursuant to section 7½ of article 11 of the Constitution, which provides:

"That it shall be competent in all charters framed under the authority given by this section, * * * in addition to any other provisions allowable by this Constitution, and the same shall provide, for the following: * * *

(4) For the powers and duties of boards of supervisors. * * * (5) For the fixing and regulation by boards of supervisors, by ordinance, of the appointment and number of assistants, deputies, clerks, attaches and other persons to be employed, from time to time, in the several offices of the county, and for the prescribing and regulating by such boards of the powers, duties, qualifications and compensation of such persons, the times at which, and terms for

which they shall be appointed, and the manner of their appointment, and removal. * * *

The section also provides that:

"All charters framed under the authority given by this section, in addition to the matters herein above specified, may provide * * * for offices other than those required by the Constitution and laws of the state, or for the creation of any or all of such offices by boards of supervisors, * * * for the manner of such appointment, * * *" and, further, "that whenever any county has framed and adopted a charter, and the same shall have been approved by the legislature, * * * the general laws adopted by the legislature in pursuance of sections 4 and 5 of this article, shall as to such county, be superseded by said charter as to matters for which, under" section 7½ "it is competent to make provision * * * and for which provision is made therein, except as otherwise expressly provided."

Section 11 of the charter provides:

"That the board of supervisors shall have all the jurisdiction and powers which are now and which may be hereafter granted by the Constitution and laws of the state of California or by this charter."

And by section 12 it is made the duty of the board of supervisors:

"(b) To provide by ordinance for the compensation of elective and appointive officers, assistants, deputies, clerks, attaches and employees unless such compensation is otherwise fixed by this charter; * * * (d) to provide by ordinance for the number of assistants, deputies, clerks, attaches and other persons to be employed from time to time in the several offices and institutions of the county; * * * and (e) to provide by ordinance for the creation of offices, boards and commissions otherwise than required by the Constitution and laws of the state, and for the appointment of persons to fill such offices, board and commissions, and to prescribe their powers and duties and fix their compensation."

The charter makes direct provision for a system of civil service, section 33 thereof providing in part as follows:

"There is hereby created a civil service commission consisting of three electors of the county. * * * The board of supervisors shall within two weeks after this charter takes effect appoint three electors of the county as members of the commission, to take office as soon as appointed and qualified."

By section 15 the members of the commission are made appointive county officers. By section 35 the civil service of the county is divided into an unclassified and a classified service, in the latter class being placed the position of deputy sheriff to which the petitioner was appointed. It was made the duty of the commission to provide for the standardization and classification of all positions in the classified service, the classification to be based upon and graded according to the

duties and responsibilities of such positions, and to prepare and hold competitive examinations in order to test the relative fitness of all applicants for appointment in the classified service. Charter, § 36.

It is provided by section 63 that each county officer shall appoint from the eligible civil service list, except as otherwise provided in the charter for either permanent or temporary service, all deputies, clerks, etc., in the office or department of such officer, and by section 37 that, whenever a position in the competitive classified civil service is to be filled, the appointive authority shall notify the commission of that fact, and the commission shall certify the names and addresses of the three candidates standing highest on the eligible list for the class or grade to which such position belongs, and the appointing authority shall appoint to such position one of the three persons certified to him. It is also provided by section 45 that:

"If any portion of this charter relating to civil service should be held to be unconstitutional the board of supervisors shall by ordinance provide for a civil service of the county, prescribe the duties of the civil service commission and such civil service rules and regulations as they shall deem proper to govern the appointment of any and all officers, assistants, deputies, clerks, attaches and other persons to be employed in the several offices and institutions of the county."

The board of supervisors by Ordinance No. 162 also provided for a complete system of civil service; the provisions of the charter relating thereto, except section 45, being embodied therein. The ordinance also adopted the provisions of section 63 of the charter and required that each county officer should appoint from the eligible civil service list, except as therein provided, the exceptions being those of the charter, for either permanent or temporary service in the office or department of such officer, all deputies, etc., as the number is fixed by the board of supervisors, and, further, that each county officer might appoint any person without reference to the eligible list to fill a vacancy in the classified civil service in the office of such officer whenever no examination had ever been held for such position, or whenever there should be no eligible civil service list for such position, such appointee to serve until an eligible civil service list for such position should be created and an appointment made therefrom, but in no event to exceed 20 days after the creation of such eligible list.

Ordinance No. 163 fixed the number and compensation of the deputies in the several county offices, including that of the sheriff, and provided that such deputies should hold their respective positions and be transferred, reduced, or discharged according to the provisions of the charter and the ordinance and

rules adopted thereunder by the board of supervisors and the rules of the civil service commission.

Petitioner claims that the provisions of the general law empowering the sheriff to appoint deputies and fixing their qualifications have not been superseded by the charter, but remain in full force and effect. In support of this contention it is claimed that the charter contains no provision, as required by section 7½ of article 11 of the Constitution, for the fixing and regulation by the supervisors of the qualifications and manner of appointment of deputies; that the sections of the charter providing that their qualifications be determined in accordance with civil service rules and regulations, and that appointments be made from eligible lists created by the civil service commission, are violative of the above section of the Constitution, which, according to the contention of the petitioner, requires that such matters be fixed and regulated by ordinance and not by the charter; and, further, that if the board of supervisors were empowered to provide by ordinance for a system of civil service, as a condition to the exercise of the power it was made essential by section 45 of the charter that the civil service provisions thereof should have been held unconstitutional.

[1] It is held in *Jones v. De Shields*, 187 Cal. 231, 202 P. 137, that section 7½ of article 11 of the Constitution does not authorize the Legislature, or a county by means of a charter, to provide directly for the appointment of deputies, but, as prescribed by subdivision 5 of the section, the charter must provide for the fixing and regulation of such appointments by the board of supervisors by ordinance; otherwise, the general law is not superseded. In the present case, however, while the charter does not in express terms provide for the fixing and regulation by the supervisors of the qualifications and manner of appointing deputies, section 11 thereof provides that the "board of supervisors shall have all the jurisdiction and powers which are now or which may be hereafter granted by the Constitution * * * or by this charter," and section 45 makes it the duty of the supervisors, in the event any portion of the charter relating to civil service should be held unconstitutional, to provide by ordinance for a civil service for the county. The latter section prescribes the exercise of a power which is not only recognized as existing, but which by implication the section confers upon the supervisors. Moreover the power is not limited by the section—only the duty to exercise it. These sections clearly manifest the intention to give the supervisors power to regulate appointments by ordinance, and were a sufficient compliance with the requirement that provision therefor be contained in the char-

ter. Having the power, that the supervisors might in its exercise adopt a system of civil service rules and regulations, whereby the relative fitness of those seeking appointment could be determined and appointments made accordingly, admits of no serious question.

[2] As stated, section 33 of the charter creates a civil service commission of three members, who were, as therein provided, appointed by the supervisors. The commission was created pursuant to the above section of the Constitution, which authorizes a provision "for offices other than those required by the Constitution and laws of the state, * * *" and by subdivision (e) of section 12 of the charter it was also made the duty of the supervisors to provide by ordinance for the creation of offices, boards, and commissioners other than those required by the Constitution and laws of the state, and to prescribe their duties and powers. Under this provision it was competent for the supervisors to provide, as was done by ordinance No. 162, that it should be the duty of the commission to prepare rules and regulations and hold examinations for the purpose of determining the relative fitness of candidates for appointment, and, further, under their general power to regulate appointments, to provide that deputies should be appointed from the eligible list to be created by the commission.

[3] Petitioner further contends that the

provision of the charter—which was also adopted by the ordinance—that no standardization or classification of positions in the civil service as to salaries made by the commission should be final, until approved by the supervisors in their annual appropriation ordinance, contemplated that the civil service provisions should not take effect until the passage of the annual appropriation ordinance on the first Tuesday of September, 1927, and, further, that the ordinances, although adopted as emergency measures, did not take effect until 30 days after their passage. We find no merit in the first contention, and both ordinances took effect in any event before the examinations were held and the eligible list prepared, and, so far as appears, before civil service rules and regulations were adopted by the commission.

[4] It is our conclusion that the ordinance providing for civil service was valid, and that its provisions relating to the method of appointing deputies superseded those of the general law. It will therefore be unnecessary to consider the question of the constitutionality of the civil service provisions of the charter. And it appearing that the appointment of petitioner under the provisions of the ordinance terminated 20 days after the eligible list was created by the civil service commission, the writ prayed for is denied.

We concur: TYLER, P. J.; KNIGHT, J.

Eric Lyders, of San Francisco, for appellant.

A. P. Dessouslavy, of San Francisco, for respondent.

SEAWELL, J. Claus Albert Clausen died testate April 3, 1925, a resident of the county of Marin, this state. He was unmarried and left neither children, nor father, nor mother surviving him. He left as his sole heirs at law seven brothers, three sisters, four children of a deceased sister, and five children of a deceased brother. By his will he bequeathed and devised to his brothers and sisters and to the children or issue of any deceased brother or sister (such children or issue to take by right of representation) all property of which he might die seized or possessed. The heirs whose distributive shares are the concern of this proceeding are the children of said deceased brother and sister and are residents of the Kingdom of Denmark. The executor of said estate, having brought the proceeding to the stage where it was proper to make partial distribution of the same, petitioned the court to make a decree to that effect, which was accordingly made and entered by the court, whereupon Fin Lund, as the accredited consul of Denmark, whose consular district embraced the whole state of California, filed a petition wherein he prayed that the executor of said estate be ordered to pay the distributive shares of said foreign heirs to him to be by him remitted through the agency of the government of Denmark to the proper distributees, and that the petitioner be directed to furnish evidence of such remission. A general demurrer to the petition was sustained and an order subsequently made and entered denying said petition. It is from this order that the appeal was taken. Said consul claims by authority of his official station as consul of Denmark the right to receive and receipt for the shares of said estate ordered by said decree to be distributed to the children of said sister and brother of decedent, respectively, all of whom are residents of and subjects of the King of Denmark. This right is asserted under and by virtue of the provisions of the treaty existing between the United States of America and the King of Denmark, ratified August 10, 1826, and proclaimed by the President of the United States October 14, 1826 (8 U. S. Stats. 340). Said treaty is entitled "General Convention of Friendship, Commerce, and Navigation," and it has not been modified during its one hundred years of existence in any material respect. Said treaty by its express provisions is strictly a treaty of commerce and navigation. Those are the only subjects treated of therein. Every article of said treaty deals with commerce and navigation between the two nations and does not purport to deal with any other subjects. The preamble, or introductory para-

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In re CLAUSEN'S ESTATE. (S. F. 12491.)
Supreme Court of California. Oct. 10, 1927.

1. Treaties ☞8—Most favored nation clause of Danish commercial treaty does not entitle Danish consuls to receive Danish heirs' shares in decedents' estates (Treaty of Oct. 14, 1826, with Denmark [8 Stat. U. S. 340]; Treaty with Germany [44 Stat. U. S. p. 2153].

Provision of Treaty of Oct. 14, 1826, with Denmark (8 Stat. U. S. 340) that Danish consuls shall enjoy all rights of consuls of the most favored nation does not entitle such consuls to receive and receipt for Danish heirs' distributive shares in decedents' estates because Treaty with Germany (44 Stat. U. S. p. 2153) gives German consuls such right as to shares of German heirs; Danish treaty relating to navigation and commerce only.

2. Ambassadors and consuls ☞5—Consul's right to receive foreign subjects' shares in decedents' estates must be granted by treaty.

Right asserted by consul to receive and receipt for distributive shares of subjects of foreign nation in decedents' estates is more than a right, privilege, or immunity ordinarily accorded representatives of foreign powers and naturally within purview of comity of nations, but must be granted by treaty.

3. Treaties ☞7—Treaties are interpreted according to same rules as other documents.

Treaties are subject to the same rules of interpretation as other documents.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

In the matter of the distribution of the estate of Claus Albert Clausen, deceased. From an order denying a petition by Fin Lund, Consul of Denmark, for payment to him of the distributive shares of the Danish heirs residing in Denmark, he appeals. Affirmed.

graph, sets out very clearly and specifically the subject-matter of said treaty in the following language:

"The United States of America and His Majesty the King of Denmark, being desirous to make firm and permanent the peace and friendship which happily prevail between the two nations, and to extend the commercial relations which subsist between their respective territories and people, have agreed to fix, in a manner clear and positive, the rules which shall in future be observed between the one and the other party, by means of a general convention of friendship, commerce, and navigation.
* * *

[1] Because the "most favored nation" clause appears in article 8 of said treaty, which is regulatory of commercial and navigation relations between the two nations, it is claimed that whatever treaty rights or privileges any other nation may have secured to itself by reason of its treaty agreements with the United States are, *ex gratia*, it would appear, extended to all other nations though not parties to said treaty agreements, provided the treaties with said nations which are strangers to said treaty agreements contain the "most favored nation" clause. The article of the Danish treaty which is relied upon as conferring upon the consul of Denmark the right to receive and receipt for the distributive shares of Danish heirs, because such a right is given to a consular officer of Germany in express terms, provides:

"Article 8.

"To make more effectual the protection which the United States and His Danish Majesty shall afford in future, to the navigation and commerce of their respective citizens and subjects, they agree mutually to receive and admit consuls and vice consuls in all the ports open to foreign commerce, who shall enjoy in them all the rights, privileges, and immunities, of the consuls and vice consuls of the most favored nation, each contracting party, however, remaining at liberty to except those ports and places in which the admission and residence of such consuls may not seem convenient."

By the language of the article above set out, it is manifest that the rights, privileges, and immunities guaranteed to consuls are relative to navigation and commerce, granting to the consuls of each contracting nation the rights, privileges, and immunities that are germane to and tend to assist or promote commerce and navigation, and such other rights and privileges as friendly nations accord to one another. Said Danish treaty contains no words equivalent to the language expressly inserted in the German treaty which appellant seeks to adopt by reference. That treaty provides:

"A consular officer of either high contracting party may in behalf of his nonresident countrymen receipt for their distributive shares derived from estates in process of probate or accruing under the provisions of so-called Work-

men's Compensation Laws or other like statutes provided he remit any funds so received through the appropriate agencies of his government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission." 44 U. S. Stats. part 3, p. 2153, U. S. Treaty Series No. 725.

Our treaty with Denmark was ratified almost a century before the right contended for by appellant was given to any nation or inserted in any treaty to which this nation was a party. Obviously it was not within the contemplation of either of the powers in our treaty with the King of Denmark to confer upon the consul or vice consul of Denmark a right not then given to other nations. Neither is there anything in said Danish treaty that would justify the construction sought by appellant to be placed upon it. In fact, it does not contain the provisions found in numerous modern treaties made by this nation with other nations to the effect that future privileges and immunities accorded to the consuls of the most favored nations will inure to the benefit of Denmark. It may, however, by a reasonably liberal construction, be held that any privileges, rights, or immunities granted to consuls of other nations, if within the scope of the subject dealt with in our treaty with Denmark, would also inure to the benefit of the Danish consuls or other representatives.

[2] The right asserted by appellant is not a mere right, privilege, or immunity ordinarily accorded to consular or other representatives of a foreign power which may be said to naturally come within the purview of the comity of nations. It is obviously something more. Whether or no either of the treaty-making powers, the United States or Denmark, intended to confer upon its consular officers the authority claimed by appellant nowhere appears in the treaty, and an American court might properly be chargeable with unwarranted presumption should it attempt, in the absence of language plainly expressing or necessarily implying such intent, to confer upon the consulate of foreign nations powers or privileges in important matters not conferred upon them by the nations which they represent. In other words, the policy of imposing upon consuls and other representatives the duty of receiving and receipting for property transmissible to subjects of the nation they represent from foreign jurisdictions is a matter of high concern to the subjects and the ruling powers with which no other nation may properly interfere. If the Kingdom of Denmark desires to depart from the long-established practice of transmitting to its subjects their distributable shares of estates due them from foreign lands, it is most reasonable to assume that it would negotiate a treaty to that effect or express its desire in some other official form. It is to be kept in mind that this nation also is charged

with a duty and obligation in the premises, for the discharge of which duty its officers and agents can be held to strict accountability under the law.

[3] Applying the well-recognized rule that treaties are subject to the same rules of interpretation as other documents, and aided by the further consideration that those nations which have deemed it wise to change the rule of transmitting property acquired from estates in foreign lands to their subjects to whom distribution is ordered, have done so by express treaty provisions, we conclude that inasmuch as the treaty made between the United States and the King of Denmark contains no such provision or article, the appellant is without authority to maintain this proceeding.

The order appealed from is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

202 Cal. 239

LONDON GUARANTEE & ACCIDENT CO., Limited, v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (L. A. 9762.)★

Supreme Court of California. Sept. 30, 1927.

Rehearing Denied Oct. 27, 1927.

1. Master and servant §373—Injury direct result of earthquake neither arises out of, nor is proximately caused by, employment (Workmen's Compensation Act, § 6a).

Injury to employee as direct result of an earthquake does not arise out of employment and is not proximately caused thereby, within Workmen's Compensation Act (St. 1917, p. 834) § 6a.

2. Master and servant §371—Injury must be natural consequence of risk of employment to be compensable (Workmen's Compensation Act, § 6a).

To recover compensation under Workmen's Compensation Act (St. 1917, p. 834) § 6a, there must be causal connection between employment and injury, originating in, and flowing as rational and natural consequence from, risk connected with employment, and mere fact that employment brought injured party to place of injury is insufficient.

3. Master and servant §417(5)—Court must assume, where evidence was conflicting, that award for employee's death was based on evidence of improper construction of building destroyed by earthquake.

Where there was substantial conflict in evidence as to manner of construction of building destroyed by earthquake, Supreme Court must assume that award of compensation for death of employee by falling walls was made by Industrial Accident Commission in reliance on evidence that building was constructed of inferior materials or by improper workmanship.

4. Master and servant §373—Death of janitor of building, which might not have fallen in earthquake, if properly constructed, arose out of employment.

Death of janitor by collapse of building, which might not have fallen from effect of earthquake shock, except for inferior character of its construction, was due in part at least to nature of employment, and hence could reasonably be said to have arisen out of employment; deceased being exposed to greater risk than public generally.

In Bank.

Certiorari to review an order of the Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Louisa Mosteiro for compensation for the death of Segismundo Mosteiro, employee, opposed by decedent's employer and the London Guarantee & Accident Company, Limited, insurance carrier. Compensation was awarded by the Industrial Accident Commission, and the insurance carrier brings certiorari. On hearing after judgment of the Court of Appeal (253 P. 323) annulling the award. Award affirmed.

Heaney, Price & Postel, of Santa Barbara, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

W. P. Butcher, Jr., of Santa Barbara, for respondent Louisa Mosteiro.

Faries & Williamson, of Los Angeles, amici curiæ.

CURTIS, J. Proceeding brought to review and annul an award made by the Industrial Accident Commission in favor of Louisa Mosteiro for the death of her husband, Segismundo Mosteiro, who was killed by the falling walls of the San Marcos building in the city of Santa Barbara. Segismundo Mosteiro was employed as a janitor in said building. The walls of the building collapsed during an earthquake which occurred in said city on the morning of June 29, 1925, at the hour of 6:45. The evidence is without conflict that Mosteiro was struck and killed by the falling walls of said building while performing services arising out of his employment. The finding of the commission was that—

"Segismundo Mosteiro, deceased, while employed as a janitor on June 29, 1925, at Santa Barbara, Cal., by defendants, * * * sustained injury occurring in the course of and arising out of his employment as follows: Was struck by portions of the building in which he was working, proximately causing his death the same day."

[1, 2] If the injury sustained by Mosteiro was the direct result of the earthquake, the award cannot be sustained. Such an injury did not arise out of the employment, nor in

the terms of section 6 (a) of the Workmen's Compensation Act (St. 1917, p. 834) is it "proximately caused by the employment." There must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury. There must be a causal connection between the employment and the injury which had its origin in a risk connected with the employment, and flowed from that source as a rational and natural consequence." *Larson v. Industrial Acc. Comm.*, 193 Cal. 406, 409, 224 P. 744, 745; *California Casualty Indemnity Exch. v. Industrial Acc. Comm.*, 190 Cal. 433, 213 P. 257. As was said by this court in the recent case of *Storm v. Industrial Acc. Comm.*, 191 Cal. 4, 7, 214 P. 874, 875:

"To render an injury compensable there must be discernible some relationship of cause and effect between the employment and the injury, 'It is not sufficient for a workman to say, 'I should not have been injured unless I had been where I was and doing the work which I was employed to do.'" *Cooper v. Northeastern Ry. Co.*, 9 B. W. C. C. 129. It must be shown, in addition, that the injury was a natural or probable result of the employment, or of the conditions thereof. Such would seem to be the meaning of the requirement that it must have been 'proximately caused by the employment.'"

The responsibility of an employer for an injury sustained by his employee resulting from an earthquake or other like peril has frequently been the subject of judicial determination, and the rule applied by the courts almost universally is as follows:

"As a general principle, the employer is not responsible for damages caused to his workmen by lightning, storms, sunstroke, freezing, earthquake, floods, etc. These are considered as 'force majeure,' which human vigilance and industry can neither foresee nor prevent. The victim must bear alone such burden, inasmuch as human industry has nothing to do with it and inasmuch as the employee is no more subject thereto than any other person. Every human being is liable to suffer from events in which he has no share of responsibility." 28 R. O. L. 806; *State v. District Ct.*, 138 Minn. 260, 164 N. W. 917, L. R. A. 1918F, 921; *Griffith v. Cole*, 183 Iowa, 415, 165 N. W. 577, L. R. A. 1918F, 923; *Klawinski v. Lake Shore, etc., R. Co.*, 185 Mich. 643, 152 N. W. 213, L. R. A. 1916A, 342.

[3, 4] However, in support of said award the respondent relies upon the finding of the commission that the injury sustained by deceased arose out of his employment and that the proximate cause of his death was that he was struck by portions of the building in which he was working. Respondent contends that there was evidence before the commission which justified this finding. The evidence so relied upon was that which was offered for the purpose of establishing that the fatal injury suffered by decedent prox-

imately resulted not wholly from the earthquake, but in part, at least, from the defective construction of the building which would not have fallen from the effect of the shock of the earthquake had it not been constructed of inferior materials. Upon the question of the proper or improper construction of the building, a large amount of evidence was introduced before the commission. It was shown that the earthquake of June 29, 1925, was the most serious disturbance of its kind that had occurred in said city during its history of over 100 years; that many apparently substantial buildings in the near vicinity of the San Marcos building had been destroyed or severely injured as the result of said disturbance and that some 13 persons lost their lives as a result thereof; that the San Marcos building was constructed according to plans and specifications prepared by a qualified architect and by structural engineers; that all materials such as rock, sand, cement, and steel which went into the construction of said building were thoroughly tested before being used; that the mechanical construction of the building was in accordance with the accepted standards and methods in use at the time it was built; and that after the earthquake a chemist had subjected specimens of the cement taken from the building to a scientific test and found that the specimens so tested showed a sustaining strength of more than 1,400 pounds, whereas the general average of all standards of cement is 1,000 pounds. On the other hand, there was evidence that buildings in the near vicinity of the San Marcos building and similar in character were only slightly damaged by said earthquake; that the San Marcos building was a reinforced concrete building; and that specimens of concrete from the building showed that it was improperly mixed, resulting in an improper bond between the cement and the gravel or other material in which it was mixed. One witness testified that a drill would go through the cement "like a piece of cheese." O. H. O'Neill, a witness before the commission, whose occupation was that of engineer and surveyor and who testified that he had had 10 to 12 years' experience in the use of cement in constructing bridges and highways, also testified as follows:

"A. What I saw—it was a very superficial examination—I noted that the fractures through the beams or columns were not fractures through the coarse aggregate or rock used in the material, and instead of breaking on through as a homogenous would they separated around the particles of crushed rock or gravel used in the construction.

"Q. What would that indicate? A. That would indicate a lack of perfect bond between the cement or mortar, which is composed of sand and cement and the rock aggregate used in the material.

"Q. Would that result either from not a proper mixing or too hasty mixing? A. It would result from the use of too much water or dirty sand or lack of proper mixing.

"Q. What do you mean by lack of proper mixing? A. The theory of concrete is that each particle of sand must be coated with cement and each stone coated with cement and then the mortar bonding all that together; and if you do not mix it long enough each particle of sand does not get coated with cement, neither does each portion of aggregate get bonded together with the mortar."

T. W. Osgood, assistant superintendent of the department of safety, California Industrial Commission, testified before the commission as follows:

"A. At the time I first saw the building it was in collapse; there were two or three points that I noted, one of them was the fact that the concrete in a great many instances was stripped from the reinforcing rods, and that the mass of concrete as a whole broke rather fine in the collapse. I picked up three pieces of concrete the size of a man's head, approximately, and pounded them either on the pavement or one against the other, in which three cases there appeared lack of cohesion between the coarser aggregate.

"Q. You mean cohesion between the reinforcing aggregate and the mortar? A. Between the stones making up the coarser aggregate. The reinforcing steel at the joints where I observed it was joined with pipe, ferrules, the reinforcing steel being butt-ended together inside a ferrule which was approximately 12 to 14 inches in length. That at one time was considered perhaps suitable construction; it is past, however; I don't know of any construction where that system is used."

He further testified in answer to questions propounded to him:

"Q. Could you without a test of the cement form a conclusion as to its quality? A. The quality of the cement—well, I wouldn't hesitate to say that it is not first class.

"Q. In what particulars was it deficient? A. As before stated, there was a lack of cohesion or cementing between the various stones which made up the coarser aggregate.

"Q. And what would cause that lack of cohesion? A. That might be due to a variety of conditions; foreign matter in the mixture is inert material, shortage or excess of water, poor cement. That is all that I have in mind right now."

We also find the following in Mr. Osgood's testimony:

"Now, in the San Marcos building (and I will make this a general statement affecting the other buildings that were damaged) the prime cause of failure was due to a general disregard to the precautions which can reasonably be expected to resist the stresses sent up by an earthquake; and by those precautions I mean this: A tying together of the structural part of the building either by means of structural steel columns, beams, and girders, or by heavily reinforced concrete. Those, I believe, cover

my ideas for the causes of failure under earthquake conditions."

It is apparent from the foregoing statement that there was a substantial conflict in the evidence before the commission regarding the manner of the construction of the San Marcos building, and in passing upon the power of the commission to make the award in favor of the applicant we must assume that said award was made by the commission in view of and in reliance upon the evidence before it which tended to show that said building was constructed of either inferior materials or by improper workmanship. If, then, the decedent was compelled to carry on his employment in a defectively constructed building which may not have fallen from the effect of the earthquake shock except for the inferior character of its construction, then the injury received by him was, in part at least, due to the nature of his employment, and, we think, was such an injury which can reasonably be said to have arisen out of his employment. As was said by the Supreme Court of Illinois in the case of *Central Ill. Service Co. v. Indus. Com.*, 291 Ill. 256, 126 N. E. 144, 13 A. L. R. 967:

"We believe the reasonable rule to be that if deceased, by reason of his employment, was exposed to a risk of being injured by a storm which was greater than the risk to which the public in that vicinity was subject, or if his employment necessarily accentuated the natural hazard from the storm, which increased hazard contributed to the injury, it was an injury arising out of the employment although unexpected and unusual."

In *State ex rel. People's Coal & I. Co. v. District Court*, 129 Minn. 502, 503, 153 N. W. 119, L. R. A. 1916A, 344, the Supreme Court of Minnesota said:

"If the deceased was exposed to injury from lightning by reason of his employment, something more than the normal risk to which all are subject, if his employment necessarily accentuated the natural hazard from lightning, and the accident was natural to the employment, though unexpected or unusual, then a finding is sustained that the accident from lightning was one 'arising out of employment.'"

There can be no question in this case that the deceased by being compelled to perform his work in a building defective in construction was exposed to a risk of being injured by an earthquake which was greater than that to which the public generally in that vicinity was subject. It follows, therefore, that the injury received by him was one arising out of his employment.

While the earthquake, an act of God, may have contributed to the injury, yet it was not the sole cause of such injury, and except for the intervention of some human

agency might not have produced any injury whatever. In discussing the meaning of an act of God, the author of Corpus Juris, volume 1, pp. 1173 and 1174, says:

"The phrase has been otherwise defined as * * * an act of nature which implies entire exclusion of all human agency."

In an early case before the Supreme Court of this state, Mr. Justice Sanderson expressed the rule in the following language:

"What acts are to be regarded in the legal sense as 'acts of God' is well settled. * * * The expression excludes the idea of human agency, and if it appears that a given loss has happened in any way through the intervention of man, it cannot be held to have been the act of God, but must be regarded as the act of man.

"Can a different rule be applied to the interpretation of the expression 'the act of the elements'? Is it more comprehensive than the former? Does it include acts which the former does not? The answer is not material to the present purpose; for be that as it may, for the purpose of determining the cause of a particular event, the same test must be resorted to in one case as in the other. If an act to which human agency has in any way contributed, cannot be considered as the act of God, but must be held to be the act of man, how does it become less the act of man if we substitute the elements in the place of God? The elements are the means by which God acts, and we are unable to perceive why 'damages by the elements' and 'damage by the acts of God,' are not convertible expressions in the law of leases." Polack v. Pioche, 35 Cal. 416, 422, 423 (95 Am. Dec. 115).

Quoting again from the author of Corpus Juris, vol. 1, p. 1174, we find the following:

"The principle embodied in all of the definitions is that the act must be one occasioned exclusively by the violence of nature and all human agency is to be excluded from creating or entering into the cause of the mischief. When the effect, the cause of which is considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect, or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to the acts of God."

These words in our opinion aptly portray the condition shown to exist by the facts in the present proceeding. The destruction of the building in part having been contributed to by its defective construction the whole occurrence was thereby humanized and in fixing the liability of the parties hereto, the part attributed to the earthquake must be eliminated as a contributing cause of the building's downfall. Under these conditions the award of the commission should be and is hereby affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

202 Cal. 247

ENTERPRISE DAIRY CO. et al v. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA et al. (S. F. 12473.)★

Supreme Court of California. Sept. 30, 1927.

Rehearing Denied Oct. 27, 1927.

1. Master and servant ⇨417(5)—Court will assume Accident Commission allowed compensation only for compensable injuries, where no complaint was made for failure to segregate injuries.

Where no complaint was made of failure of Industrial Accident Commission to segregate compensable injuries from those not compensable, the appellate court will assume that award was made only for compensable injuries.

2. Master and servant ⇨416—Award of Accident Commission will be affirmed if any part of injuries are compensable, in absence of objection to omission to segregate injuries.

In the absence of objection to failure of the Industrial Accident Commission to segregate compensable injuries from those not compensable, award will be affirmed if any part of injuries were compensable.

3. Master and servant ⇨373—Injuries due to increased hazard of employment over that of public in vicinity of earthquake arise "out of employment."

Where the greater risk over that of public in his vicinity, to which an employee is exposed by his employment, contributes to his injuries in an earthquake, the injuries, although unexpected and unusual, arise out of employment.

4. Master and servant ⇨373—Injury to truck driver by glass from bottles broken during earthquake held to arise out of employment within Workmen's Compensation Act.

Where dairy company's driver, while loading milk bottles on truck in employer's garage, was injured by fragments of glass from bottles broken by wall of adjoining building falling in earthquake, held, that injuries arose out of employment within Workmen's Compensation Act (St. 1913, p. 279, as amended); they being caused by the broken glass and not by the earthquake.

In Bank.

Certiorari to review an order of the Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by William Wilson to recover for personal injuries, opposed by the Enterprise Dairy Company, employer, and another. Compensation was awarded by the Industrial Accident Commission, and the employer and State Compensation Insurance Fund petition for certiorari. Award affirmed.

For opinion of District Court of Appeals, see 254 P. 274.

Frank J. Creede, of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

PER CURIAM. A hearing of this proceeding by this court was granted for the purpose of further considering it in connection with the case of London Guarantee & Accident Company v. Industrial Accident Commission of the State of California (L. A. 9762) 259 P. 1096, in which we have this day filed an opinion affirming the award. We are satisfied with the opinion written by Mr. Presiding Justice Works when this proceeding was before the District Court of Appeal, and we hereby adopt said opinion as the opinion of this court:

"The facts involved in this controversy are shown by a stipulation entered into at a hearing before the Industrial Accident Commission. It was stipulated that one William D. Wilson was in the employ of petitioner Dairy Company as an automobile truck driver, and that, in the course of his employment, 'the employee was injured in the following manner: After having driven his automobile into a garage of the employer to load said automobile with milk, and while he was engaged in loading the said automobile with milk from a refrigerator belonging to the employer in said garage, an earthquake occurred, and the brick wall of an adjoining two-story building fell through the roof of said garage, causing employee to receive severe contusions over the spine and left chest posterior, with multiple lacerated wounds of his hands and arms from broken glass, the said glass coming from milk bottles which he was loading and had loaded.' As a result of the hearing, an award was made allowing compensation to Wilson for the injuries mentioned in the stipulation. Petitioners, after asking for a rehearing before the Commission, and, upon the request for a rehearing being denied, applied to this court for the writ of review, and the writ issued.

[1, 2] "The sole question presented for our determination is whether Wilson's injuries arose out of his employment. The award was for a small lump sum, payable forthwith. If it be granted, for the sake of argument, without deciding, that a part of the injuries were compensable and that the remainder were not, no complaint is made of the failure of respondent Commission to segregate the two parts. Under such circumstances, indeed, we should doubtless be compelled to assume that the Commission allowed compensation only for the compensable injuries. Be that as it may, however, and considering alone the fact that there is no objection to a lack of segregation, if any part of the injuries were compensable the award must stand. Consequently, we shall henceforth disregard that rather uncertain portion of the stipulation relating to 'severe contusions over the spine and left chest posterior.' Even with this exclusion the stipulation may not be regarded as a model of certainty. After the exclusion the concord of the parties may be rendered thus: While the employee, after driving his truck into a garage belonging to his employer, was engaged in loading bottled milk upon the truck, taking the bottles from a refrigerator located in the garage and also belonging to the employer, 'an earthquake occurred, and the brick wall of an adjoining two-story building fell through the roof of said garage, causing the employee to receive * * * multiple lac-

erated wounds of his hands and arms from broken glass, the said glass coming from milk bottles he was loading and had loaded.' In solving the problem here presented, we shall assume that the milk bottles, both those which the employee 'was loading' and those which he 'had loaded,' were broken by the falling brick wall and not by improper handling by the employee, or by any other means. We shall also assume that the brick wall fell because of the earthquake shock. These assumptions embody our understanding of the import of the stipulation, and they remove its principal uncertainties.

[3, 4] "The rule which is to govern the disposition of this proceeding has been correctly stated, we think, in this language, relating to a claim of compensation because of the death of an employee: 'We believe the reasonable rule to be that, if deceased, by reason of his employment, was exposed to a risk of being injured by a storm which was greater than the risk to which the public in that vicinity was subject, or if his employment necessarily accentuated the natural hazard from the storm, which increased hazard contributed to the injury, it was an injury arising out of the employment although unexpected and unusual' (Central Illinois Co. v. Industrial Commission, 291 Ill. 256, 126 N. E. 144, 13 A. L. R. 967). We think the present proceeding is within the rule stated. Let us ascertain the true situation under the facts before us by the statement of an imagined case. Suppose that Wilson had been in the employ of a merchant engaged in the sale of glassware; his duty having been to make delivery to customers of goods sold by the employer. Suppose that he was engaged in the delivery of a quantity of fragile merchandise of the character mentioned, that he transported it in his truck to the sidewalk curbing in front of the residence of a customer who had bought it, and that then, with a heavily loaded basket on his shoulder, containing the fragile glassware, he started on foot toward the residence of the customer. Suppose further that before he reached his goal an earthquake shock occurred of sufficient intensity to throw him to the ground, thereby causing the glass to break and to cut him severely, he suffering no injury whatever from the fall itself, that is, by his mere contact with the ground. Is there any doubt that under such circumstances Wilson would have been entitled to compensation because of his injuries? The question appears to answer itself. Nor can we see a difference in legal effect between the supposed case and the one actually presented to us. We think, specifically, that no difference arises merely because milk bottles, as commonly known, are not to a great extent fragile. Although they are fabricated for the purpose of withstanding some considerable degree of rough usage, the fact remains that Wilson was cut-lacerated, in the language of the stipulation-by the fragments into which flew those that he handled. This fact, we think, demonstrates that in the course of Wilson's employment he was subject to risks different from and in addition to those to which other persons were exposed who were within the area affected by the earthquake in question. His injuries from the broken bottles, therefore, arose out of the employment. Within the meaning of the Workmen's Compensation Act, * * * he was injured by the broken glass and not by the earthquake. As bearing upon the question here

presented, it is instructive to note the facts upon which compensation was directed in Central Illinois Co. v. Industrial Commission, supra.

"We see nothing to interfere with the conclusion here reached in the cases cited by petitioner, among which are State v. District Court, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344; Thier v. Widdifield, 210 Mich. 355, 178 N. W. 16, and Alzina Construction Co. v. Industrial Commission, 309 Ill. 395, 141 N. E. 191."

Award affirmed.

202 Cal. 264

**UNITED TAXPAYERS' CO. v. CITY AND
COUNTY OF SAN FRANCISCO.**
(S. F. 11780.)

Supreme Court of California. Oct. 7, 1927.

1. Municipal corporations ⇨1038—Municipality might move to quash levy of execution issued against it, on real estate which it had conveyed to another.

City and county might move to quash levy of execution issued against it, on real estate which municipality had fully conveyed to another prior to levy, since levy was unlawful and municipality was bound to protect title.

2. Municipal corporations ⇨1038—Property of municipality held not subject to execution, where it had been used for public jail, and had thereafter been leased; property not having lost public character.

Property owned by city and county held not subject to levy of execution in hands of private creditor, where municipality had used property for public jail until building thereon was destroyed by earthquake and fire, and thereafter had leased it from time to time for many years, and at time of levy had determined to sell it and to apply proceeds to another specific public use; the property still retaining its public character.

3. Municipal corporations ⇨1038—Levy of execution issued against municipality, on real estate which it had sold, was properly quashed.

Court properly quashed levy of writ of execution issued against municipality, where levy was made on real property which had been fully conveyed by municipality to another prior to issuance of writ.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the United Taxpayers' Company against City and County of San Francisco. Final judgment was rendered for plaintiff. From an order quashing a levy of execution on real property of defendant, plaintiff appeals. Affirmed.

Joseph E. Bien, of San Francisco, and Edwin H. Williams, of San Leandro, for appellant.

John J. O'Toole, City Atty., and Dion R. Holm, Deputy City Atty., both of San Francisco, for respondent.

RICHARDS, J. This appeal is from an order made after final judgment quashing the levy of execution upon the judgment obtained by the plaintiff against the municipality, and which execution had been attempted to be levied on certain real estate of the municipality, which property had, in other years, been used for the purposes of a public jail, but which, having ceased to be used for that specific purpose, was, at the time of the levy of the execution, either in progress of being sold or had been sold by the city to private persons, such sale having been made for the avowed purpose expressed in the ordinances of the municipality referring to such sale of applying the money received therefrom to another public use.

[1] The appellant's first contention is the purely technical one that the city and county of San Francisco, having sold and conveyed all its interest in the real property concerned, was no longer entitled to move to quash the levy of execution against such property. This contention defeats itself since, if prior to the levy of the execution the municipality had fully conveyed all its interest in the property levied upon, the appellant would have no right to impose an execution upon such property in the hands of third persons; and if such were the case it would seem that the municipality would still be bound to protect the title it had thus conveyed and would, therefore, be entitled to move to quash such levy. On the other hand, if the municipality had not completed the transfer of its title to said property at the time of the attempted levy of said writ, it would for that reason be entitled to appear in the action in which such execution had been issued in order to move to quash the levy thereof which, having been made, was impeding its transfer of the property to the purchaser thereof.

[2, 3] The next contention of the appellant is that the property in question, not being at the time of such attempted levy of said writ of execution actually in use for a public purpose, this judgment creditor was entitled to levy an execution upon the property in order to satisfy its judgment against the municipality. It is conceded by the appellant that the property was many years ago acquired by the municipality for a public use, to wit, for the use and occupation as the site of its public jail, and that the property was devoted to such public use up to the time of the destruction of the building thereon in the earthquake and fire of 1906. Thereafter the property had been leased from time to time by the municipality, apparently awaiting such time as the same might be profitably sold and the funds derived from such sale applied to other public

uses. We are of the opinion that the property of a municipality which has been acquired by it for public uses and has been in the past devoted to such uses cannot be made the subject of levy and sale under execution for the satisfaction of a judgment obtained by a private creditor against such municipality, at least until it is shown that its devotion to such use has been entirely abandoned. The earlier cases decided by this court, wherein writs of execution levied upon property of the municipality were upheld, arose out of levies made upon property which had never been impressed with any public use. The more recent case of *Marin Water Co. v. Sausalito*, 49 Cal. App. 79, 193 P. 294, wherein a petition for hearing was denied by this court, does not uphold the appellant's contention herein; but, on the contrary, as appears from the opinion of this court in denying said petition, opposes it by holding that property of a municipality which has been acquired for and impressed with a public use is not subject to levy and sale at the suit of a private creditor. In the instant case it sufficiently appears from the record that the property of the municipality, which was sought to be subjected to the levy of this writ, had retained its public character, notwithstanding its temporary disuse for a specific public purpose, and that the municipality in disposing of the same recognized this fact in its official determination to apply the proceeds derived from its sale to another specific public use. But, even were it otherwise, it further sufficiently appears from the record herein that the sale by the municipality of this property had been fully consummated before the date of the issuance and levy of said writ of execution, and that for that reason also the order of the trial court in quashing the levy of the writ as against said property should be upheld.

The order is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

202 Cal. 277

HIETT et al. v. INLAND FINANCE CORPORATION. (Sac. 4045.)

Supreme Court of California. Oct. 11, 1927.

1. Appeal and error $\S$ 799—Parties, moving to dismiss appeal because questions have become moot, should support motion by affidavit showing proceedings causing questions to become moot.

Parties, moving to dismiss appeal on ground that same has become moot, should support motion by affidavit or other showing setting forth proceedings in trial court which would have caused questions raised on appeal to have become moot.

2. Appeal and error $\S$ 659(4)—Motion for diminution of record held not proper procedure to bring before court matters which have caused questions to become moot.

Motion for diminution of record on appeal held not proper procedure to bring before Supreme Court proceedings in action occurring subsequent to taking of appeal which respondents might urge on motion to dismiss appeal on ground that questions have become moot in event of their making such motion.

In Bank.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by H. C. Hiatt and another against the Inland Finance Corporation. From the judgment, defendant appeals. Plaintiffs move for diminution of record on appeal. Motion denied.

Louitt & Stewart, of Stockton, for appellant.

Roy A. Bronson, E. D. Bronson, Jr., and Bronson, Bronson & Slaven, all of San Francisco, for respondents.

PER CURIAM. The respondents move the court for an order requiring the clerk of the superior court of the state of California, in and for the county of Stanislaus, to file herein a supplementary clerk's transcript setting forth certain proceedings in the above-entitled action occurring in said court subsequent to the taking of said appeal and the preparation and filing of the transcript on appeal herein, and which proceedings and papers sought to be included in such supplementary transcript have no relation to the questions presented upon said appeal, and would hence constitute no proper part of the original transcript thereon. The declared purpose of the respondents in making this motion is that of having such matters made a part of the record upon appeal herein in order that they may thereafter move to dismiss such appeal upon the ground that by virtue of such proceedings to be embodied in such supplementary transcript this appeal has become moot.

[1, 2] They have not, however, moved to dismiss this appeal upon the ground that the same has become moot and they may never make such motion. In the event, however, that they should do so, they may and properly should support the same by affidavit or other showing setting forth the proceedings in the trial court which would have caused the questions raised upon this appeal to have become moot. Such would be their proper procedure and it would seem evident that the present is not the proper procedure to be taken in order to bring before this court the matters which the respondents may urge upon a motion to dismiss this appeal in the event of their making such motion. It may well be doubted whether this court has the power to order the clerk of the trial court to

prepare and present a supplementary transcript embodying matters which would have been no proper part of the original transcript upon appeal.

The motion is therefore denied.

85 Cal. App. 750

O'BRIEN et al. v. DICKINSON DRUG CO.
(Civ. 4674.)

District Court of Appeal, Second District,
Division 2, California. Oct. 3, 1927.

New trial §71—Under conflicting evidence as to contributory negligence, granting new trial after verdict for damages for personal injuries held not abuse of discretion.

In action for damages for fall down stairs steps in store, under conflicting evidence as to whether plaintiff willfully disregarded signs and warnings and was injured through her own carelessness and negligence, granting new trial after verdict for plaintiff was not abuse of discretion.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Julia H. O'Brien and another against the Dickinson Drug Company. Verdict for plaintiffs. From an order granting a new trial, plaintiffs appeal. Affirmed.

Rudolph & Warne and Isaac Pacht, all of Los Angeles, for appellants.

Fred W. Morrison, of Los Angeles, for respondent.

PEAIRS, Justice pro tem. This is an appeal from an order of the court granting a new trial after verdict of the jury for damages for personal injuries.

The facts alleged by plaintiffs were that Julia H. O'Brien, one of the plaintiffs, went to the drug store of defendant, and, after making a purchase, attempted to enter the ladies' toilet, but, finding it occupied, was directed by the porter to the "gents' toilet," situated at the head of a cellar stairway, and that, not being warned of danger, she fell down a short flight of steps and was injured. The defendant alleges that, when the plaintiff found the ladies' toilet occupied, she then attempted to enter another door upon which was printed in large letters the words, "Positively No Admittance. Private," and willfully disregarding the said sign and warnings of defendant's employees, was injured because of her own carelessness and negligence.

The testimony of plaintiff Julia H. O'Brien in itself is contradictory as to what was said and done. To some extent her testimony corroborates the testimony of the witnesses Stromwall, Stout, and Harrison, showing that the door to the cellarway and "gents' toilet" was locked and not open to the public, and that it was not opened until after

she had tried to enter the ladies' toilet. The testimony of the witnesses Stromwall, Stout, and Harrison are, otherwise, quite flatly contradictory of much of plaintiff's testimony, and apparently consistent—showing the locked door, signs, warnings, conversations had, and what happened. The plaintiff says:

That she "had no conversation with the clerk Stromwall before the accident other than to ask for medicine; * * * that the door was locked at that time after buying the medicine. It is always closed. * * * I didn't notice a door there ever. * * * I saw the door after he opened it."

Both Stromwall and Harrison testify that they said to plaintiff, "Don't go in there;" and Stout testified to hearing each of these witnesses so state.

This much of the evidence is sufficient to show great contradiction, and, after considering all of the evidence in this case, some of which was decidedly conflicting, if the judge believed the testimony of any one of the witnesses Stromwall, Stout, or Harrison, it was not only his right but his duty to grant a new trial. The law in this respect is repeatedly stated in the following cases: In *Motz v. Motz*, 136 Cal. 558, 560, 69 P. 294, it says that, where there is a material conflict of testimony and the judge believes the verdict was contrary to the weight of the evidence, it is his duty to grant a new trial. In *Hitchcock v. Rooney*, 171 Cal. 285, 152 P. 913, it states that, if there is a substantial conflict in the evidence, the order of the judge granting a motion for a new trial must stand. In the *Estate of Caspar*, 172 Cal. 147, 149, 155 P. 631, it is stated to be the duty of the judge to set aside a verdict as often as his conscience is impressed with the injustice of the verdict. In *Weringer v. Rutledge*, 180 Cal. 569, 182 P. 31, it says, if there be a sharp conflict in the testimony, the court should grant a motion for a new trial when not satisfied with the verdict. In *Ham v. County of Los Angeles*, 46 Cal. App. 148, 189 P. 462, it is stated that the discretion of the trial court is very broad, and the order of the judge will be upheld unless there is an abuse of discretion. Also in *Soto v. Globe Grain & Milling Company*, 55 Cal. App. 533, 203 P. 830, it is said to be the duty of the judge, wherever a verdict is not, in his opinion, sustained by the weight of the evidence, to grant a new trial, and, unless it plainly appears that there is an abuse of discretion his order must stand.

Therefore in this case, there being a decided conflict in the evidence and no apparent abuse of discretion, the order granting a new trial is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

85 Cal. App. 656

McMILLEN v. OLMSTED. (Civ. 5509.)★

District Court of Appeal, First District, Division 1, California. Sept. 28, 1927.

Hearing Denied by Supreme Court Nov. 23, 1927.

- 1. Trusts** ⇨102(1)—Part owner of option, purchasing it without notice to co-owner, becomes trustee as to co-owner (Civ. Code, § 2224).

Where part owner of option, on obtaining extension, paid option price and took title without notice to co-owner, under Civ. Code, § 2224, he thereby became trustee for co-owner as to one-half of land.

- 2. Trusts** ⇨110—Evidence held to show that relation of partnership and trust existed between defendant and plaintiff's deceased husband (Civ. Code, § 2229, 2410).

In action to establish trust in real estate held by defendant, evidence held to show that defendant and plaintiff's deceased husband were associated as partners, and that their relations were confidential and they were trustees for each other within Civ. Code, §§ 2229, 2410.

- 3. Trusts** ⇨102(1)—Community of duty exists between persons having community of interest.

Where two persons have a community of interest, there is a community of duty between them.

- 4. Trusts** ⇨102(1)—Private benefit obtained by one of two parties interested together by mutual agreement renders him trustee for benefit of both.

On a purchase being made by parties interested together by mutual agreement, neither party can exclude other, and any private benefit touching common right which is secured by either party will turn him into a trustee for benefit of both.

- 5. Trusts** ⇨91—Constructive trust is created when person taking property cannot hold it without violating some principle of equity (Civ. Code, § 2224).

Under Civ. Code, § 2224, where circumstances of a transaction are such that person taking title to property cannot be permitted to hold it without violating some principle of equity, a constructive trust will be raised for benefit of party entitled to its beneficial enjoyment.

- 6. Trusts** ⇨110—Evidence to raise constructive trust need be no more convincing than that required to convert deed into mortgage.

No more clear and convincing evidence is required to raise a constructive trust than is required to convert a deed absolute in form into a mortgage.

- 7. Appeal and error** ⇨1011(1)—Trial court's determination on conflicting evidence is not reviewable on appeal.

Trial court's determination in favor of either party on conflicting or contradictory evidence is not open to review on appeal.

Appeal from Superior Court, Ventura County; S. M. Marsh, Judge.

Action by Belle B. McMillen, formerly Belle B. Brunton, individually, and as executrix of the last will and testament of John W. Brunton, deceased, against Thomas C. Olmsted, to establish a trust in real property. From a judgment for plaintiff and order denying new trial, defendant appeals. Judgment and order affirmed.

Bowker & Sheridan, of Ventura (Robert M. Clarke, of Los Angeles, of counsel), for appellant.

W. C. Shelton, of Los Angeles, and Wayne L. Clark, of Ventura, for respondent.

CAMPBELL, Justice pro tem. Plaintiff brought this action against defendant for the purpose of obtaining judgment that the defendant, her brother, holds in trust for her an undivided one-fourth interest in the southeast quarter of the southeast quarter of section 13, township 3 north, range 21 west, San Bernardino base and meridian, containing 40 acres of land, and for an accounting of all sums received by him therefrom and for general equitable relief. The judgment went for plaintiff as prayed for, the court decreeing that defendant was the record owner of an undivided one-half interest in the land, but that he held such record title in trust for the plaintiff as to an undivided one-half thereof, and that an undivided one-half of a certain oil and gas lease thereon to the Union Oil Company of California, as lessee, was held by the defendant in trust for the plaintiff as to an undivided one-half thereof. Judgment also went against defendant on an accounting in the sum of \$15,754.14 and \$40.50 costs. From the judgment as rendered and from the order of the court denying a new trial, the defendant has appealed.

Appellant urges that in the consideration of this case the court must commence with the presumption that the title to the real property in question vested as to a one-half interest thereof in appellant herein, Thomas C. Olmsted. For the affirmance of this judgment the testimony must be of that clear, convincing, unequivocal kind and character not only to overcome this presumption, but to establish a trust as to a one-fourth interest therein, and appellant contends that the record fails to disclose any testimony to overcome this presumption of law, much less to establish the trust by the measure and amount of evidence required under the laws of the state of California.

The record title to the 40-acre tract in question is as follows: On October 2, 1913, the 40 acres, together with an adjoining 80 acres, was located as a placer mining claim by Joshua T. Stockton, Myrle T. Rogers, Mollie L. Rogers, his wife, Emmett O. Crane, Thomas O. Olmsted (appellant herein), and J. F. Brunton (whose estate is respondent herein). On October 18, 1913, Stockton, Rog-

ers, and wife leased their interest, which was an undivided one-half interest in the 40-acre tract, to Crane and Olmsted, giving therein an option to purchase their interest for \$2,000. The 80-acre tract filed on by said locators was leased to Graham and Maustard, who organized the South Mountain Oil Company, and upon which tract oil was discovered in 1915, and the title to this tract was subsequently vested in Oak Ridge Oil Company. On May 5, 1916, a patent was issued to the 120-acre tract, which included the 40-acre parcel in dispute, to Joshua T. Stockton, Myrle J. Rogers, Mollie L. Rogers, his wife, Emmett C. Crane, Thomas C. Olmsted (appellant), and J. F. Brunton (whose estate is respondent). The option to purchase by Crane and Olmsted from Stockton, Rogers, and wife of October 18, 1913, had, by its terms, expired at the time of the issuance of the patent, but had been orally extended. On June 26, 1916, Crane and wife, Olmsted and wife, and Brunton and wife conveyed their interest in the 40-acre tract to Stockton and Rogers. On August 23, 1915, Rogers and wife and Stockton conveyed to Crane and Olmsted (appellant) the 40-acre tract. On October 11, 1916, Olmsted (appellant) and Crane leased and optioned the 40-acre tract to J. W. Brunton (whose estate is respondent) and J. W. Wallace.

The answer to the complaint does not deny the allegations of what was actually done regarding the initiation of oil rights in and to the 40 acres in dispute. It is undisputed that on June 2, 1910, the Flow No. 3 placer mining claim, containing 120 acres, which included the 40 acres in question, was located on South Mountain by Joshua T. Stockton and his associates, and that in July, 1913, said locations were owned and controlled by Stockton and his attorney, Judge M. T. Rogers; that about the month of July, 1913, an agreement was entered into between appellant and Crane and Stockton and Rogers, which provided that said placer mining claim should be relocated as the South Mountain placer mining claim by Stockton, Rogers, Mrs. Rogers, Crane, Olmsted (appellant), and Brunton (whose estate is respondent); that upon relocating the claim a corporation should be organized and procured to develop the property under lease from all locators, which lease should provide an option to purchase the 80 acres at \$50 per acre, payable to Stockton and Rogers. It is also admitted that a lease on the remaining 40 acres was made to Olmsted and Crane by Stockton, Rogers, and Mrs. Rogers, carrying with it an option to purchase for \$2,000 any time within 3 months after discovery of oil on either the 40 acres or on the 80 acres, payable one-half within a period of three months and one-half within six months after discovery. The only denial is that there was any agreement with Brunton or that he should have any interest in the locations or the 40-acre lease and op-

tion from Stockton and Rogers, even though it is conceded by the answer that he became one of the six original locators. There was no formal written contract between appellant and his brother-in-law, Brunton, as to the interest of each in this lease and option. The answer does not deny that the property was relocated as the South Mountain placer mining claim by Stockton, Rogers, Mrs. Rogers, Olmsted, Crane, and Brunton; that pursuant to agreement the South Mountain Oil Company was organized and received an oil development lease from Stockton, Rogers, Mrs. Rogers, Olmsted, Crane and Brunton for the whole north one-half of the southeast quarter of section 13, which lease contained an option to purchase the land upon discovery of oil at \$50 per acre; that about October 18, 1913, Stockton and Rogers executed and delivered to Crane and Olmsted the said lease and option to buy the 40 acres in question, and admits that the locators, including Brunton, finally, on May 24, 1916, received, after a contest, a patent to said South Mountain placer mining claim, which included the 40 acres; that all of said locators, including Brunton, deceased, executed and delivered a deed to the 80-acre tract, to wit, the north half of the southeast quarter of section 13, to South Mountain Oil Company or its successors, and that the grantee paid to Rogers and Stockton \$50 per acre therefor, and it is also admitted that about June 26, 1916, at the request of Judge Rogers, Crane, and his wife, the deceased Brunton and his wife and appellant Olmsted and his wife conveyed their title to the 40-tract to Rogers and Stockton. Judge Rogers in his testimony explains the purpose of this deed to be that the option to purchase had expired, but had been orally extended. "The fact of the matter is, Mr. Stockton and myself was getting restive about it, and we talked it over, and we finally decided we would give them another extension of time, but in order for them to have that they must convey the property to us, so that if they fell completely down in taking over the option—exercising it—why, there would be no difficulty in carrying out the arrangement which we had as to the conveyance to us of their interest, if they failed to operate under the lease and to exercise the option for the purchase of the 40, and before the option was in fact exercised, and before that for some little time, why, we of course knew, or thought and believed, that the 40 acres was worth a great deal more money than we was getting under the option. Just because my word was given they could have this opportunity to purchase all because I wanted to be fair." It is also admitted that thereafter, on or about August 23, 1916, Crane and Olmsted paid the option price of \$2,000 and received a deed to the property.

The record discloses that plaintiff's decedent, John W. Brunton, was her husband

and the defendant's brother-in-law. Brunton and defendant were good friends and defendant had worked for Brunton prior to the transaction involved in this case. Brunton was a practical oil man and had been in the business for more than 12 years, had drilled wells and organized oil companies. While defendant, when called as a witness under section 2055 of the Code of Civil Procedure, stated, "I was not associated with Mr. Brunton and had no relations whatever in any way with him prior to July, 1913," he admitted when confronted with a letter that in January, 1912, he wrote and sent a letter to Brunton concerning a joint oil enterprise the two were working on in the Sespe district in Ventura county, and on July 6, 1913, he wrote Brunton asking for the form of a lease and discussing mutual business relationships. Defendant also admitted that on July 6, 1913, he and Brunton were thinking and talking of locating some property upon South Mountain, located near Santa Paula, Ventura county. He said: "We were just simply locating—looking for open government land to locate."

In the affidavit of appellant given the inspector of the Department of the Interior concerning the patent covering the land in question, appellant acknowledges the interest of Brunton. In his testimony the following appears:

"Q. I will ask you again, Mr. Olmsted, if in your affidavit which you gave to the inspector of the Department of the Interior, if you didn't claim to them you were the owner of a half interest in the 40 acres, and one-half of your interest you transferred to your brother-in-law, J. W. Brunton? A. Yes, sir; I think I did.

"Q. You did so state? A. Yes, sir."

And the certified copy of the record of the United States Land Office clearlisting for patent the land in issue bearing date March 23, 1916, signed by Commissioner Tallman, giving the story of the locating and development of this placer mining claim, contains the following:

"He (Crane) states that his interest in the claim is a one-half interest in the 40-acre lease. * * * Brunton states * * * that his interest in the claim is a one-fourth interest in the 40-acre lease, which he still retains. * * * Olmsted states that his interest is a one-half interest in the 40-acre lease, a one-half interest in which he transferred to his brother-in-law, J. W. Brunton."

Up to March 23, 1916, six months prior to the option to purchase being exercised by Crane and appellant, appellant admits that Brunton owned a half of his half interest in the 40 acres. In fact, he so testified:

"Q. He had a quarter on that at the time you made your affidavit to the Land Department? A. Yes, sir.

"Q. That was prior to the time he had his lease, wasn't it? A. That is a different condition.

"Q. You just explain to the court what those

conditions were that made it different. A. He was a locator; we had decided on putting Mr. Brunton in and giving him half of my half of the 40 acres, providing he would pay his part in the purchase of that property."

It may here be noted that appellant's testimony quoted is in direct conflict with his verified answer wherein he denies that the lease and option from Stockton and Rogers were executed or delivered with respect to any agreement with Brunton or any understanding that Brunton was to acquire any interest in said lease on said property.

[1] The situation with respect to the 40-acre tract then is that on March 23, 1916, Brunton was an owner in common or partner in the 40-acre lease with appellant as to the one-half interest held by appellant; that, according to appellant, Brunton failed to pay his part of the \$1,000 due from appellant and Brunton to take up the option, and appellant paid it himself; that he had no letters or any document in writing to Mr. Brunton requesting him to advance his half, but he told him several times. He further testified:

"The conversation with Mr. Brunton in reference to the \$1,000, I think, was at the Hellman building at Los Angeles. I had not written to him about this matter as I recall. I told him that we had to make this payment of \$1,000 or the option would be in default, which it did, and Mr. Crane and myself had another option and later purchased the property."

This conversation appellant testified was about the time the option would expire along in September, 1916. The conversation was about the old option; appellant never told Brunton of the claimed new option. According to the testimony of Judge Rogers no new option was given; the original option was extended from time to time until it was finally paid and title conveyed. The evidence therefore shows that appellant told Brunton the option was about to expire and requested that he put up half of appellant's half of the option price; that Brunton failed to do so at that time; and that thereafter appellant and Crane got an extension of the option and later, without any notice or demand upon Brunton, paid the option price and took title, claiming that Brunton was out. This of itself would make appellant a trustee for Brunton as to one-half of appellant's half interest in the 40-acre tract, with, of course, a right to demand \$500 contribution from Brunton under section 2224 of the Civil Code providing:

"One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

It is significant that no such demand was ever made verbally or in writing. It is also significant, according to appellant's state-

ment, that no demand verbally or in writing was ever made on Brunton to pay his part of the \$1,000 prior to the exercise of the option after the extension was granted. It would be strange if Brunton, who was interested together with appellant in other development work on South Mountain and knew what was going on, would deliberately let his interest in a valuable piece of patented land slip away in the manner outlined by appellant, particularly in view of the fact, as stated by Judge Rogers, that the 40 acres "was worth a great deal more money than we were getting."

[2] That appellant and Brunton were jointly interested in oil development on South Mountain is shown by appellant's own testimony. He testified that before the original agreement with Stockton and Rogers was entered into he had talked with Brunton regarding the location of another piece of government land containing 160 acres called the Sunset-Ventura, and in fact had discussed getting several locations on South Mountain; that Mr. Brunton, himself, and associates located other land pursuant to that understanding, one claim of 160 acres being the Sunset-Ventura, in locating which they jumped prior locations of Stockton and his associates over Stockton's objections; that in 1916, the time he talked to the inspector, he and Brunton were associated on two locations, one being the Sunset-Ventura and the other the property here in question. About that time they had made a little trail across the 40-acre piece up to the 160 acres. Mr. Brunton sent his money down to pay for it. Appellant further testified that he more than likely superintended the Mexicans he hired to build the trail, though they were building it. From the evidence in the record, which would require too much space to further quote or summarize, the logical conclusion or inference to be drawn is that long prior to the time that appellant exercised the option on the 40 acres he and his brother-in-law, Brunton, were associated as partners in oil enterprises, and that they were financed by Brunton, and that therefore their relations were confidential and they were trustees for each other (Civ. Code, § 2410), and "a trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner" (Civ. Code, § 2229). "The relation between partners is confidential with respect to the firm property and business; each is trustee of the other." *Dennis v. Gordon*, 163 Cal. 427, 125 P. 1063.

[3, 4] But if a partnership relation did not exist between the deceased and appellant there certainly existed a community of interest, and where two persons have a community of interest, there is also a community of duty between them. In *re Du Paine's Estate*, 185 Pa. 332, 39 A. 947, 40 L. R. A. 552, 61 Am. St. Rep. 651; *Venable v. Beauchamp*, 3 Dana (Ky.) 321, 28 Am. Dec. 84. This prin-

ciple arises from the privity subsisting between parties having a common interest in the same land and a common interest in the possession of each. If parties are interested together by mutual agreement and a purchase is made agreeable thereto, neither party can exclude the other from what was intended for the common benefit; and any private benefit touching the common right which is secured by either party will turn him into a trustee for the benefit of both. *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134.

Appellant urges that if Brunton had been an owner of one-half of Olmsted's half interest he would not have taken the lease from Crane and Olmsted. In view of the circumstances, Brunton's acceptance of the lease was not incompatible with ownership. Appellant, who with Crane executed the lease to Brunton, had an interest in the lease. According to appellant's own testimony he had an interest in the leasehold to develop the property—took a contract to drill the well for so much equity in the lease and so much in money. Then, again, Crane, Olmsted, and Brunton evidently desired to lease the 40 acres on a royalty basis, which Crane and Olmsted eventually did, and Brunton, being the experienced oil man, was evidently thought to be the one to handle the matter and for that purpose wanted a lease to assign to the purchaser when found, as he told Olmsted at his home in Los Angeles, according to the testimony of Wedell Lodair Brunton, "to develop the land he would have to take a lease on it, but being a locator on the land could not have a lease and to develop the land he must quit deed—a quitclaim deed or some way to develop the land; a man could not develop his own. I do not know how to state that—a man could not—the owner who was a locator could not lease his own land."

Some discussion is indulged in by respective counsel in their briefs concerning certain letters written by Olmsted to Brunton, in which the context of such letters appears to have been altered or retraced. We have not given consideration to these letters, as we do not deem consideration of them necessary to an affirmation of the judgment, and adopt the views of the trial court with respect to them. The trial court in its opinion brought to this court as a part of appellant's brief uses this language:

"I do not give much credence to any of the correspondence which was received in evidence on behalf of the Brunton estate. I am perfectly satisfied that several of those letters had been doctored up by somebody. It required no expert to determine that question. An ordinary reading glass would easily disclose that fact. There is nothing, however, to indicate that the plaintiff took any part in any such fraud or had any knowledge of it. There is nothing in the testimony to indicate who made these changes in those letters, but, leaving entirely out of consideration those letters, I still felt that there was ample testimony upon which

to base the claim made by the plaintiff in her complaint."

[5] Appellant has cited us to sections of Pomeroy's Equity Jurisprudence, sections of the Civil Code, and a number of California cases in support of his contention that neither an express nor resulting trust exists in the present case, and contends that a constructive trust does not exist under section 2224 of the Civil Code, and cites us to *Burns v. Ross*, 190 Cal. 274, 212 P. 17, for a construction of that code section. In that case the court says:

"The equitable principle contained in that section is thus stated in *Mandeville v. Solomon*, 33 Cal. 38, 44: 'Where the circumstances of a transaction are such that the person who takes the title to property cannot be permitted to hold and enjoy it in whole or in part without necessarily violating some principle of equity, a constructive trust will be raised for the benefit of the party entitled in equity to its beneficial enjoyment. It is because he holds the property, or some interest therein, which it is inequitable for him to enjoy, that the court declares the trust and fastens it upon his conscience, and wrests the property or interest from him and causes it to be transferred to the person equitably entitled to it.'"

[6, 7] This language in *Burns v. Ross*, as we view the facts contained in the record, is applicable here. While it is true, as claimed by appellant, that the evidence in a case of this kind must be clear and convincing, yet no more clear and convincing evidence is required to raise a constructive trust than is required to convert a deed absolute in form into a mortgage, and it has been held in such cases, as in others, the determination of the trial court in favor of either party upon conflicting or contradictory evidence is not open to review in this court. *Couts v. Winston*, 153 Cal. 686, 96 P. 357; *Hillwig v. Boyer* (Cal. App.) 254 P. 662.

Upon a careful examination of the entire record, we are satisfied that the judgment entered was the proper one to enter.

The judgment and order are affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

85 Cal. App. 542

BURCH v. HARTFORD FIRE INS. CO.
(Civ. 3275.)

District Court of Appeal, Third District, California. Sept. 22, 1927.

1. Reformation of Instruments §45(14)—Evidence held not to establish that crop insurance was induced through misrepresentation or fraud of insurer's agent.

In action on crop insurance policy, evidence held insufficient to establish that defendant's agent misrepresented anything to plaintiff, or that application of plaintiff was made or in-

duced by any fraud or misrepresentation of defendant's agent.

2. Insurance §136(5)—Insured cannot accept indorsement of portion of policy and reject remainder, consistent with application and policy.

Insured cannot accept a portion of policy on which an indorsement had been made and reject the remainder, which is consistent with both application and policy.

3. Insurance §150—Rider or Indorsement on policy before issuance became part of contract as fully as though read by insured before loss.

Rider or indorsement made on policy prior to issuance by insurer, and delivery to insured, becomes a part of the contract as fully to all intents and purposes as though read by insured prior to date of loss.

4. Insurance §130(2)—Application subject to approval or rejection requires action on part of insurer before becoming binding.

Where application for insurance is made subject to approval or rejection by insurer, the application is one of the steps leading up to insurance, and requires action on part of insurer before binding contract can be created.

5. Insurance §665(2)—Evidence held to warrant finding that crop insurance policy, with indorsement thereon, had been accepted by insured.

In action on crop insurance policy, which had been returned pursuant to application with indorsement differing from application therefor, evidence held to warrant finding that policy together with indorsement thereon had been accepted by insured.

6. Appeal and error §1175(7)—Appellate court, where jury was waived, may enter correct judgment on uncontradicted evidence and terminate litigation (Code Civ. Proc. § 956a).

Under Code Civ. Proc. § 956a, appellate court, in case where trial by jury was waived, may enter judgment in accordance with evidence which is without conflict on any material point, and terminate cause without further litigation.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by W. E. Burch, trustee, against the Hartford Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for appellant.

M. H. Farrar and J. J. Dunne, both of San Francisco, for respondent.

PLUMMER, J. Plaintiff had judgment in the sum of \$8,625 upon a certain policy of insurance covering costs of the production of a crop of barley belonging to the plaintiff and insured by the defendant. From this judgment the defendant appeals.

The transcript shows that on or about the 1st day of March, 1921, the plaintiff applied to the defendant for insurance in the sum of \$20,700 on 1,725 acres of wheat and 1,724 acres of barley, to wit, \$12,075 on the wheat and \$8,625 on the barley. Both the wheat and the barley referred to were then and there seeded and growing upon certain premises situate in the county of Fresno, state of California. The application for insurance upon the seeded wheat crop was set forth in the application as item No. 1, upon which the premium, calculated at 10 per cent., amounted to the sum of \$1,207.50. The application for insurance upon the seeded barley crop was and is known as item No. 2, upon which the premium, calculated at 8 per cent., amounted to the sum of \$690. The application further set forth in item No. 2 that the insurance was to cover a two-thirds interest in the barley crop and not to exceed \$5 per acre. In the calculation of the amount of insurance applied for in the application, it appears that the amount of the premium was figured by the applicant as though the barley crop included 1,725 acres instead of only 1,724 acres. The insurance applied for under the application being considered was for the purpose of insuring the applicant against loss on account of the expenses incurred by him in plowing, seeding, irrigating, threshing, etc., of the crop then being upon the 1,724 acres referred to. The schedule of costs filed by the applicant is as follows: Plowing, \$2 per acre; harrowing, 40 cents per acre; seed, \$1.50 per acre; seeding, 50 cents per acre; irrigating, \$1.50 per acre; checking, 60 cents per acre; harvesting \$3 per acre; sacks and hauling, 75 cents per acre; total cost, \$10.25 per acre.

The application, among other things, included the following:

"The insurance applied for hereunder is not binding until application is approved by the general agent at San Francisco and policy is delivered to applicant. I also agree that this application is made with specific reference to the statements and representations above contained, a duplicate of which application is to be attached to my policy of insurance issued by the Hartford Fire Insurance Company at Hartford, which, in addition to the printed portion of said policy and indorsements attached, if any, constitute my contract with said company."

This application was signed by the plaintiff, W. E. Burch, on March 1, 1921. On the 18th day of March, 1921, the defendant issued and delivered to the plaintiff a policy of insurance covering the cost of the barley crop herein referred to, but declining the application of the plaintiff to insure the cost of the wheat crop referred to in the application. This policy contained the following indorsement:

"Indorsement.

"In consideration of \$1,207.50 return premium, the first item of this policy covering \$12,-

075 on 1,725 acres of wheat is hereby canceled leaving in force only \$8,625 covering two-thirds interest on 1,724 acres of barley being second item of this policy; it being understood and agreed that for the purposes of this insurance each item of schedule of costs on barley item is reduced to 5.00/10.25 of the amounts shown in application. Attached to and made a part of Crop Investment Policy C-2667 issued by the Hartford Fire Insurance Company.

"March 18, 1921.

"Dixwell Hewitt, General Agent.

"RG."

The policy, having this indorsement upon the face thereof, together with a check for the return of \$1,207.50 premium on the wheat crop, was sent to the applicant through the mails, and appears to have been received by one Taylor, a son-in-law of the plaintiff, and, upon the return and receipt of the policy, it appears that Taylor stated to the plaintiff that the defendant had refused to insure the cost of the wheat crop and had returned the premium thereon. It does not appear that there was any conversation further in relation to the insurance on the barley crop. The plaintiff testified that he did not read the policy nor the indorsement until after a loss had occurred; that the policy was placed in a safe deposit box belonging to the plaintiff and remained there until the barley crop had become a loss.

By the indorsement upon the policy, the insurance is made to cover only 5.00/10.25 or a fraction less than one-half of the cost of each particular item of loss insured against.

On the part of the plaintiff, it is contended that, as the loss exceeded the sum of \$8,625, plaintiff is entitled to recover said sum, irrespective of the fact that the indorsement purports to cover a fraction less than one-half of each item of expenditure incurred by the plaintiff.

On the part of the defendant, it is contended that each item of loss is insured only to the extent of a fraction less than one-half thereof, and that as the plaintiff did not incur a total loss of all of the items insured against, the defendant's liability extends only to the extent of 5.00/10.25 or a fraction less than one-half of each of the items of loss.

The contention of the plaintiff or respondent is further to the effect that the indorsement on the policy, in so far as it limits the liability of the appellant to a fraction less than one-half of the estimated cost of producing the crop, is void, even though the application signed by the appellant limits the insurance applied for to a sum not exceeding \$5 per acre, which is a fraction less than one-half the estimated cost of producing the crop. If we accept the indorsement of the policy as a part thereof in the language in which it is written, the insurance, so far as any loss was incurred by the plaintiff, would be covered as follows: Plowing, 98 cents per acre; discing or harrowing, 20 cents per

acre; irrigating, 73 cents per acre; seed, 73 cents per acre; seeding, 24 cents per acre; checking, 29 cents per acre. These figures are arrived at by taking 5.00/10.25 of the estimated cost of each item. The record further shows that 1,150 acres of the 1,724 acres were not irrigated. Thus, \$839.50 of the cost insured against was not incurred at all. By this calculation plaintiff's net loss covered by insurance, and which he was entitled to recover, amounted to the sum of \$4,625.58.

By the complaint filed in this action, the plaintiff took the position in the trial court, and also contends upon this appeal, that the policy of insurance fixes a liability upon the defendant in the sum of \$8,625, irrespective of the fact that the insurance is limited to a fraction less than one-half of each item of cost set forth in the schedule filed by the applicant; this, on the theory that the plaintiff's application for an insurance not exceeding \$5 per acre applied for in the application following the schedule of estimated cost, entitled the applicant to an insurance of at least \$5 per acre, in the event of loss, irrespective of the items set forth in the schedule insured against constituting such loss, as the indorsement made by the defendant, which we have referred to, limiting the amount of recovery to a fraction less than one-half of each item of cost incurred by the plaintiff in the event of loss, was and is invalid as being contrary to the application, and, not having been seen by the plaintiff or read by him until after the loss had occurred, is not binding as against him, and that it constitutes no part of the contract of insurance. Had all of the items of cost insured against been incurred by the plaintiff, then and in that case the liability of the defendant under the application made and signed by the plaintiff for insurance and the insurance policy issued by the plaintiff containing the indorsement which we are considering, would have been \$8,625, and upon which the premium would have amounted to the sum of \$690, the actual premium paid by the plaintiff and retained by the defendant. This effectually disposes of the contention on the part of the respondent that defendant had failed to return any part of the insurance premium on the barley, and therefore that the cash loss must now be figured at the rate of \$5 per acre, irrespective of the rate of insurance upon the items of loss fixed in the indorsement. There is no pretense that the plaintiff sought an insurance covering the entire amount of the estimated expenses of raising a crop of barley that was figured at \$10.25 per acre, which would bring the cost of raising the crop of barley to between seventeen and eighteen thousand dollars.

As evidencing the meaning of the policy with the indorsement attached that the insurance was not issued with the intent of

covering the loss as a whole, but only as to item by item as costs may have been incurred, reference may be had to paragraph No. 4 of the insurance policy issued by the defendant, to wit:

"This company will not be liable beyond the actual cash value of the interest of said insured in said insured crops at the time of loss or damage, nor exceeding in any event the respective amounts set opposite the items shown in said application."

This language, without the indorsement, is clear and specific that the items of cost were to be covered separately, and, in estimating and determining the liability of the defendant in the event of loss, the items of cost set forth in the schedule were to be considered.

Turning again to the application filed by the plaintiff, we find therein an estimated cost of the several items contained in his application of \$10.25 per acre, and a statement that insurance was desired in a sum not exceeding \$5 per acre, in pursuance of which the company issued its policy based upon the application, and wrote the insurance covering 5.00/10.25 of each item of cost listed in the schedule, which amounted to exactly \$5 per acre. Thus the application and the indorsement on the policy harmonized exactly, and covered the costs incurred and to be incurred by the plaintiff at the time of the insurance of the exact amount contemplated by the language both of the application and the policy. It may be that the plaintiff did not, at the time of filing his application, understand that the items of cost bore a relation to the insurance applied for by him, and that the items of cost would be covered by an insurance of \$5 per acre only in that proportion which each item of cost bore to the insurance to be obtained, but we do not well see the relevancy of setting forth each item of cost specifically and the limiting of insurance to a sum not exceeding \$5 per acre, unless it be that insurance was being applied for, and it was understood that the company would not issue a policy covering the costs in excess of the rate which each item of cost bore to the total amount of insurance. There is nothing in either the application or the policy indicating that any of the parties contemplated 100 per cent. insurance upon any item of loss. If not 100 per cent. upon any item, then the only consistent construction which can be given to the application and the policy is that each item of loss is covered just in proportion as the item of cost bears to the insurance applied for and issued.

[1] Many cases have been cited by the respondent dealing with ex parte modifications of policies and modification slips and riders issued to be attached to policies after the policy involved has been issued. Nothing of that kind is presented for our consideration by the record in this case. The indorsement

was on the face of the policy at the time of its issuance. It was not issued subsequent to the date of the policy as an attempt to modify the insurance, but the policy was issued with the indorsement as a part and parcel thereof. Many cases have also been cited dealing with the subject of misrepresentation by agents of companies and holding that, where any vice has entered into a policy under such conditions, the policy may be reformed, and that oral testimony may be introduced to establish such facts. In the present case there is no pretense of any fraud having been perpetrated upon the plaintiff. What we have said rather shows that it is a case where the plaintiff did not really understand or take the pains to fully acquaint himself with what he should have understood as to the meaning and extent of his own application for insurance. Nor does the record bear out the contention of misrepresentation on the part of one Mr. Smith, the agent for the defendant. The plaintiff's own testimony in this particular is as follows:

"On this application of mine I said to Mr. Smith: 'I know nothing about this insurance. This is new to me. I do not know one thing in the world about it, and explain to my clientage what you will pay or the company will pay if there is a net loss or a total loss of the grain, and that is what I want you to make clear to these men so that they will know what they are doing because I know nothing about it.' And Mr. Smith took my policy, and he said: 'If you have a total loss we will pay you dollar for dollar on this policy.'"

Again, on cross-examination, the plaintiff further testified:

"Mr. Smith made that application out, and he explained a lot of stuff to my clientage and myself. I cannot tell you about that application no more than what the application is; it is self-evident; and that is all I can tell you about it."

"Q. Well, the application deals with separate costs, etc., plowing, harrowing, irrigating the land, etc.? A. Mr. Smith took my figures."

"Q. Well, that is what I am trying to get at. You furnished that? A. Mr. Smith asked how much money we had to expend, and he showed me a book about what we had to put the expenses at."

"Q. You furnished the figures as to the cost of each one of those steps in the operation of putting in and taking off that barley? A. Mr. Smith took those figures off their schedule."

There was some further testimony as to the different items of cost, all showing that the different items were discussed by the plaintiff and Mr. Smith as they were being placed in the schedule. Had a total loss been incurred by the plaintiff of the items set forth in the schedule, then what Mr. Smith, the agent of the defendant, told the plaintiff, would have measured the exact liability of the defendant, and would have just equalled the judgment rendered by the trial court in this action, but such was not the case. There

was not a total loss of the items insured against. As we have stated, some 1,150 acres of the land were not irrigated. No barley was harvested, threshed, sacked, or hauled to market. Hence we think there is nothing in the contention of respondent that the defendant's agent misrepresented anything to the plaintiff, or that the application of the plaintiff was made or induced by any fraud or misrepresentation of any agent of the defendant. While in this case there was a total loss of the crop, there was not a loss of all of the items insured against, as we have herein shown, and, as to the items of loss covered by the insurance to the extent of a fraction less than one-half thereof, it appears from the record that the defendant is willing that the plaintiff may take judgment. The transcript further shows that, if the insurance had been issued for the total estimated cost of producing a crop of barley, the premium would have been twice as much.

[2, 3] Notwithstanding the fact that the indorsement upon the policy or rider, as it is sometimes called in the briefs of counsel, mentioned the fact that the defendant declined to insure the wheat crop about to be raised by the plaintiff, and was returning the premium, and also mentioned the total insurance upon the 1,724 acres of barley which the plaintiff accepted as constituting insurance upon the barley, it is nevertheless contended that the remaining portion of the indorsement or rider is invalid, on the theory that the plaintiff was unaware of the language used therein until after the loss had occurred, and therefore is not bound by the same. We do not very well see how the plaintiff can accept a portion thereof and reject the remainder, as the remainder is consistent with both the application and the policy, as we have heretofore shown. However, the rider or indorsement having been made upon the policy prior to its issuance by the company and forwarded to the plaintiff, we think it became and is a part of the contract, if there is any contract in this case, as fully to all intents and purposes as though read by the plaintiff prior to the date of loss.

In 26 C. J. p. 76, § 72, in considering attached slips or matter on the margin of policies, the text-writer uses the following words:

"Provisions may be incorporated into the policy by slips or riders attached thereto. Such slip or rider will be construed in connection with the printed provisions of the policy, and the entire contract harmonized, if possible, but, if there is an irreconcilable conflict, the slip or rider will control. In order, however, to form a part of the contract, the slip or rider should be referred to in the body of the policy; it is not a part of the policy merely because it is enclosed in the same envelope in which the policy is sent to insured, or because it is pinned on the policy. A rider indorsed on the standard form of policy, containing provisions within the contemplation of the statute permitting

such form to be added to or modified, prevails over conflicting provisions in the standard form."

This text is supported by a great number of authorities cited in footnotes 49, 50, 51, and 52 of the same volume, pages 76 and 77.

The indorsement referred to herein contains, among others, the following words: "Attached to and made a part of the crop investment policy C-2667 issued by the Hartford Fire Insurance Company." That a slip or rider attached to a policy modifying or explaining its provisions will be read into the contract, see, also, volume 1, Cooley, Briefs on the Law of Insurance, p. 642; 14 R. C. L. p. 934; Scharles v. N. Hubbard Junior & Co., 74 Misc. Rep. 72, 131 N. Y. S. 848; Aetna Ins. Co. v. Sacramento-Stockton S. S. Co. (C. C. A.) 273 F. 55. In 14 Cal. Jur. p. 432, § 17, the law relative to modification of insurance contracts is thus stated:

"The modification of a contract of insurance is governed by the rules which are applicable to contracts generally. Unless the contract itself otherwise provides, it cannot be changed without the consent of all the parties, since each has a right to have the agreement remain unaltered and to have it performed. A standard fire policy cannot be modified, changed, or added to except by attachment of separate riders before delivery, or afterward, with the consent of the insured."

The record in this case, as we have stated, shows that the indorsement or rider was attached to the policy before delivery, and, as the authorities which we have cited hold, became a part and parcel thereof at the time it was issued by the defendant and received by the plaintiff. The case cited by respondent, holding attempts to modify policies by riders or slips issued after the execution and delivery of the policy, have no bearing upon the case at bar.

[4, 5] The application for insurance in the case at bar was made subject to the approval or rejection by the defendant. Under such circumstances the application is but one of the purposes or steps leading up to a contract of insurance. It requires action on the part of the insurer, to whom the application is made, before a binding contract can be created. In other words, there must be a meeting of minds or a meeting of the mind of the applicant and the insurer. If the insurer, instead of following the application, makes some additions or changes and forwards the policy to the insured, then and in that case a completed contract has not been made until the insured has accepted the same, or by his acts may be held to have accepted the same. Fidelity & Casualty Co. of New York v. Curtis Brown Co., 105 Okl. 136, 232 P. 99. In the opinion in this case we find the following:

"It is well settled that acceptance of the application in order to be good must be of the very terms offered; otherwise no contract can

result" (citing First National Bank v. Hall, 101 U. S. 43, 25 L. Ed. 822; Stephens v. Capital Insurance Co., 87 Iowa, 283, 54 N. W. 139). "An application for insurance, whether or not it is accompanied by payment of a premium, amounts to but a proposal, and does not become a completed contract until it is accepted by the insurer. Until there has been an acceptance of the terms proposed, the meeting of the minds which is necessary to the contract is wanting" (citing authorities).

To the same effect State ex rel. Equitable Life Assur. Soc. of U. S. v. Robertson et al. (Mo. Sup.) 191 S. W. 989, and cases cited on page 991 of said volume. See, also, Rioridan v. Equitable Life Assur. Soc. of the U. S., 31 Idaho, 657, 175 P. 586.

Was the policy accepted by the plaintiff? Respondent's contention, as we have shown, is to the effect that the policy was accepted, save and except as to that portion of the indorsement relative to the proportion of the items of cost covered by the insurance. Appellant's contention is to the effect that the policy, including the whole of the indorsement thereon, was accepted by the respondent, and that the facts and the law so establish in this case, and likewise that, if such is not the case and the holding to be had herein, then and in that event there is no policy, and no recovery can be had. The transcript shows that at the time of the receipt of the policy from the company, about March 18, 1921, it bore the indorsement as we have set forth; that accompanying the policy there was returned the sum of \$1,207.50 on account of premium on the insurance sought to be obtained by the plaintiff on 1,725 acres of growing wheat; that the indorsement set forth the fact that the application for an insurance upon the wheat crop was canceled and the premium thereon was being returned, and then proceeds to set forth the insurance on the barley that was accepted, the interest of the insured therein, and the rate of insurance or amount of insurance on each item of cost set forth in the plaintiff's application covering the 1,724 acres of growing barley. The insurance policy was placed in a safe deposit vault belonging to the plaintiff, and there remained until some time the latter part of May of the same year. The returned check was cashed by the plaintiff, and nothing further appears to have been done by the plaintiff in reference to the policy until the loss had occurred. Under such circumstances we think the evidence warrants only one finding, and that is that the policy, with the whole indorsement, was accepted by the plaintiff. We do not very well perceive how it can be found or held that the plaintiff accepted a part of the indorsement and not the whole thereof. In this particular the case of Blunt v. Fidelity & Casualty Co., 145 Cal. 268, 78 P. 729, 67 L. R. A. 793, 104 Am. St. Rep. 34, is in point. There, as in the case at bar, the policy issued differed in some particulars from the application. It

was there held that the company was at liberty to insert conditions in the policy differing from what was contained in the application; that under such circumstances the insured, upon receipt of the policy, had the right to reject the same, but that, when he received the policy and accepted it without objection, it became binding. That case goes slightly farther than the one at bar, in that there was a renewal of the policy, the terms of which were disputed. Here, however, the plaintiff knew that the policy issued by the defendant differed in some of its provisions from his application by the very fact that the premium paid in advance on account of the insurance sought upon the wheat, was returned, and yet, in face of this fact and in face of the fact of having cashed the check representing such return premium, his testimony is to the effect that the policy was placed in his safe deposit vault without his having read the same or taken the pains to inform himself as to the contents of the indorsement canceling his application for insurance upon the wheat and setting forth the fact of the return of the premium thereon. In *Kahn v. Royal Indemnity Co.*, 39 Cal. App. 180, 178 P. 331, where a hearing was denied in the Supreme Court, we find the following:

"Nor is there any merit in the further claim that the provisions of the policy cannot be enforced against plaintiff for the reason that the insured did not read it and was unfamiliar with its provisions. By accepting and retaining the policy without objection, the insured was bound by its terms, and the plaintiff claiming thereunder cannot be heard to state that the insured did not read the policy or any of its provisions."

Likewise, it would follow here that the insured, in seeking to enforce the terms of the policy against the defendant, cannot be heard to say, under the circumstances which we have set forth, that he did not read the policy, and therefore is not bound by all of the terms of the indorsement, a portion of which he accepted, and still claim the benefit thereof. In *Capps v. National Union Fire Insurance Co.*, 318 Ill. 350, 149 N. E. 247, the rule is thus stated:

"Unless [the insured] has been misled by some act of the insurer, it is generally held that a person who accepts and retains the possession of an insurance policy is bound to know its contents."

To the same effect is *Browne v. Commercial Assurance Co.*, 30 Cal. App. 547, 158 P. 765; *Bank of Fruitvale v. Fidelity & Casualty Co.*, 35 Cal. App. 666, 170 P. 852. These cases cite a number of other decisions to the same effect.

In *Madsen v. Maryland Casualty Co.*, 168 Cal. 204, 142 P. 51, the rule followed in this state is set forth as follows:

"By accepting and retaining the contract without objection plaintiff was bound by its

terms and cannot now be heard to say that he did not read it or know its terms. *Quinlan v. Providence Washington Ins. Co.*, 133 N. Y. 356 [31 N. E. 31, 28 Am. St. Rep. 645]; *Cleaver v. Traders Co.*, 65 Mich. 527 [32 N. W. 660, 8 Am. St. Rep. 908]; *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392 [89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705]; *Wierengo v. American Fire Ins. Co.*, 98 Mich. 621 [57 N. W. 833]; *McFarland v. St. Paul F. & M. Ins. Co.*, 46 Minn. 519 [49 N. W. 253]; *Reeve v. Phoenix Ins. Co.*, 23 La. Ann. 219; *Overton v. American Cent. Ins. Co.*, 79 Mo. App. 1; *Johnson v. Dakota F. & M. Ins. Co.*, 1 N. D. 167 [45 N. W. 799]; *Monitor Mut. Fire Ins. Co. v. Buffum*, 115 Mass. 343; *Conner v. Manchester Assur. Co.*, 130 F. 743 [65 C. C. A. 127, 70 L. R. A. 106]."

See, also, *Fidelity & Casualty Co. v. Fresno Flume & Irrigation Co.*, 161 Cal. 466, 119 P. 646, 37 L. R. A. (N. S.) 322; 14 Cal. Jur., p. 427, sec. 13.

In view of the authorities cited and the facts set forth herein, it must be found and held that the plaintiff accepted the policy, including the whole of the indorsement thereon, and that the trial court's finding to the contrary is not supported by the evidence, and the conclusions of law drawn by the court from its findings are erroneous.

[6] As the evidence in this case is without conflict upon all the material points involved therein, and proper findings may be drawn therefrom and a correct judgment entered thereon awarding to the plaintiff the amount to which he is entitled, and this cause terminated without further litigation by this court exercising the authority conferred by the recent constitutional amendment empowering an appellate court so to do, and also in accordance with the provisions of section 956a of the Code of Civil Procedure, where trial by jury is not a matter of right, or where trial by jury has been waived, as in this case, it is hereby ordered that finding No. 9, made by the trial court, is amended to read as follows:

"It is true that, in the event plaintiff's crop of barley became a total loss, then and in that event the plaintiff was entitled to recover the sum of 5.00/10.25 of the amount of each and every item of cost incurred in the production of said crop of barley, not exceeding the sum of \$8,625."

It is further ordered that finding No. 10 be amended to read as follows:

"It is true that plaintiff applied for said policy on or about the 1st day of March, 1921, and that said application thereafter became, and now is a part of said policy; that said application was rejected as to the insurance applied for on the wheat crop mentioned therein, and there was returned to the applicant the sum of \$1,207.50, leaving in force in said policy the sum of \$8,625 on 1,724 acres of barley in said policy of insurance mentioned, loss, if any, to be calculated at the rate of 5.00/10.25 on each item of expenditure, in the production of

said crop of barley, made and incurred by the plaintiff."

It is further ordered that finding No. 11 be stricken out.

It is further ordered that finding No. 12 be amended to read as follows:

"It is true that it was understood and agreed that, for the purposes of said insurance, every item of the schedule of costs mentioned in said application for a policy of insurance on said barley was, by indorsement on the policy prior to its issuance by the defendant and made a part thereof, reduced to the sum of 5.00/10.25 of the amount shown in the application."

It is further ordered that finding No. 13 be amended to read as follows:

"It is true that the indorsement placed on said policy was attached to and made a part of said policy of insurance prior to its issuance by the defendant; that said policy was received by the plaintiff with the indorsement thereon canceling his application, as to the insurance upon the growing crop of wheat, applied for by the plaintiff; that a check was returned to the plaintiff by the defendant for the amount of the premium on the wheat policy applied for, to wit, in the sum of \$1,207.50; that the plaintiff cashed said check, was aware that his application had been accepted only in part; that said policy was placed in a safe deposit vault belonging to the plaintiff and kept by him from the time of its receipt on or about March 18, 1921, until the latter part of May, 1921, without any objection being made by him to the defendant on account of anything contained in said indorsement."

It is further ordered that finding No. 14 be amended to read as follows:

"It is true that on or about the 18th day of March, 1921, the sum of \$1,207.50, part of the total premium upon said policy, was returned to plaintiff by defendant, which said sum of \$1,207.50 was the return premium upon the first item of said policy covering the sum in the amount aforesaid of \$12,075 on the aforesaid 1,725 acres of wheat, which said item was canceled, as hereinabove found, and at the same time there was forwarded by the defendant to the plaintiff, and received by the plaintiff, as herein stated, a policy of insurance covering the growing crop of barley in the following words and figures: 'In consideration of \$1,207.50 return premium, the first item of said policy covering \$12,075.00 on 1,725 acres of wheat is hereby canceled leaving in force only \$8,625.00 covering two-thirds interest in 1,724 acres of barley, being second item of this policy, it being understood and agreed that for the purposes of this insurance each item of schedule of costs on barley item is reduced to 5.00/10.25 of the amounts shown in application. Attached to and made a part of crop investment policy C-2667 issued by Hartford Fire Insurance Company.

"March 18, 1921.

"Dixwell Hewitt, General Agent."

It is further ordered that finding No. 15 is amended to read as follows:

"It is also true that the premium of \$690, being the second item of said policy covering the aforesaid sum and amount of \$8,625 on the aforesaid 1,724 acres of barley in said policy mentioned, was wholly and entirely retained and kept by said defendant, and that no part thereof was ever returned by said defendant to said plaintiff, and that said sum of \$690 was the correct amount of the premium to be paid by the plaintiff to the defendant for the insurance issued to him by the defendant on account of said 1,724 acres of barley."

It is further ordered that finding No. 17 be corrected to read as follows:

"It is true that at least 1,150 acres of said barley were not irrigated by the plaintiff."

It is further ordered that finding No. 18 be amended to read as follows:

"It is true that the total amount of insurance recoverable by said plaintiff does not exceed the sum of \$3.17 per acre, being 5.00/10.25 of the amount set forth in said schedules."

It is further ordered that finding No. 19 be amended to read as follows:

"It is true that the amount of the insurance due the plaintiff should be reduced by the failure to irrigate 1,150 acres thereof, to the extent of 73 cents per acre."

It is further ordered that finding No. 20 be amended to read as follows:

"It is true that plaintiff's net loss which he is entitled to recover under the policy of insurance issued by the defendant and accepted by him is as follows: 1,724 acres of barley at \$3.17 per acre, \$5,465.08, from which there should be deducted for failure to irrigate, 1,150 acres thereof, the insured cost of 73 cents per acre not incurred by the plaintiff, amounting to the sum of \$839.50, leaving plaintiff's net loss which he is entitled to recover from the defendant in the sum of \$4,625.58."

It is further ordered that the conclusions of law drawn by the trial court be amended by striking therefrom the figures representing \$8,625 wherever said figures occur, and inserting in lieu thereof the figures "\$4,625.58."

It is further ordered that, in accordance with the findings in this case as herein amended and the conclusions of law as herein amended, the judgment in favor of the plaintiff be modified by striking therefrom the words "eight thousand six hundred twenty-five dollars" and the figures "\$8,625.00," and inserting in lieu thereof the words "four thousand six hundred twenty-five and $\frac{58}{100}$ dollars," and the figures "\$4,625.58, together with legal interest thereon from the 31st day of May, 1921," and as so amended the judgment of the trial court will stand affirmed. The defendant will have and recover its costs on appeal.

We concur: FINCH, P. J.; GLENN, Justice pro tem.

85 Cal. App. 746

VAN HOOSSEN et ux. v. BRISCOE.*
(Civ. 5606.)District Court of Appeal, First District,
Division 1, California. Oct. 3, 1927.

Hearing Denied by Supreme Court Dec. 1, 1927.

1. Money received $\S$ 18(3)—In action to recover money had and received, evidence held to support findings for plaintiffs.

In action to recover money paid to defendant by plaintiffs' debtor, evidence that such money was paid, to be held by defendant until he and plaintiffs entered into contract for sale of land for which they contemplated entering into written contract, that written contract was never entered into, and that land deal did not take place, held to support findings for plaintiffs.

2. Vendor and purchaser $\S$ 21—When parties to contract for sale of land understand that it is to be reduced to writing and signed, assent thereto must be shown by written contract.

Where parties to oral contract for sale of land have understanding that its terms are to be reduced to writing and signed, assent to its terms must be evidenced in such manner to become binding.

3. Contracts $\S$ 15—To be final, material terms of contract must be agreed on, and cannot be left to future settlement.

Preliminary negotiations leading up to contract must be distinguished from contract itself, and, to be final, material terms must be agreed on, and cannot be left to future settlement.

4. Contracts $\S$ 32—Contract is not binding where, although terms have been agreed on orally, parties have agreed it shall not be binding until evidenced by writing.

There is no binding contract where, although terms have been agreed on orally, parties have also agreed that it shall not be binding until evidenced by writing.

5. Money received $\S$ 9—In absence of binding contract authorizing defendant to receive and keep money from plaintiffs' debtor, plaintiff may recover it.

In action for money had and received, where there was no binding contract authorizing defendant to retain money paid to him by plaintiffs' debtor, plaintiff was entitled to recover money.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Eugene Van Hoosen and wife against E. V. Briscoe. From a judgment for plaintiffs, defendant appeals. Affirmed.

Cosgrave & Barstow, of Fresno, for appellant.

Ernest Klette, of Fresno, for respondents.

TYLER, P. J. Action for money had and received. The complaint alleges that on or about the 15th day of March, 1923, defendant collected of and from W. F. Steffin and

R. B. Steffin, for the use and benefit of said plaintiffs, the sum of \$1,490 then owing by the said Steffins to plaintiffs, which sum defendant agreed to repay on request, but that he failed so to do. Defendant denied these allegations, and as a separate defense alleged that on or about December 15, 1922, plaintiffs agreed to purchase of and from defendant a certain tract of land consisting of 20 acres, for the sum of \$12,000, which sum plaintiffs agreed to pay in installments from time to time, and that defendant received from plaintiffs the amount sued for in partial performance of this agreement, which sum was voluntarily paid by plaintiff.

[1] The trial court found all the allegations of plaintiffs' complaint to be true. It further found that it was not true as alleged by defendant that plaintiffs agreed to purchase of or from defendant the land described in his answer for the purchase price mentioned, or any other sum. In this connection it found that plaintiff Eugene Van Hoosen and the defendant did, in the year 1921, enter into negotiations for the sale of 20 acres of land near Delano, county of Tulare, from defendant to said plaintiff Eugene Van Hoosen; that said negotiations continued from time to time until about the end of March, 1923, when they were terminated; that during all of the time the negotiations were being carried on between said parties it was their intention that said proposed contract should be reduced to writing, and was so agreed by them; that it was not true that the sum of \$1,490, referred to in plaintiffs' complaint, or any part thereof, was transmitted by the Steffins or either of them, to the plaintiff by defendant, or that plaintiff paid the same to defendant as a partial payment on any contract. Additional findings are to the effect that on or about March 15, 1923, defendant was in possession of the sum of \$1,490, the property of plaintiffs, and that at said time Eugene Van Hoosen and defendant orally agreed that when the terms and conditions of a contract for the sale of the land should be agreed upon and determined and a contract made and executed, the said money should be applied upon the purchase price of the land, and it was orally agreed that defendant should retain said money for such purpose; that defendant did retain the money, but without the knowledge or consent of Grace Van Hoosen, who was the wife of Eugene Van Hoosen, one of the plaintiffs herein; that the terms of the contract were never agreed upon and determined or ever entered into. As a conclusion of law, the court found that plaintiffs were entitled to recover the sum of \$1,490 principal, together with interest.

It is here claimed that these findings are entirely unsupported by the evidence, and that the finding that negotiations only for a sale were had by the parties is in direct con-

tradiction to the undisputed evidence. We do not think so, but, on the contrary, we are of the opinion that the findings are fully supported by the evidence. There is evidence to show that defendant Briscoe had acquired under a contract of purchase a tract of some 150 acres of land at Delano, Tulare county, on which he was making payments of the purchase price. The plaintiffs Van Hoosen and his wife lived near defendant, who employed Eugene Van Hoosen to take charge of the improvement work upon the tract so purchased. The parties entered into a tentative verbal agreement for the sale and purchase of 20 of the 150 acres, upon the same terms defendant was acquiring the lands. Van Hoosen at that time had a tract of land which he was about to sell to one Steffin, and during the negotiations leading up to this sale, and before a contract had been signed, Van Hoosen proposed to defendant that the payments coming from Steffin might be applied on the purchase price. The sale between Van Hoosen and Steffin was completed. On March 15, 1923, Steffin was desirous of paying an installment of \$1,000 principal and \$490 interest upon his contract with Van Hoosen, and, being of the opinion that the payments were to go to defendant upon the contract of purchase contemplated between him and Van Hoosen, Steffin delivered to defendant two checks, one for \$1,000 and the other for \$490. One of the checks was from the Fresno Abstract Company, drawn in favor of Steffin for between \$900 and \$1,000, and the other was payable to defendant, Briscoe, and it amounted to the difference between that sum and the \$1,490 that Steffin was to pay. Briscoe cashed the checks and retained the proceeds. Van Hoosen and defendant, Briscoe, continued their negotiations for the purchase and sale of the 20 acres, but no contract was ever entered into by them for the sale and purchase of any particular portion of the tract. Some time in March, 1923, and shortly after defendant had cashed the two checks mentioned, and proximately a year and a half after their original negotiations were entered into, Van Hoosen became dissatisfied with the arrangement and demanded the amount of money defendant had received from Steffin as above

narrated. The evidence shows conclusively that no written contract was ever entered into in relation to the sale of any particular land, and there is evidence to show, not only that no exact portion of the tract that Van Hoosen was to have was ever set apart by metes and bounds, but was only discussed generally and no definite terms of payments were ever agreed upon between them except that indefinite sums were to be paid "from time to time." There is also evidence to show that defendant was never directly authorized by Van Hoosen to retain the sums he received from Steffin in payment of any contract of purchase. The finding that it was the intention of the parties to reduce the terms of any contract that they might determine upon to writing also finds full support in the evidence.

[2-5] We are not, therefore, here concerned with the question of what character of performance of an oral contract for the sale of land will take the case out of the operation of the statute, for, when it is part of an understanding between the parties that the terms of the contract are to be reduced to writing and signed by them, assent to its terms must be evidenced in the manner agreed upon, in order to become binding. Preliminary negotiations leading up to the execution of a contract must be distinguished from the contract itself. 13 Cor. Jur. 289. There is no meeting of the minds of the parties while they are merely negotiating as to the terms of an agreement to be entered into between them. To be final, the material terms must be agreed upon, and cannot be left to future settlement; nor is there a binding contract where, although the terms have been agreed on orally, the parties have also agreed that it shall not be binding until evidenced by writing. *Los Palmas, etc., Distillery v. Garrett & Co.*, 167 Cal. 397, 139 P. 1077. Since no binding contract was ever entered into between the parties, the sums retained by defendant under the circumstances indicated may be recovered by the plaintiffs, and the trial court correctly so concluded.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

85 Cal. App. 753

LEUTHOLTZ v. HOTCHKISS. (Civ. 5933.)

District Court of Appeal, First District, Division 2, California. Oct. 4, 1927.

Public lands ⚡53—Grantee of state's lieu land, after federal government's erroneous cancellation of state's selection, lost rights by laches extending over adverse possession period.

Where the United States Land Office, through an erroneous decision, denied its approval of the state's lieu land selection, and canceled any title the state might have obtained, the state's grantee of such land, who slept on his rights of appeal or further proceedings relative to such decision for a period equivalent to the adverse land possession period in law, thereby lost, through his laches, his equitable rights in the land.

Appeal from Superior Court, Kern County; W. B. Wallace, Judge.

Action to quiet title by Louise L. Leutholtz against O. E. Hotchkiss. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Hall and Charles S. Wheeler, Jr., both of San Francisco, for appellant.

C. E. Arnold, of Bakersfield, and George B. Bush, Philip C. Farman, and Roland Rich Woolley, all of Los Angeles, for respondent.

WARNE, Justice pro tem. This is an appeal by the defendant from a judgment in favor of plaintiff, adjudging plaintiff the owner of the exclusive right to the possession of certain lands in Kern county to prospect for and remove oil and gas therefrom and to the possession of said lands, and decreeing that defendant had not any right, title, or interest in said land, and enjoining defendant from asserting any claim of ownership in, or any right, title, or interest in or to, said land adverse to plaintiff.

Defendant answered, denying the claim of plaintiff, and asked for affirmative and injunctive relief.

The legal title to the land is vested in the United States.

Plaintiff's claim is predicated upon an oil and gas prospecting permit issued by the Secretary of the Interior on May 23, 1921, under the provisions of an Act of Congress, approved February 25, 1920 (U. S. Comp. St. § 4640¼ et seq.).

Defendant claims an equitable title to the land under a lieu land selection made therefor by the state of California on February 17, 1908, a purchase thereof by one Clarrage on March 12, 1921, and a grant deed from Clarrage on January 9, 1923. This deed was recorded in Kern county on June 11, 1924.

On February 17, 1908, when the land in question was selected by the state in lieu of certain school land within the boundaries of a government reservation, it was vacant

and unappropriated public land and not known to contain any valuable minerals or pools of oil or gas. This selection was rejected by the local land office because the base lands tendered by the state in exchange were within a temporary forest reserve withdrawal. An appeal was taken to the Commissioner of the General Land Office, resulting in a reversal of the order on April 20, 1909, with the direction that it be allowed, "if no other objection appears than the defect for which you reject the same."

No further action was taken by either the local or General Land Office until November 20, 1909, when the local land office returned the selection to the General Land Office, stating that it was suspended on October 12, 1909, on account of the lands selected being classified as oil lands. The state was allowed to furnish, and did furnish, an ex parte non-mineral affidavit, and an appeal was taken.

On July 17, 1916, the Commissioner of the General Land Office ordered the local land office to notify the state and its transferee that they would be allowed 30 days to accept a patent to the land, reserving to the United States the oil and gas therein, or to apply for a hearing to prove the nonmineral character of the land, and that, in the event of a failure to take action, or appeal from the decision to the Secretary of the Interior, within the specified time the case would be reported for appropriate action. Notice was accordingly served upon the state and its transferee on July 17, 1916. No action was taken in response by either, and the selection was ordered canceled on July 20, 1927. Clarrage made application to the state to purchase this land as land not suitable for cultivation, in January, 1908. This application was subsequently approved, and the state issued a certificate of purchase for the land in 1912. The certificate contained the following as a part thereof:

"The title to the within lands at date hereof is in the United States. State may not receive title, in which event this certificate is void. Also applicant's failure to comply with the rules of the United States Land Office will defeat applicant's right hereunder."

Plaintiff entered upon the lands under her prospecting permit, and has drilled a well to the depth of about 2,600 feet, at an expense of \$70,000. Plaintiff was aware of defendant's alleged claim to the land prior to the time of making any part of said expenditure, but it does not appear that she knew of the claim at the time her permit was issued. The mineral character of the land as known at the date of selection has not been established. Neither defendant nor his grantor have ever had possession of the land.

It seems to be that, at the time of the adverse decision of the Commissioner of the General Land Office, the Department of the

Interior took the erroneous position that it could deny an applicant approval of his lieu land selection if it became known that the land in question was mineral in character at any time after the original selection was made, although it was not known to be mineral when the applicant selected it. In March, 1921, the Supreme Court of the United States disapproved this rule (*Payne v. New Mexico*, 255 U. S. 367, 41 S. Ct. 333, 65 L. Ed. 680, and *Wyoming v. U. S.*, 255 U. S. 489, 41 S. Ct. 393, 65 L. Ed. 742), and laid down the rule that the mineral or nonmineral character of the land, as known at the date of the selection, is the only fact with reference to the character of the land open for determination by the Department in passing on the priority or validity of the selection, and further held that a selection made in compliance with law and the regulations of the Land Department took effect and vested an equitable interest in the state at the time it was filed in the Land Office.

The trial court concluded that the state and its transferee had accepted the construction of the law as announced by the Commissioner of the General Land Office by failing to appeal from his decision to the Secretary of the Interior and thereby abandoned his claim; "also that defendant is barred from relief by the court by his long delay, including that of his predecessor in interest, in asserting an interest in the land."

Appellant attacks these conclusions. He claims that an equitable interest having once vested in the state upon making the lieu land selection, it was not defeated by the erroneous ruling of the Land Department on a question of law; that, it being a mistake of law, the Secretary of the Department of the Interior should, and can, correct it at any time on application; that it is his function and duty to correct such mistake, and, until the Secretary has determined the question of whether the land was known to be mineral or nonmineral at the time of selection, the appellant's equitable title cannot be questioned. In support of the authority or duty of the secretary to correct a mistake of law, appellant cites the case of *Gage v. Gunther*, 136 Cal. 338, 68 P. 710, 89 Am. St. Rep. 141. This might be urged, were it not for the intervening rights of the respondent, and it could be said without question that appellant and his

predecessors in interest had not by their acts and delay led one to the conclusion that they had abandoned whatever right they may have had to the land. Appellant did not avail himself of his right of appeal to the Secretary of the Interior from the Commissioner's ruling. The state's selection was canceled, and both the state and Clarrage acquiesced in such cancellation. True, the right once having vested, it could not be lost merely by the subsequent discovery of the land's being mineral in character, but the right could be, and was, we think, lost by permitting the government's cancellation of the selection duly made according to its rules and regulation to stand for the time it did. After the cancellation, the prospecting permit was duly issued to respondent, and at that time it does not appear that respondent was aware of any outstanding claim to the land. The land was open for prospecting for oil so far as the government's records showed. Neither appellant nor his grantor have ever occupied the land. Appellant took no steps to establish any equitable interest he may have had in the land until suit was brought by respondent to quiet title to her prospecting right, and this notwithstanding the fact that the Supreme Court of the United States had decided the *Payne Case*, supra, and *Wyoming Case*, supra, some two years before. Such delay as is shown here must, we think, be treated as abandonment of his claim. The appellant slept on his rights. As was said by the court below:

"A party defeated by the decision of the Land Department may not wait many years after an adverse decision there, especially of an intermediate department, and, when the Supreme Court shall have announced a new construction of the law in an entirely different action, successfully reassert his claim under such circumstances as are here disclosed. * * * The government, through its cancellation of the state selection, reasserted its title to the land, and resumed control of it for a much longer period than the statute of limitations (Code Civ. Proc. §§ 315-328) provides, and which may be relied upon in adverse proceedings to quiet title to real property."

For the reasons stated, the judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

85 Cal. App. 312

**PEOPLE of the State of California, Plaintiff
and Respondent, v. Mack GONZALES,
Defendant and Appellant. (Cr. 988.)**

District Court of Appeal, Third District, California. Sept. 1, 1927.

Appeal by defendant from a judgment of the Superior Court of Siskiyou County, C. J. Luttrell, Judge, of conviction of murder in the first degree with life imprisonment and from an order denying motion for new trial. Affirmed.

James M. Allen and J. P. McNamara, both of Yreka, and D. D. Hawkins, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was charged with the murder of his wife. He was convicted of murder of the first degree and his punishment was fixed at life imprisonment. The appeal is from the judgment and the order denying a new trial.

The transcript on appeal was filed in this court June 16, 1927. No brief has been filed in behalf of appellant. The cause was regularly placed on the September calendar for oral argument. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

85 Cal. App. 796

**PEOPLE of the State of California, Plaintiff
and Respondent, v. Victor NERRI, Defendant
and Appellant. (Cr. 992.)**

District Court of Appeal, Third District, California. Sept. 1, 1927.

Appeal by defendant from a judgment of the Superior Court of Merced County, E. N. Recor, Judge, of conviction of possession of a concealable weapon and from an order denying motion for new trial. Reversed.

Edward Bickmore and Andrew R. Schottky, both of Merced, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The indictment charged that the defendant, being an unnaturalized foreign-born person, had possession of a pistol capable of being concealed upon his person. He was convicted and his motion for a new trial was denied. This appeal is from the judgment and the order denying a new trial.

The state of the evidence and the grounds urged for a reversal are the same as upon which a reversal was had in *People v. Quarez*, 196 Cal. 404, 238 P. 363. On the authority of that case, the judgment and the order are reversed.

85 Cal. App. 311

**PEOPLE of the State of California, Plaintiff
and Respondent, v. William H. WATSON,
Defendant and Appellant. (Cr. 984.)**

District Court of Appeal, Third District, California. Sept. 1, 1927.

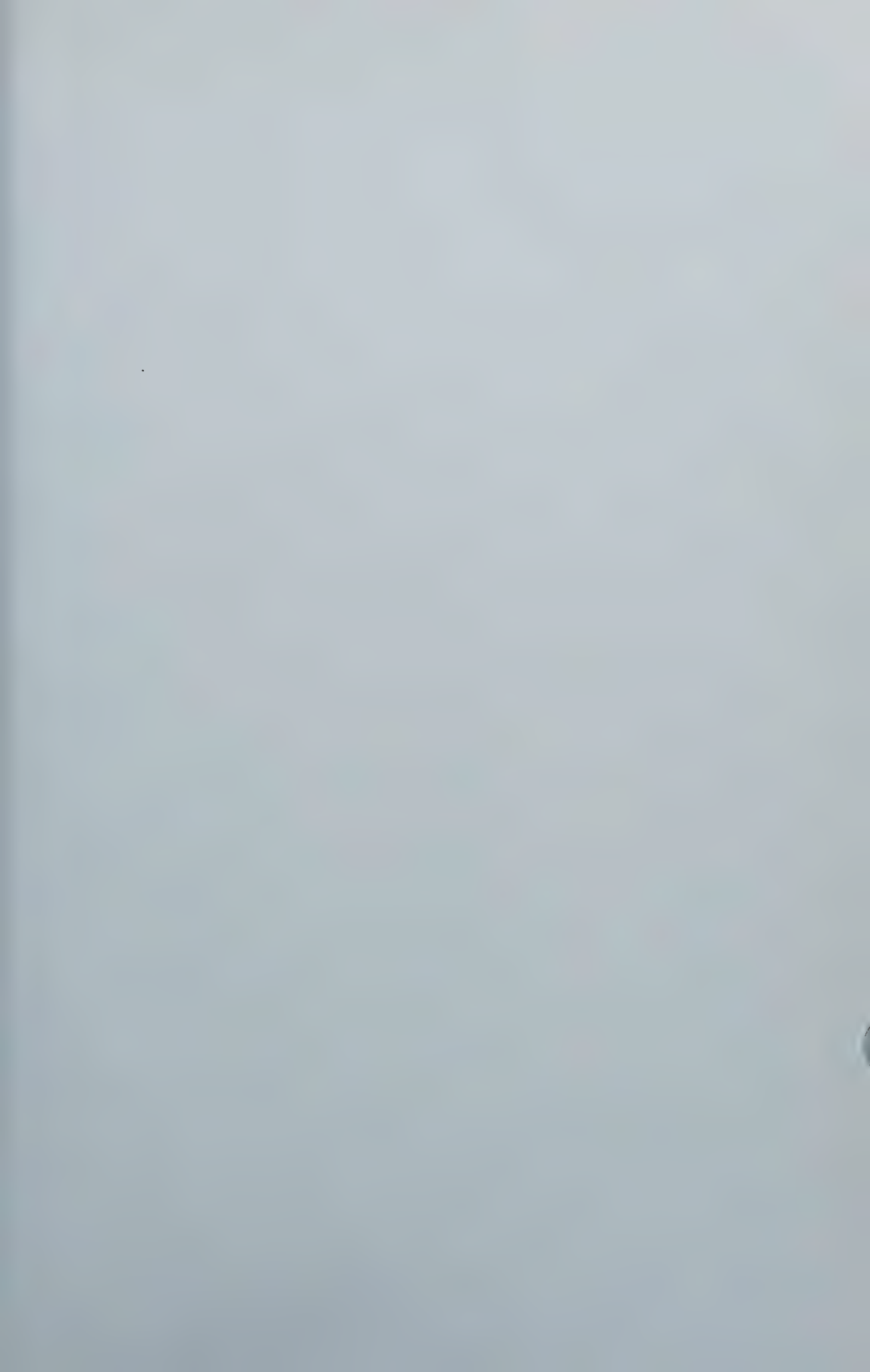
Appeal by defendant from a judgment of the Superior Court of Stanislaus County, J. C. Needham, Judge, of conviction of assault with a deadly weapon. Affirmed.

D. M. Maclean and Hugo McKinley, both of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted in the superior court of Stanislaus county of a felony, to wit, the crime of assault with a deadly weapon.

The transcript on appeal was filed in this court May 31, 1927. No brief has been filed in behalf of appellant. The cause was regularly placed on the September calendar for oral argument. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code the judgment and the order are affirmed.



CALIFORNIA REPORTER

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202 Cal. 295

DAHLBERG v. DAHLBERG. (S. F. 12495.)★

Supreme Court of California. Oct. 18, 1927.

Rehearing Denied Nov. 17, 1927.

1. Appeal and error ⇐766—Record held not to show error, where plaintiff did not set forth pleadings, evidence, findings, or judgment (Code Civ. Proc. § 953c).

Supreme Court could properly affirm, notwithstanding plaintiff's claim that judgment entered was detrimental to him, where he did not in brief set forth pleadings, findings, judgment nor evidence, as required by Code Civ. Proc. § 953c.

2. Appeal and error ⇐1135—Supreme Court can affirm judgment where, in absence of record, it cannot say error was committed.

The Supreme Court can properly affirm a judgment where, in absence of record, it cannot say that error was committed by trial court in rendition of judgment.

3. Appeal and error ⇐763—Offer to print supplemental brief and file portions of record held too late when made at hearing of motion to affirm judgment (Code Civ. Proc. § 953c).

Offer to print supplemental brief and file portions of record the Supreme Court might deem necessary to proper presentation of appeal held too late when first made at hearing of motion to affirm judgment because of failure to set forth parts of record in brief or supplement, as required by Code Civ. Proc. § 953c.

In Bank.

Action to cancel deeds of conveyance of real property by Andrew Dahlberg against Emma Dahlberg. From a judgment for defendant, plaintiff appeals. On motion to affirm. Judgment affirmed.

Wal J. Tuska and Herbert Chamberlin, both of San Francisco, for appellant.

Gerald C. Halsey and Frederic T. Leo, both of San Francisco, for respondent.

PER CURIAM. [1] Motion to affirm judgment on the ground of the failure of appellant to print or set forth in his brief, or any supplement thereto, in accordance with the requirements of section 953c, Code of Civil Procedure, any part of the record herein sufficient to justify a reversal of said judgment. The action was instituted for the purpose of canceling two certain deeds of conveyance of real property whereby plaintiff purported to convey to defendant an undivided one-half of three certain parcels of land, and also for the purpose of canceling a judgment of partition based upon said deeds. By the terms of said judgment one of said tracts of land was awarded to defendant herein, and the two other tracts were awarded to plaintiff herein, subject to a lien thereon of \$11,497.05, in favor of the defendant herein. In appellant's brief he claims:

"That by mutual mistakes of fact on the part of the attorneys for the respective parties in the partition suit, by the referees appointed by the court and by the court, an erroneous estimate of values was made and considered and, based thereon, an erroneous judgment was entered in the partition proceedings to the detriment of appellant."

Yet appellant has not in his brief nor in any supplement thereto printed or set forth any of the pleadings in this action nor the findings nor judgment of the court herein, nor any of the evidence offered by plaintiff in support of his claim that said judgment in the partition action was erroneously rendered by reason of said mutual mistakes. The record before us, therefore, fails to show any error on the part of the trial court in rendering judgment against appellant upon the ground just stated.

[2] Again, the appellant in his brief contends that the judgment in the partition suit was procured through the fraud of his attorneys in conspiring and colluding with the attorneys for respondent in said action to have the final decree of partition entered in the form in which it was entered without consultation with appellant, and that his said attorneys conspired and colluded with the attorneys of respondent to have said final decree become a finality by entering into a stipulation with respondent's attorneys without notice to appellant and without his knowledge or consent, whereby appellant's right to move for a new trial and his right to appeal from said judgment were waived. The appellant has not printed in his brief nor in any supplement thereto any evidence whatever in support of his contention that the decree of partition in the form in which it was entered was rendered through the connivance and collusion of his attorneys with those of the respondent. A brief skeleton of the evidence of appellant, as a witness in the case, tending to show that plaintiff's counsel in the partition action acted without appellant's knowledge or consent in waiving his right to move for a new trial and to appeal, appears in the printed brief. This is followed by a statement that an examination of the record discloses that neither of appellant's attorneys in the partition suit was called to the witness stand to contradict the appellant. This "record," however, is not printed in appellant's brief nor in any supplement thereto, and is therefore not before us for our examination. We are unable to say, therefore, that any error was committed by the trial court in the rendition of said judgment. As was said by this court in the case of Scott v. Hollywood Park Co., 176 Cal. 680, 681, 169 P. 379:

"Neither in his brief nor in any supplement thereto is there anything to indicate what relief was sought by the action, nor is there any-

thing printed in the brief indicating the nature of the judgment which appellant says was erroneously rendered. All presumptions indulged in are in favor of the regularity of the judgment and proceedings upon which it is based, hence it devolves upon an appellant to affirmatively show the existence of the error upon which he asks for a reversal."

See, also, *Estate of McPhee*, 156 Cal. 335, 104 P. 455, Ann. Cas. 1913E, 899; *Marcucci v. Vowinkel*, 164 Cal. 693, 130 P. 430; *McKinnell v. Hansen*, 34 Cal. App. 76, 167 P. 887; *Miller v. Oliver*, 174 Cal. 407, 163 P. 357; *Estate of Berry*, 195 Cal. 354, 233 P. 330. In the *Estate of Berry*, supra, at page 359 (233 P. 332) thereof, this court said:

"The result is not only that it was the plain duty of appellants to print in their brief or in the supplement thereto all portions of the record necessary to be considered by this court before arriving at a conclusion that the judgment should be reversed, but also that because of their failure so to do, this court would be fully justified in affirming the judgment appealed from without further consideration of the record. Appellants seem to believe that they have performed their duty fully in this respect when they have printed the portions of the evidence upon which they rely. They overlook the fact that in order to determine whether or not the evidence is sufficient to sustain a given finding, we must have before us not only the evidence but also the finding. If we had the finding before us and should conclude that the evidence was insufficient to support it, we still could not determine whether or not such finding was essential to support the judgment unless we had before us the pleadings or at least an accurate statement of the issues framed thereby."

We are reluctant to dismiss an appeal on any mere technical rule of procedure and thereby deny to appellant the right to have his case decided upon its merits, but the above cited section of the Code has been in full force and effect since the year 1907, excepting during the years 1919 to 1923. This court has repeatedly called the attention of the profession to the mandatory character of its provisions by affirming judgments appealed from when the appealing party has failed to comply with its requirements. It now seems that the rule of procedure thus enunciated has become so firmly established and so often reiterated by this court and the District Courts of Appeal that there is little excuse for any one to fail to comply with its terms. In the very recent case of *Jeffords v. Young*, 197 Cal. 224, 229, 239 P. 1054, 1056, we had occasion to consider the effect of the failure to comply with this section of the Code, and on that occasion expressed our views as follows:

"Not a word of the pleadings, findings, judgment, order, or testimony is to be found in appellants' brief, as is expressly required by sec-

tion 953c of the Code of Civil Procedure. It has been reiterated approximately one hundred times in the decisions of this court and of the District Courts of Appeal that it is incumbent upon an appellant who relies upon a typewritten transcript to print in his brief or in a printed supplement thereto sufficient of the record to justify a reversal of the judgment or order appealed from. (2 Cal. Jur. 643 et seq.) Furthermore, as we pointed out some months ago (*Estate of Berry*, 195 Cal. 354, 233 P. 330), since the 1923 amendment to the section last cited, an appellant who fails to do this incurs thereby the risk that the order or judgment appealed from may be affirmed upon motion."

[3] The belated offer of appellant, made at the hearing of this motion, to print in a supplemental brief and file herein certain portions of the record as this court might deem necessary to the proper presentation of his appeal, does not, in our opinion, merit a denial of said motion. Such a procedure would cast upon this court the burden of a laborious examination of the typewritten transcript filed herein in order to enable us to determine the portions thereof necessary to be printed in such supplement. This labor properly belongs to the appellant and should have been performed by him previous to the filing of his brief and the necessary portions of said record set forth therein. We are therefore of the opinion that the motion of the respondent should be granted.

The judgment appealed from is affirmed.

202 Cal. 279

NULTY v. PRICE. (S. F. 11602.) ★

Supreme Court of California. Oct. 17, 1927.

Rehearing Denied Nov. 14, 1927.

1. Appeal and error ~~§~~994(3)—Court, sitting without jury, is judge of witnesses' credibility.

Trial court, sitting without jury, is judge of credibility of witnesses.

2. Bills and notes ~~§~~39—Note promising to pay "two thousand dollars of horse hire" held one for payment of \$2,000 in money (Civ. Code, § 3082).

Note promising to pay "two thousand dollars of horse hire" held one to pay \$2,000 in money, within Civ. Code, § 3082, especially in view of evidence showing maker's indebtedness on running account for horses and horse hire.

3. Bills and notes ~~§~~116—Uncertain language in note is interpreted most strongly against maker (Civ. Code, § 1654).

When uncertainty exists as to meaning of note, language is to be interpreted most strongly against maker as party who caused such uncertainty to exist, in view of Civ. Code, § 1654.

4. Bills and notes ~~§~~126—Notes containing words "any attorneys fees paid," "and attorney fees aded," and "attorney fees I promise to pay" justified recovery for attorney's fees.

Notes containing words "any attorneys fees paid," "and attorney fees aded," and "attor-

ney fees I promise to pay" held to justify recovery of attorney's fees; it being clearly indicated that maker intended to pay reasonable attorney's fees in event of suit.

5. Pleading $\S$ 258(4)—**Trial** $\S$ 377(2)—**Refusal to vacate submission and allow further proof and amended answer on ground that new evidence was cumulative, and that failure to produce it at trial was lack of diligence, held not abuse of discretion.**

In action on notes, denial of motion to vacate submission of case and allow further proof on merits, with permission to file amended answer, held not abuse of discretion, where denial was because of lack of diligence in presenting evidence at trial, and because alleged new evidence was cumulative.

6. Bills and notes $\S$ 501—**Evidence of mental and physical condition shortly after signing of notes is admissible in action on such notes.**

In action on notes, evidence tending to show mental and physical condition of maker, resulting from intoxication subsequent to time notes were signed, is admissible, if such condition was shortly after signing of notes.

7. Appeal and error $\S$ 1056(5)—**Error in excluding cumulative evidence is not reversible in trial to court.**

In action on notes, tried to court without jury, error in excluding evidence is not prejudicial where it is cumulative, and it cannot be said that a consideration of it would have caused a different result.

In Bank.

Appeal from Superior Court, Contra Costa County; J. A. Smith, Judge.

Action by W. T. Nulty against W. E. Price. Judgment for plaintiff, and defendant appeals. Affirmed.

R. P. Henshall, of San Francisco, for appellant.

Thos. D. Johnston, J. E. Rodgers, and A. F. Bray, all of Martinez, for respondent.

SHENK, J. [1] This is an appeal from a judgment in favor of the plaintiff on three promissory notes dated December 11, 1920. Each note was signed by the defendant as maker. The first one sued on was made in favor of Anna Nulty, wife of the plaintiff, in the sum of \$6,225, and was assigned to the plaintiff before the action was commenced. The second and third notes were made in favor of the plaintiff in the sums of \$2,000 and \$5,072.90, respectively. In his answer the defendant admitted that he had signed said notes, but alleged as to all of them that they were signed when he "was incapacitated and weak from intoxication and unable to act for himself, and done under threats of great bodily harm to defendant made by said Anna Nulty and others then and there present and the plaintiff herein. Said threats were made before and at the time of the signing of said instruments, and the same were signed by

said defendant in the belief that he could escape great bodily harm only by signing the same." As to the first and third notes, it was alleged in the answer that they were made without consideration. The court, sitting without a jury, found these allegations of the answer to be untrue and entered judgment for the full amount of the principal sums, interest, attorney's fees, and costs. As to the findings on the alleged incapacity and want of consideration, the defendant contends that they are wanting in sufficient evidentiary support. The evidence on those issues is voluminous and presents a conflict of a very material character. The trial court was the judge of the credibility of the witnesses. Assuming that we have, under present law, the power to make findings, in a case such as the present one, contrary to those made by the trial court, we do not feel warranted in doing so on the evidence presented by the record.

[2] The note set forth in the second count provides:

"Two W. T. Nulty I promise to pay for value received 2000 two thousand dollars of horse hire which I promise to pay," with interest, etc.

It is contended that this is not a promissory note by reason of the inclusion of the phrase "of horse hire." No question of the negotiability of the note is here involved, as the action is between the payee and the maker. The point is that the obligation is not one for the payment of "a sum certain in money." Civ. Code, $\S$ 3082. The complaint alleged in the second count that the defendant "made a certain promissory note in writing," further describing it, and then setting forth a copy thereof in full. This allegation was not denied, and the plaintiff insists that the defendant is now in no position to urge the point. Assuming for the purpose of this case that the admission is not binding on the defendant in the presence of a copy of the note in the pleading, it is clear that the words "of horse hire" are but a description of the source of the consideration for the obligation and are not a designation of payment in services to be performed. See *Womack v. Walling*, 1 Baxt. (60 Tenn.) 425; 8 C. J. 132. We think the obligation was one to pay \$2,000 in money. If there be any doubt as to the meaning of the language on the face of the note, because of ambiguity, and if it might be said that the obligation on the face thereof was to pay \$2,000 *worth* "of horse hire," this ambiguity is dispelled in the light of the evidence, which shows that prior to the execution of the instrument the defendant was indebted to the plaintiff on a running account for horses and horse hire, concerning which the note was to constitute a settlement. The parties undoubtedly meant that \$2,000 was to be paid in money "for" horse hire.

[3, 4] It is next insisted that in no event

should there be a recovery of attorney's fees. The first note contains the words "any attorneys fees paid." In the second note we find the words "and attorney fees aded." The third note provides, "Attorney fees I promise to pay." There is misspelling in each note, and each is inartificially framed. The defendant himself drafted the instruments, and when uncertainty exists therein the language is to be interpreted most strongly against him as the party who caused the uncertainty to exist. Civ. Code, § 1654. The trial court applied this rule of construction and allowed attorney's fees on each note. This conclusion seems reasonable in view of the language employed, which indicates clearly that it was the intention of the defendant to pay reasonable attorney's fees in the event of suit. Taking into consideration the length of the trial and the service performed, the amount fixed by the court does not appear to be excessive. It may also be noted that the complaint in each count alleged that attorney's fees were payable and prayed that a reasonable amount be allowed. These allegations were not denied in the answer.

[5] The defendant charges prejudicial error in the denial by the trial court of a motion to vacate the submission of the case and allow further proof on the merits with permission to file an amended answer. The action was commenced in 1920 and was partially tried before a judge who died prior to decision. On retrial five days were occupied in the taking of evidence, after which the case was submitted on briefs in February, 1924. In the month of September following the defendant filed his notice of motion to vacate the submission and to be allowed to file an amended answer. The showing in support of the motion was by affidavit of the defendant and of his former counsel, now deceased, wherein it was alleged that since the submission of the cause the defendant had discovered that three checks, two in the sum of \$4.70, and the third in the sum of \$267.70, had been made in his favor by the board of trade on March 25, 1919, and had been indorsed by some one by writing his name on the back thereof without his authority, and that he firmly believed said handwriting to be that of Mrs. Nulty. He averred that if these checks passed through his hands they did so at a time when he was intoxicated. He further alleged that two checks in the sum of \$264.08 each appeared on the books of the board of trade to have been issued to him, and that the moneys represented thereby had not been received by him, and that he verily believed that said checks were indorsed and cashed by Mrs. Nulty, and not by himself. It was further alleged that on April 28, 1919,

his former attorney delivered to him a check in the sum of \$400, and that this check was indorsed by some one other than himself, whom he believed to be Mrs. Nulty, and likewise that if said checks passed through his hands they did so at a time when he was intoxicated. The affidavit of the former attorney for the defendant corroborated the statement made in defendant's affidavit to the effect that the attorney had issued to him the check for \$400, and that the canceled check bears an indorsement not in the handwriting of the defendant. The defendant further stated in his affidavit that the reason why he did not produce evidence concerning these checks was because he was not aware of the facts concerning them when he testified at the trial, and that he must have delivered them to Mrs. Nulty, who cashed them. There was evidence that the defendant authorized Mrs. Nulty to indorse checks for him and deposit the amounts thereof in the bank to his credit or cash the same and make payments therefrom on his behalf. In the proposed amended answer the defendant sought to set up a confidential relationship between himself and Mrs. Nulty, and that the latter appropriated money to her own use, the amount being unknown to the defendant. These allegations were in the nature of allegations to conform to the proof. The trial court ruled on the motion by a formal order of denial without stating the reasons for the order, but it is apparent from the record, which includes numerous items of account covering some 85 pages of the transcript and involving large sums of money, that the motion was denied because of lack of diligence in presenting the evidence at the trial, and that the alleged new evidence was cumulative. We find no abuse of discretion in the denial of the motion.

[6, 7] In a supplemental brief the defendant further objects to rulings of the trial court relating to evidence tending to show the mental and physical condition of the defendant resulting from intoxication subsequent to the time the notes were signed. Evidence of mental and physical condition shortly after the event is admissible (*Estate of O'Connor*, 51 Cal. App. 339, 196 P. 792, and cases cited); but this proffered evidence was, at the most, cumulative, and it cannot be said that if the court had considered the same the result would have been different.

As no prejudicial error is found in the record, the judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

202 Cal. 289

In re JACOBSEN. (Cr. 3067.)

Supreme Court of California. Oct. 18, 1927.

Attorney and client —39—Attorney, convicted of felony involving moral turpitude, but placed on probation, should be suspended pending further action in criminal case (Pen. Code, § 1203).

Where attorney at law was convicted of a felony involving moral turpitude, but the trial court placed him on probation, suspending the imposition and execution of sentence, and might thereunder set aside the verdict of guilty, dismiss the accusation, and release him from all penalties and disabilities, under Pen. Code, § 1203, held that Supreme Court should suspend him from practice until further action should be taken in the criminal case.

In Bank.

In the matter of the suspension of Victor L. Jacobsen, an attorney at law. Attorney suspended.

WASTE, C. J. Victor L. Jacobsen, an attorney at law, admitted to practice in this state, was duly convicted of a felony involving moral turpitude, and the clerk of the superior court for the county of Los Angeles, the court in which such conviction was had, has transmitted to this court a certified copy of the record of conviction. The defendant did not appeal, and in that regard the judgment of conviction has become final; but the trial court has placed Jacobsen on probation, and the imposing and execution of the sentence have been suspended. The terms of the order of probation are not before us, but, if the defendant fulfills the conditions of his probation for the entire period thereof, or shall be discharged from probation prior to the maximum period of punishment for the offense of which he has been convicted, the trial court may set aside the verdict of guilty and dismiss the accusation against the defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. Pen. Code, § 1203.

We are informed that Jacobsen has made application to the appropriate District Court of Appeal for permission to resign as an attorney and counselor at law, but that the application has not yet been acted upon. Whether he should be permitted to resign under the circumstances in which he has been placed by his conviction (see *Ex parte Thompson*, 32 Or. 499, 52 P. 570, 40 L. R. A. 194), or what may be the final result of his probation, are matters which do not now concern this court. An attorney convicted of a felony involving moral turpitude, the nature of which is calculated to injure his reputation for the performance of the important duties which the law enjoins,

should not be permitted to escape punishment. If the court permits it, such act tends to lessen the respect which the public should have for the members of the legal profession. *Ex parte Thompson*, supra. Pending any further action in the case of the attorney, an order of suspension should be made.

Let an order be entered that Victor L. Jacobsen be suspended as an attorney and counselor at law until the further order of this court, and that, until such further order, he be precluded from practicing as an attorney at law, or as an attorney or agent of another, in and before all the courts, commissions, and tribunals of this state, and from holding himself out to the public as an attorney and counselor at law.

We concur: CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

202 Cal. 272

TUBBY v. TUBBY. (S. F. 11260.) ★

Supreme Court of California. Oct. 11, 1927.

Rehearing Denied Nov. 10, 1927.

1. Divorce —303(3), 309—Service of notice of hearing and order to show cause on former husband gave court jurisdiction to modify divorce decree as to child's custody and support.

Service on former husband of notice of hearing and order to show cause why decree granting him divorce should not be modified as to custody and support of child was sufficient to give court jurisdiction over him and subject-matter of motion to modify decree.

2. Divorce —303(3), 309—Former husband, present with counsel when motion to modify divorce decree came on for hearing, waived objections, not then made, to service.

Former husband, present in court and represented by counsel when motion to modify divorce decree as to custody and support of child came regularly on for hearing after service of notice and order to show cause on him, waived objections that no affidavit or copy thereof was served on him, nor any copy of notice of motion, hearing of order or affidavit on his attorney, by making no objection at such time.

3. Divorce —303(3)—Court could modify divorce decree as to child's custody, though such intended modification was stated very generally in order to show cause and notice of hearing (Civ. Code, § 138).

Under Civ. Code, § 138, trial court, having jurisdiction of divorce action and parties thereto, had full authority to modify final decree as to custody of minor child, though intended modification was stated in very general terms, except as to amount demanded for support of child, in order to show cause and notice of hearing.

4. Courts —52—Transfer of cause to another department of superior court does not transfer jurisdiction; court being single entity.

Jurisdiction being vested by Constitution in superior court of city and county of San Fran-

cisco, not in particular judges or departments into which it is divided for convenient dispatch of business, transfer from one department to another is not a transfer of jurisdiction of cause, which remains throughout in court as single entity.

5. Courts ⇐50—Five days' notice of reassignment or transfer of cause to another department of superior court is not required (Code Civ. Proc. § 594).

Code Civ. Proc. § 594, as to "notice of trial," does not require service of notice of reassignment or transfer of cause from one department of superior court to another.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Benjamin K. Knight, Judge.

Suit by Oliver G. Tubby against Leah Rodman Tubby. Decree for plaintiff. From an order modifying the decree, he appeals. Affirmed.

Superseding opinion, 256 P. 586.

John L. McNab, of San Francisco (R. H. Countryman, of San Francisco, of counsel), for appellant.

Clara Shortridge Foltz, of Los Angeles, for respondent.

WASTE, C. J. An interlocutory decree was rendered in the court below by which the plaintiff was granted a divorce from the defendant on the ground of her willful desertion. The custody of the minor child of the parties, a son, of the age of about 3 years, was, by consent, awarded to the defendant, but no provision was made in the decree for the support of the child. In due course a final decree was entered. It contained the same provision as to the custody of the minor child that was embodied in the interlocutory decree, and, it appearing to the court that the property rights of the parties had been settled out of court, nothing was awarded the defendant by way of alimony, and no provision was made for the financial support of the child.

Some 2½ years after the entry of the final decree the defendant obtained an order of court, based upon an affidavit of herself, directing the plaintiff to appear and show cause why an order theretofore "made and entered in the above-entitled action should not be modified; and further to show cause * * * why [he] should not pay to defendant * * * for the support and maintenance of said minor child * * * the sum of \$50 per month." This order, accompanied by a notice of hearing, but without the affidavit, was served by the sheriff on the plaintiff personally. The motion to modify came on regularly for hearing in department 9 of the superior court of the city and county of San Francisco, the parties being personally present in

court, and each represented by counsel. The record recites that:

"After certain proceedings were had therein, the matter of said motion was by the court continued until Friday, June 8, 1923, at the hour of 10 o'clock a. m."

On the day to which the proceeding was continued, the defendant and her counsel were in court, but the plaintiff was not present and was not represented. The presiding judge of the court reassigned the proceeding to department 8, and the clerk of that department placed the proceeding upon the calendar for hearing at 10 o'clock. The matter was reached about noon of that day. It was taken up and considered by the court, which made an order modifying the final decree. It found that the child, then of the age of 7 years, was physically frail, at all times exceedingly nervous and easily excited, and was then, and for some time had been, under the care of a physician. After reciting other matters relating to the comfort and welfare of the child, and finding that the plaintiff was then voluntarily contributing toward its maintenance the sum of \$35 per month, the court ordered that the final decree of divorce be modified in substance to conform to the final decree as to the custody of the child and the right of the plaintiff in the premises, and further, that the plaintiff be ordered to pay to defendant, for the maintenance and support of the child, the sum of \$50 per month, to continue regularly thereafter until the further order of the court. It is from this order modifying the final decree that the plaintiff has appealed.

[1, 2] Appellant complains, first, that no affidavit, or copy of any affidavit, of the defendant, on which the motion to modify was based, was ever served on plaintiff, and that no copy of notice of motion or hearing of the order to show cause or of the affidavit was served on the attorney for plaintiff. Plaintiff is not in position to make this objection to the order. Two and a half years had elapsed after the entry of the final decree, and there was nothing of record to show that the attorney who formerly represented plaintiff in the divorce action was still his attorney. The service of the notice of hearing and order to show cause on the plaintiff was sufficient service to give the court jurisdiction over him and of the subject-matter of the motion. The plaintiff was present in court and was represented by counsel at the time the motion to modify the decree came regularly on for hearing in department 9. No objection was then made, and from the record it does not appear that any objection was ever made to the service had on the plaintiff. He must therefore be held to have waived any objections which he might have offered at that time.

[3] It is next contended by appellant that neither the order to show cause nor the notice of hearing served on the plaintiff con-

tained any statement or gave notice to the effect that it was the desire of the defendant to have the final decree of divorce modified in relation to the custody of the minor child. It is true that any intended modification therein, except as to the amount to be contributed to the support of the child, is stated in very general terms; but the trial court having jurisdiction of the divorce action and the parties thereto was vested with full authority to make any order it might deem necessary for the custody, care, education, maintenance, and support of the minor child, during its minority. Civ. Code, § 138. The modification made by it in regard to the custody of the child is, in effect, but a restatement in different form of the provisions contained in the interlocutory and the final decrees, and the rights of the plaintiff are safeguarded by the language of the decree as modified.

[4, 5] Appellant's real contention appears to be that the trial court had no jurisdiction to make the order modifying the decree for the reason that the plaintiff did not have notice of the reassignment and transfer of the cause from one department of the superior court to another. He contends that he should have had "notice of trial," under the provisions of section 594 of the Code of Civil Procedure. There is only one superior court in the city and county of San Francisco. *Brown v. Campbell*, 110 Cal. 644, 43 P. 12. Jurisdiction is vested by the Constitution in the court, not in a particular judge or department. It further provides that there may be as many sessions of the court as there are judges. Whether sitting separately or together, the judges hold but one and the same court. The division into departments is for the convenient dispatch of business. *Ransome-Crummey Co. v. Wood*, 40 Cal. App. 355, 180 P. 951. A transfer from one department to another is not a transfer of the jurisdiction of the cause, which remains at all times in the court as a single entity. *Graziani v. Denny*, 174 Cal. 176, 162 P. 397. In those counties in which there are more than one department of the superior court, it is the recognized practice, when a cause assigned to one department cannot, for some reason, be heard at a designated time, to transfer it to another department where the court is not engaged at the time, for hearing forthwith. It would bring about an absurd situation in the courts of the counties having more than one department of the superior court to require service of the 5 days' notice provided in section 594, supra, in situations like that we are now considering. The record shows that the judge presiding in department No. 8 did not proceed with the hearing until satisfied that counsel for the plaintiff had assured counsel for the defendant that he was engaged elsewhere and would not appear at the hearing. The order modifying the decree also recites that the "motion

came on regularly for hearing in department 8 * * * of the court * * * after due and legal notice thereof to the plaintiff." The cases relied on by appellant do not apply to the present situation. They relate to setting causes for trial, failure to give the required notice, and inadvertence and excusable neglect on the part of counsel to properly note the date fixed. *Hagenkamp v. Equitable Life Assurance Society*, 29 Cal. App. 713, 156 P. 520; *Cahill v. Verdier*, 54 Cal. App. 465, 202 P. 154. Any general expression of the court in either case which may seem to make the decision applicable to the proceeding now before us must be disregarded.

The order appealed from is affirmed.

We concur: SEAWELL, J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

202 Cal. 284

In re DALY'S ESTATE.

DALY v. GEORGE et al.

(S. F. 12015.)

Supreme Court of California. Oct. 17, 1927.

1. Wills ☞754—Bequest to widow of one-half of stock owned by testator held specific legacy (Civ. Code, § 1357).

Bequest to widow of one-half of stock owned by testator was a specific legacy, under Civ. Code, § 1357, as legacy of particular thing specified and distinguished from all others of same kind.

2. Wills ☞728—Specific legacies carry all accretions by way of dividends or interest accruing after testator's death.

Specific legacies carry with them all accretions by way of dividends or interest that may accrue after death of testator.

3. Wills ☞812—Specific bequest to widow in codicil held not chargeable with portion of estate to be paid daughter to equalize distribution required by will (Civ. Code, § 1320; Code Civ. Proc. § 1563).

Will distributing estate to daughters, and providing for payment of deficiency to one daughter to equalize distribution, and that trust property not including specific legacy to widow should be subject to equalization provision, considered as a whole, under Civ. Code, § 1320, held not to manifest intention that specific bequest to widow in codicil should be charged with adjustment of estate to pay deficiency of one daughter, and, under Code Civ. Proc. § 1563, where there was other sufficient estate to pay debt, specific bequest was exempt.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Petition for partial distribution by Florence Adele Daly against William George and another, as executors of the last will and

testament of John D. Daly, deceased. From an order denying petition in part, petitioner appeals. Reversed.

Jos. T. O'Connor, Alexander McCulloch, and Cross & Brandt, all of San Francisco, for appellant.

Karl C. Partridge and Cullinan & Hickey, all of San Francisco, for respondents.

SHENK, J. This is an appeal from an order denying in part a petition for partial distribution.

The decedent, John D. Daly, died testate on the 1st day of January, 1923, at the age of 80 years. His will, of date September 8, 1912, and codicils thereto dated June 2, 1922, and November 17, 1922, were duly admitted to probate. On January 25, 1923, the son and a son-in-law of the decedent qualified as executors. The testator was survived by the son, four daughters, Sarah F. Tilton, Lillie I. George, Ida E. Levensaler, and Minnie E. Carson, and the widow, Florence Adele Daly, the appellant herein. During his lifetime the testator made deeds of gift and advancements to his five children. The second paragraph of the will devised and bequeathed to the daughters, other than Minnie E. Carson all of the estate, "subject, however, to the charges against my estate and provisions for equalizing benefits received or to be received from me or my estate and provisions for * * * my daughter, Minnie E. Carson, hereinafter contained."

The daughter Minnie E. Carson received by means of deeds and advancements less property than the other daughters. With the expressed purpose and desire to have his four daughters participate equally, it was provided in the will as follows:

"And, I further will and direct that before distribution of my said estate is made and at the time thereof, so nearly as may be, there shall be ascertained the value of my said estate otherwise subject to distribution to my said daughters other than Minnie E. Carson, plus the then value of all the properties conveyed to my daughters as herein recited. * * * That said value of all said properties be divided by four and that said Minnie E. Carson be paid from my estate the difference (if there be any to her detriment). * * * And I hereby give, devise and bequeath unto her a sum so to be paid to her equal to said difference."

Until this division was accomplished Mrs. Carson was to receive \$100 per month from the estate. At the time the original will was executed the testator was a widower. He subsequently remarried. By the codicil of June 2, 1922, he republished the original will subject to the provisions of the codicil. The second paragraph of this codicil provided for a \$500 bequest to each of seven grandchildren and other relatives. In the third paragraph the testator bequeathed one-half of 15,377½ shares of the Dairy Delivery

Company, a corporation, then owned by him, to the appellant, and the other one-half to his executors in trust for his residuary legatees and devisees (which class included the daughters, but did not include the widow), subject to equalization according to said will. The executors, as trustees, were required to account to the "ultimate beneficiaries of the trust after all equalizations provided for in said will." If the said stock was disposed of prior to the death of the testator, the widow was to receive the sum of \$125 per month during her lifetime. The codicil of November 17, 1922, made additional specific bequests not material to this controversy. During the course of administration the executors received as dividends on all of the stock of the Dairy Delivery Company the sum of \$66,931.14. The widow filed her petition for partial distribution, wherein she prayed that the court distribute to her the stock and the dividends accrued thereon. The court made its order distributing to her one-half of said stock, but denied the petition for the distribution to her of one-half of the income therefrom. It is from that portion of the order denying the distribution of the income from one-half of the stock that this appeal is taken.

[1, 2] The bequest to the widow of one-half of the stock of the Dairy Delivery Company, being a "legacy of a particular thing, specified and distinguished from all others of the same kind," was, of course, a specific bequest (Civ. Code, § 1357; Estate of De Bernal, 165 Cal. 223, 131 P. 375, Ann. Cas. 1914D, 26), and "specific legacies carry with them all accessions by way of dividends or interest that may accrue after the death of the testator" (2 Schouler on Wills, § 1138, p. 1300; Estate of De Bernal, supra; Matter of Estate of Woodworth, 31 Cal. 595, 605; Larned v. Adams, 14 Fed. Cas. 1155, 1158, No. 8,092; Nash v. Ober, 2 App. D. C. 304, 308; Walton v. Walton, 7 Johns. Ch. [N. Y.] 258, 11 Am. Dec. 456). See 11 Cal. Jur. 484, 486.

[3] Notwithstanding the foregoing well-recognized propositions of law, it is contended by the respondents that the several testamentary instruments—the will and the two codicils—must be read together (Civ. Code, § 1320), and that, when so read, it must be concluded that it was the intention of the testator to make the deficiency in favor of Minnie E. Carson a charge against the entire estate, because in one clause in the original will it was provided that the said difference "be paid from my estate." But that clause must be read in connection with the other provisions of the will that the trust property, which, of course, does not include the legacy to the widow later provided for, is left to the residuary devisees and legatees, subject to equalization as provided in the will, and that the income from the trust property shall be paid to the residuary legatees and

devises "after all equalizations, as provided for in said will." The clause last quoted plainly refers to the equalization of the shares of the four daughters. Considering the three documents as one, we are unable to conclude that the specific bequest to the widow was intended by the testator to be charged in any way, either as against the corpus of the specific bequest or the income therefrom, with the adjustment of the portion of the estate to be received by Minnie E. Carson. If the difference in favor of the daughter could be properly considered a debt or an expense against the estate, the specific legacy to the widow would be charged therewith, if there were no other sufficient estate to satisfy the same; but a specific legacy is exempt from liability for debts and expenses, if there be other sufficient estate to satisfy them, and it was the intention of the testator that the specific legacy be not so charged. Code Civ. Proc. § 1563. No such intention appears and no question of the insufficiency of the estate otherwise to satisfy all claims or to respond to the equalization provided for by the testator is here involved. If it had been the intention of the testator to make the specific bequest to the widow subject to such equalization, it would have been an easy matter to have so provided in the codicil. The fact that he did not do so is persuasive that such was not his intention. It is pointed out that the executors, prior to the filing of the petition for partial distribution, paid in full the specific bequests to the grandchildren and others without abatement on account of the equalization of the share to be received by Mrs. Carson. This payment is not objected to by the appellant, but it is referred to as an indication that the executors believed that the specific legacies were not charged in any way with the adjustment of Mrs. Carson's share. There is nothing in the record to indicate that they were incorrect in so believing.

The portion of the order appealed from is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

86 Cal. App. 74

M. V. B. MacADAM CO., Inc., v. BRYANT.
(Civ. 5745.)

District Court of Appeal. First District, Division 1, California. Oct. 14, 1927.

1. Brokers ⚡49(1)—Broker was not entitled to commission where there was no unconditional acceptance of owner's offer to exchange property.

Under terms of owner's offer to exchange his ranch for apartment house wherein owner

agreed to pay certain commission, broker was not entitled to receive commission where apartment house owner accepted offer, subject to condition regarding loan to be obtained on ranch, and thus there was no unconditional acceptance of particular offer made by owner.

2. Exchange of property ⚡3(1)—Where apartment house owner accepted defendant's offer to exchange ranch, subject to condition regarding loan, condition destroyed mutuality of consideration and offer could be revoked.

Where defendant wrote broker agreeing to exchange his ranch, subject to certain incumbrances, or for certain apartment house, subject to incumbrances stated, and apartment house owner wrote on back of proposal acceptance, subject to conditions that furniture in house should be included in bill of sale and that broker should procure second loan for \$1,500 on defendant's ranch, premium to be not more than \$150, and interest at 8 per cent., but later eliminated clause regarding furniture, imposition of condition destroyed mutuality of consideration, and defendant could revoke his offer at any time before acceptance.

3. Exchange of property ⚡3(1)—Conditional acceptance of offer to exchange ranch operated as rejection of offer.

Where ranch owner offered to exchange his ranch for certain apartment house, insertion in proposed acceptance of condition as to obtaining second loan on ranch constituted counter-offer and operated as rejection of ranch owner's proposal and ended transaction.

4. Brokers ⚡40—Instrument offering to pay plaintiff commission if exchange of properties could be effected was mere proposal to exchange properties, not contract of employment.

Communication addressed to plaintiff in which defendant agreed to exchange his ranch for certain apartment house and stated that, if plaintiff succeeded in securing an acceptance of agreement on or before certain date, defendant would pay \$1,500 commission was mere proposal to exchange properties, and was not contract of employment.

5. Brokers ⚡44—Contract of agency to exchange lands, if not coupled with interest, may ordinarily be revoked by principal before performance.

Contract of agency to sell or exchange lands, if not coupled with an interest in subject of agency or given for valuable consideration, and which contains no provision that authority of agent shall remain irrevocable for any particular period, may be revoked by principal at any time before performance by agent.

5. Brokers ⚡44—Agreement to pay commission for exchange of property if effected before certain date, if contract of employment, was revocable any time before performance.

Agreement by ranch owner to pay broker certain commission if he could secure an acceptance of his offer to exchange ranch for apartment house on or before May 15, 1927, if contract of employment, was revocable by owner at any time prior to performance by broker.

Appeal from Superior Court, City and County of San Francisco; John L. Hudner, Judge.

Action by the M. V. B. MacAdam Company, Inc., for services as real estate broker against B. S. Bryant. From a judgment for defendant, plaintiff appeals. Affirmed.

Goldman, Nye & Spicer, of San Francisco, for appellant.

Walter Christie, and Frederic C. Benner, both of San Francisco, for respondent.

KNIGHT, J. Plaintiff appeals from an adverse judgment in an action to recover \$1,500 alleged to be due for services rendered as real estate broker in connection with a proposal made by respondent to exchange his ranch in Sonoma county for an apartment house in San Francisco.

It appears from the evidence that in May, 1924, after having had certain preliminary negotiations with a real estate salesman named Cohen, who was connected with the appellant company, respondent addressed a communication to appellant, dated May 6, 1924, wherein he agreed to exchange his ranch, subject to a bank incumbrance of \$12,500 bearing interest at 7 per cent., for an apartment house situate on Hyde street, in the city and county of San Francisco, subject to two incumbrances, one for \$20,000 bearing interest at 6 per cent., the other for \$6,500 bearing interest at 8 per cent. Continuing, the communication provided:

"Should you succeed in securing an acceptance of this agreement on or before May 15, 1924, I agree to pay you as commission \$1,500 for your services rendered, and you may also receive a commission from second party."

On May 8, 1924, Cohen, accompanied by Arthur M. Clement and wife, with whom the exchange was to be made, inspected the ranch in Sonoma county, and upon their return to San Francisco the same day Cohen drew a purported acceptance of respondent's offer on the reverse side thereof, which Clement and his wife signed. It reads as follows:

"May 8, 1924. We hereby accept the proposal upon the opposite side, subject to the following conditions, to wit: All furniture in the house to be included in bill of sale. The full commission to be \$1,000, of which \$500 is payable in cash, and \$500 in note, 180 days, with interest at 6 per cent. The MacAdam Company is to procure a second loan in the sum of \$1,500 for the period of 1 year at seller's option, the premium on said second mortgage to be not more than \$150 and interest at 8 per cent. That the matter of interest on first mortgage on Hyde street property to be corrected to 7 per cent. It is understood that the MacAdam Company is also receiving a commission from the first party. [Signed] Arthur M. Clement. Frieda L. Clement. Witness: A. E. Cohen."

After the foregoing had been signed, Cohen concluded that it did not constitute a legal acceptance of respondent's offer because of the insertion therein of the conditions that respondent include his furniture in the exchange, and that the interest on first mortgage on Hyde street property be corrected to read 7 per cent. After discussing the matter with the Clements, Cohen struck out the two clauses embodying the conditions mentioned by drawing a line through them, and on the margin of the paper opposite each clause had Clement write the word "Eliminated" and sign his name. On the following morning Cohen phoned respondent, and without informing him of the purported acceptance by the Clements, asked him about including his furniture in the transfer of his property, which respondent refused to accede to. The next day, which was May 10, after obtaining certain information relating to the value of the apartment house, respondent informed Cohen personally that his offer was withdrawn, at which time Cohen told respondent of the existence of the Clements' acceptance. Later, on the same day, respondent mailed appellant a written cancellation of his offer, which reached appellant on Monday, May 12, 1924.

[1, 2] It is apparent from the terms of respondent's proposal that appellant was not entitled to receive the commission specified therein unless it procured an unconditional acceptance of the particular offer made by respondent; that is, an acceptance which would have been legally enforceable at his option in case of default on the part of those seeking to be bound thereby. The trial court found that no such acceptance had been obtained, and we believe that this finding is fully supported by the facts and the law. The purported acceptance in its modified form was based, as will be observed, upon the express condition that the MacAdam Company obtain for the Clements "a second loan (on respondent's ranch) in the sum of \$1,500, for the period of 1 year at seller's option, the premium on said second mortgage to be not more than \$150 and interest at 8 per cent." In other words, the Clements agreed to exchange the apartment house for the ranch as proposed in respondent's offer only in case a second loan on the ranch was obtained for them on the terms specified. The imposition of such condition clearly destroyed the mutuality of consideration, because as the transaction then stood, although respondent's proposal was enforceable against him, the acceptance thereof was unenforceable against the Clements until the condition as to the second loan was complied with by appellant. Construed, therefore, as a proposal for exchange of properties, the instrument signed by respondent was revocable by him at any time before its

acceptance. *Hamlin v. Barnhart*, 26 Cal. App. 632, 147 P. 1188.

The case just cited, in its essential facts and on principle, is analogous to the one before us, and the court there held:

"The right of respondent to withdraw from the agreement seems clear. There was no mutuality of consideration provided for. On the one hand, it was proposed to bind respondent in absolute terms to perform on her part, while appellant's performance was made conditional. He was to perform only in case he could borrow \$4,500 on respondent's property, and impliedly the agreement was that this loan should be upon whatever conditions he might choose to impose as to duration of loan term, rate of interest, etc. In the event of his default, respondent had no remedy as against his caprice. The agreement of the parties imported no obligation on appellant's part which respondent could enforce. 'If a promise does not offer any enforceable legal right or forbearance it is not a consideration. This principle is sometimes expressed in the rule that promises, in order to be a valid consideration each for the other, must be mutual.' * * * Where the parties assume to make a contract in which a promise is the consideration for a promise, and analysis shows that one of the promises does not impose any legal duty upon the party making it, such promise is not a consideration for the other promise.' 1 Page on Contracts, §§ 302, 303, 304. It will be of no service to multiply citations to this fundamental rule governing the making of contracts. Having construed the contract as imposing no definite obligation on appellant to perform (a construction which his own words expressly declare to have been the one intended) there is no room left for further argument to the point that the alleged contract lacked mutuality of obligation or of consideration, which means the same thing. Treated as a mere offer to exchange, the proposal was revocable by respondent at any time before acceptance by appellant."

[3] Furthermore, it is held that an offer which is met by a counteroffer is thereby rejected (*McRae v. Ross*, 170 Cal. 74, 148 P. 215); also, that one who submits a counterproposal instead of accepting the offer cannot abandon the substitute and accept the original offer (*Niles v. Hancock*, 140 Cal. 157, 73 P. 840). In the present case the insertion in the proposed acceptance of the condition as to obtaining a second loan on respondent's ranch doubtless constituted a counteroffer, and therefore operated as a rejection of respondent's proposal, and ended the transaction.

[4] Appellant contends, however, that respondent's proposal to exchange properties was, in legal effect, a contract of employment, and that since respondent revoked the same prior to May 15, 1924, which was the limitation of time granted appellant to obtain an acceptance of respondent's proposal, appellant was entitled to receive the full commission provided for therein. We find no merit in the contention, because there appears to be no language used in the instru-

ment indicating that it was intended to be anything more than a mere proposal to exchange properties.

[5] Even assuming it to be a contract of employment, appellant is in no better position to claim the commission provided for therein, because it is well settled that a contract of agency to sell or exchange lands, if not coupled with an interest in the subject of the agency or given for a valuable consideration, and which contains no provision that the authority of the agent shall remain irrevocable for any particular period, may be revoked by the principal at any time before performance by the agents. *Brown v. Pforr*, 38 Cal. 550; *Roth v. Moeller*, 185 Cal. 415, 197 P. 62. A different rule prevails where the contract does contain a stipulation that the agency shall remain irrevocable for a specified time, the distinction between the two classes of cases being clearly pointed out in *Blumenthal v. Goodall*, 89 Cal. 251, 26 P. 906, *Ropes v. Rosenfeld's Sons*, 145 Cal. 671, 79 P. 354, and *Roth v. Moeller*, supra.

The clause of the contract reviewed in *Brown v. Pforr*, supra, is substantially the same as the one involved here, the principal there having agreed to pay the agents a commission if they "would undertake to seek, and should, within a month from that date, succeed in finding a person who should be willing and able, and who would agree to purchase" the principal's property for the price stated. The court held that the limitation of time mentioned therein was a restriction limiting the time allowed for performance by the agent, and not a restriction upon the principal's right of revocation, the court saying:

"It seems obvious to us that the restriction was intended for the benefit of the defendant, and not the plaintiffs. The force of the limitation is, that the defendant will pay them the stipulated price for the service if they completely perform it within one month; otherwise he will pay them nothing. There is nothing directly or impliedly affecting the question of revocation; and, indeed, we are unable to perceive how, under any circumstances, a mere limit as to the time allowed for the performance of a contract of agency to sell land, can be construed into an agreement on the part of the principal not to revoke the power."

[6] In the present case appellant makes no claim of interest in the subject-matter of the proposed exchange; the contract was in its nature purely unilateral, no contractual duty being imposed upon appellant; the consideration for the promise to pay the commission was wanting until appellant performed its part of the contract, which, as already shown, it did not do; and the contract contained no provision that appellant's authority thereunder should remain irrevocable for any period. Under such circumstances and in view of the decisions above cited, the con-

tract in question, if it be one of employment, was revocable by respondent at any time prior to performance by appellant.

The conclusion we have reached that the trial court's decision on the controlling issues should be sustained makes it unnecessary to discuss the other points presented by the appeal.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

86 Cal. App. 53

PEOPLE v. DEYOT. (Cr. 1533.)

District Court of Appeal, Second District, Division 1, California. Oct. 13, 1927.

Embezzlement — 44(1)—Evidence held insufficient to sustain conviction of embezzlement, but rather to show loan (Pen. Code, § 503).

Evidence, on appeal from conviction of embezzlement under Pen. Code, § 503, held to show money alleged to have been embezzled had been loaned to defendant, rather than intrusted to him, and hence conviction was erroneous.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Samuel H. Deyot was convicted of embezzlement, and he appeals. Reversed.

Paul C. Hill and Marcus Clarke, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards and John L. Flynn, Deputy Attys. Gen., for the People.

HOUSER J. Defendant appeals from a judgment of conviction of the crime of embezzlement and from an order denying his motion for a new trial.

The only point on which appellant relies for a reversal of the judgment is that the evidence was insufficient to support the verdict.

From the record it appears that defendant had a contract or an option with certain stockholders of a corporation to sell their stock therein for a price of approximately \$200,000, for which service defendant was to receive a fixed amount in cash and stock in the corporation; that in preparing to make such sale defendant apparently required some assistance in the way of ready cash, and in order to acquire same, or a portion thereof, he entered into a contract with one Marie Taylor by which, among other things, defendant agreed:

"That in consideration of Marie Taylor's syndicating with him and investing the sum of \$3,000 to assist in financing and acquiring a valuable interest with said company, he will return the investment of \$3,000 within twelve months from date, with interest at seven per cent. per

annum, and will cause to be issued, as the office of the corporation commissioner of California may direct, to said Marie Taylor by the Columbia Cement Company, not less than \$12,000 common stock at par. * * *

Although the prosecuting witness testified in substance that she gave the \$3,000 to defendant for the purpose of making an "investment," or for the purchase of "a valuable interest," and that the \$3,000 was to be returned to her at the end of one year, with interest at the rate of 7 per cent. per annum, together with not less than \$12,000 in stock of the corporation, nevertheless the evidence shows that a part only of the \$3,000 was repaid to the prosecuting witness, and that she received none of the stock of the corporation. Her testimony as to whether such "valuable interest" was to be acquired in her behalf, or for defendant personally, included the following:

"Q. Mrs. Taylor, did he say he was going to give you the interest, the valuable interest in the company, that he was to purchase? A. No. * * *

"Q. Was anything said by Mr. Deyot that you were to have that interest? A. No. He was to give me \$12,000 worth of stock. * * *

"Q. Now, I will refer you to a conversation of March 14, 1924, at the time this agreement was entered into; did you have any conversation at that time with Mr. Deyot regarding the formation of a partnership with Mr. Deyot? A. Why, no. He said that he wanted to purchase a valuable interest in the company, and that is why he needed my money. * * *

"Q. Did Mr. Deyot tell you at that time what valuable interest he intended to purchase in that company? A. No. He just said it was a valuable interest in the company. * * *

"Q. I will show you this agreement under date of March 14, 1924, which has been offered in evidence as People's Exhibit No. 1, and calling your attention to the portion of the agreement which reads as follows: 'and Deyot hereby agrees that in consideration of Marie Taylor's syndicating with him and investing the sum of \$3,000 to assist in financing and acquiring a valuable interest with said company,' did you have any conversation with Mr. Deyot as to what was meant by 'assisting in financing'? A. No. He told me that he wanted to purchase this valuable interest in the company."

Further testimony of the prosecuting witness disclosed what her understanding was with reference to the money which she advanced to defendant. In regard thereto, she testified as follows:

"Q. Mr. Deyot promised to return the \$3,000 at the expiration of the year? A. On or before one year.

"Q. And, in addition to the \$3,000, you were to receive 7 per cent. interest? A. Yes.

"Q. What was that interest to be? A. That was interest on the \$3,000 that I let him have for a year.

"Q. He was paying that interest to you for the use of that money for the year? A. Yes."

As to whether the money advanced by the prosecuting witness was to be expended or "invested" by defendant in accordance with instructions given to him by the prosecuting witness, the following testimony is significant:

"Q. Did you, at the time you gave this \$3,000 to Mr. Deyot, instruct him as to how he was to expend that money? A. Why, he wanted my \$3,000 to buy this valuable interest in the Columbia Cement Company.

"Q. You never instructed him as to how he should expend the money? A. Why, that is what he told me he was going to do with it. That is why I gave it to him.

"Q. For the purpose of acquiring a valuable interest in the Columbia Cement Company? A. Yes—and giving me \$12,000 worth of stock.

"Q. But as to how he was to expend it, you gave him no instructions, and had no conversation as to how he was to acquire that valuable interest? A. Why, no. He told me that he was going to do it. * * *

"Q. Did you discuss with Mr. Deyot what the value of this interest that he was to acquire was—what the market value of this interest he was to acquire was to be? A. No, I did not."

As showing the interpretation which the parties to the agreement placed upon its terms, a further and later agreement between them witnesses the following stipulation:

"That, whereas, certain agreements have been entered into by and between the parties hereto, and by a mutual settlement of said agreements it has been agreed that the party of the second part owes to the party of the first part the sum of three thousand dollars (\$3,000), with interest at seven per cent. (7%) from March 14, 1924. * * *"

At the time of entering into such agreement, the evidence shows that each of the parties was represented by an attorney.

It thus appears that by agreement of the parties the prosecuting witness advanced to defendant the sum of \$3,000 for the purpose of assisting him "in financing and acquiring a valuable interest" in the corporation, which "he (defendant) wanted to purchase," for which the prosecuting witness was to receive "not less than \$12,000 common stock at par," and within one year to have her "investment" of \$3,000, with interest at the rate of 7 per cent. per annum, returned to her; that defendant did not state that the "valuable interest" or any part thereof which he expected to acquire was to be the proper-

ty of the prosecuting witness; and that the prosecuting witness gave to defendant no instructions as to how he was to expend the money which was advanced by the prosecuting witness to defendant; nor was there any intimation that the "valuable interest" in question consisted wholly or in part of the "\$12,000 common stock at par." By some undisclosed means, but by way of "financing," which included the use of the \$3,000 belonging to the prosecuting witness, it is more or less apparent that defendant expected to become the owner of a large block of stock in the corporation; but that neither at the time the \$3,000 was delivered to defendant, nor at any time during the negotiations of the parties, was any mention made of any specific stock which was to be purchased by defendant for the use of the prosecuting witness.

By section 503 of the Penal Code the crime of "embezzlement" is defined as the fraudulent appropriation of property by a person to whom it has been intrusted; in the case of *People v. Shearer*, 143 Cal. 66, 67, 76 P. 813, it is said that it is essential to the commission of the crime of embezzlement that there should be a fraudulent appropriation of property to some use or purpose not in the due and lawful execution of his trust by one into whose possession it has come by reason of some relation of trust or confidence.

On consideration of the evidence, including the several agreements between the prosecuting witness and defendant, and especially the testimony of the former, it is impossible to arrive at the conclusion that a trust relationship existed between the prosecuting witness and defendant with reference to the \$3,000 which was advanced by the prosecuting witness to defendant. To the contrary, the evidence tends to establish the fact that the money involved in the transaction was a loan only, on which the prosecuting witness was to receive a stipulated rate of interest, together with "not less than \$12,000 common stock at par." In such circumstances it is clear that the evidence fails to show any "fraudulent appropriation of property by a person to whom it has (had) been entrusted" (section 503, Pen. Code), and therefore that it was insufficient to support the verdict.

The judgment and the order denying the motion for a new trial are reversed.

We concur: CONREY, P. J.; YORK, J.

85 Cal. App. 789

(260 P.)

PEOPLE v. PILBRO et al. (Cr. 977.)

District Court of Appeal, Third District, California. Oct. 8, 1927.

- 1. Criminal law** $\Rightarrow$ 1119(1)—When record shows motion only for severance, appellate court cannot say whether trial court properly exercised discretion (Pen. Code, § 1098, as amended by St. 1921, p. 90).

While under Pen. Code, § 1098, as amended by St. 1921, p. 90, trial court may in discretion order separate trials of defendants jointly charged, where the record shows motion only for severance by one defendant, appellate court cannot say whether trial court, in denying motion for separate trial by one defendant, properly exercised its discretion.

- 2. Jury** $\Rightarrow$ 136(7)—In joint trial, challenges of jurors by state under statute are not dependent on number of challenges exercised by defendants (Pen. Code, § 1070, and § 1098, as amended by St. 1921, p. 90).

Where under Pen. Code, § 1098, as amended by St. 1921, p. 90, each defendant in joint trial is entitled to five additional challenges from number prescribed by section 1070, and state is entitled to additional challenges equal to number of additional separate challenges allowed defendant, the challenges are allowed by law to the state, and the number to be exercised by it is not made dependent on number of challenges exercised by defendants.

- 3. Criminal law** $\Rightarrow$ 1166½(6)—Permitting prosecution to exercise more challenges than defendant could have exercised held not prejudicial unless objectionable juror sat (Pen. Code, §§ 1070, 1404, and § 1098 as amended by St. 1921, p. 90).

Where defendant was jointly prosecuted with another for unlawfully manufacturing intoxicating liquor, permitting the state under Pen. Code, § 1070, and section 1098, as amended by St. 1921, p. 90, to exercise more peremptory challenges than one defendant could have exercised because additional challenge allowed to defendants jointly tried must be exercised jointly, *held*, under section 1404, not prejudicial where it was not shown that objectionable juror sat at trial.

- 4. Criminal law** $\Rightarrow$ 1130(1)—Mere assignment of error on admission of testimony and argument of district attorney will not be considered.

Mere assignment of error on admission of testimony and error in argument of the district attorney will not be considered, in absence of citation of authorities or specification of particulars showing error.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Charles Pilbro and Frank X. Walsh were convicted of manufacturing intoxicating liquor, and defendant Walsh appeals. Affirmed.

E. Fitzgerald, of Placerville, for appellant.
U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. On the 8th day of March, 1927, an information was filed in the superior court of the county of El Dorado accusing the defendants, Charles Pilbro and Frank X. Walsh, of the crime of willfully and unlawfully manufacturing intoxicating liquor, etc., in said county. Both of the defendants, upon trial, were convicted. The defendant Walsh interposed a motion for new trial, which motion was denied, and thereupon said defendant appealed to this court from the order denying his motion for a new trial and from the judgment entered against him in said cause.

No contention is made that the evidence is insufficient to warrant the verdict of the jury, and an examination of the record shows that no such contention could be reasonably urged. We are presented upon this appeal with certain alleged errors relative to the order of the court denying the appellant's motion for a separate trial, errors in the impanelment of the jury, and errors in the admission of testimony and in the argument of counsel for the people made to the jury.

[1] The record on appellant's motion for a new trial shows the following: That on the 8th day of March, 1927, the appellant served a notice in these words (omitting the title):

"Take notice that on Friday, the 11th day of March, 1927, at the courtroom at the courthouse in Placerville, El Dorado county, Cal., at the hour of 10 o'clock a. m., of said day, the above-named defendant, Frank X. Walsh, will move the court, and said defendant hereby moves the court, for a separate trial in the above-entitled action. That said motion will be made and based upon the record and files in this cause. [Signed] E. Fitzgerald, Attorney for Frank X. Walsh."

In *People v. Anderson*, 59 Cal. App. 408, 211 P. 431, this court had before it for consideration an almost identical motion, where the record, just as in this case, shows absolutely nothing further. It was there held that while, under section 1098 of the Penal Code, as amended in 1921 (St. 1921, p. 90), the court may, in its discretion, order separate trials of two or more defendants jointly charged, but it is not bound or required to do so upon the mere request of any one of the defendants. On page 431 of the opinion in that case (211 P. 431) will be found cited numerous authorities to the effect that where the record shows nothing further than a mere motion, there is nothing upon which an appellate court can say that the trial court did not properly exercise its discretion.

In *People v. Erno*, 195 Cal. 272, 232 P. 710, a case where two defendants were charged with the crime of murder, the Supreme Court in that case said:

"When two or more defendants are jointly charged with a public offense, they must be tried jointly, unless the court order separate trials, and it is not bound to order separate trials upon the mere request of a defendant."

[2] Upon and during the course of the impanelment of the jury, the defendant Pilbro declined to join with his codefendant, Walsh, in the exercise of certain peremptory challenges. The record in this particular, so far as it is necessary to illustrate the point, is as follows:

"Mr. Fitzgerald: I will say to the court that I have talked with the defendant Pilbro, and he refuses to co-operate with the defendant Walsh in excusing persons on the jury that we desire to excuse.

"The Court: You understand what you are doing, Mr. Pilbro?

"Defendant Pilbro: Yes, sir; I am satisfied with the jury as they are.

"The Court: You deem it to your interest not to join in the challenge, is that it?

"Defendant Pilbro: Yes, sir.

"The Court: You deem it contrary to your interest at the present time to exercise this joint challenge, is that right?

"Defendant Pilbro: Yes, sir.

"Mr. Fitzgerald: Then I have no challenge.

"Mr. Lyon: Excuse Mr. Martin.

"Mr. Fitzgerald: We take an exception to the excusing of the last juror upon the ground that the state is exercising more challenges than the defendant can exercise—the defendant Walsh.

"The Court: Mr. Martin will be excused."

Substantially the same proceedings were had in relation to some other jurors, the record showing that the prosecution excused eight jurors challenged peremptorily, and the appellant Walsh five. It does not appear from the record that the defendant Walsh at any time asked leave to exercise more challenges than the five exercised by him; but, nevertheless, we will set forth the cases which seem to determine the law, irrespective of whether the appellant has or has not placed himself in a position to take advantage of any ruling of the court made during the impanelment of the jury. Section 1070 of the Penal Code, as it existed at the time of the trial of this cause, gave to a defendant ten and to the state five peremptory challenges, and section 1098 of the Penal Code, applying to cases where defendants are tried jointly, read then as it does now:

"If the defendants are tried jointly, the state and the defendants shall be entitled to the number of challenges prescribed by section 1070 of this Code, which challenges on the part of the defendants must be exercised jointly. Each defendant shall also be entitled to five additional challenges which may be exercised separately; the State shall also be entitled to additional challenges equal to one-half the number of all the additional separate challenges allowed the defendants."

Under this provision of the Code the defendants in this case were allowed ten chal-

lenges to be exercised jointly and five challenges to be exercised separately, which gave to the state the right to exercise ten challenges. The challenges are allowed by law to the state, and the number to be exercised is not made dependent upon the number of challenges exercised by the defendants.

[3] In the case of *People v. Rambaud*, 248 P. 954, this court had before it similar questions involving the impanelment of a jury. In that case no showing was made that any biased or unfit jurors were sworn to try the case, as it is not made to appear here that any other than an acceptable juror was sworn to try the case. In the *Rambaud Case* this court in its opinion said:

"As was said in many of the cases, the important thing to be considered is whether the objectionable juror was forced upon the defendant and whether he had had that to which he was entitled—a fair and impartial jury and not a jury composed of any particular individuals"—citing *People v. Johnson*, 57 Cal. App. 391, 207 P. 281; *People v. Kromphold*, 172 Cal. 512, 157 P. 599; *People v. Schafer*, 161 Cal. 573, 119 P. 920; *People v. Troutman*, 187 Cal. 313, 201 P. 928.

In the *Rambaud Case* it further appeared that after the defendant had exercised all his peremptory challenges, the court permitted the prosecution to exercise peremptory challenges upon two veniremen who had theretofore been passed for cause, and after the prosecution had declined to exercise, in turn, its peremptory challenges, as set forth in section 1088 of the Penal Code; but there, as here, no showing was made that any objectionable juror was forced upon the defendant, and the language there used in considering this question is pertinent here, to wit:

"Not the slightest intimation appears in the record of any dissatisfaction whatever relative to the jurors who were sworn to try the cause in the places of the persons just referred to."

We there held, as we may hold here, that under such circumstances section 1404 of the Penal Code applies relative to errors not affecting the substantial rights of the parties. See, also, 15 Cal. Jur. p. 323, § 3, and authorities there cited, all of which hold that while a defendant is entitled to a fair and impartial jury, he is not entitled to the service of any particular juror. The record shows that the appellant in this case was allowed and exercised all the challenges to which he was entitled.

Section 1098 of the Penal Code, in relation to peremptory challenges, requires, as we have said, that ten of them must be exercised jointly when two or more defendants are being jointly tried. As said in 15 California Jurisprudence, 407, § 79:

"In criminal cases when several defendants are tried together, they cannot sever their challenges but must join therein. And in civil ac-

tions where there are several parties on either side, they must join in the challenge before it can be made. In construing these provisions, it has been held in criminal cases that defendants must join in peremptory challenges as well as in those for cause. The provisions of the Code of Civil Procedure does not deny persons the equal protection of the laws, and thus violate the Fourteenth Amendment, for the same rule applies to all the parties to an action where they are united with others either as plaintiffs or defendants."

In *People v. McCalla*, 8 Cal. 301, the defendants were on trial for murder. We quote from the opinion of the court:

"The only error assigned, is the refusal of the court to exclude from the panel a juror, who was challenged peremptorily by one of the defendants, the other expressly refusing to join in the challenge."

It was there held that the challenge could only be exercised jointly. See, also, *State v. Mitchell*, 36 Idaho, 724, 214 P. 217. The same ruling was had in the County of San Luis Obispo v. Simas, 1 Cal. App. 175, 81 P. 972. To the same effect is the case of *Muller v. Hale*, 138 Cal. 163, 71 P. 81, where it is also held that the requirements that defendants or parties must join in the exercise of peremptory challenges is not violative of any constitutional provision.

The foregoing cases show clearly that the appellant's contention relative to the impanelment of the jury in the cause under consideration is wholly untenable. To support his contention the appellant relies upon the case of *People v. O'Connor*, 254 P. 630, where this court had under consideration the subject of peremptory challenges. An examination of the *O'Connor* Case, however, and of the facts set forth in the opinion, shows that that case does not uphold any of the appellant's contentions made herein.

[4] Appellant, as we have stated, assigned as error the admission of certain testimony, and also error in the argument of the district attorney. We are not given any reason why any of the rulings of the court in the admission of testimony or exclusion of testimony should be held erroneous. Appellant, in his argument, sets forth only the following:

"We have also numerous errors noted in allowing the district attorney and defendant Pilbro to get before the jury inadmissible evidence involving Walsh, and last, we have the court's error in permitting the district attorney to argue before the jury concerning certain alleged offenses of Walsh for which he was not being tried."

It has been frequently held that assignments of errors of law committed in rulings, made during the progress of the trial, which are not discussed in appellant's brief, will not be examined or considered upon appeal, but it will be presumed that no errors existed in

such rulings. *Bell v. Southern Pac. Co.*, 144 Cal. 560, 77 P. 1124, and *People v. Clark*, 183 Cal. 677, 192 P. 521; where it is held that a mere assignment of error will not be considered in the absence of citation of authorities or specification of particulars showing the error.

In *Dolley v. Ragon*, 66 Cal. App. 707, 228 P. 52, a similar presentation of alleged errors was made by the appellant. It was there said:

"Other points suggested by appellant are neither argued nor seriously presented in any way. In such circumstances, under the rule frequently announced by the Supreme Court of this state, such alleged errors are entitled to no consideration."

See the last page of the opinion in that case for a long list of authorities announcing the same rule.

We think the record shows that the appellant was fairly tried and that no cause for reversal has been presented.

The order and judgment of the trial court are affirmed.

We concur: FINCH, P. J.; BURROUGHS, Justice pro tem.

86 Cal. App. 142

VALENTINE v. G. S. DONALDSON INV. CO.
et al. (Civ. 4920.)

District Court of Appeal, Second District, Division 1, California. Oct. 17, 1927.

1. Licenses ⇐37—New dealer's license is unnecessary after change of members of partnership doing business under fictitious name (Motor Vehicle Act, § 9).

Motor Vehicle Act (St. 1915, p. 403) § 9, does not require application for new dealer's license after change in membership of partnership doing business under a fictitious name.

2. Replevin ⇐72—Evidence held to support finding that employer was owner, entitled to possession of automobile mortgaged by employee.

In claim and delivery for automobile, evidence held sufficient to support trial court's finding that plaintiff was owner and entitled to possession of automobile, and that plaintiff's employee had no right to transfer it to himself, nor to execute and deliver chattel mortgage thereon to defendant.

3. Estoppel ⇐75—Dealer, whose employee fraudulently secured registration certificate, held not estopped to assert ownership and right to possession of automobile.

Automobile dealer whose employee fraudulently secured issuance of registration certificate to himself by signing fictitious corporate name, in which dealer's license was held, to application, without authority of dealer doing business under such name, held not estopped to assert ownership and right of possession.

4. Estoppel  97—That automobile registration certificate was not signed by registrant as legal owner put purchasers on inquiry precluding them from urging his employer's estoppel to assert ownership and right of possession.

That certificate of registration of automobile had not been signed by registrant as legal owner when presented to purchasers was sufficient to put them on inquiry as to registrant's authority to transfer automobile to himself from his employer, so as to preclude purchasers from equitable estoppel of employer to assert ownership and right of possession.

5. Judgment  18(2)—Answer admitting that defendants took and retained possession of automobile supported finding against individual defendant as officer and director of corporate defendant.

Admission in answer that defendants took and retained possession of automobile, sued for in claim and delivery, was sufficient to support finding and judgment against individual defendant as officer and director of corporate defendant.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by F. E. Valentine, doing business under the name and style of the Golden State Motor Company, against the G. S. Donaldson Investment Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

Leonard Evans, of Anaheim, for respondent.

McLUCAS, Justice pro tem. This is an action in claim and delivery for the recovery of a certain automobile, resulting in a judgment for damages in the sum of \$1,250. By reason of the fact that at the time of the trial the automobile had been sold, possession thereof could not be delivered to the plaintiff. Defendants appeal from the judgment.

At a time prior to April 3, 1922, one Walter Hodges was connected with George M. Ross and Walter J. Ross, doing business under the name of Golden State Motor Company. While so engaged in said business said Walter Hodges, as manager, made an application on behalf of the copartnership, namely, Golden State Motor Company, to the motor vehicle department of the state of California, for a dealer's license to buy and sell automobiles, under which dealer's license the copartnership named conducted and carried on business. On April 3, 1922, respondent, together with one E. N. Moore, entered into a written contract with said Walter Hodges, which recited that respondent and E. N. Moore had purchased and taken over one-half of the assets and liabilities of the said Golden State Motor Company, the copartnership, and un-

der the terms of which they agreed that they employed said Walter Hodges at a certain salary, with a future or contingent interest in the business. Respondent carried on his business under the original dealer's license applied for and issued to his predecessors, Golden State Motor Company, a copartnership, and was doing business under said dealer's license and under said fictitious name at the time of the transfer of the title of the automobile by Hodges to himself, to wit, on or about May 4, 1922. On April 13, 1922, respondent handed to Hodges a check for the sum of \$1,215, payable by the Golden State Motor Company to Greer-Robins Company, for the car in dispute, which was subsequently returned to respondent and then used by him as a car for demonstrating purposes. On May 3, 1922, Walter Hodges, purporting to be a co-owner of said automobile by reason of his alleged interest in the Golden State Motor Company, caused the title of said car to be transferred from the Golden State Motor Company to himself as an individual, and obtained a loan upon the car in dispute from the G. S. Donaldson Investment Company. A mortgage upon the car was taken by said corporation to secure the repayment of the loan. Hodges failed to make the payments upon the loan; whereupon the appellant G. S. Donaldson Investment Company took possession of said automobile under the terms of said mortgage. Thereupon respondent instituted a cause of action in claim and delivery to recover the automobile, or its alleged value of \$1,525.

The trial court's findings were:

That plaintiff at all times mentioned in the complaint was, and now is, the owner and entitled to the possession of said automobile. That on or about the 24th day of July, 1922, the defendants took the said automobile from plaintiff's possession without plaintiff's consent. "That, at the time of such taking of said automobile by the defendants from the plaintiff, the defendant the G. S. Donaldson Investment Company held an instrument in the form of a chattel mortgage, dated May 4, 1922, upon and covering said automobile, and executed by one Walter Hodges, then in the employment of the plaintiff as a salesman, which instrument was executed in favor of the defendant the G. S. Donaldson Investment Company as security for the payment of a promissory note of even date therewith, executed by the said Walter Hodges, for the principal sum of \$457, payable as follows: \$225 payable on July 5, 1922, and \$232 on September 5, 1922, with interest at the rate of 1 per cent. per month. That on said date, to wit, May 4, 1922, the said automobile was registered in the name of said Walter Hodges at the office of the motor vehicle department of the state of California, at Sacramento, Cal., which registration was obtained and procured by the said Walter Hodges upon an application filed in said motor vehicle department, dated May 3, 1922, purporting to show a sale of said automobile by

the Golden State Motor Company to said Walter Hodges, but which said purported sale and transfer was made by the said Walter Hodges purporting to be the manager of the said Golden State Motor Company. That, at the time of the said transfer of said automobile to the said Walter Hodges and of the execution and delivery of said chattel mortgage, the said automobile was the property of the plaintiff and not of the said Walter Hodges, and the said Walter Hodges had no right or authority whatsoever to make said transfer to himself or to execute and deliver said chattel mortgage upon said automobile to the defendant the G. S. Donaldson Investment Company. (6) That, at the time of the taking of said automobile by the defendants from the plaintiff, to wit, July 24, 1922, the said automobile was of the value of \$1,250. That the taking of said automobile by the defendants from the plaintiff, and the retention thereof by the defendants from the plaintiff, was wrongful, without the consent of the plaintiff, and without any right in the defendants, or either of them, in said automobile, and by taking said automobile and withholding the same from the plaintiff, the defendants became liable unto the plaintiff for the value of said automobile, to wit, \$1,250, as damages suffered by the plaintiff."

Appellants contend that the evidence is insufficient to support the findings, and in support of this contention urge a noncompliance with the provisions of the Motor Vehicle Act with respect to the name under which respondent conducted and carried on his business. The original application for a dealer's license stated the name of the concern to be Golden State Motor Company, a copartnership, and was signed, "Golden State Motor Company by Walter Hodges, Manager." After purchasing the business, respondent continued to do business under the name of Golden State Motor Company, and did not apply for a new dealer's license. Hodges, while in the employment of the respondent as a salesman, on May 3, 1922, reported to the division of motor vehicles the sale of the automobile in question to himself, the report being signed, "Golden State Motor Company, by Walter Hodges." On the same day, Walter Hodges applied for a new registration of the automobile in his own name and received a certificate of registration showing Walter Hodges to be the registered owner, which certificate was never signed by said Walter Hodges as legal owner. On the next day, May 4th, Hodges applied to the defendants for a loan and mortgaged the automobile as security for a loan of \$457. G. S. Donaldson testified that Hodges informed him he was part owner and manager of the Golden State Motor Company, and that he had bought the automobile from the Golden State Motor Company, thereby securing a registration certificate, which he showed to Donaldson.

Under the terms of Hodges' employment as a salesman by the respondent, Hodges acquired no interest in respondent's business

and had no interest therein at the time he dealt with said automobile and made and delivered said chattel mortgage. At the best, he had only a contingent interest, dependent upon his conduct and the quantity of business produced. The contract was dated April 3, 1922, and provided that at the expiration of twelve months Hodges should receive a one-third interest in the assets of the Golden State Motor Company, provided that the parties thereto had withdrawn an equal amount of money with Hodges during said twelve months, and providing that Hodges should not drink any malt, spirituous, or vinous liquors. The contract further provided that Hodges should forfeit all his rights in case of violation of the last-mentioned portion of the agreement. Twelve months had not expired when Hodges mortgaged the automobile. It was necessary for Hodges to comply with the provisions precedent specified in the contract before he could acquire any ownership or interest in said business. Hodges, while an employee of respondent, fraudulently secured the registration of said automobile in his own name and fraudulently represented to appellants that he was the owner of said automobile, that he was part owner and manager of Golden State Motor Company, and that he had bought the automobile from said company. Appellants, relying upon these fraudulent representations, made the loan to Hodges.

[1, 2] Appellants urge that respondent failed to comply with the provisions of section 9 of the Motor Vehicle Act (St. 1915, p. 403) by not making an application for a new dealer's license. The original application did not disclose the names of the partners, nor is it so required. A new application likewise would not have disclosed the names of the new owners. Our attention has not been called to any provision of the Motor Vehicle Act requiring a new license to be taken out where the members of a partnership doing business under a fictitious name are changed; neither do we know of such provision therein. In our opinion, the evidence was sufficient to support the finding of the trial court that respondent was the owner and entitled to the possession of the automobile in question, and that said Walter Hodges had no right or authority to transfer said automobile to himself, or to execute and deliver said chattel mortgage upon said automobile to the defendant G. S. Donaldson Investment Company.

[3, 4] In view of the foregoing, we see no merit in appellants' contention that respondent is estopped to assert his ownership and right to possession of said automobile. This is not a case where the evidence shows, as in *Parke v. Franciscus*, 194 Cal. 284, 228 P. 435, a case relied upon by appellants, that respondent was guilty of any culpable negligence in allowing Hodges to keep the certificate of registration so that he might trans-

fer title to an innocent purchaser. In the present case the evidence shows that Hodges never had a certificate of registration until he fraudulently secured the issuance of such certificate to himself by signing the name of Golden State Motor Company, the holder of the dealer's license, to an application for such registration and without any authority so to do. This certificate of registration, when presented to appellants, had not been signed by Walter Hodges as legal owner, which fact alone was sufficient to put appellants upon inquiry as to the authority of Hodges to transfer said automobile to himself. Appellants are thereby precluded from urging the doctrine of equitable estoppel.

Appellants' objection that excessive damages were awarded to respondent for the value of the automobile is met by the evidence submitted on the part of the respondent, which is sufficient to support the finding of the court that the value of said automobile was the sum of \$1,250.

[5] The answer admits that the defendants took and retained possession of said automobile, which admission is sufficient to support the finding and judgment against Lloyd Donaldson as an officer and director of said corporation.

The judgment is ordered affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

86 Cal. App. 167

GUALCO v. CITY OF BAKERSFIELD et al.
(Civ. 5923-5931.)

District Court of Appeal, First District, Division 2, California. Oct. 18, 1927.

1. Municipal corporations ⇨266—Effect of charter provision held to be that street improvements shall be done according to general law.

Where city charter made no direct reference to street improvement proceedings, effect of provision therein that, in absence of provision in charter, law of state shall be applicable, is to say that street improvements shall be done according to general law.

2. Municipal corporations ⇨327—As between general and specific charter provision for advertisement for bids, principle that specific provisions shall prevail over general ones held applicable (Street Improvement Act 1911; Code Civ. Proc. § 1859).

In construing conflict between general provision in city charter requiring advertising for five days, and specific provisions of Street Improvement Act of 1911 (St. 1911, p. 730), which by charter is to govern, requiring advertising for bids for two days for street improvements, under Code Civ. Proc. § 1859, the principle of statutory interpretation that specific provisions shall prevail over general ones is applicable.

3. Municipal corporations ⇨327—Charter provision for advertisement for bids held not to prescribe rules for street improvement proceedings initiated under general laws.

General provision in city charter requiring five days' advertising for public improvements held not, in view of specific provision of Street Improvement Act 1911 (St. 1911, p. 730), adopted by charter, requiring two days' advertising, to prescribe rules for any part of street improvement assessment proceedings initiated under provisions of general laws enacted for that purpose.

4. Municipal corporations ⇨330(4)—Requirement that certain pavement material be used held not to destroy competitive bidding, whether material was patented or not.

Requirement in specifications for bids for street improvements that certain type of pavement material should be used held not to destroy competitive bidding within meaning of statutes, irrespective of whether pavement material was patented or not.

5. Municipal corporations ⇨330(3)—Requirement as to pavement material in specifications for bids must be unjust to invalidate assessment.

It is only when requirement as to pavement material in specifications for bids for street improvements imposes an unjust or unreasonable burden on property owners that courts will declare assessment invalid therefor.

Appeals from Superior Court, Kern County; J. W. Mahon, Judge.

Separate actions by Peter Gualco, by Albert M. Jones and others, by L. J. Benzino and others, by E. B. Knight, by Eliza J. Baker, by Mrs. F. C. Jump and others, by Harriet F. Sanborn, by Frank L. Vega, and by J. H. Collins against the City of Bakersfield and others to quiet title against certain street assessment liens. Judgment for defendants, and plaintiffs take consolidated appeal. Judgments affirmed.

T. F. Allen, of Bakersfield, for appellants.

Brittan & Brittan, of Bakersfield, for respondents.

KOFORD, P. J. These actions, consolidated into one appeal, are all for the purpose of quieting title against certain street assessment liens arising from public proceedings taken for the paving of certain portions of Twentieth and Twenty-First streets in the city of Bakersfield. Judgment was for defendants upon demurrers to the complaints.

[1-3] Appellants advance two main reasons for the invalidity of the assessment liens: First. That in addition to following the procedure of the Improvement Act of 1911 (St. 1911, p. 730), which requires notice for bids to be published for two days only, the public authorities of the city should have gone further and published this notice for five days because of the provisions of section 136 of the

charter of the city of Bakersfield (Stats. 1915, p. 1552).

Section 136 of the charter provides:

"In the erection, improvement and repair of all public buildings and works, and in furnishing any supplies and materials for the same, or for any other use by the city, when the expenditure required for the same exceeds the sum of five hundred dollars, the same shall be done by contract, and shall be let to the lowest responsible bidder, after advertising for sealed proposals for the work contemplated for five consecutive days in the official newspaper.
* * *

The charter does not contain any clause expressly providing for public proceedings for street improvement, but such are provided for by section 161 in an indirect way. This section reads as follows:

"Sec. 161. Whenever any municipal function or affair arises, for which no provision is made by this charter or ordinances, the law of the state applicable thereto shall govern. Any law of the state applicable may be made the law of the city by ordinance."

Street improvement by assessment proceedings is a well-known and recognized function of municipalities, and it is likewise known to require a complete scheme of procedure by which its cost may be legally assessed against the property benefited by it. Inasmuch as the charter makes no direct reference to street improvement proceedings and does not prescribe a method for taking such proceeding, the effect of section 161, above quoted, is to say that such improvements shall be done according to the general law governing that subject-matter. If, therefore, it be conceded any conflict exists between section 136 and the Street Improvement Act of 1911, it would not be a conflict which should be resolved in favor of section 136 on account of the matter being a municipal affair. It would be a conflict between two sections of the charter—one section of the charter saying advertise five days and the other saying do it according to general law, viz., advertise two days.

In construing these two sections of the charter, the principle of statutory interpretation applicable is that specific provisions shall prevail over general ones. Code Civ. Proc. § 1859; 23 Cal. Jur. p. 732, and cases cited. With this principle in mind, it follows that it is not the purpose nor intention of section 136 to prescribe rules for any part of street improvement assessment proceedings initiated under the provisions of any of the several general laws enacted for that purpose.

[4, 5] The second point raised by appellants is that the complaints show that competitive bidding was destroyed by the requirement in the specifications that all bids must be made with the understanding that Warrenite bitulithic wearing surface purchased from Warren Bros. Company at \$9 per ton be used in the street work. The complaints were drawn

up on the theory that the requirement of this particular pavement from Warren Bros. Company was a fraud. This theory, apparently untenable under the allegations of the complaints, has been abandoned by appellants, and it is now claimed that the complaints contain enough allegations to show that the proceedings prohibited competitive bidding by street contractors, and were therefore void regardless of fraud.

A written agreement or offer of Warren Bros. Company was incorporated in the complaints and was alleged to be referred to in the advertisement for bids. This agreement or offer was in the customary form. *Woodworth v. Sebastopol*, 72 Cal. App. 187, 236 P. 981; *Warren Bros. Co. v. Boyle*, 42 Cal. App. 246, 183 P. 706. It recited that the specifications called for the use of certain patented pavement material, that such patents were owned by Warren Bros. Company, and in order to provide for competitive bidding, and at the same time secure the adoption of Warrenite bitulithic for the improvement, the company offered and agreed to furnish the material with considerable detail as to time, place, and condition at \$9 per ton to any bidder or to the owners in case they elected to do the work themselves. That such procedure and requirement of patented material does not destroy competitive bidding within the meaning of the statutes is well established by the decisions. *Woodworth v. Sebastopol*, supra, and cases cited.

In the closing brief appellants point out where the complaints allege that in truth and in fact said Warren Bros. Company had no existing or valid patents covering the mixture called for by the specifications, and that the same mixture could be obtained and used without let or hindrance of said company and at a cheaper price. Counsel has cited no authority to the effect that an unpatented material may not be required from a particular source. We see no distinction in principle between a patented material and a material which may be otherwise monopolized as by most favorable location or known special skill in preparation of the same. Some discretion is necessarily left to the city authorities as to how streets shall be paved and as to what materials and workmanship shall be used. Undoubtedly opinions differ as to what pavement and what material is best and cheapest. It is only where such requirements impose an unjust or unreasonable burden upon the property owners that courts will interfere and declare the assessment invalid for that reason. *Stanwood v. Carson*, 169 Cal. 640, 649, 147 P. 562. In view of the numerous cases which appear in our reports in which Warrenite bitulithic is recognized as a patented material, and in view of the rule that an uncertain allegation may be construed against the pleader, we are justified in construing the alternative allegation in the complaints, viz., "had no existing or valid patents," as only an

allegation of invalidity of existing patents. In administering this business of the city, the city authorities may decide that it is better, more competitive, more expeditious and cheaper to put all bidders upon the same footing rather than invite them to buy a lawsuit with even a pretended patentee, by requiring the use of the mixture without recognizing the patent. This court cannot substitute its discretion for that of the city authorities. We are unable to see from the complaint how their action has imposed an unjust burden upon the property owners. It is equally probable that they have protected them from such burden by the specifications.

The judgments are affirmed.

We concur: STURTEVANT, J.;
NOURSE, J.

86 Cal. App. 106

NEWBERRY v. EVANS et al. (Civ. 3223.)

District Court of Appeal, Third District, California. Oct. 14, 1927.

1. Appeal and error $\S$ 607(1)—Reporter must prepare transcript on filing of notice of appeal requesting transcript, regardless whether court orders him to do so (Code Civ. Proc. $\S$ 953a).

It is duty of phonographic reporter of trial court to prepare transcript of record within 20 days after party files notice of appeal with request that reporter make up such transcript, under Code Civ. Proc. $\S$ 953a, regardless of whether the trial court makes any order requiring the reporter to make the transcript.

2. Appeal and error $\S$ 607(1)—Transcript made by reporter pursuant to notice of appeal, without order of court, constitutes "record on appeal," when settled, as completely as if made under order of court (Code Civ. Proc. $\S$ 953a).

Where party files notice of appeal with request that phonographic reporter make up transcript of record, under Code Civ. Proc. $\S$ 953a, but trial court fails to direct phonographic reporter to make such transcript, the transcript, when settled, is nevertheless the "record on appeal" as fully and completely to all intents and purposes as though the trial court had directed the reporter to make the transcript.

3. Costs $\S$ 254(4)—Reporter's fees for making transcript for appeal held taxable, though transcript was made without order of court (Code Civ. Proc. $\S$ 274, 953a, 1027).

Where appellant had transcript of record prepared, under Code Civ. Proc. $\S$ 953a, which requires phonographic reporter to make up transcript on filing notice of appeal requesting transcript, regardless of whether court makes order directing him to do so, and appellant was awarded costs, he was entitled to recover the reporter's fees for making the transcript, under section 1027, notwithstanding that the reporter made it without order of court; section 274 being inapplicable.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by H. O. Newberry against W. E. Evans and others. Judgment for plaintiff was reversed, with directions by the District Court of Appeal (76 Cal. App. 492, 245 P. 227). From an order disallowing an item of costs, defendants appeal. Reversed.

W. F. Cowan and A. W. Hollingsworth, both of Santa Rosa, for appellants.

Barrett & McConnell, R. M. Barrett and C. W. Anderson, all of Santa Rosa, for respondent.

PLUMMER, J. Upon a former action between the above-entitled parties the judgment in favor of the plaintiff therein was reversed by this court. Upon the going down of the remittitur the appellants in the action just referred to and the appellants in this matter filed their cost bill, which included an item of \$289.90 charged as reporter's fees in making up the record to be used on appeal in said cause, as provided for by section 953a, Code of Civil Procedure. Thereupon the plaintiff in said action and the respondent upon this appeal filed his motion to retax the cost bill filed by the appellants, moving to strike out said item of \$289.90. The motion was made upon the following grounds, to wit: That such item is improper, not legal, unreasonable, excessive, and further, that an order of the court was never secured or made directing the preparation of said transcript for use on appeal in said case, or otherwise, and that such transcript on appeal was prepared and made up at the request of the said parties without any order of court or legal authority therefor. Upon the hearing of said motion the trial court struck out the item of \$289.90, and it was from this order that the defendants appealed.

The record presented on this appeal shows that on the 17th day of November, 1924, the appellants herein filed a notice with the clerk of the superior court of Sonoma county, stating the fact of their appeal from the judgment entered against them in said cause, as referred to herein, and requesting that a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, etc., constituting all matters to which the same related, be made up and prepared; that thereafter, and on December 1, 1924, the phonographic reporter filed with the clerk of said court a typewritten transcript of the record to be used on the appeal from said judgment, including therein copies of all writings offered or received in evidence and all other matters and things required by said notice to be contained therein; that on the 3d day of December, 1924, the trial judge who presided at said cause certified that he had examined said transcript and that it was

a full, fair, and true transcript, etc., of said cause, and the same was thereupon settled and allowed by said trial judge; that on the 4th day of December, 1924, said transcript was filed by the clerk of said superior court and forwarded to the clerk of the court of the third appellate district, and used upon said appeal; that said transcript was prepared according to the terms and provisions of section 953a of the Code of Civil Procedure. On the 10th day of February, 1926, the judgment of the trial court in said cause was reversed by said Court of Appeal and the appellants in said action were allowed to recover their costs. That, upon the going down of the remittitur, the appellants herein served and filed their memorandum of costs, which included, among other items, the amount paid the phonographic reporter for making up the typewritten copy of the proceedings in the trial court and constituting the record on appeal. The original case referred to herein is entitled *Newberry v. Evans et al.*, reported in 76 Cal. App. 492, 245 P. 227.

[1] The record before us does not show that the trial court ever made any order in the original action, as is made its duty by the first sentence of the second paragraph of section 953a, Code of Civil Procedure. It is apparently upon the lack of this order that the trial court disallowed the item of costs incurred by the appellants in making up the record on appeal in the manner and form provided for by section 953a, Code of Civil Procedure. The record discloses that the appellants took all the steps that they were legally required to take in order to secure a typewritten copy of the proceedings in the trial court to make up a transcript which would constitute the record to be used upon appeal and which was actually settled and allowed by the trial court. The first paragraph of said section of the Code of Civil Procedure directs what an appellant should do, to wit: File his notice with the clerk, stating the fact of his appeal from the judgment, and setting forth all that the appellant desires to have included in the transcript, and requesting that the phonographic reporter make up such a record. This must be done within a certain length of time, all of which appears to have been done in this case. Thereupon the second paragraph of said section applies, which reads as follows:

"Upon receiving said notice, it shall be the duty of the court to require the stenographic reporter thereof to transcribe fully and completely the phonographic report of the trial. The stenographic reporter shall, within twenty days after said notice has been filed with the clerk, prepare a transcript of the phonographic report of the trial," etc.

[2] After this is done, and the phonographic reporter has filed his transcript with the clerk, notice is given by the clerk to the respective parties, when it will be presented to

the trial judge for settlement, and settlement had. The section does not specify that any one shall serve the notice on the trial judge. It simply reads, "Upon receiving said notice," not that any one shall serve the same upon the trial judge. The section then further provides that the stenographic reporter shall, within twenty days after said notice has been filed with the clerk, prepare the record, not that the stenographic reporter shall, within so many days after being directed so to do by the trial court, prepare a stenographic report. It is the legal duty of a stenographic reporter to prepare the record within 20 days after the notice has been filed with the clerk. This duty is none the less incumbent upon the phonographic reporter whether the trial court does or does not make any order in the matter. The Code section specifically places this obligation upon the phonographic reporter, and the typewritten copy of the proceedings had in the trial court made in pursuance of the notice given as provided for in the first paragraph, when settled by the court, constitutes the record on appeal just as fully and completely, to all intents and purposes, as though the trial court had added to the legal duty, already incumbent upon the phonographic reporter, its order to follow the statute.

[3] Having complied with all the requirements of section 953a of the Code of Civil Procedure relative to making up the transcript on appeal required by said section to be done and performed by an appellant, are the appellants entitled to recover the costs of the phonographic reporter's fees, even though the record does not show any order of the court directing the reporter to transcribe the testimony? Basing its decision upon the *Estate of Gallo*, 71 Cal. App. 352, 235 P. 66, the trial court disallowed such item of expenditure. The facts and circumstances in the *Gallo* Case are, however, distinguishable from the facts and circumstances which we are here considering. In the *Gallo* Case the record was made up under the old procedure and not in accordance with section 953a of the Code of Civil Procedure. In the transcript in the *Gallo* Case the following appears:

"It was conceded, and taken as true at said hearing, that the court had made no order for the transcript; that said transcript was ordered by plaintiff's attorney, and was made after entry of judgment herein, and was actually used only for the sole purpose of enabling plaintiff's attorney to prepare plaintiff's bill of exceptions, to be, and actually used as a part of their record on appeal."

In other words, the *Gallo* Case involved the allowance of costs for an attorney's private copy of the testimony which was not made the record on appeal, but which private copy was used by the appellant's attorney in making up the bill of exceptions. Thus it appears

that the facts in the Gallo Case and the facts in this case are readily distinguishable. In the Gallo Case, what was there said, as applying to a private copy ordered by counsel we think a correct statement of the law, but inapplicable here. In the Gallo Case the court says:

"Section 1027 of the Code of Civil Procedure is the latest expression of the Legislature, but does not repeal the provisions of section 274 of the Code of Civil Procedure requiring the party ordering a transcript without the order of court to pay for the same. Construing these two sections together, we must conclude that the statute allows all costs actually incurred by the prevailing party in preparation of the record on appeal, except in the absence of an order of court, where the party himself orders the transcript, he must pay for the same. The only way to properly charge the expense of a transcript as costs on appeal is to obtain an order of court pursuant to section 274 of the Code of Civil Procedure."

A number of cases are then cited which refer to bills of exceptions on appeals prepared and taken under the old method. It will be observed that the provisions of section 953a, Code of Civil Procedure, are not construed in the Gallo Case; in fact, that section was not involved in that action, as the proceeding was entirely outside of and separate and apart from the method of preparing records on appeal set forth in section 953a, Code of Civil Procedure. Section 1027, Code of Civil Procedure, referred to in the Gallo Case, among other things, states:

"The party entitled to costs, or to whom costs are awarded, may recover all amounts actually paid out by him in connection with said appeal, and the preparation of the record for the appeal."

In the Gallo Case the record on appeal consisted of the printed transcript, the cost of which was allowed by the trial court. In the case at bar the record on appeal consists of the phonographic reporter's typewritten copy of the testimony. Section 274, Code of Civil Procedure, is not a section dealing with appeals. It is a section having to do with reporter's fees and providing for payment thereof when the court orders a copy made, whether for its own use, or otherwise, and also for payment by parties when copies of the testimony are ordered for individual use. There is nothing in section 274, Code of Civil Procedure, which makes the copy of the testimony ordered by the court a record on appeal. The record on appeal made up under the old method of procedure from the copy of the testimony made by the reporter, whether ordered by the court or by the respective parties, consists of the printed transcript, and of the printed transcript only. Section 274, Code of Civil Procedure, allows the prevailing party to charge as costs in the trial court the reporter's fees of making a transcript of the testimony when the transcript is ordered by

the trial court, and does not depend upon whether an appeal is taken therefrom or not. This is simply followed out on appeal, and the prevailing party on an appeal under the old system is allowed to recover the costs of making a transcript of the testimony when ordered by the court, just as the prevailing party in the trial court is allowed to include such item in his memorandum of costs in the trial court.

In the case of *Turner v. Eastside Canal & Irrigation Co.*, 177 Cal. 570, 171 P. 299, the court had before it an attempt, on the part of the prevailing party, to recover, as an item of cost, the expense of a private copy of the transcript, ordered in the cause, and not prepared according to section 953a, Code of Civil Procedure, and, while not necessary to the decision of that case, the opinion, however, does state what we believe to be the law. When referring to the requirements of said section, in order that costs may be recovered, the court said:

"To procure such a record which will be available for use on an appeal, it is essential that the party preparing to appeal shall, within a specified time after judgment, file a demand for the preparation of the same, in pursuance of which the reporter transcribes his notes and certifies the same, being paid by such party the charge allowed by law therefor. Such a payment, of course, can be recovered as a cost of appeal, being an amount actually paid out in the preparation of the record on appeal."

The opinion then goes on to state that the plaintiffs had substituted a copy of the testimony which they had obtained and paid for during the trial, the costs of which could not, of course, be allowed. The opinion then further says:

"The record for the appeal under section 953a," Code of Civil Procedure, "in so far as the reporter's transcript is concerned, is the transcript furnished by him in response to the legal demand therefor made after judgment and within the time, and in the manner specified in the section. When the record is prepared under this section, it is the money that the appellant is actually compelled to pay out to obtain this record that he is entitled to recover."

In *Stafford v. Hill*, 63 Cal. App. 15, 217 P. 766, the Second district had before it the same question which we are here considering. And it was there held that under the terms of section 953a of the Code of Civil Procedure, which provides for the alternative method of appeal, the reporter's transcript filed by the appellant is a part of the record on appeal and the expense of such transcript is a proper item of costs under section 1027 of that Code. The opinion in the case of *Stafford v. Hill*, supra, distinguishes the case from that of *Sime v. Hunter*, 55 Cal. App. 157, 202 P. 967, in that in the latter case the item of costs was for a copy, which necessarily leads to the conclusion that the court in the case of *Stafford v. Hill* was not dealing with the

copy, but was dealing with the original transcript, prepared by the reporter under section 953a, Code of Civil Procedure, and therefore the expense of the transcript became a proper charge under section 1927, Code of Civil Procedure.

The case of *Kohn v. Kempner*, 66 Cal. 64, 225 P. 24, had to do, just as in the case of *Sime v. Hunter*, supra, with the expense of a private copy made for one of the parties, and not with anything that constituted the record on appeal, and like the other cases having to do with private copies, has no bearing upon the question of whether costs incurred in following the alternative method of appeal set forth in section 953a, Code of Civil Procedure, may be allowed.

Other cases have been cited by the respective parties, but the foregoing is sufficient to show that the order of the trial court disallowing the item of costs referred to must be reversed, and it is so ordered.

We concur: FINCH, P. J.; WEYAND, Justice pro tem.

86 Cal. App. 45

PEOPLE v. CASSIDY et al. (Cr. 1488.)★

District Court of Appeal, Second District, Division 1, California. Oct. 13, 1927.

Rehearing Denied Nov. 3, 1927. Hearing Denied by Supreme Court Dec. 12, 1927.

1. Lewdness §10—Evidence held to show defendants were living together in state of cohabitation and adultery (Pen. Code, § 269b).

Evidence held to show that defendants were living together in a state of cohabitation and adultery, within meaning of Pen. Code, § 269b, warranting conviction for adultery.

2. Lewdness §9—Evidence tending to establish commission of adulterous acts by defendant outside county in which defendants were charged with offense held proper.

In adultery prosecution, admission of evidence, consisting of circumstances tending to establish commission of adulterous acts by defendants outside county within which defendants were charged with offense on which they were tried, held not error.

3. Criminal law §1037(1), 1171(1)—Statement of district attorney relative to which no testimony was offered nor objection made held not prejudicial.

In adultery prosecution, statement of district attorney that female defendant went with a male friend on trip to certain place held not prejudicial, where no evidence relative thereto was offered and no objection to statement was made.

4. Criminal law §409—Statements by defendants held mere admissions and not confession, and hence properly admitted without laying foundation.

Statement by defendants, in adultery prosecution, that at time and place other than

specified in indictment defendants had lived together and sustained sexual relations, was merely an admission and not a confession, and hence was properly admitted without foundation being first laid that it was voluntarily made, without hope of reward or immunity from punishment.

5. Criminal law §730(10), 1186(4)—Insinuation by district attorney as to defendants' failure to testify, though error, held not to have resulted in miscarriage of justice, in view of prompt instruction to disregard and overwhelming evidence of guilt (Const. art. 6, § 4½).

Insinuation by district attorney that defendants had not testified, though error, held not to have resulted in miscarriage of justice under Const. art. 6, § 4½, in view of prompt instruction by judge to disregard it and overwhelming evidence of defendants' guilt.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Helen M. Cassidy and another were convicted of adultery, and they appeal. Affirmed.

Chandos E. Bush and Franklin M. Sturgis, both of Los Angeles, and E. W. Bartlett, of Colton, for appellants.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

HOUSER, J. Defendants appeal from a judgment of conviction of the crime of adultery and from an order of the trial court denying their motion for a new trial.

[1] It is first urged by appellants that the evidence was insufficient to justify the verdict. Without attempting to set forth more than the substance of the material evidence introduced by the prosecution, it appears therefrom that the defendants were not married one to the other, but that at the time the offense was committed each of them was married to some other person; that defendant Cassidy, with one of her infant children, left her husband in Colorado and came to California; that prior thereto she had left her husband temporarily and during her absence had "met" her codefendant; that while living with her husband she received letters and Christmas presents from her codefendant, also sufficient money from him to enable her to leave her husband in Colorado and pay her railroad fare to California; that for a period of about two months thereafter defendant Cassidy occupied apartments in a court, defendant McLean paying the rent therefor, and often being seen leaving the apartments at between 6 and 6:30 o'clock in the morning; that thereafter defendant McLean occupied a room in a hotel where defendant Cassidy later took up her residence and for a short time occupied a room therein on a floor different from that on which her

codefendant had his room, following which defendant Cassidy took a room adjoining and opening into that of her codefendant and for which two rooms there was but "one bath and toilet"; that defendant McLean made the necessary arrangements for renting the said rooms, paid the rent therefor, bought the meal tickets on which Mrs. Cassidy received her meals at the hotel, and agreed to pay for dresses purchased by defendant Cassidy; that the general outward conduct of the two defendants one toward the other was such as ordinarily exists between a husband and a wife; that the door between the two rooms occupied by the two defendants, if not always open, was only closed; that each of the defendants passed freely from one room to the other, defendant McLean on one occasion having been seen clad in his pajamas only in the room occupied by defendant Cassidy; that defendant Cassidy kept some of her clothing in the room occupied by her codefendant; that sometimes she drove the automobile owned by defendant McLean, and that the two defendants were frequently seen riding together in defendant's automobile; that in the presence of third persons defendant McLean addressed his codefendant as "honey," referred to her as his wife, and that defendant Cassidy had been seen sitting in the lap of her codefendant; that the infant child of defendant Cassidy was lodged and cared for elsewhere than in the hotel where the two defendants roomed, and that defendant McLean arranged and paid for the room, board, and care of the child at such place; that defendant Cassidy stated that she had objected to going to live with her codefendant at the hotel "because it was too open"; that she and her codefendant had been married in Mexico, admitted that they sustained meretricious relations one toward the other, and that by reason thereof she had become afflicted with "female trouble"; that each of the defendants made a statement to the effect that they had made various trips together and had registered at different hotels as "man and wife."

Section 269b of the Penal Code provides, in part, as follows:

"If two persons, each being married to another, live together in a state of cohabitation and adultery, each is guilty of a felony. * * *

It is the contention of appellants that the facts hereinbefore stated do not sufficiently show that the defendants lived together in a state of cohabitation and adultery within the meaning of the statute.

In *People v. Breeding*, 19 Cal. App. 359, 362, 126 P. 179, 181, it is said:

"As used in the statute, the words 'living in a state of cohabitation and adultery' mean the living or dwelling together as husband and wife and exercising the sexual rights and duties implied by such relation when legally created—in other words, a counterfeit of the marriage relation. Hence, to justify the conviction of de-

fendants it should appear from the evidence that there existed between them an adulterous cohabitation. * * *

In the case of *People v. Scarpa*, 32 Cal. App. 453, 163 P. 882, the rule is announced in effect that where two persons, each of whom is married to another, live together in a state of cohabitation and adultery, each of them is guilty of a felony, and that the commission of the crime may be established by a showing that they were occupying such a position one toward the other "as would constitute a counterfeit of the marriage relation." See, also, *People v. King*, 26 Cal. App. 94, 146 P. 51; *People v. Bealey* (Cal. App.) 254 P. 628.

Judged by the facts as hereinbefore stated and the law as laid down in the cases to which reference has been had, it is clear that the jury was justified in determining that the defendants were living together in a state of cohabitation and adultery, and therefore that the contention of appellants to the effect that the evidence was insufficient to support the verdict cannot be sustained.

[2] Appellants further contend that on the hearing of the action prejudicial error was committed by the trial court in the admission of certain evidence over the objection of defendants. Such evidence consisted of circumstances which tended to establish the commission of adulterous acts by the defendants outside the county within which the defendants were charged with the offense on which they were tried.

In the case of *People v. Koller*, 142 Cal. 621, 76 P. 500, where it appears that the defendant was prosecuted on a charge of incest, in ruling on a point similar to that here under consideration the court said, in part:

"* * * It is now the settled rule in this state that evidence of prior acts of incestuous intercourse are admissible. *People v. Stratton*, 141 Cal. 604 [75 P. 166]. And while we recognize that there is a conflict in the authorities as to the admissibility of evidence of subsequent acts, we are of the opinion that the better rule, and the one sanctioned by the weight of authority, is, that acts of improper familiarity, or illicit intimacy, or relations between the parties, subsequent as well as prior to the act charged in the information relied on by the prosecution for a conviction, are admissible as corroborative evidence, where they tend to show a continuous, illicit relationship. * * *

To the same effect, see *People v. MacDonald*, 167 Cal. 545, 140 P. 256; *People v. Christian*, 48 Cal. App. 646, 192 P. 182; *People v. Branch* (Cal. App.) 246 P. 811; *People v. Jones*, 76 Cal. App. 144, 244 P. 101.

It must therefore be concluded that in the admission of the evidence to which appellants refer no error was committed by the trial court.

[3] In the same connection, appellants complain that on the trial of the action evidence was admitted of the fact that on the trip made by defendant Cassidy from Colorado to

California, "she met a friend, or took up with a man as a friend, and went with him on a trip to the Grand Canyon of Colorado." It appears that after the jury had been impaneled the district attorney, in outlining what he expected to prove, made a statement which included the remark which is now the subject of appellants' specification of error. But nowhere in the record does it appear that any evidence was offered of the fact to which reference was thus made; nor was any objection made at any time to the statement made by the district attorney. It would follow that appellants are in no position to complain.

[4] Appellants make further criticism of the admission in evidence by the trial court of what is termed a confession of guilt by the defendants, without a sufficient or proper foundation having been first laid for the introduction of evidence of such alleged confession. But as to such specification of error on the part of appellants the record discloses the fact that the alleged confession amounted to nothing more than an admission by the defendants in substance that at a time antedating that specified in the accusation of the defendants, and at a place outside the county where it was alleged that the offense of defendants was committed, the defendants had lived together in the same house and had sustained sexual relations one with the other.

In the case of *People v. Ferdinand*, 194 Cal. 555, 568, 229 P. 341, 346, it is said:

"An admission as applied to criminal law is something less than a confession, and is but an acknowledgment of some fact or circumstance which in itself is insufficient to authorize a conviction, and which tends only toward the proof of the ultimate fact of guilt. On the other hand, a confession by a defendant leaves nothing to be determined, in that it is a declaration of his intentional participation in a criminal act, and must be a statement of such a nature that no other inference than the guilt of the defendant may be drawn therefrom. *People v. Strong*, 30 Cal. 151; *People v. Parton*, 49 Cal. 632; *People v. Velarde*, 59 Cal. 457; *People v. Miller*, 122 Cal. 84, 54 P. 523. As stated in *Michaels v. People*, 208 Ill. 603, 70 N. E. 747, citing 8 Cyc. 562; 1 *Greenleaf on Evidence*, § 170; *Johnson v. People*, 197 Ill. 48, 64 N. E. 286: 'A confession is a voluntary acknowledgment of a person charged with the commission of a crime that he is guilty of the offense. It is a voluntary declaration by a person charged with a crime of his agency or participation in the crime. It is not equivalent to statements, declarations, or admissions of facts criminating in their nature or tending to prove guilt. It is limited in its meaning to the criminal act, and is an acknowledgment or admission of participation in it.' And see, also, *Riley v. State*, 1 Ga. App. 651, 57 S. E. 1031; *Burnett v. State*, 86 Neb. 11, 124 N. W. 927; *Ransom v. State*, 2 Ga. App. 826, 59 S. E. 101; *Shelton v. State*, 144 Ala. 106, 42 So. 30; *State v. Campbell*, 73 Kan. 688, 85 P. 784, 9 L. R. A. (N. S.) 533, 9 Ann. Cas. 1203; *State v. Royce*, 38 Wash. 111, 80 P. 268 [3 Ann. Cas. 351]."

It is therefore clear that the evidence relating to the statements made by the defendants did not amount to a confession, but that such statements were but admissions of circumstances which constituted some evidence which tended to establish their guilt of the crime of which they were charged. With reference to an admission, as distinguished from a confession, the rule is well settled that no foundation to the effect that such admission was freely and voluntarily made, without hope of reward or immunity from punishment, is required for the introduction in evidence of such admission.

[5] Appellants also predicate error upon the alleged misconduct of the district attorney in commenting upon the fact that neither of the defendants testified on the trial of the action. The remarks of the district attorney to which appellants now object were as follows:

"All the evidence that has been presented here, everything placed before you, everything that we could gather, as counsel on the other side told you, everything that we could present has been presented, and some of it doubtful in my estimation, and doubtless in yours, but everything we could get, and everything that the law entitles us to present here under oath, we have presented to you for what it is worth; and all that you have, good or bad, all that you have, comes from the prosecution, not one single iota or statement of it denied, not one witness against it. In whose power, I ask you, within whose mind and heart lies the power and the control of the situation to tell you whether it is true or not true? But they stand on their constitutional rights of the presentation of evidence, and the doctrine of reasonable doubt, and no evidence whatsoever has been presented on the other side. * * * He sits here, and he has never by any witness for the defense told you anything to the contrary, and how can you believe anything else."

No immediate objection was interposed by the defendants to the comments made by the district attorney, but within a short time after such statement was made, defendants did object "to the remark insinuating an opinion in regard to the defendants not taking the stand," and requested the court to instruct the jury that such remarks should be disregarded by it—to which request the court acceded by instructing the jury that "if there have been any remarks along that line, or anything from which you might infer there was any comment in that direction, you will kindly disregard it." No instruction other than that to which reference has been had was requested by the defendants; from which fact it must be assumed that, so far as the purported instruction was concerned, defendants were satisfied.

There can be no question but that a comment by the district attorney on the fact that a defendant has not testified in the action in which he is being tried constitutes error. An examination of the remarks made by the

district attorney in the instant case shows that while no direct reference was made by him to the fact that neither of the defendants had been called as a witness for the defense, at least an insinuation of such fact was present. The substance of the statement was that all the evidence in the case had been produced by the prosecution; that it was within the power of the defendants either to affirm or to deny the truth of such evidence; but that they had stood on their constitutional rights and had failed to present any evidence in their own behalf. The statement closed with a query to the jury as to "how can you believe anything else" (that is, anything other than the evidence produced by the prosecution). It would thus appear that the reference to the fact that the defendants personally had not testified in the case was not stressed; to the contrary, the district attorney was directing particular attention to the fact that the evidence presented by the prosecution was uncontradicted from any source, and therefore that the probability was that such evidence was true. However, though slight the comment, the conduct of the district attorney in the premises is not to be commended, but rather condemned. It constituted error; although, considering the circumstances of its commission, together with the prompt instruction to the jury by the judge of the trial court, the effect of such comment was necessarily negligible. In view of what appears to be the overwhelming evidence of the guilt of the defendants, it is clear that the error did not result in a miscarriage of justice. Section 4½, art. VI, Const.; *People v. Nakis*, 184 Cal. 105, 116, 193 P. 92; *People v. Kizer*, 22 Cal. App. 10, 20, 133 P. 516, 521; 134 P. 346.

The judgment and the order denying defendants' motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

STARK et al. v. HOEFT. (Civ. 3307.)★

District Court of Appeal, Third District, California. Oct. 8, 1927.

Hearing Granted by Supreme Court Dec. 5, 1927.

1. Appeal and error ⇨277—Order denying motion to strike out supplemental complaint and portions thereof held not deemed excepted to (Code Civ. Proc. § 647).

Where order denying defendant's motion to strike out supplemental complaint and also portions thereof was not excepted to at the time, it might not be reviewed by the appellate court, under Code Civ. Proc. § 647.

2. Appeal and error ⇨679(2)—Petition for leave to file supplemental complaint and order granting leave might not be considered, where not set forth in transcript.

Appellate court might not consider petition for leave to file supplemental complaint or

order of trial court granting leave to do so, where they were not set forth in the transcript.

3. Appeal and error ⇨1078(1)—Assignments of errors of law committed in rulings during trial will be presumed not well taken, where not discussed in appellant's brief.

Assignments asserting that there were errors of law committed in rulings made during progress of trial will not be examined or considered on appeal, where they are not discussed in appellant's brief, but it will be presumed that no error was made.

4. Pleading ⇨22—Complaint to quiet title, setting forth deraignment of title and also alleging ownership, held not redundant.

Complaint to quiet title to mining property, which set forth location of mining claim, posting of notices, recording of notices that plaintiffs were citizens of United States, and also alleged that plaintiffs owned property, held not redundant because setting forth deraignment of title in addition to alleging ownership.

5. Quieting title ⇨35(2)—Allegations in complaint to quiet title, setting forth deraignment of title held not to limit or control allegation of ownership.

In action to quiet title to mining property, allegations showing deraignment of title by setting forth location of mining claim, posting of notices, and recording of notices that plaintiffs were citizens of United States, held not to limit or control further allegation that plaintiffs owned property.

6. Appeal and error ⇨1041(5)—Permitting filing of supplemental complaint, if error, held harmless, where matters set forth could have been properly set up by amendment to complaint (Code Civ. Proc. § 464; Const. art. 6, § 4½).

Permitting filing of supplemental complaint setting up judgment rendered before action commenced, if error under Code Civ. Proc. § 464, held harmless, where matters set forth therein could have properly been pleaded by amendment to complaint; there being no miscarriage of justice within the meaning of Const. art. 6, § 4½.

7. Judgment ⇨948(1)—Plaintiffs seeking to quiet title to mining property did not waive rights under previous judgment quieting title in them, by failing to set up judgment by original complaint.

That plaintiffs in action to quiet title to mining property did not set up previous judgment quieting title in them by original complaint, but set it up only by their supplemental complaint, held not to show waiver of rights secured by this judgment, notwithstanding Rev. St. U. S. § 2326 (30 USOA § 30), since such judgment could be introduced in evidence even if not pleaded at all.

8. Pleading ⇨280—Allegations in answer to original complaint that defendant owned land were to be disregarded, where answer to supplemental complaint admitted plaintiffs' ownership.

Where answer to original complaint in action to quiet title alleged that defendant was

★For opinion of Supreme Court adopting opinion of Court of Appeal, see 269 P. 1105.

owner of land, but answer to supplemental complaint admitted that plaintiffs were owners thereof, allegations of ownership in first answer could not be considered.

9. Pleading ⚡349—Where answer in action to quiet title admitted conclusiveness of previous judgment quieting title in plaintiffs, court was bound to grant judgment on the pleadings.

Where supplemental complaint in action to quiet title to mining property set forth previous judgment quieting title in plaintiffs as conclusive, and answer thereto admitted conclusiveness of judgment, plaintiffs were entitled to judgment on the pleadings.

10. Pleading ⚡238(2)—Denying leave to file amended answer held not error, where defendant failed to comply with statute requiring that notice be given adverse party (Code Civ. Proc. § 473).

Trial court did not abuse discretion in denying motion for leave to file amended answer to supplemental complaint where defendant failed to comply with Code Civ. Proc. § 473, requiring notice of such motion to be given to adverse party.

Appeal from Superior Court, Nevada County; J. B. Landis, Judge.

Action to quiet title to mining property by J. H. Stark and others against Eleonore E. Hoeft, who alleged ownership. From a judgment on the pleadings in favor of plaintiffs, defendant appeals. Affirmed.

John T. Hennessy and Lynne Kelly, both of Grass Valley, for appellant.

Dozier, Kimball & Dozier, of San Francisco, for respondents.

PLUMMER, J. Appellant filed an application for a United States patent to certain mining ground situate in Washington mining district, Nevada county, state of California, located and known as Lucky Strike and Lucky Strike Extension mining claims. To this application the respondents filed a protest within the time as provided by law. In pursuance of said protest and in compliance with the law relating thereto, the plaintiffs began this action to quiet title to certain mining property claimed by the respondents and included within the exterior boundaries of the mining premises claimed by the appellant under her application for patent as the Lucky Strike and Lucky Strike Extension mining claims. The mining premises or claims alleged to be owned by the respondents bear the following names: Quartz and Asbestos, January Quartz, The Cotton King Asbestos Quartz, Asbestos Quartz, and Lent Asbestos and Gold mining claims. The right of possession to this mining ground appears to have been determined adversely to the appellant on January 2, 1920, by a judgment then entered in the superior court of Nevada county in an

action where the respondents and their predecessors in interest were defendants, and where the appellant in this action was plaintiff. After the filing of the complaint in this action and the answer of the defendant thereto, the plaintiffs, by leave of the court, in a pleading called a supplemental complaint, set forth the fact of the entry of the judgment herein referred to, and that all proceedings relating to the settlement of a bill of exceptions to be used on appeal from said judgment, had been dismissed. To this supplemental complaint the appellant filed a motion to strike out the whole thereof, and also certain paragraphs thereof, and also demurred thereto. Appellant's motion was denied, and her demurrer overruled. Thereupon an answer was filed by the appellant to the supplemental complaint. After appellant's answer to respondents' supplemental complaint had been filed in this action, the respondents moved the court, upon notice for judgment on pleadings. The trial court granted judgment upon the pleadings in favor of the respondents herein. From this judgment the defendant appeals.

The supplemental complaint sets forth the fact: That a complaint in this action was filed in the office of the clerk of the superior court of Nevada county, on the 19th day of January, 1924. That at the time of the filing of said complaint there was pending in the above-entitled court the action to which we have herein referred, where the defendant in this action was plaintiff and the plaintiffs in this action were defendants. That said action was numbered 4726. That on the 19th day of January, 1924, there was pending and undetermined a proceeding instituted by the plaintiff therein to obtain a bill of exceptions on her appeal from the judgment theretofore duly rendered and entered in said action No. 4726. That since the filing of the complaint in the above-entitled action, and on the 26th day of February, 1924, an order was duly made and entered in said action No. 4726 that the said proceedings of the said plaintiff to obtain a bill of exceptions on appeal from said judgment in said action No. 4726, be dismissed. That no appeal has been taken from said last-mentioned order dismissing said proceeding for bill of exceptions, and the said order has become, since the filing of the complaint herein, final, and is now a final order. The supplemental complaint then proceeds to allege the entry of judgment in action No. 4726, wherein it is adjudged and decreed that the defendant in this action possessed no title or interest in and to the mining premises described therein which are alleged to be the same premises set forth and described in the defendant's answer in this action, and also set forth the fact that the defendant in this action was not entitled to have her claim or title to said premises quieted as against the

plaintiffs in this action, and that the rights of the plaintiffs in this action to said premises are and were superior to the claim of the defendant herein, and that by reason of said judgment the defendant in this action is estopped from claiming or asserting any right, title or interest in or to said mining property.

[1] As stated herein, the defendant interposed a motion to strike out said supplemental complaint, and also certain portions thereof. This motion was denied. The defendant also demurred to said complaint, which demurrer was overruled. Thereupon the appellant herein filed her answer to said supplemental complaint. Upon this appeal it is first argued that the court erred in denying the appellant's motion to strike out the supplemental complaint filed by the respondents, as herein stated. An examination of the record, however, shows that no exception was taken by the defendant to the order of the court denying the defendant's motion to strike, and for this reason, if for no other, the alleged error of the court is not before us for determination.

[2] Section 647 of the Code of Civil Procedure specifies what action on the part of the trial court is excepted to. It may be further stated that the petition for leave to file a supplemental complaint and the order of the court granting leave to file a supplemental complaint, are not set forth in the transcript, and therefore cannot be considered herein. By a reference to section 647 of the Code of Civil Procedure, which it is not necessary to set forth herein, it will be seen that, in order to avail herself of any error upon the part of the court in relation to the order refusing to strike out the supplemental complaint, an exception should have been taken thereto. This matter was before the court in the case of *Davies v. Ramsdell*, 40 Cal. App. 424, 181 P. 94. It was there held, quoting from the syllabus:

"An order refusing to strike out a pleading, or a portion thereof, is not an order deemed excepted to under section 647 of the Code of Civil Procedure, therefore, in order that the objection may be urged on appeal, an exception must be taken at the time the decision is made."

[3] Appellant, in relation to the demurrers interposed by her, sets forth the following: Neither the demurrer to the original complaint nor the demurrer to the so-called supplemental complaint, was waived by appellant's filing answers thereto, and the sufficiency of respondents' said pleading is now before this court for determination—citing *Reynolds v. Lincoln*, 71 Cal. 183, 9 P. 176, 12 P. 449, to the effect that a demurrer is not waived by filing an answer. Appellant then continues:

"This applies to the special grounds of demurrer as well as to the general demurrer to

the supplemental complaint, which cannot, of course, be waived."

[4, 5] It has been frequently held that assignments of errors of law committed in rulings made during the progress of the trial, which are not discussed in appellant's brief, will not be examined or considered upon appeal, but it must be presumed that no error exists under such rulings. *Bell v. Southern Pacific R. R. Co.*, 144 Cal. 560, 77 P. 1124; *Pigeon v. Fuller*, 156 Cal. 691, 105 P. 976; *Born v. Castle*, 175 Cal. 680, 167 P. 138; *Frazier v. David*, 187 Cal. 724, 204 P. 17. Notwithstanding that there has been no discussion of the alleged errors and no reasons pointed out showing merit in appellants' demurrer, we have examined this complaint in this action and also the supplemental complaint, or the paper called the supplemental complaint. It satisfactorily appears from the plaintiffs' complaint that the complaint in this action substantially follows and sets forth all the facts necessary to constitute a cause of action entitling the plaintiffs to maintain the same in an action to determine their title thereto and any adverse claims of the defendant. The complaint sets forth the location of the mining claim, posting notices, recording notices that the plaintiffs are citizens of the United States, and also alleges ownership of the property. None of these matters are subject to a motion to strike out for redundancy, nor does their presence in the complaint limit or control the allegation of ownership. The objection is made that the plaintiffs have in their pleading set forth their deraignment of title, and that the deraignment of title so set forth is contrary to the allegation of ownership. Some of the cases cited by appellant, such as *Altoona Q. M. Co. v. Integral Q. M. Co.*, 114 Cal. 105, 45 P. 1047, do state that in an action to quiet title plaintiff is not bound to show the source of his title in the complaint, but, as respondents herein say, such a holding is far from deciding that such special facts should be stricken out from the complaint or that such facts limit or controvert an allegation of ownership. It would serve no useful purpose to set forth extensively the allegations of the complaint herein, and we will content ourselves with saying that the complaint complies with the text found in *Lindley on Mines* (3d Ed.) § 754, p. 833, and the cases there cited.

[6] It is next urged that under section 464, Code of Civil Procedure, a supplemental complaint is improper herein and must be disregarded; that the facts set forth in the supplemental complaint should have been pleaded in the original complaint. We are inclined to the opinion that the paper styled a supplemental complaint should have been filed as and named an amendment to the original complaint. It is not quite certain from the pleadings as to whether there was or

was not any appeal pending in action No. 4726 referred to in the pleadings; the supplemental complaint simply shows that the proceedings to dismiss the application for a bill of exceptions culminated after the filing of the original complaint. But whether the court erred or did not err in permitting the plaintiff to file the pleading called a supplemental complaint, we think that there has been no miscarriage of justice by reason of the ruling of the court granting permission to the respondents to file the pleading called the supplemental complaint, rather than filing the pleading as and named an amendment to the complaint on file in the action. There is no question in our minds that the matters set forth in the pleading called the supplemental complaint would constitute a proper amendment to the complaint in this action. It therefore follows that under section 4½ of article 6 of the Constitution the error of the court, if any, has not resulted in a miscarriage of justice. The plaintiffs in this action had a final judgment against the defendant determining the rights of the parties to the premises involved, and therefore, no matter what name might be given to the pleading as filed, it did not result in a miscarriage of justice.

[7] It is next argued that, by reason of the failure of the respondents to include in their original complaint herein allegations in relation to the judgment obtained by them in action No. 4726, whatever rights they had thereunder were waived. To support this, our attention is called particularly to section 2326 of the United States Revised Statutes (30 USCA § 30) which, in relation to this subject, reads as follows:

"It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same, with reasonable diligence, to final judgment; and a failure so to do shall be a waiver of his adverse claim."

There is no mention in this section which bears upon or has any relevancy to what constitutes, or the different facts or right or title to be set forth as an adverse claim. Had no reference been made to the judgment mentioned in the respondents' supplemental complaint in any of the pleadings, the former judgment obtained by the plaintiffs would nevertheless have been admissible in evidence. In *Kipp v. Reed*, 183 Cal. 49, 190 P. 363, which was an action to quiet title, it was held, quoting from the syllabus:

"A person who brings an action to quiet title to certain lands, the title to which has been adjudicated to be in him in a former action against the same defendant, is not estopped from offering in evidence the judgment roll in the former action as a muniment in his chain of title, because he did not plead or rely upon such judgment."

Other citations supporting this statement of the law seem unnecessary. Was it error on the part of the trial court to enter judgment for the plaintiffs upon the pleadings?

[8] As we have stated, paragraph III of the supplemental complaint set forth the judgment favorable to the plaintiffs in this action entered in the same court in which this action was pending, in an action numbered 4726; that in that action it was determined that the mining premises described therein did not belong to the defendant in this action, but that the plaintiffs in this action and their predecessors in interest had a superior right thereto; that the premises described in the defendant's answer in this action as being mining property belonging to her were the same premises involved in action No. 4726, wherein it was determined that appellant had no interest therein. We need not follow further the particular statements contained in paragraph III of the supplemental complaint, further than to state that it shows the entry of such judgment and the finality thereof. The only question to be determined is to ascertain whether the allegations of paragraph III and the other allegations of the plaintiffs' complaint have been denied. The denial of the defendant, as set forth in the transcript, is as follows:

"Denies that the property referred to in the said judgment in said action No. 4726 is the same property described in paragraph I of the answer of defendant, Eleonore E. Hoeft, now on file in the above-entitled action; and in this behalf this defendant alleges that a portion only of the property described in paragraph I of the answer of this defendant now on file in the above-entitled action is a portion only of the property described and referred to in said judgment in said action No. 4726; that the other property described in paragraph I of said answer of this defendant is not described or referred to in nor affected in any way in said judgment in said action No. 4726; and that the other property described in said action No. 4726 and not described in paragraph I of said answer of this defendant is not claimed by defendant."

The answer then contains the further allegation:

"Denies that the property referred to in the said judgment in said action No. 4726 is the same property described in paragraph I of the answer of defendant Eleonore E. Hoeft, now on file in the above-entitled action; and in this behalf this defendant alleges that a portion only of the property described in paragraph I of the answer of this defendant now on file in the above-entitled action, is a portion only of the property described and referred to in said judgment in said action No. 4726; that the other property described in paragraph I of said answer of this defendant is not described or referred to in, nor affected in any way by, said judgment in said action No. 4726, and not described in paragraph I of said answer of this defendant is not claimed by this defendant. Except as hereinbefore expressly admitted, denied,

and alleged by this defendant, this defendant admits all the other allegations in paragraph III of said supplemental complaint."

[9, 10] A reading of the answer as we have set forth herein shows clearly that no denial is made of the respondents' title to the disputed premises, as determined by the judgment entered in action No. 4726. The affirmative matter contained in the answer to the original complaint alleging that the appellant is the owner thereof must be wholly disregarded, in view of the appellant's admissions of the right and title of the respondents set forth in the supplemental complaint founded upon the judgment just referred to. The force, effect, and conclusiveness of the judgment not being denied, wherein it was determined that the respondents in this action possessed the superior right to the premises involved, the trial court could not do otherwise than grant the motion for judgment on the pleadings. After this judgment had been entered, the appellant made a motion to set aside the judgment, and asked leave to file an amended answer to the plaintiffs' supplemental complaint. This was denied. The record does not show compliance with section 473 of the Code of Civil Procedure. Under such circumstances we cannot say that the trial court abused its discretion. And especially is this true when the granting of appellant's motion to set aside the judgment theretofore entered herein and permitting the filing of an amended answer, would only serve to prolong litigation after a judgment had already been entered in a previous action determining the rights of the parties to the premises involved.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; BURROUGHS, Justice pro tem.

86 Cal. App. 10

Ex parte GREGORY. (Cr. 1427.)

District Court of Appeal, First District, Division 1, California. Oct. 11, 1927.

1. Constitutional law ⇨55—Legislature may regulate procedure in criminal cases.

Legislature has power to regulate procedure in criminal cases.

2. Criminal law ⇨206—Statute, permitting accused to waive right to preliminary examination before magistrate, does not violate constitutional provision relating to preliminary examination (Pen. Code, § 860; Const. art. 1, § 8).

Pen. Code, § 860, providing that accused, when represented by counsel, may waive right to preliminary examination before magistrate, and, when so waived, permitting magistrate to hold him to answer, held not to violate Const.

art. 1, § 8, relating to preliminary examination by magistrate.

3. Criminal law ⇨225—Constitutional provision relating to preliminary examination by magistrate is one for benefit of accused, and he may waive right to examination under statutory authorization (Const. art. 1, § 8; Pen. Code, § 860).

Guaranty extended by Const. art. 1, § 8, to right to preliminary examination before magistrate, is not imperative; it being one for benefit of an accused to insure him his security, and, though he has clear right to insist on compliance with provision, he may also waive right, under Pen. Code, § 860.

4. Criminal law ⇨225—By regularly waiving preliminary examination, accused is estopped to claim discharge because none was held (Pen. Code, § 860).

Where accused regularly waives preliminary examination before magistrate, under Pen. Code, § 860, he is estopped to claim a discharge because none was held.

Application of Ernest Spagnoli for writ of habeas corpus to be directed to the Sheriff of the City and County of San Francisco to secure release of Fred Gregory, in custody on commitment for trial for forgery. Writ discharged, and petitioner remanded.

Ernest B. D. Spagnoli, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and Joseph A. Garry, Deputy Dist. Atty., both of San Francisco, for respondent.

Walter F. Lynch, of San Francisco, amicus curiae.

R. M. J. Armstrong, of Los Angeles, for Sheriff, City and County of San Francisco.

TYLER, P. J. Petition for habeas corpus. It appears therefrom that petitioner was charged with the crime of forgery. The complaint was filed in the police court of the city and county of San Francisco. The matter came on regularly for hearing; petitioner being represented by counsel. He waived a preliminary examination and the judge of said court, sitting as a committing magistrate, held him to answer. It is claimed that the commitment is void for the reason that a preliminary examination is made mandatory by constitutional provision, and the privilege cannot be waived by an accused. The constitutional provision invoked reads as follows:

"Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law." Cal. Const. art. 1, § 8.

As originally enacted the provisions of the Penal Code regulating proceedings in criminal cases contained no provision that such an

examination could be waived. In construing these provisions it has been held that, as they contemplated an examination by the committing magistrate, a waiver thereof was not warranted. See *Ex parte Walsh*, 39 Cal. 705; *Kalloch v. Superior Court*, 56 Cal. 229; *People v. McCurdy*, 68 Cal. 579, 10 P. 207.

[1-4] In 1923, however, the Legislature amended these provisions so as to allow an accused, when represented by counsel, to waive his right to a preliminary examination before a magistrate, and, when so waived, to permit the magistrate to hold him to answer. Pen. Code, § 860. Petitioner claims that this section contravenes the provisions of the state Constitution above referred to, and is therefore unconstitutional. There is no merit in the contention. The Legislature has power to regulate procedure in criminal cases, and a provision for waiver of a preliminary examination by an accused is not an infringement of the constitutional right invoked. The guaranty extended by the organic law is not therefore imperative, it being one for the benefit of an accused to insure him his security, and, while he has a clear right to insist upon a compliance with the provision, he just as clearly has the right to waive it under statutory authorization. By regularly waiving such examination he is estopped to claim a discharge because none was held. 16 C. J. p. 318. We are cited to the case of *People v. Bomar*, 73 Cal. App. 372, 238 P. 758, as opposing this conclusion. In that case a preliminary examination was had, and the accused was held for trial for the crime of which he was charged. Thereafter the committing magistrate amended his commitment by holding the defendant for an entirely different offense, and it was held that the accused was entitled to a preliminary examination upon the charge for which he was held. There is nothing in the decision that in any manner indicates that an accused may not waive the requirement in question.

Writ discharged, and petitioner remanded.

We concur: KNIGHT, J.; CASHIN, J.

86 Cal. App. 130

PEOPLE v. OLDS. (Cr. 1522.)

District Court of Appeal, Second District, Division 1. California. Oct. 15, 1927.

1. Criminal law § 1159(4)—Credibility of witnesses corroborating accomplice is for jury.

Credibility of testimony of witnesses corroborating accomplice lies exclusively within province of jury, and question whether such witnesses were truthful may not be decided by appellate court.

2. Criminal law § 1174(1)—Failure of record to show that court admonished jury at each recess held not ground for complaint, where jury was admonished and no injury to defendant was shown (Pen. Code, § 1122).

Defendant held not entitled to complain of failure of record to show that at each recess court admonished jury, in accordance with Pen. Code, § 1122, in view of record showing that jury was admonished, though silent as to form of such admonition, and fact that no injury was shown to have resulted from admonition given by court.

3. Criminal law § 1038(3)—Failure to instruct as to necessity of corroborating accomplice and to define accomplice held not reversible error, in absence of request therefor by defendant (Pen. Code, §§ 1093, 1111, 1127).

Defendant held not entitled to complain of court's failure to instruct jury pursuant to Pen. Code, §§ 1093, 1111, 1127, as to definition of accomplice and corroboratory evidence necessary to support conviction, where no request for such instructions was made by defendant.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Ray Olds was convicted of a violation of the Penal Code, § 288a, and he appeals. Affirmed.

A. S. Maloney, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime of sex perversion as defined and denounced in section 288a of the Penal Code.

[1] The first point presented by appellant for a reversal of the judgment is that, because the principal witness for the prosecution was an accomplice of defendant, a conviction could not have been had on testimony of such accomplice, unless it was corroborated by such other evidence as tended to connect the defendant with the commission of the offense. Section 1111, Pen. Code. But, assuming, without deciding, that in the circumstances of this case, as shown by the evidence, the principal witness was an accomplice of defendant, it clearly appears that the testimony given by such witness was fully corroborated by three eyewitnesses to the commission of the offense. If, as claimed by appellant, the testimony given by such corroborating witnesses is unbelievable, it is well established that the credibility to be attached to such evidence was a matter which lay exclusively within the province of the jury; and hence the question as to whether such witnesses were truthful in their several state-

ments is one which may not be decided by this court.

[2] Appellant also contends that the record fails to show that at each of the several recesses or adjournments of the court the jury was admonished in accordance with the provisions of section 1122 of the Penal Code. With reference thereto, it is admitted that the record does show that the jury was "admonished"; but the specific complaint of appellant is that the record is silent as to the form of such admonition.

In the case of *People v. Ye Foo*, 4 Cal. App. 730, 738, 89 P. 450, 452, a question along similar lines was suggested by the appellant. The court said:

"The record fails to show that the court admonished the jury at each adjournment, as required by section 1122 of the Penal Code, not to converse among themselves, nor with any one else, on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted. In the absence of a showing to the contrary we will presume that the court did its duty, and gave the proper admonition at each adjournment."

In *People v. McKeehan*, 11 Cal. App. 443, 447, 105 P. 273, 274, the following language of the court appears:

"The failure of the court to admonish the jury under section 1122 of the Penal Code is not necessarily reversible error. While the section should have been, and always ought to be strictly complied with, yet, if no injury appears to have resulted from an omission to do so, prejudice will not be presumed. [Citing cases.] In the case at bar, the error complained of was the failure to give the language of the section in full at two adjournments. It does not appear that it was not given at other adjournments, or that there were no other adjournments at which it may be presumed it was given."

See, also, *People v. Witt*, 170 Cal. 104, 108, 148 P. 928; *People v. Coyne*, 116 Cal. 295, 297, 48 P. 218; *People v. Thompson*, 84 Cal. 598, 606, 24 P. 384.

In view of the rulings in the several cases to which reference has just been had, and the fact that no injury was shown to have resulted from the "admonition" admittedly given by the court in the instant case, it must be concluded that the point urged by appellant is not well taken.

[3] Finally, appellant specifies error in that no instruction was given by the court to the jury pertaining to the definition of one who is an accomplice, and especially the necessity of corroboration of the testimony of an accomplice. While, under the provisions of sections 1093 and 1127 of the Penal Code, "if requested by either party," it became and was the duty of the court to charge the jury on the points of law pertinent to the issues and which were necessary for the information of the jury,

nevertheless in the instant case it should be noted that defendant made no request of the court that it instruct the jury in accordance with the law generally, or as particularly provided in section 1111 of the Penal Code, which relates to the definition of an accomplice and the corroboratory evidence necessary to support a conviction. In such circumstances appellant is in no position to complain. *People v. Hettick*, 126 Cal. 425, 429, 58 P. 918; *People v. Baker*, 64 Cal. App. 336, 343, 221 P. 654; *People v. Vukojevich*, 25 Cal. App. 459, 464, 143 P. 1058.

It is ordered that the judgment be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.

86 Cal. App. 119

OUSDAL v. SANSUM. (Civ. 5935.)★

District Court of Appeal, First District, Division 2, California. Oct. 15, 1927.

Hearing Denied by Supreme Court Dec. 12, 1927.

1. Libel and slander ⇨86(2)—When writing is not libelous per se, plaintiff must plead by innuendo facts showing injurious meaning of writing.

When language of alleged libelous writing is susceptible of two meanings, one harmless and the other injurious, and particularly when words in question are not libelous per se, plaintiff must plead by innuendo facts on which he relies to point out injurious meaning of writing.

2. Libel and slander ⇨86(2)—Letter, stating that name of plaintiff licensed physician and drugless practitioner does not appear in directory, held not libelous per se requiring innuendo by plaintiff.

In action by licensed physician and drugless practitioner for libel, based on letter stating that plaintiff's name does not appear in directory of licensed physicians and drugless practitioners, held, that letter not being libelous per se in view of State Medical Act (St. 1917, p. 114) § 11, it was incumbent on plaintiff to plead by innuendo facts showing injurious meaning of letter.

3. Libel and slander ⇨123(2)—Whether matters alleged in innuendo are warranted by alleged libelous writing is question of law for court.

Where innuendo is necessary in complaint for libel, question whether matters therein alleged are fairly warranted by writing is one of law for court, and, if court should determine at close of plaintiff's case that innuendo is insufficient, cause should not go to jury.

4. Libel and slander ⇨86(3)—Demurrer to complaint in libel action by licensed physician and drugless healer, based on letter stating that his name was not in directory, held properly sustained.

In action for libel by licensed physician and drugless practitioner, based on letter stating that plaintiff's name was not in directory of

physicians and drugless healers, held, that court properly sustained demurrer to complaint in view of insufficiency of complaint in pleading innuendo.

5. Libel and slander —Sustaining demurrer to second amended complaint held proper, in view of ample opportunity to plaintiff to properly state cause of action.

Court held not to have abused its discretion in sustaining demurrer to second amended complaint in libel action, in view of ample notice to plaintiff of objections to his pleadings and ample time to request leave to amend.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action for damages for libel by Asbjorn P. Ousdal against W. D. Sansum. Judgment for defendant, and plaintiff appeals. Affirmed.

S. J. Bingham, of Santa Barbara, and W. J. Ford and Pierce Works, both of Los Angeles, for appellant.

Heaney, Price & Postel, of Santa Barbara, for respondent.

NOURSE, J. Plaintiff sued for damages for an alleged libel on the part of the defendant. An amended demurrer to plaintiff's second amended complaint was sustained without leave to amend, and thereafter judgment was entered in favor of the defendant for his costs. From this judgment plaintiff has appealed upon a typewritten judgment roll.

The second amended complaint (which will hereafter be referred to as the complaint) alleges that the plaintiff had for a number of years prior thereto been a duly and regularly licensed physician under regulations of the state board of medical examiners, and that he was also licensed by that board to practice as a drugless practitioner in this state; that both licenses were duly recorded in the office of the county clerk of Santa Barbara county; that he had for some years past been engaged in the practice of his profession as a physician and surgeon and also as a drugless practitioner in said county. It was then alleged that during the month of July, 1924, one Alice V. Bradley was employed as a teacher in the Teachers' College at Santa Barbara, and that within one year prior to said date the plaintiff at the request of said Alice V. Bradley had given a series of lectures to the students of said Teachers' College, and that it was planned that the plaintiff would be again requested to give another series of lectures to said students; that about the 15th day of July, 1924, defendant "addressed to said Alice V. Bradley" a letter containing the following statement:

"Relative to our conversation concerning A. P. Ousdal, I have again carefully gone through the directory of physicians and surgeons, natu-

ropaths, drugless practitioners, chiroprodists, midwives, holding certificates issued under the medical practice acts of the state of California including licentiates in the government service published by the board of examiners of the state of California. Ousdal's name does not appear in the physicians and surgeons of Santa Barbara county or in the list of drugless healers. For your information there is only one licensed drugless practitioner in the county of Santa Barbara, Cal., that individual being Malcolm J. Pearring."

By way of inducement, complainant then alleges that the defendant intended to charge and mean, and intended to be understood and was understood by the reader thereof to charge and mean, that plaintiff by his practice as a drugless practitioner in the county of Santa Barbara was unlawfully, corruptly, and fraudulently engaged in practice without a valid license so to do and in violation of the laws of the state of California. A second and separate cause of action is pleaded which is identical with the first cause of action, except that the letter which it is charged the defendant addressed to Alice V. Bradley reads:

"Relative to our conversation concerning A. P. Ousdal, for your information there is only one licensed drugless practitioner in the county of Santa Barbara, Cal., that individual being Malcolm J. Pearring."

It will be noted that this letter consists of disconnected excerpts from the letter which is pleaded in the first cause of action.

[1, 2] On this appeal two points are advanced: (1) That the trial court erred in sustaining the demurrer to the second amended complaint, and (2) that the trial court had abused its discretion in sustaining the demurrer without leave to amend. A reading of the complaint forces the conclusion that it has been drawn with extreme care to avoid pleading all the facts and circumstances which, if pleaded, would have shown without a doubt that no cause of action existed. It is alleged that the letter was addressed to Alice V. Bradley, but it is not alleged that it was either sent or delivered to her; it is alleged that the defendant intended the letter to charge that plaintiff was practicing without a license and that it was so understood by the reader of the letter, but it was not alleged who it was who read the letter or what, if anything, was done by the defendant in the nature of a publication of the letter quoted. When the language of the writing is susceptible of two meanings, one of them harmless and the other injurious, it is necessary for the plaintiff to plead by innuendo the facts upon which he relies to point out the injurious meaning of the writing. This is particularly true when the words in question are not libelous per se, and this rule is applicable here because the inhibitions of the

State Medical Act (Stats. 1917, p. 114) covering the practicing of a system of treating the sick without having an unrevoked certificate do not cover the case of one practicing his profession without having his name inserted in the official directory.

[3] Where, therefore, an innuendo is necessary in a complaint for libel the question whether the matters therein alleged are fairly warranted by the writing in question is one of law for the court to determine rather than one of fact to be left to the jury. If, therefore, at the close of plaintiff's case the court should determine that the innuendo is not warranted by the writing, the cause should not go to the jury.

[4] A fair construction of the letter is that the defendant had carefully examined the directory of physicians and surgeons published by the state board of medical examiners and that he failed to find plaintiff's name in that directory as a licensed physician or as a licensed drugless practitioner, but that he did find in said directory the name of Dr. Pearring as the only one listed as entitled to practice as a drugless practitioner in Santa Barbara county. The defendant did not draw conclusions from these facts that the plaintiff was practicing without a license, but merely conveyed the information which he had obtained from this official publication on to the party to whom his letter was addressed. This being the fair interpretation of the writing, the trial court was not bound by the plaintiff's allegations of what he believed the defendant intended to charge or mean as there is nothing in the writing from which an ordinary person could draw any other conclusion than that the defendant was merely conveying to the addressee of the letter the result of his examination of the official directory. Thus if the cause had gone to trial and the plaintiff had proved nothing more than the matters alleged in his complaint, it would have been incumbent upon the trial court to determine whether the letter, as explained by the averments, was libelous, and if it should have determined that it was not libelous as a matter of law, then the case should have been taken from the jury. Though under a liberal view of the complaint it might be said that it pleads facts sufficient to permit plaintiff to put in his evidence, under our course of procedure, where it is incumbent upon an appellant to show prejudice arising from the claimed error, we are unable to perceive how the plaintiff has suffered by the ruling on the demurrer rather than at a later stage of the proceedings.

[5] The argument is made that the trial court abused its discretion when it sustained the demurrer without leave to amend. It should be noted that the demurrer to the second amended complaint was both general and

special. In the special demurrer particular attention was directed to the failure of the plaintiff to plead the essential facts of publication. This demurrer was filed on February 24, 1925, and was sustained on May 4th of the same year. The plaintiff had made three attempts to plead his cause of action and he is not in a position to say that his attention was not directed to the failure of his pleading in ample time to have permitted an amendment or at least a request for leave to amend long before the trial court sustained the demurrer and entered the judgment. The plaintiff has cited a number of cases to the point that when a demurrer is sustained because of defects in the pleading which could be readily cured by amendment the trial court should grant leave to amend, but the cases are not applicable here. As the order was made upon the second amended complaint after the plaintiff had been given ample notice of the objections which were to be raised to his pleading and had failed to request leave to amend from the trial court, we are satisfied that the court's discretion was properly exercised.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

80 Cal. App. 32.

BLODGETT v. ROWLET et al. (Civ. 5519.)

District Court of Appeal, First District, Division 1, California. Oct. 13, 1927.

1. Brokers ⇨82(1)—Complaint for recovery of commissions against owners agreeing to exchange lands under contract providing that particular owner should not pay commissions did not state cause of action against that owner.

Complaint by broker for recovery of commissions on sale of real estate against both parties to exchange agreement, setting forth exchange agreement which recited that owner of one parcel has no commission to pay on his property, did not state cause of action against such owner.

2. Brokers ⇨82(1)—Complaint to recover commission on sale of realty and for damages must allege that plaintiff was licensed broker or salesman (Real Estate Brokers' Act, §§ 18-20).

Complaint by broker to recover commission on sale of real estate and damages, failing to allege that plaintiff was licensed real estate broker or salesman when cause of action arose, did not state cause of action, in view of Real Estate Brokers' Act (St. 1919, p. 1252) §§ 18-20.

3. Pleading ⇨225(1)—Demurrers held not sustained without leave to amend, where no order to that effect was made, in view of court rule.

Under rule of superior court of Santa Barbara county, providing that, when demurrer to

pleading is sustained, adverse party has 10 days in which to amend pleading unless otherwise ordered, demurrers were not sustained without leave to amend, where no order to that effect was made.

4. Brokers ⇐82(1)—Allegations that plaintiff, suing for commissions for sale of realty, was employed by licensed brokers and was legally licensed, were sufficient against demurrer (Real Estate Brokers' Act, §§ 18-20).

Allegations in amended complaint that for more than one year plaintiff was constantly engaged as salesman, employed on commission by licensed real estate brokers, and was legally licensed to act as such salesman, were sufficient as against general demurrer to show compliance with Real Estate Brokers' Act (St. 1919, p. 1252) §§ 18-20.

5. Brokers ⇐81—Plaintiff, though agent for broker, could sue in own name for commissions under contract to pay commissions to him.

Where owners of property expressly contracted to pay commissions for sale of real estate to plaintiff, plaintiff could maintain action in own name, though acting only as agent for real estate brokers.

6. Brokers ⇐82(1)—Complaint, alleging exchange agreement, accepted by defendant agreeing to pay commissions to plaintiff, and fraudulent termination of agreement, alleged cause of action for commissions.

Complaint to recover commissions on sale of real property and for damages, setting forth contract between holders of land for exchange of properties and acceptance by defendant, who agreed to pay commissions to plaintiff, and alleging that defendant terminated exchange agreement with intent to defraud plaintiff out of commissions, set forth cause of action.

7. Appeal and error ⇐959(1)—Pleading ⇐225(2)—Trial court may allow filing of amended complaint or enter judgment, and will be sustained in absence of abuse of discretion.

Trial court, on sustaining demurrer, may in its discretion allow amended complaint to be filed or enter judgment forthwith for defendant, and action either way will be sustained on appeal, unless there has been an abuse of discretion.

8. Pleading ⇐225(1)—Right to file amended complaint held not affected by offer for filing in open court, and refusal was denial of permission to amend.

Under rule of superior court of Santa Barbara county, right to amend on sustaining of demurrer was not affected because pleading was offered for filing in open court, and refusal to allow filing was in effect denial of permission to amend.

9. Pleading ⇐229—Amendment to pleading allowed in furtherance of justice should be permitted where rights of others are not prejudiced.

Amendments to pleading are allowed in furtherance of justice, and, though proposed amendment is properly refused where it would

prejudice rights of others, amendment should be allowed where no prejudice would result.

10. Brokers ⇐82(3)—Filing amended complaint in action for real estate commissions and damages held erroneously refused (Real Estate Brokers' Act, §§ 18-20).

In action to recover commission on sale of real estate and for damages, filing of amended complaint to allege plaintiff was licensed real estate broker or salesman, as required by Real Estate Brokers' Act (St. 1919, p. 1252) §§ 18-20, held erroneously refused.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by D. T. Blodgett against Louis A. Rowlet and others. Judgment for defendants, and plaintiff appeals. Reversed in part, and affirmed in part.

D. T. Blodgett, in pro. per.

Heaney, Price & Postel, of Santa Barbara, for respondents.

CASHIN, J. An appeal from a judgment in an action to recover a commission upon the sale of real estate and for damages.

The defendants filed separate demurrers to the complaint, which were sustained, following which a motion for leave to amend the complaint was denied and judgment entered for the defendants.

Appellant contends that the trial court erred in sustaining the demurrers and in denying his motion for leave to file an amended complaint.

The original complaint alleged:

That defendant Rowlet was the owner of 4.14 acres of land situated in the Rancho Atascadero in San Luis Obispo county, and that defendants Jeal owned two lots on the corner of Salinas and Carpinteria streets in the city of Santa Barbara, both parcels being particularly described in the complaint. That Rowlet, on or about February 16, 1924, subscribed and delivered to appellant a writing, which was as follows:

"For the three bungalows on corner of Salinas and Carpinteria I will offer \$14,000.00 in the following way: Assuming the \$6,000.00 mortgage, put in as payment my 4.14 acres in Atascadero and \$8,000.00 in cash on delivery of a clear title excepting the six thousand incumbance stated above; providing I have no commission whatever to pay on the Atascadero property."

That defendants Jeal on February 24, 1924, accepted the above offer; their acceptance being evidenced by a writing signed by them, in which the offer was set forth in terms and the properties described. The acceptance recited that the offer from Rowlet had been "obtained by our agent D. T. Blodgett, salesman with Weinberg and Quick," and concluded with the following: "And we agree to pay our agent D. T. Blodgett a commission of

\$800." It was further alleged that defendants, with the intent to defraud appellant of the commission, by mutual agreement terminated the exchange agreement, and that each released the other from obligation thereunder. Upon the latter transaction, in addition to his demand for the commission, appellant sought to recover against all of the defendants the sum of \$2,000 by way of exemplary damages.

[1, 2] The original complaint failed to allege that appellant was at any time a licensed real estate broker or salesman; and it was clear that no cause of action was stated therein against defendant Rowlet. In the absence of an allegation that appellant was a licensed real estate broker or salesman when the cause of action arose, the complaint was insufficient as to all of the defendants, and the demurrers thereto were properly sustained. Real Estate Brokers' Act, §§ 18-20 (Stats. 1919 p. 1252); Haas v. Greenwald, 196 Cal. 236, 237 P. 38; Firpo v. Murphy, 72 Cal. App. 249, 236 P. 968; Wise v. Radis, 74 Cal. App. 765, 242 P. 90.

[3] The demurrers, however, were not sustained without leave to amend, no order to that effect having been made; and it was provided by rule of the superior court of Santa Barbara county:

"* * * When a demurrer to a pleading is sustained, unless otherwise ordered the adverse party shall have ten days after notice in which to amend the pleading demurred to, but the court reserves the right to refuse leave to amend an answer."

So far as shown, no notice of the order sustaining the demurrers was given, but appellant, who appeared in propria persona, subsequently served and filed a notice of motion for leave to file an amended complaint; the proposed complaint as amended being attached thereto. The motion was presented to the court and leave to file denied, following which, on December 15, 1924, the judgment appealed from was entered.

[4, 5] No change in the material allegations of the original complaint with respect to defendant Rowlet appeared in the proposed amendment; and as to him no cause of action was stated. With respect to the other defendants, however, the amended pleading, in addition to the material allegations contained in the original complaint, alleged:

"That more than one year prior to the 1st day of March, 1924, plaintiff was constantly engaged as a salesman employed on commission by licensed real estate brokers and was legally licensed to act as such salesman."

These allegations were sufficient as against a general demurrer to show a compliance with the Real Estate Brokers' Act; and, defendants Jeal having expressly contracted to pay the commission to appellant, the latter, though an agent, could maintain the action in his own name. *Tustin Fruit Co. v. Earl Fruit*

Co., 6 Cal. Unrep. Cases, 37, 53 P. 693; *Phillips v. Henshaw*, 5 Cal. 509; *Allen v. Chatfield*, 34 Cal. App. 785, 168 P. 1149; *Kelley-Clarke Co. v. Leslie*, 61 Cal. App. 559, 215 P. 699; 2 Corp. Jur. Agency, 896, § 595; *Pomeroy*, Code Remedies, §§ 141, 177.

[6] The appellant was not represented by counsel, and as a consequence his proposed pleading contained much that was redundant and immaterial; and, while it was insufficient as against defendant Rowlet, as to defendants Jeal, the facts alleged were sufficient, if proven, to support a judgment for the amount of the commission. *Jauman v. McCusick*, 166 Cal. 517, 137 P. 254; *Rucker v. Hubler*, 56 Cal. App. 771, 206 P. 472; *Goodrich v. Turney*, 44 Cal. App. 516, 186 P. 806.

[7] The trial court, upon sustaining a demurrer, may in its discretion allow an amended complaint to be filed or enter judgment forthwith for the defendant, and its action either way will be sustained on appeal unless there has been an abuse of discretion. *Billesbach v. Larkey*, 161 Cal. 649, 120 P. 31. It has been held, however, that such discretion should be liberally exercised in favor of an application to amend (*Galusha v. Fraser*, 178 Cal. 653, 174 P. 311), and, unless it is clear that the defective complaint cannot be amended so as to obviate the objections made thereto, an amendment should be allowed (*Payne v. Baehr*, 153 Cal. 441, 95 P. 895).

It is urged by respondents that under the rule of court appellant might have filed the proposed pleading with the clerk without applying to the court for leave, and that the opportunity was still available after the denial of the motion.

[8-10] If it be conceded that the rule gave the appellant the right to file an amended complaint, such right was not affected by the fact that such pleading was offered for filing in open court; and the refusal to allow the same to be filed was in effect a denial of permission to amend. In *Duff v. Duff*, 101 Cal. 1, 35 P. 437, a refusal of leave to file an amended answer was sustained where the proposed filing presented no new issue or any defense not embraced in the original answer; but, as held in the following cases, the right to amend does not depend upon whether the amended pleading is wholly invulnerable to objection by demurrer or motion to its form or substance, and it is subject to such tests thereafter the same as the original pleading. *Pacific Mill Co. v. Inman*, 50 Or. 22, 90 P. 1099; *Pratt v. Rhodes*, 78 Conn. 310, 61 A. 1009. Amendments are allowed in furtherance of justice; and, while it is the rule that, when a proposed amendment would prejudice the rights of others, leave to amend is properly refused, here it is conceded that the right was given by the court rule; and although no cause of action was stated as to defendant Rowlet, as to the others the proposed pleading was sufficient, and its filing would have

prejudiced no substantial right of the former, whose objections thereto could have been presented by demurrer.

In view of the facts, we are of the opinion that the denial of the motion was erroneous; that in furtherance of justice appellant should be permitted to amend as against defendants Jeal; but, it being apparent that the complaint with respect to defendant Rowlet was incapable of amendment, the judgment as to him should be affirmed.

The judgment as to defendants J. W. Jeal and Jessie Jeal is reversed, and as to defendant Louis A. Rowlet it is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

86 Cal. App. 100

PEOPLE v. SINGH. (Cr. 997.)

District Court of Appeal, Third District, California. Oct. 14, 1927.

1. Assault and battery ☞88—Threats of defendant against prosecuting witness held properly admitted in prosecution for assault with deadly weapon.

In prosecution for assault with deadly weapon, testimony as to threat by defendant, about two years before assault, to kill prosecuting witness, held properly admitted; question of remoteness being for jury.

2. Criminal law ☞384—Testimony of threats by defendant against another will not be excluded because of remoteness alone.

Mere length of time elapsing between time of threats by defendant to injure another and time at which injuries were committed does not itself render testimony of such threats incompetent or inadmissible.

3. Assault and battery ☞88—Inability of witness, testifying to threats by defendant, to definitely fix month, held not to render testimony inadmissible; such fact only going to its weight.

In prosecution for assault with deadly weapon, fact that witness, testifying to threats by defendant against prosecuting witness, could not definitely fix particular month, did not render testimony of such threats inadmissible; such fact affecting only weight of testimony.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Wariama Singh was convicted of assault with a deadly weapon, and he appeals. Affirmed.

George E. Gardner, of Oroville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, Acting P. J. The defendant was charged by information filed in the superior

court of Butte county with the crime of assault with a deadly weapon with intent to commit the crime of murder. The jury before and by whom the cause was tried found the accused guilty of the crime of assault with a deadly weapon. He made a motion for a new trial, which motion was denied, and he brings the case to this court on appeal from the judgment and the order denying said motion.

The defendant for a reversal submits and insists upon the validity of but one point, to wit: That the court erred, to the prejudice of his rights, in overruling his objection to the testimony of the prosecution's witness Sixt that in or near the month of June, 1925, the defendant, speaking to said witness of the assaulted party, one Banta Singh, declared that he (defendant) did not like Banta Singh, and that he (defendant) "would kill said Banta if he (said Banta) took any more wood." The grounds of the objection to said testimony were that it was "irrelevant, immaterial, incompetent, and too remote."

The defendant interposed as in resistance to the crime charged against him the plea of self-defense. The people claimed that the assault was wholly unprovoked and without excuse. Testimony was introduced in support of the respective antithetical theories. Thus the importance to the people's case of testimony disclosing that the defendant had, prior to the time of the commission of the assault, nursed a feeling of bitter antipathy towards Banta Singh, the assaulted party, and had, prior to said time, threatened to kill or inflict bodily injury upon the person of Banta Singh, is plainly apparent, and will be the more conspicuously exposed by a brief reference herein to the evidence disclosing the immediate circumstances leading to and culminating in the assault as detailed by a number of persons that witnessed the near tragedy and testified on behalf of the people. First, it may be noted that, as is to be implied from the fact that the point above indicated involves the single and only ground upon which the conclusion reached below is attacked, no question as to the sufficiency of the evidence to support the verdict is here raised.

A recital of the facts in a general way will be based upon the testimony given for the people by certain parties who witnessed the assault, there being no substantial divergence in the stories of the assault as told by them.

Both the defendant and the party upon whom the assault charged is alleged to have been made are Hindus. At the time the assault was committed, and for some time prior thereto, the assaulted party, Banta Singh, to whom, for brevity and convenience, we will hereinafter refer as "Banta," was and had been foreman on an orchard situated near

East Biggs, in Butte county. The defendant was in the employ of one C. S. Hickson, an orchardist, whose orchard was situated east and about three-quarters of a mile from the ranch or orchard on which Banta was employed. The assault occurred early in the afternoon of February 15, 1927. Rain was falling on that day, and for that reason work on the ranch was suspended pending cessation of the rain. Banta and five other Hindus were gathered in the house and alternately engaged in talking, reading, and playing at cards. One Thada Singh had gone to Banta's house to procure some milk. None was to be had, and he thereupon started to leave the premises, and, as he stepped outside the house, he observed the defendant leading two cows along the road running in near proximity to and parallel with the ranch on which Banta was employed and residing. About the head of each cow was a halter, to which was attached a long chain for the purpose, presumably of tethering the animals. Thada, recognizing the cows as being the property of Banta, or the party by whom the latter was employed, exclaimed, in a voice loud enough to be heard by the parties then in Banta's house, that defendant (calling him by name) was leading away Banta's cows. The parties in the house immediately stepped into the yard, Banta leading and proceeding in the direction of where the defendant stood holding the chains attached to the animals until he had reached a point 12 or 15 feet from the defendant. Banta asked defendant what he was doing or intended to do with the cows. Defendant replied, saying that the cows had been on the premises of his employer eating his hay and feed and otherwise damaging the property. Banta answered by saying that if defendant's employer had been damaged by his cows he (Banta) would pay therefor. Thereupon the defendant drew a revolver from his pocket, and, as Banta turned his back and started to return to the house, the defendant fired at him; the bullet striking Banta in the back. Banta fell to the ground, and defendant fired a second shot at the former while he was lying prostrate upon the ground; the bullet striking and entering Banta's right arm. Some of the friends of Banta (those who had been in the house with him) then grabbed the assailant and tried to wrench, and finally, after much scuffling and one of the parties had struck defendant on the head with a milk pail, succeeded in wrenching the weapon from the latter's possession. While the scuffling was in progress, the defendant fired the pistol three times, shooting "at random," as two of the witnesses described it. In the meantime, others of the parties present engaged in assisting Banta, who was unable to walk, to the house. The defendant was held by the parties witnessing the assault until the arrival of the constable of the township, for

whom a messenger had been dispatched. The constable, on his arrival, placed defendant under arrest and took him to the county jail. Banta was conveyed to the county hospital at Oroville. It is not necessary to describe in detail the nature of the wounds received by Banta, as the doctor attending him described them on the witness stand. It is sufficient to say generally that the doctor found that the lower extremities of the wounded man were paralyzed to an extent which made it impossible for him to move them, and, further, that the bowels and urinary organs were paralyzed so that they refused to function without the aid of artificial appliances. The doctor performed an operation on the spine. After the operation Banta was able to move his feet slightly. The doctor expressed the opinion, however, that the injured man would never again be able to walk. At the time of the trial in the latter part of June, 1927, over four months after he was wounded, Banta was brought to the courthouse on a cot or stretcher to testify, and was then unable to use his lower limbs. Banta Singh testified that at the time he was assaulted he had no weapon of any kind or character upon his person and that he made no demonstration of a hostile character toward the defendant. This testimony was corroborated by all the Hindus who were present at the time of the trouble, they having testified that they examined the coat and clothing of Banta immediately after he was carried into the house and found no weapon in any of the pockets thereof.

Other than some testimony of incriminatory admissions of defendant after the assault was committed and the testimony regarding threats asserted to have been made by defendant to commit violence upon Banta Singh previous to the time of the trouble, the above statement embraces a general recital of the facts brought out by the people.

The story of the defendant, corroborated in some particulars by several white witnesses who were not far distant from the scene of the trouble when it occurred, was that he found the cows referred to grazing in the barley field of his (defendant's) employer; that he caught the cows and, by means of the chain attached to one of them, he led the cows out of the field to the road spoken of above; that, when near Banta's house, he tied the cows to a tree, and that about this time Banta Singh, closely followed by Nata Singh (one of the Hindus in Banta's house at the time), approached the point where the defendant stood; that the other Hindus in the house soon made their appearance; that Banta ordered his friends to get hold of defendant, and thereupon several of the parties surrounded defendant, got hold of him, and while several began beating and kicking him about the body, another struck him over the head a number of times with a large mil-

can or pail; that he attempted to defend himself, but was unable to resist or overcome the combined attack of the Hindus, and, realizing this, he took his revolver from his pocket and fired several times, with the result as indicated. That the defendant was violently beaten and struck on and about his head and body was declared to be true by the doctor who attended and treated him immediately following his incarceration in jail.

[1, 2] It will be observed from the facts adduced before the jury by the people and the defense set up by the accused and the testimony presented by him in support thereof that, as above stated, testimony tending to show that the accused had for a long time entertained and cherished a feeling of ill will toward Banta Singh, and at times had threatened to do him bodily injury, was of singular importance, in that it would strongly tend to support the theory of the people that the assault was committed as described by the witnesses for the people and was entirely without any justification whatever. If, therefore, the objection by the defendant that the testimony tending to show such ill feeling and threats was for any reason incompetent is legally sound, it could not then well or justly be said that prejudice against the accused had not resulted from the ruling of the court allowing such testimony. But the testimony to which objection was made at the trial and is urged here was neither immaterial nor irrelevant nor incompetent. The only possible question is whether the time at which such alleged threats were made was too remote to the time at which the assault was committed to render it a proper matter to go before the jury. It is, though, very clear that the court was right in allowing the testimony. The objection addresses itself to the weight of the testimony rather than to its competency or relevancy. There was no testimony introduced by the defense tending to show that the ill feeling, if any there was, existing in the accused against Banta Singh, or between the two, had ever been composed or so settled as to render their relations uniformly friendly and amicable down to the time of the assault. The jury, believing the testimony as to such ill feeling and threats, as we may assume that they did, could justly infer that the hostility expressed by the de-

fendant against Banta Singh some year or two prior to the date of the assault was still nourished in the breast of the defendant. At any rate, the testimony was, as stated, proper for the jury to consider and give to it whatever weight they might in their judgment believe it to be entitled to. We have not found any divergence in the cases upon the proposition that the length of time elapsing between the time that threats by the defendant to do bodily injury to a party and the time at which the injuries were committed by the former upon the latter itself rendered the testimony of such threats incompetent or inadmissible in the trial of the assaulting party upon the charge of committing such assault. In other words, the cases, so far as our investigation has gone, have uniformly held that testimony of threats because of remoteness will not be excluded. See *Hardy v. Commonwealth*, 110 Va. 910, 67 S. E. 526; *State v. Quinn*, 56 Wash. 295, 105 P. 818, 821; *State v. Gates*, 28 Wash. 689, 69 P. 385; 10 Cal. Jur. p. 1140, § 360.

It may be added that another witness testified of threats similar to those above spoken of made by the defendant against Banta Singh as late as December, 1926, which was two months only prior to the commission of the assault.

[3] The fact that the witness Sixt could not definitely fix the particular month in the year 1925 that he claimed to have heard defendant make threats against Banta Singh did not render testimony of such threats inadmissible. That fact went only to the weight of the testimony and involved the question, which could have been made an issue by cross-examination, to be determined by the jury, whether the witness' memory as to the particular threats made was sufficiently accurate to constitute the testimony dependable. The cases cited by counsel for the defendant regarding the admissibility of testimony of threats by an accused against the party upon whom the crime charged against the former was committed are not at variance with the conclusion herein arrived at upon the proposition in hand.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; WEYAND, Justice pro tem.

86 Cal. App. 160

PEOPLE v. WILSON et al. (Cr. 1381.)★

District Court of Appeal, First District, Division 1, California. Oct. 18, 1927.

Rehearing Denied Nov. 11, 1927. Hearing Denied by Supreme Court Dec. 15, 1927.

- 1. Criminal law** §112(1)—Where property is obtained by burglary, robbery, etc., in one county and carried into another, jurisdiction of offense is in either county (Pen. Code, § 786).

Generally, in view of Pen. Code, § 777, one who commits a crime is answerable therefor in jurisdiction where crime is committed, but in view of section 786, where property is obtained by burglary, robbery, larceny, or embezzlement in one county and carried into another, in legal contemplation such crimes are committed in both, and jurisdiction may be punished in either.

- 2. Indictment and Information** §86(5)—Indictment for robbery, charging that offense was committed at place unknown, and that defendants thereafter carried property into county of prosecution, held sufficient (Pen. Code, § 786).

Indictment for robbery, charging that offense was committed in state and at place to grand jury unknown, and that thereafter defendants brought property into county of prosecution, held sufficient, under Pen. Code, § 786, and in view of section 27, subd. 1, and sections 959 and 960.

- 3. Criminal law** §706—References to presence of another at arrest of defendant held not prejudicial, in absence of request for instruction to disregard it.

District attorney's statement that a fugitive from justice was present at time of defendant's arrest and was killed and references thereto throughout the trial held not to have prejudiced defendant; there being no request for instruction that jury disregard it, and it being proper to show under what circumstances defendant's arrest was made.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Theodore Wilson and another were convicted of robbery in the second degree, and they appeal. Affirmed.

William J. Gloria and Alfred J. Hennessy, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Lionel B. Browne, Deputy Atty. Gen., for the People.

TYLER, P. J. Appellants, together with Charles Carlisle and Ernest Apac, were jointly indicted by the grand jury of the city and county of San Francisco of the crime of robbery. Carlisle and Apac were not apprehended and now are fugitives from justice. Defendants Wilson and De Bardeleben, appellants herein, were jointly tried in said city and county upon the charge and were con-

victed of robbery in the second degree. The indictment is in two counts. The first charges the four defendants with the commission of the crime of robbery committed on the 11th day of November, 1926, at an unknown place in the state of California. It alleges that defendants feloniously took from the person of one Harold Turney certain personal property by putting him in fear, and that thereafter they brought said property into the city and county of San Francisco. The second count is identical with the first, except that it accuses the same persons of committing the same crime against the person of Margaret Turney, wife of Harold Turney. Defendants were found guilty upon both counts. In brief, the evidence shows that defendants, both ex-convicts, had planned with Turney and his wife for an automobile trip. On November 11, 1926, at about 7 o'clock in the evening, they met by arrangement and proceeded along the Skyline boulevard to the vicinity of Colma in San Mateo county. At this time one of the defendants suggested that they procure some wine, and Mrs. Turney, who was driving the machine, was instructed to turn off the light, she being informed that the bootleggers objected to a lighted machine. They then proceeded along a dirt road in the neighborhood, and when they had traveled a short distance all of the defendants set upon and beat and robbed Turney. They procured from him certain sums of money and other personal property. Thereafter two rings were taken from Mrs. Turney. The evidence further shows that the robbery took place somewhere near the county line dividing San Francisco and San Mateo counties. Turney reported the robbery to the San Francisco police authorities. The officers obtained information that defendants resided at a certain rooming house on McAllister street, San Francisco, and they proceeded there to make an arrest. They demanded entrance into the premises. Defendant De Bardeleben was in bed, and he requested that the officers wait until he put on his clothes, whereupon they attempted to gain entrance to the premises through a window. Shooting immediately commenced, resulting in the wounding of two of the officers and the killing of one Joe Tanko, a fugitive from justice. Upon search being made of the premises, certain of the personal property taken from the Turneys was found. Upon conviction defendants moved, upon various grounds, for a new trial and in arrest of judgment. These motions were denied and separate appeals were taken from the final judgment of conviction, and from the order denying the motions for a new trial. Appellant Wilson in support of his appeal contends that the judgment and order respecting him should be reversed for several reasons. It is first claimed that the superior court in and for the city and county of San

Francisco had no jurisdiction of the case for the reason that the indictment does not designate the county in which the crime charged was committed. It appears from the evidence taken before the grand jury, which is a part of the record, that the offense took place on a road bordering the two counties, but it is indefinite as to the exact location where the crime was actually committed, and it was for this reason, no doubt, that the indictment was made to recite that the place was unknown in order to avoid a variance. The indictment recites that the offense was committed in the state of California and at a place to the grand jury unknown, and that thereafter defendants did unlawfully and feloniously bring the property so taken into the city and county of San Francisco.

[1, 2] Generally speaking, it is a fundamental rule of criminal procedure that one who commits a crime is answerable therefor only in the jurisdiction where the crime is committed, and in all criminal prosecutions, in the absence of statutory provisions to the contrary, the venue must be laid in such jurisdiction. In conformity with this rule our Penal Code provides that, except as otherwise provided, the jurisdiction of every public offense is in the county where it is committed. Section 777. At common law, the crime of robbery was considered altogether local, and was cognizable and punishable exclusively in the jurisdiction where committed. In this state, however, it is provided by statute that when property, taken in one county by burglary, robbery, larceny, or embezzlement, has been brought into another county, the jurisdiction of the offense is in either county. Pen. Code, § 786. As in larceny at common law, this section makes the asportation of the fruits of a robbery the commission of the crime of robbery in the county where the goods are brought. Where, therefore, property is obtained in the commission of any of the crimes enumerated in the section in one county and carried into another, in legal contemplation such crimes are committed in both jurisdictions and may be punished in either, and where, as here, the indictment alleges that the stolen property was brought into the county of San Francisco, it in effect charges a robbery in San Francisco, and the exact location within the state where the original crime was committed is a matter of evidence. *People v. Staples*, 91 Cal. 23, 27 P. 523; *People v. Sing*, 42 Cal. App. 385-394, 183 P. 865; 7 Cal. Jur. 912. The only conclusion that can possibly follow from the charges contained in the indictment is that a crime was committed in a county within the state and the stolen goods brought into the county of San Francisco, for before property could be brought into the city and county of San Francisco it had to be, in the first instance, taken from a point outside such city and county, and this

is all that is required under the statute. All persons who commit in whole or in part any crime within the state are punishable under its laws. Pen. Code, § 27, subd. 1. An indictment charging an offense is sufficient if it can be understood therefrom that the offense was committed within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein, and the acts and omissions are clearly and distinctly set forth in such a manner as to enable a person of common understanding to know what is intended. Pen. Code, § 959. Strict technical rules formerly governing proof of such matters have been greatly relaxed by statutory enactment and by modern courts of criminal jurisdiction. No indictment or information is insufficient, nor can the trial, judgment, or other proceedings thereon be affected by reason of any defect of imperfection in matter of form which does not prejudice a substantial right of the defendants upon its merits. Pen. Code, § 960. Here the gist of the charge is that defendants committed the crime of robbery some place within the state, and that they brought the fruits thereof into the county of San Francisco. This being so, the venue is laid within the jurisdiction of the court. The indictment fully and correctly informs the defendants of the criminal act charged, and they could not possibly have been misled in making their defense.

[3] The omission of the name of the county where the actual robbery was committed in no manner affected the jurisdiction of the court, as under the statute the offense could be tried in either county, and it certainly did not affect their substantial rights. Equally without merit is the claim that the evidence is insufficient to convict either of the defendants. The evidence shows that the robberies were both committed at the time, and that all the parties charged participated in the act. What we have said with reference to the points urged on behalf of appellant Wilson disposes of the contentions of appellant De Bardeleben except his exception to the reference made by the district attorney in his opening statement of the jury that Joe Tanko was present at the time of De Bardeleben's arrest. Reference was made throughout the trial to the presence of Tanko in the premises where the arrest was made, and, while objected to, no error was assigned in consequence thereof. It was proper to show under what circumstances the arrest was made, and the fact that Tanko was killed was one of the circumstances. Moreover, no instruction was offered that the jury disregard any reference to this fact.

The judgment and orders as to both of the defendants are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

85 Cal. App. 783

CANNON v. SELMSER. (Civ. 4916.)

District Court of Appeal, Second District, Division 1, California. Oct. 6, 1927.

- 1. Brokers ⇐75—Contract to pay commission when purchaser paid first installment held not equivalent to contract to pay when installment was due.**

Contract with broker to pay commission for sale of land when the purchaser paid the first installment *held* not equivalent to an agreement to pay the commission on the date when the first installment was due, whether or not it was paid.

- 2. Brokers ⇐75—Under contract providing for paying commission when purchaser paid first installment, vendor's foreclosure of trust deed and recovery of land held not equivalent to payment of installment.**

Under contract with broker, providing for payment of a commission for selling real estate when the purchaser paid the first installment, the vendor's foreclosure of a trust deed on the land and recovery of the land from the purchaser *held* not equivalent to purchaser's payment of installment, so as to entitle broker to commission.

- 3. Brokers ⇐64(2)—Broker held strictly bound by contract that commission was to be paid only when purchaser paid first installment.**

Broker *held* strictly bound by written contract providing that he should receive commission for selling land only when the purchaser paid the first installment of the purchase price.

- 4. Contracts ⇐143—Courts cannot make contracts between parties to litigation.**

Courts have no power to make contracts between the parties to a litigation.

- 5. Contracts ⇐147(2)—Courts cannot say what parties intended, where contract provisions are plain.**

Courts have no power to say what parties intended by a contract, where its provisions are definite and certain.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by R. L. Cannon against E. E. Selms. Judgment for defendant, and plaintiff appeals. Affirmed.

Shreve, Dorn, Shreve & Tyler, of San Diego, for appellant.

Edward T. Lannon, of San Diego, for respondent.

McLUCAS, Justice pro tem. Plaintiff appeals from a judgment rendered for defendant in a suit brought for the recovery of a real estate commission.

Plaintiff and defendant entered into a written agreement on February 6, 1923, which recited that the plaintiff had made a sale to Frank G. Miller of a property known as

the Cannon ranch, for a consideration of \$32,500, and for the first payment on which Miller deeded his \$6,000 equity in a 5-acre lemon orchard at Lemon Grove, leaving a balance due on the Cannon ranch of \$26,500, which Miller agreed to pay, with six per cent. interest payable semiannually, in payments of \$2,000 each year for 10 years, when the unpaid portion of the entire amount was to be paid. The agreement contained the following language:

"It is agreed that R. L. Cannon is to receive an accrued balance of commission of one thousand and seventy-seven dollars and 50/100 (\$1,077.50), which is to be paid to the said R. L. Cannon when the said Frank G. Miller makes his first payment of \$2,000, together with accrued interest on the \$26,500. It is also agreed that in case R. L. Cannon should sell the above-described lemon orchard at Lemon Grove for a consideration of \$8,500, or other price acceptable to the sellers, subject to the \$2,000 mortgage, and a sufficient payment is made on this orchard to satisfy the sellers, R. L. Cannon is then to receive the above-mentioned balance of one thousand seventy-seven and 50/100 dollars (\$1,077.50), instead of waiting for the first payment of \$2,000 and interest from Frank G. Miller."

Miller did not make the first payment of \$2,000, or the interest due on the \$26,500, on February 6, 1924, according to the terms of the foregoing contract. The defendant took a trust deed on the Cannon ranch from Miller as security for the payment of said sum of \$26,500, and, upon the failure of Miller to make the said payment of \$2,000 and interest on February 6, 1924, the defendant foreclosed the trust deed and recovered title to the Cannon ranch.

[1-5] It is the appellant's contention that the payment of the \$1,077.50 was not contingent, but was due on February 6, 1924; that by the foreclosure of said trust deed and sale of said property the said Miller was precluded from making payment of said \$2,000, and in equity said \$1,077.50 became due and payable immediately upon the sale under said trust deed, if not already due; and that the court erred in rejecting the evidence of when the parties understood the \$1,077.50 was to be paid. We cannot agree with these contentions. The contract was definite and certain as to when the \$1,077.50 was to be paid, namely, "when the said Frank G. Miller makes his first payment of \$2,000, together with accrued interest, on the \$26,500," unless the Lemon Grove orchard should be sold according to the terms provided. Under the contract of the parties the commission was not earned until the foregoing contingency occurred. Foreclosure cannot be held the equivalent of payment of the first \$2,000 installment, with accrued interest, which was the particular contingency upon which the parties contracted the commission should be

earned. After foreclosure the respondent found himself in possession of the property originally owned and sold by him—the Cannon ranch—after being out of possession for more than one year, without payment of any accrued interest, and after being put to the expense of obtaining possession. True the respondent also held the equity in the Lemon Grove orchard, the estimated value of which was \$6,000. But this was not the contingency upon which the respondent agreed to pay the commission. Parties are bound by their written contract. If appellant desired the payment of commission on February 6, 1924, without any contingency, he should have demanded such provision in the contract. Courts have no power to make contracts between the parties, or to say what the parties intended by the contract, where its provisions are definite and certain. It is quite conceivable that, had the appellant demanded an absolute agreement to pay the commission, respondent would not have made the contract at all. In the following cases it was held that conditions precedent were valid where it was provided that the commission should be paid out of the purchase price only; therefore that the commission was not earned until the purchase price was paid: *Hargrave v. Moody* 56 Cal. App. 498, 205 P. 890; *Irwin v. Klimper*, 56 Cal. App. 434, 205 P. 714; *Dunne v. Colomb*, 192 Cal. 740, 221 P. 912. In the latter case it is said (page 745 [221 P. 913]):

"Where the vendee is in default there is no longer any legal obligation on the vendor to proceed with the performance of the contract. The law gives him the right to regard the contract as at an end. The law prescribes no penalty for the exercise of this right. The default of the vendee, with the consequent destruction of the right of the broker to his commission, was a contingency inherent in the contract, the risk of the occurrence of which was assumed by the broker."

Judgment affirmed.

We concur: **HOUSER, Acting P. J.; YORK, J.**

85 Cal. App. 616

OLIVER v. SANTA MARIA GAS CO.*
(Civ. 5936.)

District Court of Appeal, First District, Division 2, California. Sept. 27, 1927.

Rehearing Denied Oct. 27, 1927. Hearing Denied by Supreme Court Nov. 23, 1927.

1. Sales ⇨199—Contract for sale of pipe line held to show intention that title was not to pass until pipe was removed from ground.

Contract for sale of pipe line in ground, providing that pipe should be taken and paid for before certain date, with exception of a rea-

sonable additional time for removal of specified pipe, held to show that parties intended that title should not pass until such time as pipe was removed from land.

2. Sales ⇨199—As between buyer and seller, question as to passing of title depends on intention of parties.

As between buyer and seller, question whether or not and when title passes to property sold is dependent on intention of parties.

3. Contracts ⇨147(2)—Intention of parties is to be determined primarily by reference to provisions of contract.

Where contract is evidenced by instrument in writing, intention of parties is to be determined primarily by reference to provisions thereof.

4. Sales ⇨199—Use of words of present sale is not controlling unless contract show such intent.

That parties in contract for sale of pipe line are designated as seller and buyer, and that words of present sale are used, is not absolutely controlling, unless contract show such intent.

5. Sales ⇨391(9)—Amount deposited by buyers of pipe line, to be applied on account of last pipe removed, held not recoverable by buyers on their default.

Under contract of sale for pipe line, title not passing until pipe was removed from ground, sum paid by buyer, which was to apply on account of last pipe removed, was not recoverable by latter on their default, even though there is no forfeiture clause in contract, and hence sellers are not accountable for such amount.

Appeal from Superior Court, Santa Barbara County; **S. E. Crow, Judge.**

Action by **A. J. Oliver**, trustee in bankruptcy for the partnership consisting of **H. L. Emerson** and another, against the **Santa Maria Gas Company**. Judgment for plaintiff, and defendant appeals. Reversed.

Chickering & Gregory, of San Francisco, and **Griffith & Thornburgh**, of Santa Barbara, for appellant.

Keyes & Erskine, of San Francisco, and **Heaney, Price & Postel**, of Santa Barbara, for respondent.

WARNE, Justice pro tem. This is an appeal by defendant from a judgment in favor of plaintiff in a suit for the conversion of 51,426.3 feet of 8-inch pipe and 500 thread protectors, brought by **A. J. Oliver**, as trustee in bankruptcy for the partnership consisting of **H. L. Emerson** and **R. K. Howk**. The trial of the action took place before the court sitting without a jury, and resulted in findings of fact that the defendant had converted 46,333 feet of this pipe and the 500 thread protectors, that the value of the pipe was found to be \$33,598.96, and that the value of the

★Rehearing denied. Hearing denied by Supreme Court.

thread protectors \$60. Judgment was entered accordingly.

For some time prior to February 11, 1920, the Midland Counties Public Service Corporation had been the owner of a certain pipe line extending from the oil fields in Santa Barbara county to the plant of the Union Oil Company at Avila in San Luis Obispo county. This pipe line was known as the Graciosa pipe line. It in turn connected with a 4-inch pipe line leading to the plant of the Midland Counties Public Service Corporation in the city of San Luis Obispo.

The Graciosa pipe line had been laid in 1906 over rights of way granted to one Adolph Phillips, and was originally used to transport oil from the Graciosa oil lease in Santa Barbara county to an oil refinery located at Oilport in San Luis Obispo county. By mesne conveyance the Midland Counties Public Service Corporation had become the successor in interest to Adolph Phillips and had used the line for the conveying of gas from the oil fields to its properties in the city of San Luis Obispo and in serving consumers in proximity to the line.

Prior to February 11, 1920, the Midland Counties Public Service Corporation had contracted to sell certain of its properties, including the Graciosa pipe line, to the Santa Maria Gas & Power Company. On February 11, 1920, and at a time before the Railroad Commission had approved the transfer of these properties, the Santa Maria Gas & Power Company, the predecessor in interest of the appellant, entered into a contract with H. L. Emerson, who was acting for the partnership of H. L. Emerson and R. K. Howk. The portion of the contract under consideration provides as follows:

"(1) The seller agrees, upon the acquisition of said pipe line by itself or its said successor and subject to the approval of the Railroad Commission of the state of California of the abandonment of said line, to sell the same to the buyer, and the buyer agrees to purchase the same from the seller or its said successor for the sum of one hundred eight thousand (108,000) dollars, payment of said sum to be made as follows, to wit: Within fifteen (15) days after the approval of the Railroad Commission of the state of California of the abandonment of said line, the buyer shall pay to the seller the sum of twenty-five hundred (2,500) dollars and within thirty (30) days thereafter, and in any event before commencing the work of removing said line, the additional sum of five thousand (5,000) dollars; said deposit of seventy-five hundred (7,500) dollars shall apply on the last shipment of pipe as removed. The balance of the purchase price shall be paid by the buyer to the seller at the rate of ninety (90) cents per foot as pipe is loaded on cars at the depot at such railroad shipping point as may be selected for shipment and shall be paid before shipment is made.

"(2) The seller also agrees to sell, subject to its acquisition under said contract of December 15, 1919, and to the approval of the

Railroad Commission of the state of California of said contract and of the abandonment of the same, 44,000 to 46,000 feet of four-inch pipe line extending from the eight-inch pipe line above described at a point near the old Graciosa Oil Company's refinery, sometimes known as Oilport, to the city limits of San Luis Obispo, which said four-inch pipe line the buyer agrees to buy, the purchase price thereof to be the sum of thirty-five (35) cents per foot, payable as and when the same is loaded on cars at the railroad depot from which the same is to be shipped and before the same shall have been shipped; provided that there shall be excluded herefrom such portion of said four-inch line as seller may decide to use in the conduct of its gas business.

"(3) All of said pipe shall be taken and paid for in any event on or before July 1, 1920, except that seller agrees to allow buyer such reasonable additional time to take and remove not exceeding ten thousand (10,000) feet of said eight-inch line, about forty-six hundred (4,600) feet of which is in the bed of the Santa Maria river.

"(4) The seller agrees to seek the approval of the Railroad Commission of the state of California with all reasonable speed and to use its best efforts to obtain the same.

"(5) The seller agrees to obtain for the buyer the right to go on the lands through which said pipe lines pass for the purpose of removing the same and to assume responsibility for damage to crops and land reasonably occasioned by the seller in removing said pipe lines, but in this connection the buyer agrees to use every endeavor to cause as little damage as possible to crops and fences on the lands through which said pipe line runs and to put said lands as nearly as possible in the same state as they were prior to starting removal after said pipe has been removed.

"(6) Recognizing that it is contemplated by buyer that he may sell said pipe lines in place, the purchase price thereof from buyer to seller is hereby made payable, in case said pipe lines be sold by buyer to some third party in place as soon as buyer had arranged such sale to such third party or third parties, and in any event such payment shall be made not later than July 1, 1920.

"(7) It is expressly understood between the parties that the approval of the Railroad Commission of the state of California must be obtained not only to the carrying out by seller of said contract of December 15, 1919, and the issuance of securities to enable the same to be carried out, but also to the abandonment of the pipe lines covered hereby, and it is expressly agreed that seller shall not be responsible for inability to sell and deliver the same should said Railroad Commission fail to approve any act necessary by seller to carry out the terms of this agreement.

"(8) Time is hereby made of the essence of this agreement."

Thereafter the Santa Maria Gas Company was organized and became the successor of the Santa Maria Gas & Power Company. The Railroad Commission approved the transfer of the properties of the Midland Counties Public Service Corporation, and the appellant herein took title to the properties,

including the Graciosa pipe line on June 26, 1926.

Emerson paid the initial payment of \$2,500 on July 3, 1920, and on the same day appellant gave Emerson a letter extending his time under the contract, and provided:

"The time within which you may remove the 8-inch line, in accordance with the terms of the contract, is extended as follows: One-half of said line shall be removed, taken, and paid for not later than September 15, 1920; three-fourths of said line shall be removed, taken, and paid for not later than October 1, 1920; and the balance of the line shall be removed, taken, and paid for not later than November 1, 1920."

On July 17, 1920, Emerson paid the \$5,000 required to be paid before commencing the work of removing the pipe line. On July 20, 1920, Emerson was given a second extension of time by letter. Under this extension Emerson's time to remove the 8-inch pipe line was extended to December 1, 1920, and Emerson was required to pay interest at the rate of 6 per cent. on the purchase price of the line as follows: If one-half of the purchase price is not paid by September 15, 1920, interest on any balance thereof from date; if three-fourths of the purchase price is not paid by October 1, 1920, interest on any balance thereof from that date; and if the entire purchase price is not paid by November 1, 1920, interest on any balance thereof from that date.

On October 11, 1920, Emerson and the appellant entered into an agreement which provided, in substance, that title to the Graciosa pipe line shall pass to Emerson when he pays 90 cents a foot therefor, that the sum of \$7,600, paid under the agreement of February 11, 1920, shall apply on the payment of the last pipe removed, and that in any event title to all the pipe shall pass to Emerson when he pays in full the sum of \$108,000, the entire purchase price.

Thereafter, on October 13, 1920, a further extension of time was obtained by Emerson in which to pay for the pipe.

Emerson removed and paid for several thousand feet of pipe, but on February 21, 1921, all of the pipe involved in this suit was still in the ground and on said date appellant served upon Emerson and Howk, who were then in default, a notice that, if the entire purchase price was not made by March 1, 1921, they would no longer consider themselves bound in any way by said agreement and modifications thereof. After service of this notice, no further payments were made by respondent.

Shortly after March 1, 1921, appellant on its own account commenced and thereafter continued the removal and sale of the remaining pipe in ground.

Emerson and Howk were adjudicated bankrupts on May 11, 1921.

The \$7,500 which Emerson and Howk paid to be applied on the last pipe removed was

not refunded. The trial court found that no consideration passed whatever for the execution of the agreement of October 11, 1920, and that therefore title to the pipe in question was not retained or reverted thereto by said agreement in appellant.

The principal question to be determined, and the crucial one in this case, is the nature of the contract of February 11, 1920, as to whether it was a conditional sale after the approval by the Railroad Commission. Appellant contends that, although not expressed, the contract plainly shows upon its face that the parties intended that title should remain in the Santa Maria Power & Gas Company, or its successors, the appellants herein, until the pipe had been removed from the ground or the purchase price had been paid.

[1] It is to be noted that paragraph 3 of the contract provides that—

"All of the pipe *shall be taken* and paid for in any event before July 1, 1920, except that seller agrees to allow buyer such reasonable additional time to take and remove not exceeding ten thousand feet of said eight inch pipe line, about forty-six hundred (4,600) of which is in the bed of the Santa Maria river."

We think this paragraph contains not only a limitation as to the time allowed Emerson to pay for the pipe, but also an express time limit to "take" and "remove" the pipe. It is also to be noted that by paragraph 8 of the agreement time is expressly made of the essence of the contract.

To us it seems clear that under this agreement it was the intention of the parties, and so contemplated by them, that title should not pass until such time as the pipe was removed from the land. If not, what was the purpose of inserting these provisions in the contract? They were inserted for some purpose. The most reasonable conclusion to us is that they were inserted to limit the passing of title to so much only of the pipe as was taken and removed within the time mentioned. Further, under the time extensions executed prior to the agreement of October 11, 1920, a time limit is also mentioned within which the pipe might be removed.

The extensions given Emerson after October 11, 1920, contain no such provision, but this may be readily accounted for because by that agreement the parties expressly stated that title should not pass until the purchase price of the pipe had been paid.

We must conclude that the parties did not intend to pass title, since, had they so intended, the provisions found in the contract and in the time extensions would have been meaningless.

Nor do we find anything in paragraph 6 of the contract which is opposed to our conclusion. The object of that paragraph was to specify the time when the purchase price should be paid in the event the pipe lines were sold in place.

The appellant contends that, even if it

might be construed that title to the whole pipe line passed to Emerson under the contract, notwithstanding title was reverted by the agreement of October 11th. As heretofore stated, the trial court found the latter agreement to be without consideration, and we are not disposed to disturb its finding. However the fact may be, we do not think it necessary to a determination of this case because of our conclusion that title did not pass under the original contract.

[2, 3] As between the buyer and the seller, the question whether or not, and when, the title passes to property sold, is dependent upon the intentions of the parties. 24 R. C. L. § 275, p. 15; 35 Cyc. 277; and see note to Barber v. Andrews, 26 L. R. A. (N. S.) at page 7. Where the contract is evidenced by an instrument in writing, the intention of the parties is to be determined primarily by a reference to the provisions thereof. Potts Drug Co. v. Benedict, 156 Cal. 324, 104 P. 432, 25 L. R. A. (N. S.) 609.

[4] True, the parties are designated as "seller" and "buyer," but this phraseology is not in itself conclusive upon the subject, and, as was said in Turner, Kuhn & Fraser, Inc., v. Jones, 61 Cal. App. 732, 215 P. 1033:

"There is no question, but that such language has a certain persuasive force in determining the intention of the parties, as it imports a present sale. [Citing cases.] But the mere use of the words of present sale is not absolutely controlling unless the contract shows such intent. Potts Drug Co. v. Benedict, 156 Cal. 322, 329 (104 P. 432, 25 L. R. A. [N. S.] 609)."

And the same may be said of the fact that \$7,500 was paid to apply upon the last pipe

removed. Glanelli v. Globe G. & M. Co., 48 Cal. App. 103, 191 P. 720.

[5] Nor is appellant guilty of a conversion of so much of the pipe as was to be paid for with the \$7,500 which Emerson deposited. This sum was only to apply on account of the last pipe removed. As Emerson and Howk were in default under the contract, they would not be entitled to recover this sum even though there is no forfeiture clause in the contract. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. This being so, we fail to see how appellant can be held accountable for said \$7,500.

The thread protectors involved in this suit at no time became the property of the appellant, and, as the court below found there was a conversion of same, that part of the judgment should stand.

We do not deem it necessary to discuss the many other points argued on this appeal.

A mistake evidently occurred in entering the judgment upon the findings of fact and conclusions of law, in that the total principal sum of the judgment is equal only to the amount found due on account of the conversion of the pipe. This may give rise to some doubt as to whether any judgment was given for the pipe thread protectors. It is therefore ordered that the judgment appealed from be reversed, and that the trial court enter judgment for the plaintiff for the amount allowed in the findings of fact and conclusions of law for pipe thread protectors and interest. Appellant will recover its costs on appeal.

We concur: KOFORD, P. J.; NOURSE, J.

DULLANTY v. SMITH. (Civ. 5818.)★

District Court of Appeal, First District, Division 2, California. Sept. 23, 1927.

Hearing Granted by Supreme Court Nov. 21, 1927.

1. Municipal corporations ☞706(7)—Contributory negligence of pedestrian struck by automobile held for jury.

In pedestrian's action for injuries when struck by automobile, where only evidence of contributory negligence was of nature of indirect evidence, consisting of inferences and presumptions, solution of such matters was for jury.

2. Depositions ☞95—Plaintiff held entitled to offer defendant's deposition only as whole.

In personal injury action, plaintiff's attorney held entitled to offer defendant's deposition, taken by stipulation, as a whole, but not merely a part of it.

3. Depositions ☞109—Defendant, if he had any objection to any part of deposition offered by plaintiff, should mark objectionable parts and submit objection for ruling.

Where, in personal injury action, plaintiff offered defendant's deposition in evidence, defendant, if he had any objection to any part of it relating to insurance carried by him, should mark such part and submit objections for ruling.

4. Trial ☞127—Plaintiff in personal injury action may examine defendant regarding conversation relative to accident, notwithstanding reference to fact that defendant carried insurance (Code Civ. Proc. § 1870, subd. 2).

In action for personal injuries sustained in automobile accident, plaintiff was entitled to examine defendant regarding conversation relative to accident, though it contains some reference to fact that defendant carried insurance; correct ruling being that, if conversation was admissible for any purpose, it should be received, notwithstanding it contained some material which under other circumstances would be objectionable, in view of Code Civ. Proc. § 1870, subd. 2.

5. Damages ☞158(4)—Evidence that plaintiff's teeth were knocked out, shoulders, neck, head, and throat were black, and that she suffered lapses of memory, held admissible under allegations of concussion of brain, contusions of chest, cheek, arms, and legs, pain, and nervous shock.

In personal injury action, evidence that plaintiff had two teeth knocked out, that her shoulders, neck, head, and throat were black, and that she suffered lapses of memory, held admissible under allegation that she suffered severe concussion of the brain, severe contusions of chest, left cheek, arms, and legs, great physical pain and anguish, and severe shock to nervous system.

6. Municipal corporations ☞706(8)—Instruction that pedestrian may assume motor vehicle drivers will obey traffic laws held not erroneous.

In action for injuries received when plaintiff was struck by automobile, instruction that per-

son lawfully and carefully using street may assume that all others using it will also use ordinary care, and that pedestrians may assume that motor vehicle drivers will obey traffic laws, held not erroneous.

7. Negligence ☞141(3)—Instruction that by pleading contributory negligence defendant confesses own negligence, though not erroneous, should not be given.

Instruction that defendant, in pleading contributory negligence, confesses his own negligence and pleads by way of avoidance thereof, though not error, in view of divided opinion of Supreme Court approving it, should not be given, since decisions by divided court do not have binding weight of other decisions.

8. Courts ☞90(2)—Supreme Court decisions rendered by divided court, though binding, do not have weight of other decisions.

Though courts are bound by Supreme Court decisions rendered by divided court, such decisions do not have binding weight of other decisions.

9. Municipal corporations ☞705(4)—Automobile driver's failure to sound horn is not violation of statute, but circumstance to be considered by jury in determining negligence (Motor Vehicle Act, §§ 95, 125[b], 139).

In pedestrian's action for injuries against automobile driver, failure to sound horn is not failure to comply with Motor Vehicle Act, § 95 (St. 1923, p. 545), in view of sections 125-b and 139, but such fact is circumstance for consideration of jury in determining whether defendant was negligent.

10. Appeal and error ☞1064(1)—In personal injury action, expression, "while plaintiff was in the exercise of ordinary care," in instruction, held not reversible error, in view of time covered by complaint.

In pedestrian's action for injuries against automobile driver, expression, "while plaintiff was in the exercise of ordinary care," used in instructions, held not prejudicial error, as unduly limiting consideration of plaintiff's conduct, in view of period of time covered by complaint.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Eleonore Dullanty against Ashley Smith. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Cooley & Gallagher, of San Francisco, for appellant.

Ralph H. Lachmund, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover damages for injuries alleged to have been suffered in an automobile accident. The defendant answered and a trial was had in the trial court before the court and a jury. The jury returned a verdict in favor of the plaintiff. The defendant made a motion for a nonsuit, and his motion was denied. He

has appealed from the judgment, under section 953a of the Code of Civil Procedure.

In drawing her complaint, the plaintiff followed the form used by the plaintiff in *Stein v. United Railroads*, 159 Cal. 368, 113 P. 663. In his answer the defendant denied many of the plaintiff's allegations, and also pleaded affirmatively the contributory negligence of the plaintiff.

The accident occurred in Alameda on the 25th day of March, 1924. On that day it had been raining, and there were some puddles of water on the street. The plaintiff was proceeding along the south side of Grand avenue in an easterly direction. About the time that she approached the intersection of Grand avenue and Webster street, automobiles were parked parallel to the sidewalk on both angles of the four corners of the crossing. Each street is 66 feet wide. Automobiles are 5 feet wide. The traveling space was therefore about 56 feet wide. The evidence discloses that, about the time the plaintiff reached Webster street, the defendant was traveling south on Webster street, approaching the plaintiff from her left. At the same time Mr. Rinderneck was traveling north on Webster street, and approaching the plaintiff from her right. All of the evidence as to how the accident occurred was given by Mr. Rinderneck, Mr. Ashley Smith, the defendant, and Mr. Earl Smith, the defendant's brother, who was riding in the automobile with the defendant.

As defendant approached Grand avenue, an automobile crossed Webster street in front of him, traveling west on Grand avenue, and another 100 feet back was traveling in the same path. No other vehicles or other pedestrians appear to have been using the street at the time of the accident. The defendant saw the plaintiff start to walk from the westerly curb of Webster street easterly. At that time both were about equidistant from the point where the collision occurred. The plaintiff was walking at an ordinary speed or faster, and had her head up looking straight ahead. She had hold of her skirts, apparently holding them up to keep them dry. When she had passed the center line of Webster street, she paused, turned her head in a northerly direction, and about that time the impact occurred. The defendant was attempting to pass in front of the plaintiff. There is no evidence that the automobile of the defendant was traveling more than 15 or 18 miles per hour as it approached Grand avenue. The evidence discloses that its speed was reduced as it entered the intersection, and was as low as 7 or 8 miles as it passed over the intersection, and that the defendant put on his brakes several times, and finally put them on more severely immediately before the impact. The last time that the brakes were applied the defendant's car skidded about 3 feet and then

came to a standstill. In the meantime the impact occurred. When the defendant's car had come to a complete standstill, the plaintiff's body was about 5 feet to the rear and slightly to the right of the defendant's machine; her feet pointed toward the machine and her head away from it. At the same time the left front fender of the defendant's car was in immediate contact, if not entangled, with the left rear fender of Mr. Rinderneck's car. At this same time the defendant's car was standing diagonally with its left front wheel on the easterly side of Webster street; that is, on the defendant's left-hand side of the road. No witness testified that he saw the plaintiff look to the right or the left before she entered Webster street. No witness testified that she did not do so.

The plaintiff, testifying in her own behalf, gave testimony to the effect that before the accident she came to the crossing looking for a certain vine-covered house; that she crossed over Webster street and stood on the southeast corner. While standing there, her memory became a blank, and she recalled no facts whatever until several days later in an Oakland hospital.

The defendant complains that the evidence was insufficient to prove negligence on his part. The record is such that it is clear an argument to that effect could be made to the jury. It is equally clear that the reverse contention could be made to the jury. Furthermore, it is equally clear that the case is by no means so clear that any court could properly say that there was no evidence of negligence on the part of the defendant. In making this point the defendant speaks of the willful act as defined in one of the court's instructions. That element will be discussed when we reach that instruction.

[1] The next point made by the defendant is that the negligence of the plaintiff proximately contributed to the happening of the accident. That point is hardly involved. As will be seen from what is written above, no witness observed the plaintiff until after she had left the curb. She testified to a set of facts purporting to explain why she did not remember what she had done, but did not claim to testify as to what she actually did do. The only evidence touching the subject of the care exercised by the plaintiff was therefore of the nature of indirect evidence consisting of inferences and presumptions. The solution of those matters was for the jury.

[2, 3] Before the case was called for trial the plaintiff took the deposition of the defendant. At the time of the trial the plaintiff's attorney stated that he offered the deposition in evidence and that he expected to read it to the jury. The document is not before us, as it has not been certified up, and neither is it included in the transcript. It appears that the deposition was taken pur-

suant to a stipulation. The terms of the stipulation are not set forth in the record. Before Mr. Carey, the plaintiff's attorney, commenced to read, Mr. Gallagher, the attorney for the defendant, interposed no objection to the deposition as a whole, or any part thereof. Mr. Carey was entitled to offer the deposition as a whole; he was not entitled to offer merely a part. *Bank of Orland v. Finnell*, 133 Cal. 475, 65 P. 976. If the defendant had any objection to any part, upon request, no doubt, he would have been allowed to mark the objectionable portions and submit his objections for a ruling. This he did not do. As the reading proceeded, Mr. Gallagher interrupted the reading by addressing the trial court and asking the judge thereof to "read the next 10 or 15 questions and answers of the deposition. We will object to the reading of them to the jury as incompetent, irrelevant, and immaterial." The transcript contains a colloquy between court and counsel, but the statements are so worded that we cannot ascertain what was objected to. Mr. Carey read further. Another colloquy. Same condition of the record. Then Mr. Carey read further, and there was another colloquy. The condition of the record is the same. On this last occasion Mr. Gallagher made a motion to strike out. There was another colloquy. The motion was granted, and the jury was thereafter twice admonished in the clearest language possible that the matter which had been stricken out should not be considered.

The defendant now presents the incident as prejudicial error. If we gather the correct understanding of the condition of the record, the error was committed by the defendant. If he had marked the deposition as he should have done, and had called to the attention of the court the passages so marked, nothing regarding the defendant's insurance would have come into the record, nor would it have come into the record if the defendant had made a timely objection. Both of the statements are made on the assumption that there was a legal objection to the matter that was stricken out. *Dameron v. Ansbro*, 39 Cal. App. 289, 298, 178 P. 874, and cases there cited. However, those authorities are applicable to a set of facts quite different from the facts in the instant case.

[4] Immediately after the accident this defendant made a report to his insurance carrier. He also made a report to the police department. Thereafter the plaintiff's daughter invited him to call at her home. He called and found several persons in attendance. Thereupon those present proceeded to propound to the defendant various questions as to how the accident had occurred. He declined to answer some of the questions, saying that he had made a report to his insurance carrier and that the questions should be propounded to the insurance company.

The plaintiff was clearly entitled to examine the defendant regarding that conversation. Code Civ. Proc. § 1870, subd. 2. The defendant assumed that because the conversation contained some reference to the fact that he carried insurance rendered the conversation inadmissible. The correct rule is that, if the conversation was admissible for any purpose, it should have been received, notwithstanding that it contained some material which under other circumstances would be objectionable. *I. Upham Co. v. United States, etc., Co.*, 59 Cal. App. 606, 610, 211 P. 809. Moreover the evidence stricken out included all reference to the report made to the police department. The defendant does not even claim that there was any legal objection to that report, in so far as it might have contained any evidence against the defendant or inconsistent with the evidence given by him in the trial court.

[5] Over the objection of the defendant evidence was received which disclosed that at the time of the accident the plaintiff was injured by having two teeth knocked out; that her shoulders, neck, head, and throat were black; that for three days she suffered lapses of memory, and thereafter that she had a loss of memory which she did not have before the accident. In her complaint she alleged that she suffered "severe concussion of the brain, * * * severe contusions of chest, left cheek, arms, and legs; * * *" that she suffered " * * great physical pain and anguish and a severe shock to her nervous system, and she will be permanently injured and disfigured as a result of her said physical injuries." The evidence received was within the allegations pleaded. *Lauder v. Currier*, 3 Cal. App. 28, 84 P. 217; *Fogg v. Kansas City*, 187 Mo. App. 252, 173 S. W. 712, 713; *Colorado Springs & I. Ry. Co. v. Allen*, 48 Colo. 4, 108 P. 990; *Fitzgerald v. City of Chicago*, 144 Ill. App. 462.

[6] The trial court, at the request of the plaintiff, instructed the jury as follows:

"I instruct you that a person lawfully and carefully using a street has the right to assume that all other persons using the street will also use ordinary care and caution. This rule allows pedestrians to assume that motor vehicle drivers will obey and abide by the traffic laws and regulations."

The defendant asserts that the giving of that instruction was error and cites *McPherson v. Walling*, 58 Cal. App. 563, 209 P. 209. The citation is a case involving facts altogether different from the facts in the instant case. We think the trial court committed no error in giving the instruction.

[7, 8] On the request of the plaintiff the trial court gave the following instruction:

"One of the defenses imposed by defendant in this case is the plea of contributory negligence. Contributory negligence is an affirmative defense by way of confession and avoidance. By pleading it the defendant in effect

confesses his own negligence, and pleads by way of avoidance thereof that plaintiff's own negligence helped to produce his injuries."

The defendant claims that the instruction is erroneous. The Supreme Court, in a divided opinion on an application to transfer, held otherwise. *Mulholland v. Western Gas Constr. Co.*, 21 Cal. App. 44, 52, 131 P. 110, 113. The court is bound by that decision. However, it is patent that the instruction should not be given when it has been approved only by a divided court. Such decisions do not have the binding weight of other decisions. 15 C. J. 938, § 326.

The trial court gave the jury, on the request of the plaintiff, an instruction defining reckless driving. See Stats. 1923, p. 517, § 121. The defendant cites *Tognazzini v. Freeman*, 18 Cal. App. 468, 123 P. 540, and claims that the instruction was error. It will be noted that the instruction was not to the effect that the defendant was liable if he willfully and knowingly ran his automobile against the plaintiff. The instruction contains other factors and is on a different subject. The authority cited is not in point.

The trial court gave a long instruction, which covers more than page 276 of the transcript. The defendant assigns the giving of that instruction as error. It will do no good to quote it. Reading it most carefully, and assigning to it a meaning no broader than is actually written therein, the instruction is not subject to the objections which the defendant makes.

[9, 10] The trial court also gave, at the request of the plaintiff, an instruction worded as follows:

"The Motor Vehicle Law also provides as follows: 'Every motor vehicle when operated upon the public highways shall be equipped with a bell, gong or horn in good working order capable of emitting sound audible under normal conditions for a distance of not less than two hundred feet.' It is the duty of the driver of an automobile to give notice of the approach of said automobile towards pedestrians or other vehicles using the same highway by seasonable warning signal, such as sounding a horn in sufficient time to give timely warning to other persons using said street of the approach of said automobile, and a failure to comply with this requirement of law constitutes negligence in itself. If you find from the evidence in this case that the defendant failed to comply with this requirement of law, and that such failure was the proximate cause of the injury herein complained of, while plaintiff was in the exercise of ordinary care, then your verdict must be against the defendant and in favor of the plaintiff, Mrs. Eleonore Dullanty."

The first sentence of the instruction is the first paragraph of section 95 of the Motor Vehicle Act. Statutes 1923, pp. 517, 545. The second sentence is not supported by any statutory provision. See Stats. 1923, p. 517, §§

95, 125(b), and 139. The ordinary meaning of the language used was to the effect that the failure to sound a horn was a failure to comply with the statute. It was not. If the defendant failed to sound a horn, that fact was a circumstance, together with other circumstances, for the consideration of the jury in determining whether the defendant was negligent; but it was not a subject of law to be given as an instruction.

The defendant also complains of the expression "while plaintiff was in" being inserted near the end of the foregoing instruction. He also makes a similar complaint of the same expression as inserted in some other instructions. The plaintiff contends that the point was ruled in plaintiff's favor in the case entitled *Gergen v. Tulare County Power Co.*, 173 Cal. 709, 720, 161 P. 269. We do not think so. The point was neither discussed nor decided in that case. Nevertheless in the case before us we think the expression complained of was not a prejudicial error. The plaintiff, in the instruction quoted, was complaining because the defendant did not sound a horn. The complaint covered a period of time commencing with the instant that the defendant saw her until the accident occurred. According to some of the testimony, that period of time was to be estimated on the period that it took the defendant to drive over one-half of a block. It is clear that the expression, "while plaintiff was in the exercise of ordinary care," when used in connection with the foregoing facts, did not limit unduly the jury's consideration of the plaintiff's conduct.

The judgment is reversed, and the cause is remanded for a new trial.

We concur: KOFORD, P. J.; NOURSE, J.

85 Cal. App. 667

WORDEN v. COAST TIRE & RUBBER CO.
et al. (Civ. 5819.)

District Court of Appeal. First District, Division 2, California. Sept. 28, 1927.

1. Fraud ☞58(2)—Evidence held insufficient to show fraudulent misrepresentations in sale of corporation units.

Where the purchaser of certain corporation units sought to recover damages from one inducing her to purchase and alleged fraudulent misrepresentations in the letters sent to her by the defendant relative to such units, evidence held not sufficient to show that the representations made in such letters were false and fraudulent.

2. Fraud ☞27—That corporation was not authorized to do business in state did not make false representation that it was incorporated, going concern.

Where, in letters promoting the sale of corporation units the statement was made that the corporation was an incorporated, solvent, and

successful going concern, the fact that the corporation was not authorized to do business in the state where the letters were circulated did not make the indicated statement a false representation.

3. Fraud ⇨58(1)—Strong suspicion of fraud in sale of corporate units is not proof sufficient to replace legal evidence.

Strong suspicion of fraud in a sale of corporation units will not suffice as proof thereof in action for damages for fraudulent representations, but such fraud must be proved by legal evidence.

4. Fraud ⇨50—Fraud is never presumed.

Fraud is never presumed, but must be proved.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Lucinda Worden against the Coast Tire & Rubber Company and others. Judgment for plaintiff, and defendants appeal. Reversed, and new trial ordered.

Albert H. Elliot and Guy C. Calden, both of San Francisco (P. L. Benjamin, of San Francisco, of counsel), for appellants.

Louis Oneal, of San Jose, and Clarence M. Booth, of San Francisco, for respondent.

KOFORD, P. J. This is an appeal from a judgment in favor of plaintiff, based upon fraudulent misrepresentations. The ground of the appeal is insufficiency of the evidence to prove that the representations made were false or fraudulent.

The evidence showed that the president of the appellant company, over the signature of the company, sent circular letters to its stockholders, including plaintiff, and these letters contained the representations alleged to be false and fraudulent. The circular letters stated that the appellant company had formed a plan of operation with the Bankers' Mortgage & Discount Company, by which the latter would discount the appellant company's trade acceptances, warehouse receipts, and the like, and strongly urged the stockholders to buy unit shares of the Bankers' Mortgage & Discount Company so that they could share in the large profits to be realized from that source. The letters also stated that representatives would call. The letters were fulsome in their praise of the prosperity and strength of the company, of the wisdom and efficiency of its officers, and of the large profits which were soon to fall into the lap of the stockholders. They contained direct and indirect statements concerning the arrangements made and to be made with the Bankers' Mortgage & Discount Company to effectuate the discount scheme.

Relying upon these letters, plaintiff gave an order for the purchase of 15 units of the said Discount Company to two men, uniden-

tified by the evidence as connected with either company, who called at her door. She gave them \$1,500 cash and her 150 shares of capital stock of the appellant company, with a signed order upon their printed form addressed to the Bankers' Securities Company, for the purchase of the 15 units of the Bankers' Mortgage & Discount Company. A receipt for the money and stock was signed by these men, with the name of Bankers' Securities Company, and it stated that her shares were to be converted at not less than \$10 per share and the proceeds applied on the purchase of the unit shares.

Time passed, but plaintiff received nothing for her property and heard nothing further about the transaction. She then gave notice of rescission to all the companies named and brought this action. At the conclusion of her case in chief she voluntarily dismissed as to the Bankers' Mortgage & Discount Company and as to the Bankers' Securities Company. As respondent here, she does not claim in support of her judgment that she has traced her money and property to the appellant or its agents, and does not attempt to defend the judgment as one for the recovery of her property from those who received it as the fruits of rescission on account of failure of consideration or as upon cancellation of her purchase order for the units never delivered to her. She claims that no matter who received her property and money, the false and fraudulent misrepresentations contained in the appellant company's circular letters were the direct and only cause of her loss, and hence defends the judgment upon that ground alone.

[1] Substantially all of the representations as alleged in the complaint are found in the circular letters. Whether these representations were true or false, however, is not proved by the evidence. Respondent defends the finding that the unit shares of the Bankers' Mortgage & Discount Company were worthless by stating that if the Bankers' Mortgage & Discount Company was all that the appellant company represented it to be, some evidence of that fact would be that she had received the unit shares ordered. This may be grounds for strong suspicion, but it does not amount to legal evidence.

[2-4] Respondent defends one other finding of false representation. The representation that the Bankers' Mortgage & Discount Company was an incorporated, solvent, and successful going concern is said to be proved false by a stipulation of fact made at the trial. This stipulation was that the Bankers' Securities Company was never at any time a corporation nor authorized to do business in the state of California, and that the Bankers' Mortgage & Discount Company was a corporation under the state of Dela-

ware, which had never been domesticated in California nor filed its articles in California. But both the representation and the stipulation could be true. First, the representations neither as contained in the letters, nor as pleaded in the complaint, state that that company was authorized to do business in the state of California. The circular letter stated:

"This eminently desirable result (i. e., large profits from discounting trade acceptances) may be obtained * * * by a close relation with a subsidiary of a finance corporation formed to perform this financial service. * * *"

Again:

"The Bankers' Mortgage & Discount Company was incorporated, and through its California subsidiary is permitted to loan money," etc.

Second, the fact that the company had not been authorized to do business in California does not prove untrue the representation that it was an incorporated, solvent, and successful going concern. It is argued that the letters create the impression that the Bankers' Mortgage & Discount Company was a California corporation, especially where they set forth that the officers of the appellant company were also the executives of the Discount Company. It is true that the letters are skillfully persuasive, and that they are more eloquent in this respect in what they do not say than in what is expressed. They give rise to strong suspicion of fraud. However, fraud must be proved by legal evidence, and strong suspicion will not suffice. Fraud is never presumed.

We conclude that the evidence produced was insufficient to prove the representations fraudulent and untrue. The judgment is reversed and a new trial ordered.

I concur: NOURSE, J.

85 Cal. App. 720

BRANDT et al. v. BRANDT et al. *
(Civ. 3302.)

District Court of Appeal, Third District, California. Sept. 30, 1927.

Hearing Denied by Supreme Court Nov. 28, 1927.

1. Appeal and error $\S$ 882(10)—Plaintiffs, having had testimony stricken out, cannot complain on appeal.

Plaintiffs cannot complain of striking of testimony which was done pursuant to their motion.

2. Witnesses $\S$ 205—Testimony as to statements by grantor on delivering deeds to attorney to be held until grantor's death held admissible (Code Civ. Proc. $\S$ 1881, subd. 2).

Testimony of conversation between grantor and attorney to whom grantor delivered deeds to be held until grantor's death is admissible; Code Civ. Proc. $\S$ 1881, subd. 2, not being applicable.

3. Deeds $\S$ 200—Testimony of subsequent acts of grantor, though admissible, is not conclusive on intent with which deeds were executed and delivered.

Testimony of subsequent acts of grantor, though admissible as bearing on intent with which deeds were executed and delivered, is not conclusive.

4. Deeds $\S$ 61—On grantor delivering deed to third person intending it to operate as present transfer of title, title passes, though deed is not delivered until after grantor's death.

Where grantor delivers deed to third person without condition and with intent that it shall operate as present transfer of title, title passes as of date of delivery, though deed is not actually delivered to grantee until after grantor's death, irrespective of grantee's knowledge of the existence of the deed until after grantor's death.

5. Wills $\S$ 93—That grantor when delivering deed used word "leave" held not conclusive evidence that he intended only testamentary disposition.

That grantor on delivering deed to third person to be delivered at his death spoke of intending to "leave" his property is not conclusive evidence that he intended only a testamentary disposition, since, though word "leave" is often used with reference to property left by will, it is so often loosely used that it should not be given controlling importance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Leave—Leaving.]

6. Evidence $\S$ 265(18)—Testimony as to conversation occurring 20 years before should be viewed with caution (Code Civ. Proc. $\S$ 2061, subd. 4).

Under Code Civ. Proc. $\S$ 2061, subd. 4, testimony of witness as to conversation which took place 20 years before should be viewed with caution.

7. Deeds $\S$ 208(5)—Evidence held to support finding that grantor delivering deeds to third party without condition intended to immediately pass title.

Evidence that grantor delivered deeds to third person without any conditions except that delivery was not to take place until after grantor's death held to support finding that grantor intended to immediately pass title.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Rose Brandt, executrix of the last will and testament of Charles H. W. Brandt, deceased, and another, against Louis Brandt and others to quiet the title to real property. Judgment for defendants, and plaintiffs appeal. Affirmed.

Gerald C. Halsey and Frederick T. Leo, both of San Francisco, for appellants.

A. R. Bogue, R. C. Minor, and Scott Rex, all of Stockton, for respondents.

PLUMMER, J. Charles H. W. Brandt, by his first wife, Theresa Brandt, had five sons and three daughters. Theresa was the sole heir of her father, C. A. Bachmann, and inherited from him all the lands referred to herein. After the descent was cast from Bachmann, Theresa granted by deed of conveyance all of her interest in and to said property to Mr. Brandt. Theresa Brandt died on or about July 28, 1904. Shortly before that date she requested her husband, Mr. Brandt, to leave all of their property to their children. This Brandt promised her he would do. On August 2, 1904, after the death of his wife, Theresa, Mr. Brandt went to the office of Mr. Charles L. Neumiller, an attorney at law, in the city of Stockton, and had Neumiller draft a will disposing of all his personal property, and also then and there had Mr. Neumiller prepare certain deeds conveying to his children certain lands and premises in the county of San Joaquin. The validity of one of these deeds is involved in this action. These deeds, after being drafted, were left in the custody of Mr. Neumiller. Mr. Brandt's instructions to Mr. Neumiller were to prepare these deeds and deliver them to the respective grantees on his death. Mr. Neumiller's testimony in this particular is as follows:

"He gave me instructions to prepare these deeds running to his children, and I prepared the deeds, and he signed them and acknowledged them and gave them to me, with instructions to deliver to the children upon his death."

The deeds were separately inclosed in envelopes by Mr. Neumiller, and Mr. Brandt's instructions, in substance, indorsed thereon, the indorsement reading as follows:

"Deed of C. H. W. Brandt to [here appeared the name of the grantee, as the case might be] to be delivered upon the death of C. H. W. Brandt."

The indorsement on the envelopes containing the respective deeds was substantially in the same form as to all of them. The deeds referred to were all left in the custody of Mr. Neumiller and remained continuously in his possession until after the death of Mr. Brandt, save and except as to one of the deeds which was borrowed from Mr. Neumiller by Mr. Brandt for a few minutes to show to some party for some purpose not disclosed by the testimony, and then returned to Mr. Neumiller. The deed here just referred to was out of the possession of Mr. Neumiller from 1 to 2 hours only, and upon the receiving of this deed from Mr. Neumiller, Mr. Brandt signed and handed to Mr. Neumiller a receipt therefor. After the death of Mr. Brandt, which occurred on December 8, 1924, Mr. Neumiller delivered all the deeds herein referred to to the respective grantees named therein. The deed in controversy in this action was delivered by Mr. Neumiller to the respondents August, Louis, and Frederick

Brandt. This deed was subsequently recorded on December 27, 1924. On April 22, 1916, Mr. Brandt made a new will, and on December 2, 1922, he executed a codicil thereto. Under this will 370 acres of the land described in the deed to the defendants herein named was devised to the five sons of the said Brandt, namely, Fred, Charles, Louis, Gus, and Emil. The will differs from the deed in that under the will each would take one-fifth, whereas under the deed the grantees therein would take one-fourth each. As to the remaining 33 acres contained in said deed in controversy, the will purported to devise and give the same to Rose Brandt, the surviving wife of the deceased, Mr. Brandt, after the death of his first wife, having married Rose Brandt on October 20, 1906.

The transcript shows that after the execution of the deed by Mr. Brandt in 1904, at various times, he executed different instruments in relation thereto, to wit, a mortgage dated November 20, 1905, for \$10,000; a mortgage dated November 7, 1910, for \$10,722.40; a mortgage dated October 1, 1913, for \$16,900; a mortgage dated September 13, 1918, for \$16,900; a mortgage dated August 6, 1923, for \$16,900. Also, that on March 18, 1911, he made a deed to his son, Charles H. Brandt, of property described in a prior deed to him, and delivered the same to him immediately in consideration of the sum of \$15,000. At the time of executing the first deed herein referred to Mr. Brandt was of the age of about 65 years.

In addition to the foregoing, the plaintiff testified as follows: That in 1904 she was and for some time previously had been the housekeeper for Mr. and Mrs. Brandt; that on or about the 2d day of August, 1904, at the residence of Mr. Brandt on his ranch on the San Joaquin river, Mr. Brandt made some statements to her in relation to his disposition of the property that he had received from his wife. This testimony is as follows:

"Q. Calling your attention to the conversation you had with Mr. Brandt in the dining room you have told us of, on the morning of the 2d of August, 1904, what did he say? A. He told me he was going to town to Mr. Neumiller's office to leave, by will and deeds, the Brandt ranch for the three girls, the home ranch for the four boys, and the Island ranch for Charlie, so in case anything happened to him it would save probate expenses."

The appellant also called to the stand another witness named Miss Catherine Tully, a resident of Stockton, who, after testifying that she had attended to certain insurance business for Mr. Brandt, and that Mr. Brandt had made some statements to her relative to leaving his property after the death of his wife in 1904, testified:

"Q. Tell us what he said to you, as near as you can recall. A. Within a week after Mrs. Brandt's death, I think it was the first time he came to the office after Mrs. Brandt had passed,

he said he was going to make deeds in escrow at the request of his wife. He had promised his wife to leave the property so as to save probate, the Island ranch to Charles, the C. A. Bachmann ranch, which was inherited by his wife from her father, to the girls, share and share alike—that was his three daughters—and the balance of his property, which was the home ranch, to the sons, share and share alike."

The trial court gave judgment to the effect that the deeds executed by Mr. Brandt in 1904 were effectual to convey the lands and premises therein named to the respondents in this action, and from this judgment the plaintiffs appeal.

The contention made here is that the deeds were testamentary in character; that they never passed out of the control of the grantor; and that the grantor had no intent that the title to the property mentioned in the deeds should immediately pass to the grantees therein named.

That there was a manual tradition of the deed involved in this action is beyond question. It was handed to Mr. Neumiller with the request to keep the same and deliver to the grantees upon the death of the grantor. The intent with which the deed involved in this action was placed in the custody and control of Mr. Neumiller must be gathered from the circumstances surrounding the transaction. We find nothing in the testimony which tends to sustain the contention of the appellants that Mr. Neumiller was simply the agent of Mr. Brandt and held the deeds in his custody as such agent. The fact that Mr. Neumiller had acted as the attorney for Mr. Brandt, or rather for Mrs. Brandt, in the settlement of her father's estate in 1904, and also, as attorney for Mr. Brandt in the execution of the will referred to herein as executed in 1904, does not impel the conclusion that Mr. Neumiller was the agent of Mr. Brandt, rather than the trustee of the grantees named in the deeds of which he was, for the time being, custodian.

[1] As bearing directly upon the intent with which the deeds were executed and delivered to Mr. Neumiller, to be held by him and delivered to the grantees therein named, Mr. Neumiller's testimony is substantially as follows:

"Mr. Brandt gave me instructions to prepare these deeds running to his children, and I prepared the deeds, and he signed them and acknowledged them and gave them to me with instructions to deliver to the children upon his death.

"Q. Do you recall anything further that took place or that was said between you and him at that time, Mr. Neumiller? A. Of course, there was a discussion of the properties to be included in the deeds, and the purpose of the deeds, and the usual—I would not say usual—but the transaction, of course, was discussed with Mr. Brandt by me, and by him to me.

"Q. In the course of that discussion was anything said as to what the legal effect of what he was doing would be upon his rights in the land

covered by the deeds? A. I explained to Mr. Brandt the transaction.

"Q. We will have to ask you, Mr. Neumiller, to state to us the statement that you made to him as you are now able to recall it? A. Well, in the making of these deeds, and in the signing of them, and the delivering of them to me, I explained to Mr. Brandt what the legal effect of that was, in my opinion.

"Q. Well, if you will go ahead, Mr. Neumiller, and tell us what the discussion was, particularly relative to the effect of these deeds, and more particularly this deed, if there was any separate discussion with reference to it? A. I advised him at that time or discussed with him, that the delivery of the deed to me, or the deposit of the deed with me, and then for me to deliver at the time of his death, reserved in him, in my opinion, a life estate. In other words, I explained the transaction to Mr. Brandt as best I could, with what ability I possessed."

The witness further testified that after the discussion the deeds were left with him; that after that time there was no modification or change in the condition of the trust under which those deeds were left with the witness; that witness placed the deeds in envelopes and indorsed thereon the words, "To be delivered upon the death of C. H. W. Brandt," etc. The advice given by Mr. Neumiller to Mr. Brandt as to the effect of the deeds was objected to, and thereafter, upon motion of counsel for the appellant, this portion of the witness' testimony was stricken out, to wit:

"I advised him at that time, or discussed with him that the delivery of the deed to me or the deposit of the deed with me, and then for me to deliver at the time of his death, reserved in him a life estate," etc.

The motion of appellant to strike from the testimony of the witness Neumiller was limited expressly to what we have here quoted. As this motion was granted by the trial court, the appellants' argument that it was properly granted is immaterial to a decision herein, and as judgment went for the respondents, from which no appeal is prosecuted by them, their contention that such testimony is admissible is not before us for determination. The appellants, having had the witness Neumiller's testimony stricken out, cannot be heard to complain, and the respondents, having had judgment, are not injured. There remains in the testimony of Mr. Neumiller only that portion which relates to the circumstances under which the deeds were executed, the fact that the purposes were talked over, and then the instructions given by Mr. Brandt to Mr. Neumiller as to Neumiller's keeping the deeds, and the final handing of the same to the grantees therein named upon the death of Mr. Brandt, which, we think, placed before the trial court sufficient facts to justify the conclusion that Mr. Brandt knew exactly what he was doing and fully understood the transaction, even though the testimony of Mr. Neumiller as to

what he, Neumiller, thought of the legal effect of the transaction, was stricken from the record. Under the circumstances which we have detailed, although argued, we do not find that there is anything really for us to decide as to whether the advice given by Mr. Neumiller, or the opinion expressed by Mr. Neumiller to Mr. Brandt, was or was not admissible. The facts set forth in Mr. Neumiller's testimony as to the acts of Mr. Brandt and the instructions given by Mr. Brandt enabled the trial court to draw its own conclusions, and the presumption may be indulged that the trial court was qualified to do so, irrespective of the opinion of Mr. Neumiller.

[2] That all the testimony of Mr. Neumiller, outside of that stricken from the record by the trial court, was admissible is so firmly established in this state that we need only to cite the memorandum opinion of the Supreme Court in denying a petition for hearing in the case of Messersmith v. Smith, 62 Cal. App. 446, 217 P. 105, where it is stated that subdivision 2 of section 1881 of the Code of Civil Procedure has no reference to the instructions given by a grantor to the holder of a deed to whom the deed has been delivered with instructions to pass the same to the grantees therein named upon the happening of some future event. It is there further said:

"Where the communication between the client and attorney is one authorizing the attorney to perform some act on behalf of the client, the communication giving such authority is not a confidential communication by the client, and the attorney may testify to the instructions given to him." (Following this statement, numerous authorities are cited.)

[3] While testimony of subsequent acts of a grantor is admissible as bearing upon the intent with which deeds have been executed and delivered, and whether or not the same are delivered with intent to pass title, or are only testamentary in character, such testimony is not conclusive, but simply goes into the record as testimony for the trial court to weigh and determine in making its findings and drawing its conclusions as to the character of the act performed by the grantor and the intent entertained by him at the time of its performance. Many cases may be cited from the reports where subsequent attempts have been made to regain possession of the deeds so executed and delivered, and also of subsequent acts in relation to the property, such as executing mortgages and subsequent deeds. These cases all uphold the principle of law which we have just stated. Such acts are admissible as testimony, but are not conclusive. Without analyzing the cases involving subsequent acts, we will simply cite a few where the subsequent acts were as definitive in their character as in the case at bar, and were not held to preclude a finding that the deed, delivered with instructions, such as

we have here, constituted a valid and binding transfer of title. *Boicelli v. Giannini*, 65 Cal. App. 601, 224 P. 777; *Decou v. Howell*, 190 Cal. 741, 214 P. 444; *Wilcox v. Hardisty*, 60 Cal. App. 206, 212 P. 633; *Pitney v. Pitney*, 55 Cal. App. 22, 202 P. 940; *Bury v. Young*, 98 Cal. 446, 33 P. 338, 35 Am. St. Rep. 186; *In re Estate of Cornelius*, 151 Cal. 550, 91 P. 329; *Smith v. Smith*, 173 Cal. 725, 161 P. 495.

[4] We do not deem it necessary to discuss at length the objection of vested rights urged by the appellant further than to say that the principle considered in the case of *Green v. Skinner*, 185 Cal. 435, 197 P. 60, and other cases where the same questions were involved, have no bearing upon the issues presented to us for consideration. Nor is there anything in the objection that the grantees had no knowledge of the execution and delivery of the deeds referred to by Mr. Brandt to Mr. Neumiller. See *Neely v. Buster*, 50 Cal. App. 695, 195 P. 736. A large number of cases are there cited, and they all hold in effect that where a grantor intends that the deed executed by him shall operate as a present transfer of title, and delivers it to a third person without condition, the title passes, as of the date of the delivery, to such person, although the deed is not actually delivered to the grantee until after the grantor's death. And this, irrespective of whether the grantee has or has no knowledge of the existence of the deed until after the grantor's death.

[5] Relying upon the case of *Williams v. Kidd*, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703, wherein the court, speaking through Justice Lorigan, in considering certain words of the grantor, used the following language:

"It was a fair inference to be made by the court that Williams, when he commenced the preparation of these deeds, had in contemplation the testamentary disposition of all of his property, and that the making of the four deeds, including the one in controversy, was a part thereof. That he so intended would appear from the language he used in the several talks held between himself and Kidd before they actually commenced the preparation of the various deeds which the scheme contemplated. He spoke of 'leaving his property that way—by deed,' which is not reasonably open to any other construction."

The appellant urges that the language said to have been used by Mr. Brandt in the presence of the plaintiff and of the witness, Miss Tully, is conclusive evidence that Brandt intended only a testamentary disposition, and much stress is laid upon the word "leave." We do not think that use of the word "leave," if used by Brandt, has any such binding force or effect or can reasonably be given any more force or effect than any other portion of the language used by him when speaking of the disposition of his property and giving instructions to Mr. Neumiller. There are a number of authorities which hold that the word "leave" is susceptible of, and may be reason-

ably given, a different interpretation from that indicated in the excerpt which we have quoted from the case of *Williams v. Kidd*. In 36 Cal. Jur. 974, we find the following:

"The word 'leave' is often used with reference to property left by will, meaning to give or dispose of by will; but it is so often loosely used, that its use should not be given controlling importance in determining whether a document showed a gift or was testamentary in character," (citing authorities).

This definition we think much more consonant with good reasoning than any holding that such language must be given any absolute or controlling effect. It is simply a bit of testimony for consideration by the trial court.

In the case of *Innes v. Potter*, 130 Minn. 320, 153 N. W. 604, 3 A. L. R. 896, the Supreme Court of Minnesota had before it for consideration the meaning of the word "leave," used by a donor when executing and delivering a deed to a trustee, just as we find in this case, and there the court said:

"Nor do we attach great importance to the statement of Casey that Potter said that he wanted to 'leave' a certain amount of property to his daughter Marcia. The word 'leave' is often used in reference to property left by will, but the word is often loosely used and its use should not be given controlling importance."

[6] There is another fact to be borne in mind. The testimony of the plaintiff and Miss Tully purports to relate a conversation which took place at a period 20 years antedating the date when the testimony was taken in court. What Mr. Neumiller testified to as to the directions given him by the grantor in 1904 had reference to what was written down by him at the time the deeds were executed, and was not a mere matter of recollection. Where a witness purports to relate a conversation or statements of one which took place 20 years preceding the time of giving the testimony, we think that the last clause of subdivision 4 of section 2061 of the Code of Civil Procedure may very well be considered by the trial court, where the rule is set forth that evidence of the oral admissions of a party should be viewed with caution. It is not a question of whether the witnesses under such circumstances are merely honest or dishonest, but language filtered through human recollection and coming into the record 20 years after the occurrence is necessarily of so weak a character that, even though the word "leave" were actually used by Mr. Brandt in talking with the witnesses, its force and effect is such that we think the trial court would be justified in giving it but little weight. The testimony of Miss Tully, however viewed, is about as favorable to the respondents as to the plaintiffs. This witness testified:

"I think it was the first time he came to the office after Mrs. Brandt had passed—he said he was going to make deeds in escrow at the re-

quest of his wife. He had promised his wife to leave the property so as to save probate."

This language certainly does not impel the conclusion that Mr. Brandt had only a testamentary intent.

[7] Is there sufficient testimony in the record to support the finding of the trial court that the grantor intended to immediately pass title? We have heretofore set forth the testimony of Mr. Neumiller as to the instructions given to him by Mr. Brandt, the grantor. This court had before it the effect and weight of such testimony in the case of *Wilcox v. Hardisty*, 60 Cal. App. 206, 212 P. 633. In that case this court said:

"Evidence that a grantor delivered his deed to a third person, with instructions to deliver it to the grantee after the grantor's death, without any other evidence of intention, is sufficient to justify the inference that the grantor thereby intended to part with all right thereafter to control the deed. Whether such inference is overcome by other proof involves the question of weighing the evidence, a matter within the exclusive province of the trial court."

The record in this case is absolutely silent with reference to any intent on the part of the grantor to exercise any dominion or control over the deeds executed and delivered by him to the witness Neumiller. The deeds were handed to Mr. Neumiller without any conditions whatever, save and except the limitation that they were not to be handed to the grantees until after the grantor's death. There is no evidence that the grantor retained any control or dominion over the deeds whatever.

Appellants argue that the quotation which we have taken from the case of *Wilcox v. Hardisty* is mere obiter. An examination of the facts involved in that case show, however, that in this contention the appellants are in error. The court was there speaking of an essential portion of the testimony in the case, and to be considered by the trial court and the effect to be given thereto. That there was other evidence in the case bearing upon the same subject does not render this language mere dictum. The rule set forth in *Williams v. Southern Pacific Co.*, 54 Cal. App. 571, quoting from page 579, 202 P. 356, 359, as to what is obiter and what is not, is pertinent:

"Appellant urges that this latter statement by the court is mere dictum, but 'where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but each is the judgment of the court, and is equally valid with the other'" (citing, *Union Pacific R. R. Co. v. Mason City & Fort Dodge R. R. Co.*, 199 U. S. 160, 26 S. Ct. 19, 50 L. Ed. 134; also *Rose's U. S. Notes*).

The rule which we have just stated, set forth in *Wilcox v. Hardisty*, as to the weight which may be given by a trial court to instructions given by a grantor when deliver-

ing deeds to be handed to grantees at a later date, is supported by the following authorities: *Wilson v. Bridgforth*, 108 Miss. 199, 66 So. 524; *Saltzsieder v. Saltzsieder*, 219 N. Y. 523, 114 N. E. 856; *Stonehill v. Hastings*, 202 N. Y. 115, 94 N. E. 1068; *Patrick v. Parrott*, 92 Ohio St. 184, 110 N. E. 725.

There being sufficient testimony in the record to support the finding of the trial court that the deeds executed and delivered by Brandt to Mr. Neumiller in 1904 were executed and delivered with the present intent of the grantor to then and there pass title, limited only as to future enjoyment by the grantees, it follows that the judgment of the trial court must be and the same is hereby affirmed.

We concur: FINCH, P. J.; BURROUGHS, Justice pro tem.

85 Cal. App. 624

SMITH v. ARMSTRONG et al. (Civ. 5514.)★

District Court of Appeal, First District, Division 1, California. Sept. 27, 1927.

Hearing Denied by Supreme Court Nov. 23, 1927.

1. Appeal and error ⇨731(5)—Where bill of exceptions did not specify particulars in which certain findings were unsupported by evidence, question could not be reviewed (Code Civ. Proc. § 648).

Under Code Civ. Proc. § 648, where record was presented in form of bill of exceptions, and bill did not specify particulars in which evidence was insufficient to support certain findings, question of sufficiency of evidence to support those findings could not be reviewed.

2. Trial ⇨404(2)—Conclusion that party is not innocent purchaser of note is one of law, and must be so regarded, although found among findings of fact.

Conclusion that party is or is not a bona fide or innocent purchaser or holder of note is one of law and not of fact, and such conclusions must be regarded according to their character, notwithstanding they may be found among findings of fact.

3. Trial ⇨404(2)—Conclusion of law that party was not innocent purchaser, inadvertently made part of findings of fact, should be disregarded.

Where court concluded as matter of law that party was not an innocent purchaser of note, and same conclusion was inadvertently made part of findings of fact, it should be disregarded in connection with findings of fact.

4. Bills and notes ⇨337—One having mere suspicion of infirmity of title is holder in due course of note, unless circumstances justify conclusion that failure to make inquiry arose from suspicion that inquiry would disclose defect (Civ. Code, §§ 3133, 3137, 3140).

Purchaser of negotiable instrument before maturity is not bound to make inquiry of maker as to consideration or circumstances, and mere knowledge of facts sufficient to put prudent man on inquiry without actual knowledge, or mere

suspicion of infirmity or defect of title, does not preclude transferee from occupying position of holder in due course under Civ. Code, §§ 3133, 3137, and 3140, unless circumstances justify conclusion that failure to make inquiry arose from suspicion that inquiry would disclose defect in instrument.

5. Bills and notes ⇨354—To constitute purchaser "holder in due course," price need not equal face value of note.

That transferee of negotiable paper purchases it for sum less than face value may be considered as other facts in case upon question of good faith; yet, in order to constitute him "holder in due course," it is not necessary that price should equal face value of note.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Holder in Due Course.]

6. Bills and notes ⇨337—That purchaser bought note as matter of speculation did not impugn her title as bona fide director.

That purchaser of note before maturity bought note as matter of speculation was not sufficient to impugn her title as bona fide holder.

7. Appeal and error ⇨931(3)—If from facts found other facts may be inferred which will support judgment, it will be assumed that trial court made such inferences.

While findings of fact are to receive such construction as will uphold rather than defeat judgment, and, if from facts found other facts may be inferred which will support judgment, it will be assumed that trial court made such inferences.

8. Bills and notes ⇨539—Facts found held insufficient to support conclusion of law that purchaser of note was not innocent purchaser.

In suit by assignee of purchaser on promissory note, given for corporation stock defendant claimed was valueless, facts found *held* not to support an inference of bad faith or conclusion as matter of law that purchaser, who purchased for less than face value, was not an innocent purchaser or bona fide holder.

9. Appeal and error ⇨1050(1)—In suit on note, admitting incompetent evidence regarding falsity of representations inducing execution, held not prejudicial.

In suit by assignee of purchaser of note, admission of evidence of conversation of witness with president of corporation, for whose stock note was given, regarding falsity of representations as to value of corporation's property, which was incompetent, *held* not shown to be prejudicial, where bill of exceptions did not specify particulars in which finding that representations were false was not supported by evidence.

10. Appeal and error ⇨882(8)—Exclusion of evidence, if error, held invited by plaintiff's attorney, who stated, in response to objection, that, as to certain defendant, testimony would be hearsay.

In action on note, exclusion of evidence regarding details of conversation between certain

parties before transfer of note, if error, *held* invited by plaintiff's attorney, who stated, in response to objection, that, as to certain defendant, testimony would be hearsay.

11. Appeal and error $\Rightarrow$ 882(1)—One who, by conduct, induces commission of error, is estopped from asserting that action of court was erroneous.

A party who, by his conduct, induces commission of error, is estopped from asserting that action of court was erroneous.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action upon a promissory note by D. F. Smith against J. P. Armstrong and others. From the judgment, plaintiff appeals. Reversed.

Newlin & Ashburn, of Los Angeles, for appellant.

Donald Armstrong, of Los Angeles, for respondent Armstrong.

CASHIN, J. An appeal from a portion of a judgment entered in an action on a promissory note. The note was executed on August 12, 1920, by defendant Armstrong to Nathan & Co., a corporation, for the sum of \$3,000; the principal with interest thereon being payable one year after date. The instrument was negotiable in form and was indorsed by the payee to defendant Proctor, who, in December, 1920, indorsed the same to Blanche G. Lark, by whom it was assigned to the plaintiff for collection. Judgment was entered against the indorsers and in favor of defendant Armstrong, and from the latter portion of the judgment the plaintiff appeals.

It is contended that certain findings are unsupported, that the court erred in its rulings and its conclusion from the facts found that Blanche G. Lark was not an innocent purchaser or a bona fide holder of the note and not entitled to judgment against defendant Armstrong.

Nathan & Co. was the selling agent for the stock of the Blue Jacket Mining Company, a corporation, which owned certain mining claims in Arizona, and the consideration for the note was the issuance by the latter corporation of 2,000 shares of its stock to the wife of defendant Armstrong.

Armstrong denied the allegation in the complaint that the indorsement to Blanche G. Lark was for a valuable consideration, and alleged as a separate defense that the stock was valueless, that its purchase and the execution of the note were induced by the fraudulent representations of the president of the mining company as to the condition and value of the claims and by like misrepresentations made by Nathan & Co., contained in a letter sent to defendant and in an advertisement inserted by the latter corporation in a newspaper, all of which the defend-

ant believed and relied upon in making the purchase.

The court found the allegations of the special defense to be true, and with respect to the purchase of the note by Blanche G. Lark its findings were as follows:

"That, at the time of the assignment of said note from defendants Nathan & Co. and George H. Proctor to the said Blanche G. Lark, she was the wife of Charles T. Lark, who was then, and for about 20 years had been, a practicing attorney in the city of New York, and for a long time had been and then was attorney for the defendant George H. Proctor and the Granite Springs Estates, an Arizona corporation, of which the said defendant George H. Proctor was the president; and at all times herein the said Blanche G. Lark was acting solely and only through her said husband, as her agent, in all transactions connected with the purchase of the said note and incident thereto, and the said Blanche G. Lark knew nothing of the said transaction except as aforesaid related to her by her said husband.

"That at the time of the said assignment from said defendant Nathan & Co. and George H. Proctor, the said defendant J. P. Armstrong was wholly solvent and financially responsible and able to pay the said note at its maturity. That at the time the face value of the said note was more than \$3,070. That up to December 18, 1920, the date when the said defendants Nathan & Co. and George H. Proctor assigned the said note, the said Charles T. Lark had never heard of the defendant Nathan & Co., and made no inquiry from any one regarding said corporation except from defendant Proctor. That at the time defendant Proctor had his headquarters with defendant Nathan & Co. and introduced the said Charles T. Lark to Mr. G. Nathan, the president of said corporation. That at all the said times the said Charles T. Lark had never heard of defendant Armstrong except that on December 17, 1920, the defendant Proctor told him that the defendant Nathan & Co. would allow him to borrow money on the said note. That neither the said Charles T. Lark nor his wife, Blanche G. Lark, had ever purchased any commercial paper in California, and had not operated in commercial paper anywhere. That the said Charles T. Lark made no inquiry before the purchase of said note regarding the circumstances of the consideration for which it was given, and made no inquiry from anyone or effort to learn of defendant Armstrong's financial ability, or whether the said note was valid or given for a valuable consideration except that the said G. Nathan told him that Armstrong was a wealthy man and that the Merchants National Bank of Los Angeles had looked defendant Armstrong up and found he was perfectly good and that they would take his note. That at that time the said Charles T. Lark was informed by defendant Nathan that defendant Armstrong resided at Venice, California, seventeen miles from Los Angeles. That said Blanche G. Lark through her said husband purchased said note for the sum of \$2,500.00, believing that the said Nathan was responsible, and that, if defendant Armstrong did not pay the note, Mr. Nathan would, and expecting to bring suit if the note was not paid. That the said Charles T. Lark

made no inquiry as to what authority Mr. Nathan had to transfer the note, never saw the said G. Nathan except on that one occasion, and made no inquiry to ascertain whether Nathan's statements were true, but bought the note as a matter of speculation.

"That the said Charles T. Lark knew at the time of said transfer that the defendant George H. Proctor was financially embarrassed and unable to pay the said note. *That the said Blanche G. Lark was not an innocent purchaser for value of said note sued on.*"

The conclusions of law from the findings were:

"That said promissory note was procured by fraud and is void as against the defendant J. B. Armstrong for want of consideration; that Blanche G. Lark was not nor was the plaintiff an innocent purchaser or a bona fide holder of said note as against said defendant Armstrong; that plaintiff is not entitled to take anything by this action against said defendant Armstrong; that as to said defendant Armstrong said note be canceled by the clerk of this court. * * *

The appeal is presented on a bill of exceptions in which are specified the particulars in which it is claimed that the evidence fails to support certain of the findings; but, with respect to the findings that the representations alleged were made and were untrue, that these representations were relied upon by Armstrong, and that the stock was valueless, the particulars in which the same were unsupported are not specified; and the same is true of the trial court's conclusion "that said Blanche G. Lark was not an innocent purchaser for value of said note sued on." The respondents contend therefore that the question whether these findings are supported is not open to review.

[1] It is the rule of the Code (section 648, Code Civ. Proc.), enforced by numerous decisions, that, where the record is presented in the form of a bill of exceptions, and it is sought to review the sufficiency of the evidence, the bill must specify the particulars in which the same is insufficient. *Mills v. Brady*, 185 Cal. 317, 196 P. 776; *Bird v. Am. Surety Co.*, 175 Cal. 625, 631, 166 P. 1009; *Meads, Seaman & Co. v. Lasar*, 92 Cal. 221, 227, 28 P. 935. In view of the rule, respondents' contention must be sustained as to those findings which are properly conclusions of fact in so far as the particulars in which it is claimed that they are unsupported are not specified.

But it is contended by appellant that the conclusion that Mrs. Lark was not an innocent purchaser was but a legal conclusion, which, being also found among the conclusions of law in the decision, is assigned by him as an error of law.

[2] It has been held in numerous cases that the conclusion that a party is or is not a bona fide or innocent purchaser or holder is one of law and not of fact (*Wing v. Hayden*,

10 Bush [Ky.] 276; *Downer v. Read*, 17 Minn. 493 [Gil. 470]; *White v. Brown*, 14 How. Prac. [N. Y.] 282, 286; *Roger v. Morton*, 46 Misc. Rep. 494, 95 N. Y. S. 49; *Ludlow v. Woodward*, 117 App. Div. 525, 102 N. Y. S. 647; *Davidson v. Buchanan*, 164 App. Div. 352, 149 N. Y. S. 640; *Aurrecochea v. Sinclair Co.*, 60 Cal. 532; *State v. Hackley*, 124 La. 854, 50 So. 772; *Voorhees v. Fisher*, 9 Utah, 303, 34 P. 64; *Bunting v. Mick*, 5 Ind. App. 289, 31 N. E. 378, 1055; and such conclusions must be regarded according to their character, notwithstanding they may be found among the findings of fact (*Towle v. Sweeney*, 2 Cal. App. 29, 83 P. 74; *Lynip v. Alturas School District*, 24 Cal. App. 426, 438, 141 P. 835; *Faure v. Drollinger*, 60 Cal. App. 594, 601, 213 P. 724).

[3] It is clear from the foregoing cases that the conclusion must be treated as one of law; and, the trial court having concluded as a matter of law that Mrs. Lark was not an innocent purchaser, it is apparent that the same conclusion was inadvertently made a part of the findings of fact, in which connection it should be disregarded.

A holder in due course is one who has taken the instrument under certain conditions, among which are that he took in good faith and for value, and that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it (Civ. Code, § 3133).

Every holder is deemed prima facie to be a holder in due course; but, when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course (Civ. Code, § 3140).

It is provided by section 3137 of the Civil Code that:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

In the present case the note was complete and regular on its face, and it was found that Mrs. Lark became a holder for value before the note was overdue. It was not found that she or her agent had actual knowledge of any infirmity in the note or defect in the title of the person negotiating it; but it is contended by respondent that the findings from which the conclusion of law was drawn that she was not an innocent purchaser or a bona fide holder show that her agent had knowledge of such facts that his action in taking the instrument amounted to bad faith.

[4] A purchaser of a negotiable instrument

before maturity is not bound to make inquiry of the maker as to the consideration or circumstances leading to its execution (*Kopperud v. Cookson*, 50 Cal. App. 180, 194 P. 748); and mere knowledge of facts sufficient to put a prudent man on inquiry without actual knowledge, or a mere suspicion of an infirmity or defect of title, does not preclude the transferee from occupying the position of a holder in due course, unless the circumstances are such as to justify the conclusion that failure to make inquiry arose from a suspicion that inquiry would disclose a vice or defect in the instrument (*Popp v. Exchange Bank*, 189 Cal. 296, 208 P. 113; *Goodale v. Thorn*, 199 Cal. 307, 249 P. 11).

[5, 6] It has also been held that a purchaser is not charged with the duty to make inquiry by the fact alone that he had knowledge of the indorser's want of honesty in business matters (*Setzer v. Deal*, 135 N. C. 428, 47 S. E. 466; *Vaughan v. Brandt*, 21 Idaho, 628, 123 P. 591); and, while the fact that a transferee of negotiable paper purchases it for a sum less than its face value may be considered as other facts in the case upon the question of good faith, yet, in order to constitute him a holder in due course, it is not necessary that the price should equal the face value of the note (*Schoen v. Houghton*, 50 Cal. 528; *Kopperud v. Cookson*, supra; *Kent v. Barnes*, 72 Ill. App. 617; *Farber v. Nat. F. & I. Co.*, 140 Ind. 54, 39 N. E. 249; *Wright Investment Co. v. Frisco Realty Co.*, 178 Mo. 72, 77 S. W. 296; *Citizens' Bank v. Rymon*, 12 Neb. 541, 11 N. W. 850; *Oppenheimer v. Farmers', etc., Bank*, 97 Tenn. 19, 36 S. W. 705, 33 L. R. A. 767, 56 Am. St. Rep. 778; *Lay v. Wissman*, 36 Iowa, 305; *McNamara v. Jose*, 28 Wash. 461, 68 P. 903; *Phelan v. Meyers*, 67 Pa. 59, 5 Am. Rep. 402. Nor, according to *Schoen v. Houghton*, supra, was the fact found by the court that Mrs. Lark "bought the note as a matter of speculation" sufficient to impugn her title as a bona fide holder.

[7] While findings of fact are to receive such a construction as will uphold rather than defeat the judgment, and, if from the facts found other facts may be inferred which will support the judgment, it will be assumed that the trial court made such inferences. *Paine v. San Bernardino, etc., Co.*, 143 Cal. 654, 77 P. 659; *Breeze v. Brooks*, 97 Cal. 77, 31 P. 742, 22 L. R. A. 257; *Gould v. Eaton*, 111 Cal. 644, 44 P. 319, 52 Am. St. Rep. 201; *People's, etc., Bank v. Rickard*, 139 Cal. 285, 73 P. 858.

[8] In the present case the facts found, which were analogous to those in *Popp v.*

Exchange Bank, supra, were insufficient to support an inference of bad faith or the conclusion as a matter of law that Mrs. Lark was not an innocent purchaser or a bona fide holder.

[9] The court admitted, over objection, testimony of a witness to a conversation had with Nathan, the president of defendant Nathan & Co., some months after the transfer of the note to Mrs. Lark, in which Nathan admitted the falsity of the representations as to the value and condition of the mining claims. This testimony as to plaintiff was incompetent (*First Nat. Bank v. Wolff*, 79 Cal. 69, 21 P. 551, 748), but, as the particulars in which the finding that the representations were false were not specified in the bill of exceptions, and from all that appears the finding may have been supported by other evidence, we cannot say that the testimony was prejudicial or that its admission affected the result.

[10, 11] An objection by Armstrong to a question as to the details of a conversation between Charles T. Lark and defendant Proctor shortly before the transfer of the note was sustained; and it is claimed by appellant that this testimony was relevant on the question as to the good faith of Lark and his wife. This ruling, if erroneous, was invited by the attorney for appellant, who stated in response to the objection that, as to Armstrong, the testimony would be hearsay. A party who by his conduct induces the commission of error is estopped from asserting that the action of the court was erroneous.

Without reviewing the evidence in detail, it will suffice to say that those findings as to which appellant has specified the particulars in which he contends they were not justified by the evidence were sufficiently supported.

It follows from the insufficiency of the findings to support the conclusion of the trial court that Mrs. Lark was not an innocent purchaser or bona fide holder that the portion of the judgment appealed from cannot be sustained, and it is therefore ordered that the portion of the judgment which reads as follows: "It is further ordered and adjudged that plaintiff take nothing by his said action against defendant J. P. Armstrong, and that defendant J. P. Armstrong do have and recover from the plaintiff his costs and disbursements in this action amounting to the sum of ——— dollars, and that as to said defendant J. P. Armstrong the promissory note sued on be canceled by the clerk of this court"—be, and the same is, reversed.

We concur: TYLER P. J; KNIGHT, J.

85 Cal. App. 518

(260 P.)

In re SHAW'S ESTATE.★

McREAVY v. SHAW.

(Civ. 5836.)

District Court of Appeal, Second District, Division 2, California. Sept. 21, 1927.

Hearing Denied by Supreme Court Nov. 17, 1927.

1. Executors and administrators ~~§~~495(2)—
There is distinction between executor and trustee, though offices are held by same person.

There is a distinction between a trustee and an executor, even though offices are held by one and the same person.

2. Executors and administrators ~~§~~495(2)—
Executrix had right to renounce compensation under will and obtain statutory fees and fees for special services (Code Civ. Proc. § 1616; § 1618, as amended by St. 1925, p. 624).

Under Code Civ. Proc. § 1616, and section 1618, as amended by St. 1925, p. 624, executrix had authority to renounce compensation under the will and obtain statutory fees and fees allowed for special services rendered as executrix; Civ. Code, § 2274 not being pertinent.

3. Executors and administrators ~~§~~109(1)—
Executrix can recover broker's fees only on finding by probate court that expenditure was in good faith and proper (Code Civ. Proc. § 1559, as amended by St. 1921, p. 210, § 5).

Under Code Civ. Proc. § 1559, as amended by St. 1921, p. 210, § 5, executrix held entitled to recover for broker's commissions expended by her only after determination by probate court that expenditure was made in good faith and was proper.

4. Appeal and error ~~§~~909(4)—Probate court will be presumed to have determined broker's fees disallowed executrix were not proper, in absence of evidence thereon.

Where probate court disallowed expenditure by executrix for broker's commissions on sale of real estate, it will be presumed that court decided expenditure was not proper, in absence of evidence thereon in the record, since all presumptions not contradicted or inconsistent with record must be indulged in favor of orders and judgments of lower court.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Final accounting of Marie Shaw McReavy, executrix of the estate of William Shaw, deceased, wherein Marion Shaw filed objections. From an order disallowing certain amounts, the executrix appeals. Reversed, with directions, in part, and in part affirmed.

F. L. Richardson, of San Diego, for appellant.

Crouch & Sanders, of San Diego, for respondent.

COLLIER, Justice pro tem. On February 8, 1923, William Shaw duly executed his last

will and testament, in which, among other things, it was provided:

"Twelfth: I hereby affix the compensation of my executor and trustee at the sum of \$10.00 per month, for the first twelve months after qualifying as such, and \$5.00 per month for each month thereafter."

On February 16, 1925, he duly executed a codicil to his will changing the above provision to read as follows:

"Second: It is my further will and desire that the compensation of my executor and trustee fixed in the twelfth paragraph of my said will be thirty dollars (\$30.00) per month instead of ten dollars (\$10) and five dollars (\$5) per month respectively, as therein provided, and that said paragraph twelfth of my said will is hereby revoked and changed accordingly."

Shaw died March 17, 1925. On April 3, 1925, his will and testament was admitted to probate. Marie Shaw McReavy, the appellant here, was appointed executrix thereunder and qualified as such. On May 19, 1925, appellant filed a "Renunciation of Compensation Given Executrix by Will," worded as follows:

"Comes now Marie Shaw McReavy, the duly appointed, qualified, and acting executrix of the above-named estate and hereby renounces all compensation given her under the last will and testament of William Shaw, deceased, and hereby elects to take the compensation allowed her by law, under the provisions of section 1618 of the Code of Civil Procedure of the state of California."

At the time of his death, Shaw was engaged in the business of building and selling houses, and at his decease he was the owner of a large number of houses and a large number of contracts for houses previously built. Some of these buildings were in process of construction and were completed by the executrix. Under the orders of the probate court, she sold nine separate pieces of the real estate. She also adjusted and paid many outstanding claims for labor and material. In this and other matters she performed a great number of extraordinary and unusual services, for which she applied to and was allowed by the court the sum of \$500. In her final account the appellant took credit for said \$500 and also for \$1,458.16, the statutory fees based upon the appraisal of the estate. Appellant also credited herself with \$35, expended by her as commissions and paid to an agent for the sale of the household furniture and one automobile belonging to the estate. Upon the hearing of the final account, respondent objected to said items of \$500, \$1,458.16, and \$35. The objections were sustained, and such amounts disallowed. From the order disallowing said amounts, the executrix appeals.

Respondent takes the position that, "where an instrument by which a trust is created fix-

es the compensation of the trustees, they cannot claim a larger sum. They are entitled to the amount specified, and no more." Civ. Code, § 2274.

[1] That there is a great distinction between a "trustee" and an "executor," even though these offices are held by one and the same person, there can be no question. "The performance of the trust created by the fifth article of the will is a duty devolving upon the persons named as executors and trustees *in their capacity as trustees*. [Italics ours.] It forms no part of their duty in their capacity as executors in the administration of the estate proper. * * * "The appointment to a trust under the will, not essential to the office of an executor, does not constitute the trustee an executor according to the tenor, for the offices of an executor and of a trustee are distinct, and may be vested in different persons, and, when they are vested in the same person, the functions of each are nevertheless to be performed by him in the respective capacity, the probate court having jurisdiction over him in the one, but not in the other capacity. * * * 1 Woerner on Administration, p. 504. The authorities cited by the author fully support the text." Estate of Phelps, 179 Cal. 703, 709, 178 P. 846, 848.

"The rule that the executors were succeeded by trustees whose duties were entirely different is well stated in Wheatley v. Badger, 7 Pa. 462, where it is said: 'It would be as absurd for a trustee to attempt the duties of an executor as for an executor to attempt the duties of a trustee, and it is therefore the business of the court to separate the two offices, in a question like the present, reddendo singula singulis. As executor he was to pay the legacies; as trustee he was the devisee and depository of the legal title for the accomplishment of confidential purposes, with which the office of an executor has no necessary connection. Had not the creation of the two offices in the same person been coupled also in the same clause, there would not have been a doubt of their severance in the contemplation of the testator; the will would have presented the union of distinct rights in the same person which are always treated as if they existed in different persons.'" Mackay v. San Francisco, 128 Cal. 678, 684-685, 61 P. 382, 384.

"Although the persons named in the will as its executors are the same as those to whom the testator directed the property to be distributed in trust for his children, yet the power of sale conferred upon the executors was not given by him to them as trustees, but terminated with their discharge as executors. The fact that the two offices are held successively by the same individuals does not give to them in the exercise of one office the power that had been conferred for the exercise of the other. Their rights and duties as executors were quite distinct from the duties imposed upon them as trustees, and

their powers and duties as trustees did not begin until as executors they had ceased to have any control over the property. * * * "Goad v. Montgomery, 119 Cal. 552, 561, 51 P. 681, 684 (63 Am. St. Rep. 145).

And ordinarily the trustee's duties begin when those of the executor end. Goad v. Montgomery, supra.

"In the absence of any direction in the will, or any evidence in relation thereto, the duties of a trustee named in the will, even though he be the person named therein as executor, would not begin until after the duties of the executor have terminated (see Goad v. Montgomery, 119 Cal. 552 [51 P. 681, 63 Am. St. Rep. 145]); and until he commences to exercise his duties as trustee he is not entitled to compensation therefor." (Italics ours.) Bemmerly v. Woodard, 136 Cal. 326, 331, 68 P. 1017, 1019.

Respondent relies on Estate of Whitney (Cal. App.) 248 P. 754, but the point here involved was not the issue in that case, for on page 758 the court says:

"The next objection relates to the order concerning the compensation of respondent trustees under the will."

And on page 758 we read:

"At the close of the administration of the estate * * * executors, filed their final account and petition for distribution. They filed a waiver of the compensation fixed by the will, and asked for and were given the statutory commissions as executors in lieu thereof. * * * In the order settling the final account it was provided that the sum allowed was for *executor's commissions only*, and was exclusive of such compensation as might thereafter be allowed by the court for such services as might be rendered by the executors as trustees under the terms of the will. No appeal was taken from this order, and it became final. When the *first account of the trustees* as such was heard, they petitioned the court for a reasonable allowance to them as trustees for services rendered in relation to the trust subsequent to the decree of distribution. Appellants herein filed their objection to any order being made for any allowance whatsoever, for the reason that their compensation had been specifically fixed and determined by the will of the deceased, and, under the express provisions of section 2274 of the Civil Code, they were entitled to the sum specified therein, and no more. The court disregarded the objection." (Italics ours.)

[2] In the instant case we are confronted solely with the question whether or not the *executrix* can renounce her compensation under the will and obtain statutory fees, in spite of the provision of the will as hereinbefore set forth.

Certainly, sections 1616 and 1618 (as amended by St. 1925, p. 624) of the Code of Civil Procedure are not meaningless when they provide:

1616. " * * * when the decedent, by his will, makes some other provision for the compensation of his *executor*, that shall be a full com-

pensation for his services, *unless by a written instrument, filed in the court, he renounces all claim for compensation provided for in the will.*"

1618. "The administrator, or executor, when no compensation is provided by the will or he renounces all claim thereto, must be allowed commissions upon the amount of estate accounted for by him, as follows. * * *

Attention is called to the mandatory character of this section. Perhaps, as stated in the Whitney Case, supra, and paraphrased by us, "the payment to her as executrix should be taken into account when she ultimately receives the fees provided for [as trustee]," but with that we have nothing to do and are not deciding here.

Estate of Runyon, 125 Cal. 195, 57 P. 783, does not decide otherwise. There the will provided for a fixed compensation for the executors. Neither of the latter filed a renunciation of his claim for compensation under the will, and the court, at page 197 (57 P. 784) said:

"The amount provided by the will must be taken as the measure of compensation which the testator deemed ample for all services to be rendered in the execution of the trust, and if the executors, either upon assuming their office, or by reason of unexpected circumstances occurring during the course of their administration of the trust, are called upon to perform extraordinary services, they must first renounce the compensation provided by the will before they can be entitled to any allowance for such additional services. The compensation of an executor, whether according to the rates fixed by the statute, or as determined by the testator, is not a gratuity, but is in consideration of the services he may render, and the amount fixed by the statute is deemed ample compensation for the services ordinarily required. If the executor would claim that his services entitle him to a greater compensation than that allowed by the statute, he must first renounce that provided by the will, and the court can then make him such allowance as will fully compensate him. *Unless such renunciation is made*, the provision in the will will be held under section 1616 to be 'full compensation' for his services." (Italics ours.)

Hence we decide that the court erred in disallowing the items of statutory compensation, \$1,458.16, and for special services, \$500. The special services plainly were rendered by appellant as executrix and not as trustee.

[3, 4] Now with reference to the item of \$35. Prior to the amendment of section 1559 of the Code of Civil Procedure in 1921 (St.

1921, p. 210, § 5), the executor or administrator could not bind the estate by a contract for broker's commission for the sale of real estate. The rule is correctly stated in Hickman-Coleman Co. v. Leggett, 10 Cal. App. 29, at pages 31 and 35, 100 P. 1072, 1073, 1074, as follows:

"It is well settled that an executor or administrator cannot create any liability against the estate in his charge by his employment of attorneys, brokers, or others to assist him in the performance of his duties. The attorney, broker, or other person employed has no action or claim against the estate. Whatever claim he has, whether it be absolute or conditional, is against the executor or administrator in his individual capacity, who in turn may, if the expenditure was made in good faith and was proper, be credited therewith in the settlement of his accounts with the estate. (Citing cases.) * * * The amount that might be allowed him in his settlement with the estate did rest with the court. But before the court can fix such amount it is necessary that he as executor ask for such allowance. Whatever allowance is made must be made to the executor, and not to the broker. This is so well established as the law of this state that it is quite unnecessary to cite authorities."

See, also, Estate of Willard, 139 Cal. 501, 506, 73 P. 240, 64 L. R. A. 554; Golden Gate, etc., Co. v. Taylor, 168 Cal. 97, 141 P. 922, 52 L. R. A. (N. S.) 1152, Ann. Cas. 1915D, 742; Eastwood v. Stewart, 64 Cal. App. 617, 222 P. 369, and McKee v. Hunt, 142 Cal. 526, 527, 77 P. 1103. It was therefore incumbent upon the probate court to determine "if the expenditure was made in good faith and was proper." As none of the evidence taken before the trial court appears in the record, we must presume that fact to have been decided adversely to the appellant. "Every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the orders and judgments of the superior court." 2 Cal. Jur. 852, § 499.

That portion of the order disallowing the items of statutory compensation, \$1,458.16, and special services, \$500, is reversed, with instructions to the lower court to allow said items and settle said final account accordingly. That portion of the order disallowing the item of \$35 is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

**LONDON GUARANTEE & ACCIDENT CO.,
Limited, v. INDUSTRIAL ACC. COMMISSION
OF CALIFORNIA et al. (Civ. 5721.)★**

District Court of Appeal, Second District, Division 1, California. Sept. 30, 1927.

Hearing Granted by Supreme Court Nov. 29, 1927.

1. Master and servant §405(1)—That evidence was hearsay and unsatisfactory did not make it insufficient, if believed, as basis for award of compensation (Workmen's Compensation, Insurance and Safety Act, § 60[a]).

Where, in a proceeding under the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831), by a father to recover compensation for injuries resulting from the death of his son, the evidence introduced was hearsay and appeared to be somewhat unsatisfactory and perhaps lacking both in quantity and quality, *held*, that it was sufficient as an award basis, in view of section 60(a) of said act, if believed.

2. Master and servant §388—Father, having estate of \$5,500, held not dependent of son, so as to be entitled to award for son's death (Workmen's Compensation, Insurance and Safety Act, § 14[b]).

Where, in a father's proceeding under the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831), to recover compensation for injuries resulting in the death of his son, the evidence showed that, though the father had been incapacitated for work for several years, he had an estate of approximately \$5,500, consisting of interest-bearing notes and securities, but that he had an obsession of poverty, and his son contributed \$25 per month for his support, *held*, that in view of § 14(b) of said act, the father was not a dependent of the son, so as to be entitled to an award.

Proceeding under the Workmen's Compensation, Insurance and Safety Act by John Murray, claimant, by his guardian ad litem and trustee, Frank X. Murray, for the death of the claimant's son, opposed by the London Guarantee & Accident Company, Limited, insurer. The Industrial Accident Commission of California granted an award, and claimant brings certiorari. Award annulled.

Haas & Dunnigan, H. E. Forster, and H. C. Johnston, all of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

HOUSER, J. In this proceeding petitioner seeks to have reviewed by this court an order of award of compensation made by the respondent Industrial Accident Commission to one John Murray, on account of an injury received by Ralph E. Murray in the course of his employment, which injury resulted in the death of the employee. The petitioner here was the insurer of the employer and John Murray, the beneficiary under the award made by the respondent commission, is the father of the employee.

The only questions suggested by petitioner relate to whether the evidence adduced before the respondent commission was sufficient to establish, first, that the father was a dependent of the son; secondly, that the son devoted any part of his earnings to the use of the father; and, thirdly, that the money, if any, furnished by the son to the father, was actually used by the father for his maintenance and support.

[1] Without attempting to set forth herein the evidence received at the hearing before the respondent commission, it may be stated that from the evidence it substantially appeared either directly or inferentially that for several years preceding the death of the employee his father had been totally incapacitated so far as performing any work was concerned; that, although he had an estate of approximately \$5,500, consisting of interest-bearing notes and securities, there was no cash on hand; that the father led a miserly life, was obsessed of the idea that he had no money or property; and as a matter of fact (arising from such obsession), that he actually required financial assistance for his support; that commencing at about the time when the father became incapacitated for work, and continuously thereafter until the date of the death of the employee, the son sent to his father the sum of \$25 per month.

Although the greater part of the evidence, especially that relating to the contributions made by the son to the father, depended to a large extent upon hearsay evidence, in view of the provisions of section 60(a) of the Workmen's Compensation, Insurance and Safety Act (Stats. 1917, p. 831), and the construction placed thereon by the Supreme Court of this state in the case of State Compensation Insurance Fund v. Industrial Accident Commission, 195 Cal. 174, 181, 182, 231 P. 996, and cases therein cited, to the effect that, in a proceeding before the Industrial Accident Commission for adjustment of compensation, hearsay evidence may be sufficient to establish any fact at issue, in the instant case it follows that although ordinarily speaking the evidence upon which the respondent commission acted in the premises appeared to be somewhat unsatisfactory and perhaps lacking both in quantity and quality, nevertheless, it was legally sufficient, if believed by the respondent commission, to support a conclusion that the son contributed the sum of \$25 per month to the use of his father, and that such money was actually used by the father toward his maintenance and support. Such conclusion, however, does not reach the vital fact as to whether the father was actually a dependent of the son at the time of the son's death. The finding by the respondent commission was to the effect that the father was "partially dependent"; and the question to be determined is whether

there was any substantial evidence by which such finding may be justified. It will be noted that the evidence showed that, although the father led a miserly life, he had an estate of \$5,500, which consisted of interest-bearing securities; that because of the fact that he was incapacitated for work, and that he did not realize that he had such property, he believed himself to be dependent for support upon the son, who sent him \$25 per month, and which sum was used by the father for his maintenance. But let it be supposed that while the father was incapacitated for work and that, so far as he was personally concerned, he believed himself dependent, nevertheless, as a matter of fact, he was worth \$1,000,000: Could it be said that, considering the fact that the son sent the father \$25 per month which was used by the father for his support, a finding of partial dependency of the father would be justified? If not, why in the existing circumstances of this matter should such a finding be held valid? Even assuming that the interest only on the \$5,500 estate of the father were to be used for his support, at the ordinary interest rate of 7 per cent. per annum it would amount to more per month than the father was receiving from the son. But no reason is apparent why the principal of the sum should be held intact, or why, if necessary, a part of it should not be used for the support of the father. True, by successive demands upon the principal, it would eventually become exhausted; but we are not concerned with what might happen in the future. Section 14 of the Workmen's Compensation, Insurance and Safety Act (Stats. 1917, p. 831), after providing for certain cases, contains the following provision:

"(b) In all other cases, questions of entire or partial dependency and questions as to who constitute dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee."

[2] It thus appears that our only interest with reference to the dependency of the father is what the conditions were at the time of the death of the employee. If the father was not then a dependent of the son, the fact that within a year, or within any other given time, the father might become such dependent, is neither of controlling force nor material to the inquiry; nor may a correct conclusion of the question of dependency be affected by the belief of the father in the premises, or by the possibility of the fact that the son was unintentionally deceived in the matter. The determination of the question must necessarily rest upon the facts; and those facts are that at the time of the death of the son the father at least did not require financial assistance for his support.

No evidence having been introduced before

the respondent commission in support of the finding to the effect that the father was "partially dependent" upon the son, but the evidence appearing to the contrary, it follows that the award should be annulled. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

85 Cal. App. 775

PAN-PACIFIC CONST. CO. v. MEADOWS,
Superintendent of Streets. (Civ. 5720.)

District Court of Appeal, Second District, Division 1, California. Oct. 6, 1927.

1. Municipal corporations $\S$ 269(1)—Pier extending from street held "street," within statute authorizing improvements and repairs (Improvement Act 1911, $\S$ 1, 2, as amended by St. 1925, p. 244, and St. 1923, p. 104; $\S$ 79[a], as added by St. 1913, p. 57).

Pier which abutted upon street and which was continuation or extension thereof held a "street" within the meaning of Improvement Act (St. 1911, p. 732) $\S$ 1, 2, as amended by St. 1925, p. 244, and St. 1923, p. 104, and section 79(a), as added by St. 1913, p. 57, authorizing the doing of any work deemed necessary to improve the whole or any portion of any street owned by cities of certain class.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Street.]

2. Municipal corporations $\S$ 293(2)—Contract held valid, though resolution of intention stated work was driving piles for pier and reconstructing landing, whereas specifications required also laying of asphalt surface.

Proceedings leading to award of contract by municipality for repair and improvement of pier held not invalid because resolution of intention provided that work to be done was driving of piles and reconstruction of boat landing, and that all of the work was to be done under a certain specification, whereas the specification set forth additional work of laying an asphaltic surface; the resolution of intention being controlling and the additional work being superfluous.

Application by the Pan-Pacific Construction Company for writ of mandate to be directed to W. F. Meadows, as Superintendent of Streets of the City of Hermosa Beach, to require him to pass upon the sufficiency of certain bonds and to execute a contract for the improvement and repair of a certain pier and boat landing. Writ granted.

Paul S. Honberger and Collamer A. Bridge, both of Los Angeles, for petitioner.

Arthur M. Ellis, of Los Angeles, for respondent.

HOUSER, J. [1] This is a petition for a writ of mandate to be directed to respondent, requiring him in his official capacity as Su-

perintendent of streets of the city of Hermosa Beach to pass upon the sufficiency and form of certain bonds tendered to him by the petitioner herein, and also requiring said respondent to execute a certain contract for the improvement and repair of portions of a designated pier and boat landing located within the said city of Hermosa Beach.

In ordinary circumstances, it is unquestioned that the official duty of the respondent would require the performance by him of each of the things included within the demands of the petitioner herein. But, in the particular circumstances surrounding the transaction which is the basis of this controversy, it is the contention of respondent that the city of Hermosa Beach was without authority or jurisdiction to order the contemplated work or to execute the contract for its performance, and for that reason it became and is no part of the duty of respondent as such official to comply with said demands of petitioner.

By the record herein, it stands as admitted facts that the city of Hermosa Beach is the owner of the Hermosa Beach pier, boat landing, and the lands which they cover; that the pier abuts upon and is a continuation or extension of a street within said city; that an ordinance of intention adopted by the legislative body of said city of Hermosa Beach provided:

That the "ocean end of * * * the pier be repaired and reinforced by the driving of certain piles; that the present boat landing be cut loose from the pier, changed, and reconstructed—all as shown in the plans and specifications hereinafter referred to. * * * That all the foregoing work is fully set forth and delineated in plan No. 2453a, on file in the office of the city engineer, to be done under specification No. 78, on file in the office of the city clerk, to which reference is hereby made for a full and detailed description of said proposed work."

Sections 1, 2, and 79a, of the Improvement Act (Stats. 1911, p. 730, as respectively amended by Stats. 1925, p. 244, Stats. 1923, p. 104, and Stats. 1913, p. 57) authorize the doing of any work which may be deemed necessary to improve the whole or any portion of any street owned by a city of the class of the city of Hermosa Beach.

The solution of the question presented to this court depends primarily upon whether the pier in contemplation of law was a continuation or extension of the street upon which the pier abutted.

It often happens that a street crosses a stream or marshy or overflowed land, and in such case a causeway or bridge (which in no material respect would differ from a pier or a wharf) over such stream or land would constitute a part of the street or highway with which such causeway or bridge connected. The authorities are so numerous to that effect that citation thereof is deemed unnecessary. It is apparent that the test of

whether a structure in the nature of a pier is a street depends primarily upon its location with reference to existing and recognized highways, as well as upon the use to which it is put or is adaptable by the general public.

In *Gould on Waters* (3d Ed.) § 119, it is said:

" * * * The question whether a wharf is public or private depends upon the purpose for which it was built, the uses to which it has been applied, the place where located, and the nature and character of the structure. When a public highway is laid out to navigable waters, its termination is presumed to be a public landing as incident to the highway * * *"—citing authorities.

In the case of *Hafner Manufacturing Co. v. City of St. Louis*, 262 Mo. 621, 172 S. W. 28, it is held that a public wharf may be a "public highway." In ruling upon the question the court said in part:

"It may be taken as acceptable doctrine that a public wharf on a navigable stream, connected, as here, with public streets and in a sense an extension of such streets, is, in the eye of the law, a public highway. Its character is similar. The right to the common use of it in the public is similar, and in a very just sense the rights of the city in, and its duty toward, it are akin to its rights and duties toward its public streets. * * *"

Although in *State v. Cowan*, 29 N. C. 239, 247, it was held that (syllabus) "a wharf, simply as such and not being part of a street, is not a public highway," nevertheless, in the course of the opinion, the following language may be found:

"It is possible the wharf may form part of the street, at its termination; for example, as some are made for ferry landings."

In the case of *City of Buffalo v. Delaware, L. & W. R. Co.*, 190 N. Y. 84, 82 N. E. 513, 16 L. R. A. (N. S.) 506, where many authorities are cited, it is held that, where a private dock is built on a public street on the shore of navigable waters, the dock becomes a part of the street, and the public has a right to travel over it.

In the case of *Frater v. Baylen Street Wharf Co.*, 57 Fla. 63, 49 So. 188, 131 Am. St. Rep. 1084, it appeared that a street as originally platted abutted on the waters of a bay, that thereafter such street was extended into the bay by means of a wharf or pier constructed of wooden piling and planks, and that, as time went by, the wharf extension of the street was filled in with earth and stone and thus converted into solid ground. Touching the main point at issue in the case, in part the court said:

"The contention of the plaintiff below is that the whole extension of said Baylen street, from its original terminus at Main street clear out to the end of its present terminus at deep water is still the wharf of plaintiff, and that it is en-

titled to wharfage upon all goods landed upon said extension from the water at any point south of Main street.

"This contention we cannot sustain. The rule of law is well settled that a public street leading to navigable waters will keep even pace with the extension of the land, whether the change in the land be due to natural causes or to the voluntary act of the owner of the land.—*Mark v. Village of West Troy*, 151 N. Y. 453, 45 N. E. 842; *Dana v. Graddock*, 66 N. H. 593, 32 A. 757; *Hoboken Land & Improvement Co. v. Mayor*, 36 N. J. Law, 540; *People v. Lambier*, 5 Denio (N. Y.) 9 [47 Am. Dec. 273]; *Mayor of Jersey City v. Morris Canal & Banking Co.*, 12 N. J. Eq. 547; *Newark Lime & Cement Co. v. Mayor of Newark*, 15 N. J. Eq. 64; *Gould on Waters* (3d Ed.) § 157."

The case of *Knickerbocker Ice Co. v. Mayor, etc.*, of New York, 85 App. Div. 530, 83 N. Y. S. 469, was similar in its facts to the case just cited, in that a street which abutted on navigable waters was extended into such waters by means of earthen approaches and a pier. In part the court said:

"* * * When the grantee constructed his pier and the approaches thereto, such approaches were made by the continuation of Forty-Second and Forty-Third streets, as laid down upon the map, to the bulkhead line, and further continuation of the same was made by the construction of the pier. It follows, as a necessary result from this state of facts, that this construction was of public streets, as such, and the right of the public therein to use them for all the purposes of a public street attached thereto the moment such construction was made. This right of the public not only attached to the streets so far as they were filled in with earth and extended to the bulkhead line, but the pier likewise, which was projected from such line, became a public highway as a street, subject to the passage and the rights of the public therein, and subject to the right of use by the public as a wharf and highway"—citing authorities.

And so in the case of *Knickerbocker Ice Co. v. Forty-Second St., etc.*, *Ferry R. Co.*, 176 N. Y. 408, 68 N. E. 864, the following language of the court appears:

"* * * The general public has a right of passage over the places where land highways and navigable waters meet; and, when a wharf or bulkhead is built at the end of a land highway and into the adjacent water, the highway is by operation of law extended by the length of the added structure"—citing cases.

See, also, *Gluck v. Ridgewood Ice Co.*, 56 Hun, 642, 9 N. Y. 254.

The ruling in the only California authority to which attention has been directed is in keeping with that indicated in those cases to which reference has been had. Where a street as originally laid out or dedicated extended only to the waters of a bay, and thereafter the land within the extended lines of such street into the bay was filled, or such space enlarged by accretion, it was held,

in the case of *Wood v. City of San Francisco*, 4 Cal. 190, that, after such filling, the street continued to the high water. In the course of the opinion, the court said:

"It is contended that there was no dedication of the space between Front street and the water line of the city, to public uses; and this whole argument is based upon the fact, that, on the official map of the city, by which the legislative grant of beach and water lots was made, said street was not carried out to the front line of the city, while California and other parallel streets were. To my mind this raised no such presumption. Where a city is laid out with streets running to the water, such streets should be held to continue on to the high water, if the city front is afterwards filled in, or the space enlarged by accretion or otherwise. Any other doctrine would be destructive of the interests of commercial communities."

Considering the facts in the instant case, the principle of law as announced in the foregoing cases would seem applicable. It should make no difference that, instead of a fill or a mole being constructed, the street was extended by way of a pier. Hence, if, in line with such authorities the pier in question became a part of the street as thus extended, it would follow that the proposed work came within the provisions of the Improvement Act of 1911 and the amendments thereto which authorized the city of Hermosa Beach to make the improvements and repairs to which reference has been had herein.

[2] However, respondent contends that the proceedings leading up to the awarding of the contract for such improvements were fatally defective in that by the resolution of intention adopted by the legislative body of the city of Hermosa Beach the proposed work was described as the repairing and reinforcing of the pier by the driving of certain piles, and that the boat landing be cut loose from the pier, changed and reconstructed, all as shown in plan No. 2453a, on file in the office of the city engineer, and that such work be done as indicated in specification No. 78, on file in the office of the city clerk, to which reference heretofore has been had herein.

By the resolution of intention it will be noted that it is provided that all the foregoing work is "fully set forth and delineated in plan No. 2453a," and that said work is to be done under specification No. 78. Nothing contained in the resolution of intention indicates that the extent or description of the work is to be shown in any place other than as is "fully set forth" in plan No. 2453a. By referring particularly to the provisions contained in specification No. 78, it may be found that, among other things, the manner generally of laying asphaltic surfaces is indicated, but that neither the resolution of intention nor plan No. 2453a contains either specification, profile, or cross-section for the

doing of the work of the laying of any sheet asphalt on the deck of the pier or elsewhere. It therefore appears that specification No. 78 includes a description of the manner in which certain work, to wit, the laying of an asphaltic surface, not mentioned in either the resolution of intention or in the plan No. 2453a, may be done. The description in specification No. 78 of the specifications for laying an asphaltic surface bore no relation whatsoever to the work expressly mentioned in the resolution of intention, or as referred to in plan No. 2453a. So far as asphaltic surfaces were concerned, they were entirely foreign to the work proposed to be done, either by the resolution of intention or as "fully set forth and described in plan No. 2453a." Had specification No. 78 contained, among other things, a detailed description of the manner of constructing a ten-story building, with the same propriety could it be claimed that, because specification No. 78 provided for the construction of such a building, necessarily the erection of that building became a part of the resolution of intention, as in the instant circumstances to contend that, because the manner of the laying of an asphaltic surface is set forth in specification No. 78, the laying of an asphaltic surface became a part of the resolution of intention. While the specification for the laying of sheet asphalt would have been appropriate had it been called for by the precedent resolution of intention, which included the reference to the plan number, in the circumstances present the description of the manner of laying an asphalt surface was superfluous and unnecessary.

It is clear that in case of any conflict it is the resolution of intention which governs in the premises, rather than any work described in the specifications, which is not included in the resolution of intention. The principle is applied in the case of *Bay Rock Co. v. Bell*, 133 Cal. 150, 65 P. 299, where, among other things, it is held that a resolution of intention, although it sufficiently described the proposed grading and macadamizing of a street and contained a reference to specifications as to proposed culverts, macadamizing, and crosswalks, yet which neither intelligently described nor referred to the specifications for any description of the materials for proposed curbs and gutters, could not be rendered valid by any details of construction contained within the specifications; and that the resolution of intention, which provided specifically only that the macadamizing, culverts, and crosswalks should be constructed in accordance with "the special specifications adopted for said work," must be presumed to have intentionally omitted any such direction as to curbs and gutters.

It is therefore concluded that, so far as is disclosed by the record herein, the proceedings leading up to the awarding of the

contract in question were in all respects valid, and that it became and was the duty of respondent, as street superintendent of the city of Hermosa Beach, to execute said contract and to pass upon the sufficiency and form of the bonds tendered to him by the petitioner herein in connection with the execution of said contract.

Let the writ issue as prayed.

We concur: CONREY, P. J., YORK, J.

85 Cal. App. 757

MILLER et ux. v. REIDY. (Civ. 5580; La. 9667.)★

District Court of Appeal, Second District, Division 2, California. Oct. 4, 1927.

Rehearing Denied Nov. 2, 1927. Hearing Denied by Supreme Court Dec. 1, 1927.

1. Landlord and tenant ⇨103(1)—Lessor claiming forfeiture must have closed every avenue of escape to lessee.

Where a lessor claims a forfeiture under a lease, he must have closed every avenue of escape to lessee, since courts do not favor forfeitures.

2. Contracts ⇨318—Courts avoid enforcing forfeitures wherever possible.

Courts do not favor covenants for forfeiture and will avoid enforcing them wherever possible.

3. Landlord and tenant ⇨103(1)—In construing provisions for forfeiture in lease, parties are presumed to have intended to limit application as narrowly as language will permit.

In construing the provisions of a lease providing for forfeiture in case of breach, court will give full weight to the presumption that it was the intent of the parties to limit the application of the forfeiture provisions as narrowly as the language used will permit.

4. Landlord and tenant ⇨104—Covenant in lease against assignment without lessor's written consent held personal where lease provided for forfeiture for breach.

Where a lease provided that, in case of a breach of a covenant against assignment without the lessor's written consent, the lessor might at his option claim a forfeiture of the lease, covenant held personal, binding on the lessee only, and not running with the land so as to be enforceable against the assignee of lessee's assignee.

5. Landlord and tenant ⇨76(3)—Assignee of lessee's assignee held not "successor or assign" of lessee, within lease provisions prohibiting lessee's successors or assigns assigning lease without lessor's written consent and providing for forfeiture.

Assignee of lessee's assignee held not "successor or assign" of the lessee, within the provisions of a lease that terms of lease should be binding upon the successor or assigns of the lessee, which would include provisions prohibiting the assignment of the lease without the lessor's written consent, and providing for forfeiture in case of breach.

6. Landlord and tenant ⇨76(3)—Inhibition against assigning lease without lessor's consent binds subsequent assignees only when lease specifically so provides, or when consent to each assignment is so qualified.

Provision in a lease against assigning the lease without lessor's written consent does not bind subsequent assignees unless the lease itself specifically so provides, or unless the lessor gives a qualified consent to each assignment making such inhibition binding upon each subsequent assignee.

7. Landlord and tenant ⇨112(2)—Lessor waived right to forfeiture for assignment of lease without his consent by accepting rent, notwithstanding qualified receipts.

Where lessor continued to accept rent after the assignee of lessee's assignee had assigned the lease without lessor's consent, which was alleged to be breach of lease, *held*, that he waived any right to forfeiture which the alleged breach might have given, notwithstanding that in accepting rent he executed receipts reciting that the acceptance was without prejudice to his rights.

8. Landlord and tenant ⇨112(1)—Waiver of breach of lease is question of intention.

Whether the lessor waives a breach of a lease is a question of intention.

9. Landlord and tenant ⇨291(9)—In action for unlawful detainer, pleading in answer facts constituting waiver by lessor of rights to forfeiture held sufficient pleading of waiver.

In lessor's action for unlawful detainer against the assignee of the original lessee's assignee, defendant's pleading in answer facts which would constitute a waiver by the lessor of any rights he might have to forfeiture *held* sufficient pleading of waiver.

Appeal from Superior Court, Los Angeles County; Franklin A. Griffin, Judge.

Action in unlawful detainer by J. T. Miller and wife against P. M. Reidy. Judgment for defendant, and plaintiffs appeal. Affirmed. See, also, 260 P. 361.

E. J. Miller and Leland S. Bower, both of Los Angeles, for appellants.

I. Henry Harris, of Los Angeles, for respondent.

CRAIG, Acting P. J. At all the times herein mentioned Dr. J. T. Miller and his wife, Hulda S. Miller, have been the owners of real property situated at 1140 to 1142 South Figueroa street, Los Angeles, and the business building thereon. They leased the premises to one Rutledge, doing business under the name of Rutledge Motor Company. By the provisions of the lease the latter's tenancy began on the 1st day of February, 1920, and continued for a term of 5 years. It was stipulated in the lease:

"That the lessee shall not assign the lease nor sublet any or all of the demised premises without the written consent of the lessor first had and obtained, and any attempt so to do shall be void and confirm no rights on any third

party; * * * that should the lessee default in any of the covenants or violate any of the provisions thereof, the lessor at his option may re-enter and take possession of the premises and remove all persons and property therefrom. Before lessor retakes possession of said premises, he shall give lessee 3 days' written notice within which time lessee may cure such default. Upon taking possession as above stated, lessor may either terminate the lease and recover from the lessee all damages resulting from lessee's breach of the lease, or the lessor may relet the whole or any part of the premises on such terms and conditions as he may with reasonable diligence obtain, and the lessee shall be liable for any deficiency in rent," etc.

Also:

"Provided the lessee shall have faithfully performed all of said obligations in the manner herein provided, upon the delivery of said premises to the lessor, said lessor shall return said sum to the lessee; or said lessor may at his option apply said sum or any part thereof remaining in his hands to the credit of the lessee on account of any rent coming due hereunder."

Rutledge made the deposit of \$2,000 required by the lease. Later, with the written consent of the lessors, he assigned his interest in that conveyance to one Buxton, who, on February 10, 1922, also with written consent of the lessors, assigned the same to P. M. Reidy. In October, 1922, Reidy, without the consent, written or otherwise, of the lessors, assigned his interest to the Los Angeles Haynes Company. Immediately thereafter the lessors notified Reidy that he had violated the terms of the lease by subletting without their written consent. The notice also demanded that Reidy cause the Los Angeles Haynes Company to remove from the premises or return possession to the lessors. Reidy did neither. However, he continued to pay rent in advance, which the lessors accepted, but upon each occasion J. T. Miller gave a receipt which included a statement that in receiving the money such receipt should be "without prejudice to any of my rights under the lease of said premises." The next action taken which requires mention was on October 24th, when the lessors served a second notice on the respondent herein, similar in import to the first. Again the latter made no move to comply with the requirements of the notice. Then the lessors instituted an action in unlawful detainer, and, in addition to asking for possession, prayed judgment for recovery of the reasonable rental value of the premises, which was alleged to be \$250 per month since October 1, 1922. After a trial judgment was rendered for the defendant, Reidy. This was, presumably, conformable to the defenses contained in the answer and to the findings of the court, in effect as follows: That although the plaintiffs did not file their consent in writing to the assignment of the lease by Reidy to the Los Angeles Haynes Company, nevertheless they had given such written con-

sent to two prior assignments, and "did not in any wise or at all reserve or impose any condition, covenant, or obligation against the further assignment thereof"; that the lessors accepted rent from Reidy with full knowledge that he had assigned the lease. In other words, the trial court found that by accepting the rent with knowledge of the breaches of covenants of the lease by Reidy, the lessors had waived the provision requiring their written consent to validate an assignment, and also that by giving consent to the two prior assignments without further reservation in that regard, they had exhausted their right to require written consent to any subsequent assignment thereof. It was further found that Reidy had not unlawfully retained possession of the leased premises, that the value of the rents and profits of the property was not in excess of \$300 per month, and that it was unnecessary for plaintiffs to employ attorneys to prosecute the action.

[1-4] Appellants argue that the trial court was wrong in holding that the stipulations of the lease that it should not be assigned without written consent of the lessors was exhausted by such consent being given to the assignments from Rutledge to Buxton and from Buxton to Reidy. He who claims a forfeiture must have closed every avenue of escape to his opponent. Mindful that the law provides other remedies more consonant with justice, courts avoid enforcing covenants for forfeiture wherever possible. Such agreements are rarely tolerated. *Spangler v. Spangler*, 11 Cal. App. 321, 104 P. 995. Therefore, in construing provisions of the lease relied upon by appellants, we give full weight to the presumption that it was the intent of the parties to limit its application as narrowly as the language used would permit. The covenant that "the lessee shall not assign or hypothecate this lease or the leasehold estate nor sublet any or all of the demised premises, without the written consent of the lessor first obtained," is personal, binding upon the lessee only, and not one running with the land.

[5] In another paragraph of the lease it is stipulated that:

"Each and all of the provisions hereof shall be binding upon * * * the successor or assigns of the lessee if any assignment be made with the consent in writing of the lessor."

This provision does not extend the covenant against assignment so as to include Reidy's assignment to the Haynes Company. The contract forbade the "successor or assigns of the lessee" assigning without license. The Los Angeles Haynes Company is neither a "successor" nor one of the "assigns" of Buxton. Not only a strict but a fair construction of this language leaves the lease in the hands of Reidy, free from the forfeiture clause as affecting the right of assignment. *German-American Sav. Bank v. Gollmer*, 155 Cal. 633, 102 P. 932, 24 L. R. A.

(N. S.) 1066; *Randol v. Tatum*, 98 Cal. 390, 33 P. 433; *Chipman v. Emeric*, 5 Cal. 49, 63 Am. Dec. 80, and for a case almost on all fours with the instant one, see *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 112 S. E. 512.

[6] The only manner in which the inhibition may be made binding upon subsequent assignees is by appropriate language in the lease itself or by a qualified consent to each assignment. *Rothrock v. Sanborn*, 178 Cal. 693, 174 P. 314.

[7, 8] On the other branch of the appeal we have no difficulty in upholding the judgment of the trial court. If the assignment were to be regarded as a breach of the lease, the evidence is sufficient to support the finding that the right to take advantage of such breach was waived by the lessors. It is true that in accepting each month's rent from Reidy, Dr. Miller executed a receipt in the following language:

"Received from P. M. Reidy \$300 for rent of premises at 1140 So. Figueroa St., for the month of [inserting date] without prejudice to any of my rights under the lease of said premises."

This was a clear attempt to eat the cake and still keep it. His actions belie his words. Waiver is a question of intention. *Alden v. Mayfield*, 164 Cal. 6, 127 P. 45; *Jones v. Della Maria*, 48 Cal. App. 171, 191 P. 943; *Myers v. Herskowitz*, 33 Cal. App. 581, 165 P. 1031. For the lessors month after month to accept rents specified in the lease, and at the same time declare that there was a forfeiture, results in an irreconcilable inconsistency. Dr. Miller knew that Reidy assigned or sublet to the Haynes Company as early as October 17, 1922, when appellants served the first notice above mentioned. This was two years before suit was filed, and he accepted rent from Reidy even after that time. The very words of the receipt given by Dr. Miller compel the conclusion that when each one was signed he regarded the lease as still in force. Each of these instruments declares that the lessors yet maintain all "rights under the lease of said premises." If an unauthorized assignment had been made, the lessors had the right to declare the term at an end, or they could have waived the breach and let the lease continue. Nowhere within that agreement, nor in the law, is there a stipulation or provision that they might do both. The trial court found against appellants on the issue of waiver, and we are satisfied that their conduct was such as to justify that finding.

[9] But appellants assert that one relying upon a waiver must plead it, and that "a recovery cannot be had on evidence of waiver of conditions where the complaint states preformance of the conditions." There is no merit in this claim, for, assuming the legal premise to be correct as a rule of pleading, the answer pleads facts which the

trial court found to be true, and which it is clear were held by that court to constitute a waiver of the provisions of the lease involved in this suit. In that behalf it is alleged in the respondent's answer that at the time of the transfer of Reidy's interest to the Los Angeles Haynes Company the lessors knew of that transfer, and saw said company enter possession of the premises, and remain there; also that "every month commencing in October, 1922, to October, 1924, prior to the commencement of the action, the plaintiffs have accepted the sum of \$300 monthly as rental for said premises under said lease."

In view of the foregoing, other points discussed by appellants do not require consideration.

The judgment is affirmed.

We concur: THOMPSON, J.; COLLIER, Justice pro tem.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a hearing in this court is denied. The judgment appears to have been properly affirmed for the reasons set forth in the discussion of the second branch of the appeal. We are not to be understood as approving or disapproving what is said elsewhere in the opinion concerning the covenant against assignment contained in the lease.

85 Cal. App. 764

REIDY v. MILLER et ux. (Civ. 5581.)★

District Court of Appeal, Second District, Division 2, California. Oct 4, 1927.

Rehearing Denied Nov. 2, 1927. Hearing Denied by Supreme Court Dec. 1, 1927.

1. Pleading ⇨129(2)—In action for deposit made by lessee, lessor's failure to deny plaintiff's allegation of assignment to him held to admit allegation.

In action to recover deposit made by lessee as security for performance of lease, lessor's failure to deny plaintiff's allegation that lessee's assignee had assigned rights to the deposit to him held to constitute admission of such assignment, and hence trial court properly accepted the allegation as true.

2. Appeal and error ⇨837(2)—Findings in companion case, not consolidated for trial, cannot be considered findings as to both cases on appeal.

Findings in case which, by stipulation, was made companion case on appeal, but had not been consolidated for purposes of trial, cannot be considered findings as to both cases.

3. Landlord and tenant ⇨184(2)—Substantial compliance with terms of lease held sufficient to entitle assignee to recover lessee's deposit with lessor securing performance of lease.

Substantial compliance with the terms of a lease, there having been only very minor damages amounting to \$173.20, held sufficient to en-

title assignee to recover lessee's deposit, amounting with interest to \$2,420, which was deposited with the lessor as security for the faithful performance of the lease.

4. Landlord and tenant ⇨184(2)—Equity does not favor forfeiture of money deposited as security for performance of lease.

Courts of equity do not favor forfeiture of money deposited by lessee with lessor as security for the faithful performance of the terms of the lease.

5. Landlord and tenant ⇨184(2)—Assignee of lease and lessee's deposit securing performance of lease held not to lose right to recover deposit by assigning lease.

Assignee of lease and also of lessee's deposit made with lessor to secure performance of terms of lease held not to lose his right to recover the deposit by assigning the lease to another party; there being nothing in the assignment containing any reference to lessee's deposit with the lessor.

6. Landlord and tenant ⇨184(2)—Assignor's agreement with his assignee for deposit securing performance of lease held no evidence of assignment of assignor's rights to original lessee's deposit with lessor.

Where the assignee of a lease, and also of rights to a deposit made by the lessee to the lessor to secure performance of the lease, assigned the lease, an agreement with his assignee for a deposit securing performance of the lease and to be applied in payment of rent held no evidence of an assignment of rights to the lessee's deposit with the lessor.

7. Trial ⇨396(5)—Conclusion of witness that lessee took possession when lease was written and that lease went into effect on certain date held no basis for finding as to date of lessee's possession.

In action to recover deposit from lessor deposited as security for performance of lease, statement of witness that the lessee took possession when the lease was written and that the lease went into effect on a certain date held a mere conclusion which could not be made the basis for a finding as to the date on which the lessee took possession.

8. Interest ⇨36(1)—Court's allowance of 7 per cent. interest on deposit securing performance of lease held error where contract stipulated for 4 per cent. only (Civ. Code, § 3289).

Under Civ. Code, § 3289, in action to recover deposit with lessor to secure performance of lease, where plaintiff had judgment, court's allowance of 7 per cent. interest held error where the lease agreement stipulated that the money on deposit should bear interest at 4 per cent. only.

Appeal from Superior Court, Los Angeles County; Franklin A. Griffin, Judge.

Action for money by P. M. Reidy against J. T. Miller and wife. Judgment for plaintiff, and defendants appeal. Modified, and, as modified, affirmed.

Leland S. Bower and E. J. Miller, both of Los Angeles, for appellants.

I. Henry Harris, of Los Angeles, for respondent.

CRAIG, Acting P. J. This is a suit concerning the same transaction as *Miller v. Reidy* (No. 5580), reported in (Cal. App.) 260 P. 358. Only a few facts need be here mentioned in addition to those stated in the opinion in that case. In this action Reidy filed a complaint in which he sought to recover \$2,000, with interest, deposited with the lessors by the original lessee, Rutledge, as security for the faithful performance of the lease. After trial by the court without a jury judgment as prayed was entered for the plaintiff, and the defendants appeal therefrom. A number of grounds are advanced as reasons for reversal.

[1] The assignment of his interest in the lease by Reidy to the Los Angeles Haynes Company did not constitute a breach of the covenant against assignment. *Miller v. Reidy*, supra. Appellants are not in a position to question the assignment to Reidy of the deposit money in dispute, since the amended complaint alleges such assignment to have been made, and the answer thereto makes no denial of that allegation; hence the trial court properly accepted it as true.

[2] Appellants devote much of their briefs to argument that since the complaint alleges performance by the lessee, recovery must be had if at all upon proof of such performance and that findings in favor of the plaintiff and respondent to the effect that the latter had broken a covenant of the lease, but that such breach had been waived by the lessors was unauthorized by law and erroneous. The simple answer to this contention is that the court made no such findings. In *Miller v. Reidy*, supra, findings of this nature were made, but, as appellants point out, in another part of their brief, these cases were not consolidated for the purposes of trial, but, by stipulation, are merely companion cases upon appeal.

[3, 4] What the court did find in the instant case was that all the terms and conditions of the lease had been performed by the lessees and their assigns except that they did not pay rent after the 1st day of January, 1925, but remained in possession until and including the 3d day of January, 1925, and that the respondent should reimburse appellants for damages suffered to the premises in the sum of \$173.20. This was a finding of substantial performance of the terms of the contract by the lessees and their assignees. The purpose of the deposit of \$2,000 made by Rutledge was that it should be "security for the payment of rent and the faithful performance by the lessee of each and all of the obligations herein undertaken by him." Such a stipulation does not warrant the stand of the lessors herein that the slightest default upon the part of the lessees will preclude them from receiving the balance of the money on

deposit after deduction of a sum sufficient to fully compensate the lessors for all damage resulting from the default. In contemplation of the fact that the trial court found that the full damage resulting to the lessors amounted to but \$173.20, appellants insist that they may retain the entire fund of \$2,420, principal and interest, unless respondent is able to show complete compliance with every term and condition of the lease and that such necessity is a condition precedent which has not been met by respondent. Under the circumstances above stated, the findings of the trial court are sustained by evidence and its adjustment of the matter is justified by principles both of equity and of law. It is in accord both with the fair interpretation of the contract as written and with the equitable aversion to the decreeing of a forfeiture, which would result if the lessors' exaction in this behalf were upheld.

[5] Appellants insist that Reidy has no standing in this action because he either never received an assignment of the right to recover the deposit in question, or, if he did, that he has assigned it to the Los Angeles Haynes Company. As we have pointed out, by failure to make denial it was admitted that Reidy received an assignment of the \$2,000 fund from Buxton. In supporting the alternative position appellants cite a number of cases to the effect that "plaintiff, having parted with his interest in the lease, is not damaged," none of which pertain in any way to the point under discussion. For instance, *McAllister v. Clement*, 75 Cal. 182, 16 P. 775, involved a suit for damages for alleged failure of a notary public to attach his certificate to a document acknowledged before him. *Bowman v. Wohlke*, 166 Cal. 121, 135 P. 37, Ann. Cas. 1915B, 1011, was an action for damages based upon an asserted conspiracy. In neither of these cases was any kind of assignment mentioned, nor are the other decisions referred to on this phase of the appeal at all in point. It appears to be a fact that the assignment by Reidy to the Los Angeles Haynes Company contained no reference to the deposit with the Millers. It purported to be merely an assignment of the lease. Under these circumstances, Reidy retained the right to recover the money. *Pike v. Psibogios*, 68 Cal. App. 145, 228 P. 722. In so concluding and adjudging we think the trial court committed no error.

[6] Appellants claim that other evidence offered by respondent shows that he had assigned his interest to the Los Angeles Haynes Company. The evidence to which reference is made is the agreement between Reidy and the company by which the latter was to pay the former \$5,000 in cash, \$2,000 of which was to be held as security for carrying out the terms of the lease, and finally to be applied in payment of the rent for the last 4 months of the lease, at the stipulated rate of \$500 per month. There is nothing to connect

this agreement with the contract of the Millers. It is mere conjecture to say that the parties had that deposit in mind, and to so hold would require that we read into the contract between Reidy and the company an entire provision not contained therein.

[7] Appellants insist that the term of the lease did not begin until February 1, 1920, and that, therefore rent, should have been paid for the entire month of January, 1925. The lease provides that the term shall be for 5 years from January 1, 1920, or as soon thereafter as possession might be had. The trial court found that possession was surrendered to the lessors January 3, 1925. We are referred to a statement by the witness Miller, who was asked when the lessee took possession. However, he did not answer the question, but instead said:

"When this was written, and it went into effect when the building was completed, February 1, 1922."

Later he corrected the statement to make the year indicated 1920. The answer just quoted was a conclusion of the witness and was flatly contradictory. It surely cannot be used as a basis for a finding, and we are referred to no other testimony as to the exact date on which possession was taken by the lessee.

[8] In one contention appellants are correct. The trial court allowed interest at the rate of 7 per cent. from the 3d day of January, 1925, until August 16, 1926, the date of the entry of judgment. The lease agreement stipulated that the money on deposit should bear interest at the rate of 4 per cent. per annum. This rate of interest should have been continued until judgment. Civ. Code, § 3289.

It is ordered that the judgment be modified as indicated in this regard, and as so modified it is affirmed.

We concur: THOMPSON, J.; COLLIER, Justice pro tem.

PEOPLE v. LEIN. (Cr. 1548.)★

District Court of Appeal, Second District, Division 2, California. Oct. 1, 1927.

Hearing Granted by Supreme Court Nov. 28, 1927.

1. Criminal law ☞507(1)—Possession of intoxicating liquor by purchaser held not to make him accomplice of seller prosecuted for possession.

In prosecution for possession of intoxicating liquor, possession of alleged purchaser in changing whisky from large containers into smaller ones and loading them into his automobile did not make him accomplice of alleged seller, requiring his testimony to be corroborated.

2. Fines ☞12—Judgment of imprisonment on failure to pay fine for possession of liquor for not more than six months held void only as to imprisonment beyond 90 days (Pen. Code, § 1205; National Prohibition Act [27 USCA § 46]).

Under Pen. Code, § 1205, providing that imprisonment on failure to pay fine imposed by superior court shall not be beyond term for which defendant might be sentenced to imprisonment for offense of which he was convicted, on conviction for possession of intoxicating liquor judgment fining defendant \$1,000, and, on failure to pay, imprisoning him one day for each \$2 of fine, not to exceed six months, under National Prohibition Act, tit. 2, § 29 (27 USCA § 46), making imprisonment for such offense 90 days, was void, only as to imprisonment in excess of 90 days.

3. Criminal law ☞1036(8)—Appellate court should determine sufficiency of evidence to support conviction, even if it is not challenged.

On conviction, though appellant only attacks sufficiency of evidence to corroborate alleged accomplice, court should determine whether verdict was contrary to evidence, regardless of failure to challenge it in such respect.

4. Criminal law ☞419, 420(10)—Statements by witnesses to deputy sheriff that they thought some one had hi-jacked defendant out of some whisky or money held hearsay.

In prosecution for possession of intoxicating liquor, where defendant had been shot, statement of parties to deputy sheriff that they thought defendant had been hi-jacked out of some whisky or money, based on fact that they heard somebody say something about hi-jacking some whisky, was hearsay and valueless as evidence.

5. Criminal law ☞555—Testimony of prosecuting witness, perjurer and bootlegger, held insufficient to support conviction in liquor prosecution.

In prosecution for possession of intoxicating liquor, uncorroborated testimony of prosecuting witness, a self-confessed bootlegger and perjurer, held insufficient to sustain verdict of guilty.

6. Criminal law ☞1159(2)—Though appellate court will not interfere with verdict supported by substantial evidence, verdict supported by no substantial evidence should not be allowed to stand.

Though, if any substantial testimony supports verdict, appellate tribunal will not interfere therewith, verdict supported by no substantial evidence should not be allowed to stand.

7. Criminal law ☞553—Ordinarily, credence given testimony is largely determined by witness' appearance, manner of testifying, inflection of voice, readiness of response, and other things indicating sincerity or insincerity.

Ordinarily, credence to be given witness' testimony is largely determined by witness' appearance, manner of testifying, inflection of voice, readiness of response, and manifold actions indicating sincerity or insincerity.

Appeal from Superior Court, Riverside County; Wm. H. Ellis, Judge.

H. N. Lein was convicted of the possession of intoxicating liquor, and he appeals. Reversed.

Fred L. Hamblin, of Riverside, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Dep. Atty. Gen., and John D. Richer, of Los Angeles, for the People.

THOMPSON, J. The defendant was charged by information with the offense of having possession of intoxicating liquor containing alcohol in excess of one-half of 1 per cent. for beverage purposes, and was also charged with a prior conviction of the same offense, to which prior conviction he pleaded guilty. By verdict of the jury he was found guilty of possession, and the court, by judgment upon the verdict, imposed a fine of \$1,000, and, upon failure to pay the fine ordered the defendant to be confined in the Riverside county jail, receiving a credit of \$2 per day for each day's confinement, and that he be not confined under any circumstances for more than a period of six months. The defendant appeals from the judgment.

The testimony in the case is so unusual that it seems expedient and necessary to set it forth with considerable detail. The prosecuting witness, who, by his own sworn statement, had been engaged in the illicit and forbidden business colloquially termed "bootlegging," and who also admitted that at the preliminary hearing he had testified falsely concerning material matters, testified that he met the defendant on the streets of Blythe in the afternoon of January 23, 1927, and asked him if he had some whisky for sale; that defendant said he had, whereupon the witness said he "would come out to the house and talk it over"; that shortly after 8 o'clock in the evening, he and a Mr. Babcock went out to the defendant's house about two miles west of Blythe, where in the presence of the defendant, his wife, two sons, and a Mr. Haynes, he entered into a bargain to purchase from the defendant 50 gallons of whisky and to return for it about 1 o'clock the next morning on January 24, 1927; that near that time he returned with a Mr. Rye, went out into a cotton patch near the house, and got 25 gallons of whisky, which was then contained in two kegs, and took it into the house, where there were already 5 gallons; that by test with an alcohol hydrometer the liquor appeared to be 102½ (presumably 102½ proof); that after taking these two kegs into the house there were 30 gallons there, the 25 which they had taken in and 5 gallons already there; that he knew it was whisky in the house, because they drank some of the liquor while they were there; that the defendant transferred one container of 12 gallons into 10-gallon containers; that they then

loaded into the witness' car two 10-gallon kegs, three 5-gallon kegs and one 15, which he transported to Mr. Rye's ranch near El Centro and hid in a tin container. On cross-examination the witness testified that the two containers in the cotton patch were 25 and 15 gallons in capacity; that the three 5-gallon kegs "came from outside some place"; that the time he drank the whisky at the defendant's house was on the occasion of the first visit; that he had had nothing to drink between that time until after he came back, and that he was perfectly sober; that he had been down there the week before and had been held up; that he was pretty sore about being held up; that when he saw a shotgun which had been brought to the defendant by one of his sons in response to a demand therefor, at the time they were loading up the whisky, he knocked the defendant down, and as he ran he shot, jumped on the car driven by Mr. Rye, and rode away.

The defense witnesses, consisting of John W. Haynes, the defendant, Mrs. Lein, and the two sons of defendant of the age of 17 and 19 years, told in many material respects the same story concerning the happening at about the hour of 1:30 on the morning of the 24th. They all testified that there was no liquor around the place to their knowledge and they heard no bargaining for liquor; that the house referred to was a temporary affair about 14x16; that they were all sleeping inside, and that about 1:30 somebody knocked on the door and asked for water for their automobile, and was told by the defendant that there was a pump near the front of the house; that a few minutes later some one again asked for a tire pump, whereupon the defendant dressed himself and went out; that shortly thereafter he yelled for the shotgun; some shots were fired within three or four minutes after the defendant went out, and defendant was shot in the leg; that as soon as the wound was dressed Mr. Haynes and the younger son, Raymond, went after a doctor and also the police. The defendant, Mrs. Lein, and Mr. Haynes all testified that on the occasion of the first visit of the prosecuting witness Trivet and a Mr. Babcock nothing was said concerning the purchase of liquor; that the two sons were attending a picture show; that no liquor was drunk nor in sight, but that, on account of their acquaintance with Mr. Babcock, Mr. Trivet and Babcock had dinner with them. Raymond Lein also testified that when he heard his father call for the shotgun he jumped out of bed and took the gun toward his father; that he saw that Trivet had a gun pointed at his father; that as he ran out Trivet turned the gun on him, and with a vulgar epithet, not necessary to repeat here, said "Get away from here;" that he dropped the gun; that as Trivet turned the gun from his father the latter grabbed Trivet and as he did so Trivet shot his father

and turned and ran toward the automobile; that his father told him that "they [Trivet and Rye] told me they had hi-jacked some whisky and wanted some money." The defendant corroborated the son in all of this testimony and added that, when in response to Trivet's request for \$50 he stated that he did not have that sum, Trivet said, drawing his gun, "You s— of a b—, you have got it, and you want to dig it up;" that it was then he yelled for the shotgun. Mr. Haynes and Raymond Lein also agreed in their testimony that, when they started after the officers and the doctor, the keys had been taken out of two automobiles belonging to them, and that they had to turn the ignition switch with a jackknife to start one of the cars; that they went directly to the residence of Ben F. White, constable and deputy sheriff, and told him that the defendant had been shot; that Mr. Haynes told White what had happened; and that he thought "they had hi-jacked" the defendant "out of some whisky or money." Haynes explained this latter statement by saying that, while he had not seen any whisky, he had heard somebody say something about hi-jacking some whisky, and that he thought it was Mr. Lein's until he heard the defendant tell Mr. White that he had no whisky there. The testimony of Raymond Lein and his father concerning the fight is further corroborated in important details by Mrs. Lein and the son William Lein. The officers testified that they found a 15-gallon and a 10-gallon keg of whisky in a tin container on Rye's ranch about five miles south of Holtville on the morning of January 24th, and Mr. White, the deputy sheriff, testified that, when Raymond and Mr. Haynes came out to get his assistance, Raymond said, "They stole my daddy's whisky and shot him," and that Haynes was very anxious to catch the offenders, saying "I don't care if we have to pay a little fine;" that he and Mr. Munger went to the defendant's home, and that there the defendant gave him the same explanation concerning the fight as was testified to by him; that he investigated the place and found evidences of a scuffle and a part of Mr. Lein's glasses on the ground.

[1] The appellant maintains that, assuming that defendant had possession of intoxicating liquors and that Trivet and he changed the whisky from the larger containers into the smaller ones and loaded them into the automobile belonging to Trivet, Trivet was an accomplice in the eyes of the law, and that there was not sufficient testimony without the testimony of the accomplice to connect the defendant with the offense. This argument, however, is concluded by the case of *People v. Galli*, 68 Cal. App. 682, 230 P. 20, and the cases therein cited, wherein it is held that, though the possession of the purchaser is similar to the offense of possession by the seller, yet similarity of offenses is not the same as

identity of offenses and that "a purchaser of intoxicating liquors is not guilty of inciting, aiding, or abetting, counseling, or procuring the sale thereof to himself."

[2] The defendant also maintains that the judgment is void for the reason that it provides that upon failure to pay the fine of \$1,000 he be confined in the county jail, receiving a credit of \$2 per day for each day's confinement, but that he be not confined for more than six months. The invalidity, he says, arises from the fact that the maximum imprisonment for the offense of which defendant was convicted provided in title 2, § 29, of the National Prohibition Act (Fed. Stats. Ann. 1919 Supp. p. 215 [27 USCA § 46], is 90 days. Section 1205 of the Penal Code, relating to imprisonment for the purpose of satisfying a fine imposed by the superior court, provides that the confinement shall not "extend in any case beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted." Therefore, as was held in the case of *People v. Cencevich*, 64 Cal. App. 39-45, 220 P. 448, 450, "the judgment * * * is void to the extent that it directs imprisonment beyond the period of 90 days." That does not mean, however, as counsel contends, that the entire judgment is void. It will be observed that in the case just cited and relied upon by appellant the judgment of the trial court was modified to conform to the law announced, and, as thus modified, was affirmed. As further authority for the proposition that the pronouncement of an erroneous judgment would not necessarily be sufficient grounds for a reversal, but rather an informality to be otherwise corrected, see *People v. McNeet* (Cal. App.) 251 P. 688.

[3-5] The appellant does not argue the sufficiency of the evidence to support the verdict in the event that Trivet might not be held to be an accomplice. For what reason he fails in this regard is hard to understand, unless it be that his assumption that he was an accomplice was so all persuasive to his own mind as to cause him to lose sight of the most unsatisfactory state of the record. He merely asserts that the verdict was contrary to law and the evidence and presents a sufficient résumé of the evidence to show that the witness Trivet was not corroborated and to indicate that the evidence might not be sufficient, which indication is borne out by a reading of the testimony. Under these circumstances and the paramount duty incumbent upon all courts to exercise their power to the end that no one shall receive unjust treatment, we are under the compulsion of determining whether the verdict is contrary to the evidence. It needs no citation of authority for the assertion that the statements made by the witnesses Haynes and Raymond Lein to Deputy Sheriff White were pure hearsay and were entirely valueless as evidence. Sub-

tracting these statements from the transcript, the defendant was convicted upon the uncorroborated testimony of a self-confessed "bootlegger" and perjurer. There is nothing in the story he related from the witness chair to commend it as a truthful version of the affair; in fact, it is conflicting and improbable. At first he was specific concerning 25 gallons of liquor contained in two kegs which when brought into the house where there was already 5 gallons made 30 gallons. Later these two kegs became 40 gallons of 25 gallons and 15 gallons, respectively. At first he testified in an apparent effort to demonstrate that it was liquor held in contravention of the law; that they drank some of the 5 gallons in the early morning hours, and subsequently discovering, in his own mind, that this would not hang together, changed the drinking time to 8 in the evening before. His account of the shooting is incredible and improbable. The liquor was loaded into the automobile which was some distance from the house and he says that when the defendant yelled for his gun he started to run and shoot. Somebody had to bring the gun and according to the witness the automobile was under way. There was no occasion for him to shoot. All that he had to do to make his escape was merely to run. Furthermore, no reason is assigned by Trivet why the defendant should have called for a gun. On the other hand, it is hardly probable that, had the defendant and his family been implicated in a sale of 50 gallons of liquor, they would have immediately called in a deputy sheriff. Their version of the shooting is logical and probable. In unadulterated English the witness Trivet attempted a "holdup," to which the defendant would not submit. Even though the statements made by the witness himself and Raymond Lein to Officer White are valueless as evidence, nevertheless, it is fitting to observe that these statements may easily have resulted from the defendant's statement that Trivet and Rye "had hi-jacked some whisky and wanted some money." The idea back of the testimony of the defendant can be gained from a portion of the testimony of the witness at the preliminary hearing, as follows:

"Judge: Mr. Trivet, will you tell the court, since you signed a complaint for sale of moonshine whisky on January 24, 1927, and sworn to before me, will you state just how that sale took place and what transpired at that time? A. I cannot remember just how it came up. I rather not testify. I cannot give you the information now."

Prosecutor continues questions:

"Q. What is the reason? A. It is rather a personal question is it not?

"Q. You swore that this crime was committed and now you refuse to testify relative to that matter. Now, tell the court the nature of this bargain relative to liquor; just tell your own story, just as it happened, that is all we

are asking. Just tell where the conversation first took place relative to this liquor and your proposition, if any, his proposition, if any; just tell the court if any sale was consummated. What are you afraid of? A. If I testify here it will incriminate me in the other case.

"Q. No; it will not. You can tell with freedom here; it will not be used against you. Go ahead and talk. A. I am afraid it will be used against me.

"Q. Now, just tell what the bargain was. A. There was no bargain.

"Q. Did you not agree to buy something? What was the consideration? A. What do you mean by consideration?

"Q. I mean what was to change hands from you to Mr. Lein here, money? A. Maybe money.

"Q. Are you acquainted with Mrs. Lein, the wife of the accused in this case? A. I don't know her.

"Q. When did you see her first? A. When I walked in that door.

"Q. You already testified that you were out there at his home between 8 and 9 o'clock, and had a conversation with him. What did Mr. Lein say? A. I don't remember.

"Q. How many gallons of liquor did you want? A. All I could get.

"Q. How many did he sell you? Was it 10 gallons or was it 50 gallons as set forth in the complaint? What was the approximate amount? A. There was no bargain.

"Q. You stated the amount in the complaint. Who did he sell it to? A. Not to me.

"Q. Did you get any of his whisky that night? A. I hope I did not.

"Q. Did you take any in your physical custody, put it in your automobile by and and help? A. No; I did not put it in.

"Q. Did Mr. Lein put it in your automobile? A. I don't know. I was drunk.

"Q. You were intoxicated, then? A. Yes; that sounds more like it.

"Q. Were you possessed of your mental capacities? Do you remember what transpired? A. Once in a while I can remember.

"Q. You remember your name was Mr. Trivet, don't you? A. Yes.

"Q. Evidently there was a transaction that took place to get this whisky. Just tell the court about this bargain, about this purchase, this sale of 50 gallons. A. I told you before I did not remember just how it all happened.

"Q. You don't remember anything? A. I do not remember anything that took place that night."

This testimony is a part of that which the witness admitted at the time of the trial was untrue. It is evident that the witness was endeavoring to protect himself if possible and in most any way possible at the expense of the defendant.

[6, 7] While it is true that where there is any substantial testimony to support the verdict the appellate tribunal will not interfere with the result, nevertheless, where there is no substantial evidence to support the verdict, it ought not to be allowed to stand. It may be said that, ordinarily, the credence to be given the testimony of a witness is largely determined by his appearance on the stand,

his manner of testifying, the inflection of the voice, the readiness of response, and the manifold actions that indicate sincerity or insincerity. But the testimony of the witness Trivet, as it appears in print, is so conflicting and improbable that it is entitled to no consideration and raises no substantial conflict in the testimony. It is so apparent from the record itself that it is entitled to no credence that observation of the witness is unnecessary. The verdict ought not for those reasons to be permitted to stand. We cannot escape the conclusion that the verdict in this case was the result of prejudice, rather than the calm and dispassionate judgment of the jury. As was said in *People v. Hamilton*, 46 Cal. 540: "A conviction upon such evidence would be a blot upon the jurisprudence of the country, and a libel upon jury trials." Being unable to place any reliance in the testimony of the prosecuting witness, the statement of the court in *People v. Chew Wing Gow*, 120 Cal. 298, 52 P. 657, "We do not think we should sustain verdicts against even Chinamen when it is manifest that they were procured by perjury," might well be paraphrased to meet the exigencies of this situation.

Judgment reversed.

We concur: WORKS, P. J.; CRAIG, J.

85 Cal. App. 633

MASSON v. NEW ENGLAND MUT. LIFE INS. CO. (Civ. 5459.)

District Court of Appeal, First District, Division 1, California. Sept. 27, 1927.

1. Insurance §141(3)—Stipulation of life policy, reciting issuance in consideration of "payment in advance" of annual premium, was acknowledgment of receipt and conclusive evidence of payment (Civ. Code, § 2598; Code Civ. Proc. § 1837).

Language of life insurance policy, reciting issuance in consideration of "payment in advance" of annual dividend, held to be acknowledgment of receipt of such premium, which is conclusive evidence of payment, under Civ. Code, § 2598, and Code Civ. Proc. § 1837, where policy was delivered to assured as valid and completed contract, notwithstanding that note for part of such premium was not paid when due.

2. Insurance §146(3)—Language of life insurance contract must be interpreted most strongly against insurer.

In construing language of life insurance contract, it must be interpreted most strongly against insurer, and in favor of assured, since insurer draws contract.

3. Insurance §141(3)—Where life policy provided that policy and application constituted entire contract, court is restricted to its terms in considering application of statute making recital of receipt of premium conclusive evidence of payment (Civ. Code, § 2598).

Where life insurance policy recited receipt of annual premium, and provided that "this policy and the application constitute the entire contract between the parties," court is restricted to terms of policy in determining application of Civ. Code, § 2598, providing that acknowledgment of receipt of premium in policy is conclusive evidence of payment, and cannot consider as part of contract notes and receipt given at time policy was delivered, affirmatively showing that annual premium was not paid.

4. Judgment §251(2)—Insurer, defending on single theory that policy was void, held not entitled to deduction for unpaid premium.

Where insurance company defended action on policy on single theory that policy was void for nonpayment of premiums, it was not entitled to deduction from plaintiff's recovery for unpaid portion of annual premium.

5. Evidence §383(7)—Recital in life policy as to payment of premium does not preclude recovery on notes given in payment thereof.

Recital in life insurance policy as to payment of premium in advance, though conclusive evidence of payment, so as to make policy binding, does not preclude subsequent recovery on notes given in payment of such premium.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Philip Joseph Masson, a minor, by John Masson, guardian of the person and estate of said Philip Joseph Masson, against the New England Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Thacher & Wright, of San Francisco (Thomas A. Thacher and Harrison A. Jones, both of San Francisco, of counsel), for appellant.

A. E. Cooley and Lasher B. Gallagher, both of San Francisco, for respondent.

KNIGHT, J. Plaintiff, a minor, brought this action by his guardian to recover the proceeds of a life insurance policy in which he had been designated as beneficiary. The defendant insurance company contested payment on the ground that the policy had lapsed because of the failure to pay the premium. Judgment was entered in plaintiff's favor, and defendant appeals.

The following facts are established by the evidence, which is without conflict:

Plaintiff's father, Joseph Lee Masson, applied to the company's San Francisco agency for a \$2,500 "twenty-payment" policy, and under date of April 27, 1922, the company at its home office in Boston issued to him a

twenty-year "endowment" policy. Upon the arrival of the policy in San Francisco, a representative of the company, named Holland, called on Masson to explain the policy and to deliver the same and collect the annual premium thereon. The form of policy issued was acceptable to Masson, but he was unable at that time to pay the annual premium, amounting to \$124.25, whereupon Holland informed him that under the terms of the policy he could pay the premium quarterly. Masson agreed to do this, and thereupon made a part payment of \$20 in cash on the first quarterly premium of \$31.25. Shortly thereafter Holland called on Masson again, at which time he collected \$11.25 as the balance due for the first quarter ending July 27, 1922, and presented for execution three promissory notes, for the principal sum of \$31 each, payable respectively three, six, and nine months after date, which Masson executed and delivered to Holland, and the latter in turn delivered to Masson the policy and a receipt. The notes were dated April 27, 1922, and were identical in form except as to dates of maturity. Besides containing a promise to pay the principal, each note provided that said principal sum was "for part of premium on policy No. 450153 of said company, which policy I hereby pledge for the payment hereof [which, however, was not done]; but this note, if not paid at maturity, is not to be considered as payment of said premium, and said policy will thereupon without notice become forfeited and void, except as provided by the statutes of Massachusetts." The receipt was in the following form:

New England Mutual Life Insurance Co.
87 Milk Street, Boston, Massachusetts.

April 27, 1922.

No. 450153.	Received of Joseph Lee
Annual premium	Masson cash \$31.25 notes \$93.-
due, \$124.25.	00 on account of the first pre-
Received on	mium on policy No. 450153 as
account:	per margin.
	This receipt is given, and
Notes, (3 mos. \$31.	accepted, subject to the ex-
(6 mos. \$31.	press condition that it shall
(9 mos. \$31.	not cover any part of the pol-
	icy year for which a note or
	notes, as stated in the mar-
	gin, have been given by the
	insured, until said note or
	notes shall have been paid in
	cash; and if said note or
	notes, or any of them, are not
	paid when due, thereupon and
	without further notice, said
	policy will cease to be in
	force and will have no value.
	* * *
Cash payment..\$31.25	
Countersigned:	
Joseph H. Gray	
General Agent.	

The first note matured on July 27, 1922, but the terms of the policy gave the assured 31 days' grace to make payment. Within 15 days prior to the expiration of the period of grace the agency mailed to the assured a notice to the following effect:

"We respectfully advise that the three months' note on your policy No. 450153 is nearly

31 days overdue. The period of grace for the payment of said note and interest will expire August 27, 1922, and if not paid then the policy will lapse and reinstatement can be made only upon production of evidence of insurability satisfactory to the company. Please give this your prompt attention, as this is the last notice we shall send you."

Later, and on August 24, 1922, the cashier of the agency wrote a letter to the assured which read as follows:

"Re your policy No. 450153. My Dear Mr. Masson: If you are to protect your insurance under the above-numbered policy, we must have your check for \$31.60 not later than August 27th, the expiration of the grace period. Please do not overlook this important matter, but forward the remittance for this amount by return mail."

The assured replied as follows:

"San Lucas, Cal., August 26, 1922. New England Mutual Life Ins. Co.—Dear Sir: I am writing to you asking for a thirty-day extension of time on my policy, which is now due, as I have been out of work for some time and will not be able to meet same until next month, when I get a pay day. Hoping this will be satisfactory to you, as I do not want to lose it. * * *

In answer to the request for further extension the cashier wrote Masson, on August 28th, as follows:

"August 28, 1922. Mr. Joseph L. Masson, Box 113, San Lucas, Cal. Re your policy No. 450153. My Dear Mr. Masson: We have your letter of August 26 requesting an extension of time of thirty days to meet the three months note of \$31.00 and interest of 60c. due on your above-numbered policy. We are very sorry, but this we are unable to do. The company allows thirty-one days of grace to meet these premium payments and no further extension can be granted. We can, however, if it will assist you any, accept a payment of \$20.75 and extend the balance for an additional thirty days, but, to take advantage of this, we must have the prompt return of a remittance for that amount. We have changed our records to show your address as given above and would thank you very much to keep us advised in the future of any further change. Trusting that you are in a position to avail yourself of the above settlement, I remain," etc.

The assured made no payment on this note, however, nor on either of the other two; and on September 9, 1922, said notes were forwarded by the agency to the home office of the company in Boston for cancellation. Ten days later, to wit, on September 19, 1922, and before said notes were surrendered, the assured was killed in an automobile accident, and thereupon plaintiff, as beneficiary, commenced this action to recover the proceeds of the policy.

The policy in question reads in part as follows:

"New England Mutual Life Insurance Company of Boston, Massachusetts. Number

450153. Age, 34. Amount, \$2,500. Premium, \$124.25. In consideration of the application upon which this policy is issued, which is made a part hereof, and of the payment in advance of one hundred and twenty-four and $\frac{25}{100}$ (124-25) dollars, and of the payment of a like sum on or before the 27th day of April, in each year thereafter until twenty annual premiums have been paid during the life of Joseph Lee Masson of San Francisco, California, the insured, the New England Mutual Life Insurance Company promises and agrees to pay, at its office in the city of Boston, twenty-five hundred dollars, to Joseph Lee Masson, on the twenty-seventh day of April, 1942, but if the said insured shall de cease before that date, then, upon due proof of death, to Phillip Joseph Masson, his son, if he shall survive him; otherwise, to the insured's executors, administrators or assigns (with the right reserved to the insured to change the beneficiary), less any indebtedness to the company on this policy, and less any unpaid portion of the premium for the then current policy year." (Italics ours.)

Said policy also contained the following conditions and stipulations:

"In case of failure to pay any premium when due or during the period grace, this policy shall cease to be in force and shall have no value, except as provided by the nonforfeiture provisions hereinafter set forth. * * * This policy and the application constitute the entire contract between the parties hereto, and all statements made by the insured, in the absence of fraud, shall be deemed representations and not warranties, and no such statement shall be used in defense to a claim under this policy, unless contained in the application and a copy of such application shall be endorsed hereon and attached hereto. * * * The rights, options, and provisions hereinafter set forth are hereby made a part of this contract. In witness whereof, the said New England Mutual Life Insurance Company, by its president or vicepresident, and secretary or an assistant secretary, has signed and delivered this contract at Boston, in the commonwealth of Massachusetts, this twenty-seventh day of April in the year one thousand nine hundred and twenty-two."

Among the provisions attached to and made a part of the policy was the following:

"Premiums.—Premiums shall be payable in advance at the home office in the city of Boston, but may be paid to an agent of the company upon the delivery of a receipt signed by the secretary or an assistant secretary. When requested, premiums will be made payable on a semiannual or a quarterly basis."

[1] The first question presented relates to the construction which shall be placed upon the language used in said policy as to the payment of the first annual premium. If it be construed as an acknowledgment of the receipt of said premium, then under section 2598 of the Civil Code such acknowledgment must be deemed to be conclusive evidence of the payment thereof. Said section is apparently the codification of a principle of construction affecting insurance policies which

has existed for many years (Kent's Commentaries, p. 260; Cooley's Briefs on the Law of Insurance, p. 146; 25 Cyc. 730), and it provides as follows:

"An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid."

And section 1837 of the Code of Civil Procedure defines "conclusive or unanswerable evidence" to be "that which the law does not permit to be contradicted. * * *"

In giving application to said section, it has been held in this state that, where an authorized credit has been agreed upon as the equivalent or substitute for cash payment of the premium, and the policy is delivered as a complete contract upon the consideration expressed therein, the receipt of which is "impliedly acknowledged," the insurer is estopped to deny the validity of the policy, notwithstanding the declaration in it that it shall not be binding until the premium is actually paid (Farnum v. Phoenix Insurance Co., 83 Cal. 246, 23 P. 869, 17 Am. St. Rep. 233); also that, where a promissory note is taken as the equivalent of cash payment, the recital of payment in the policy does not conclude the insurer in an action upon the note from showing that the premium has not been paid, but such recital, whether or not it is in the specific language of the Code, is conclusive evidence of payment, "so far as to make the policy binding," notwithstanding any stipulation therein to the effect that it shall be inoperative if the premium is not actually paid; that the recital has the same effect as a vendor's acknowledgment in a conveyance of land of the receipt of the purchase price (Palmer v. Continental Insurance Co., 132 Cal. 68, 64 P. 97).

In other words, as stated in Joyce on Insurance (2d Ed.) § 86:

"In California, it is held that if an insurance policy contains a formal receipt of the premium, its unconditional delivery is conclusive evidence of payment so as to estop the company from denying the validity of the policy notwithstanding the declaration in it that it shall not be binding until the premium is actually paid; that the same result follows where the policy is delivered as a valid and completed contract upon a consideration expressed therein, the receipt of which is impliedly acknowledged. And under the Civil Code of that state an acknowledgment in a policy of the receipt of the premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid, and this applies to a recital in the policy of the consideration paid where there is also a provision against liability while any note for the premium is due and unpaid and the note for said consideration remains due and unpaid."

Our attention has been called to no adjudicated case in this state involving a policy containing the identical recital of payment used here, but in the state of South Dakota, which maintains a statute (Civ. Code S. D. § 1849) in the exact wording of our Code, § 2598, a case arose wherein the policy not only contained forfeiture clauses similar to those embodied in the present policy, but, with reference to the payment of the first year's premium, recited:

"This policy is issued in consideration of the stipulations, agreements, and representations made in the application for the policy, * * * and said policy and the application constitute the entire contract between the parties hereto, and in further consideration of the annual premium of \$50.17 for one year's term insurance," etc. (Italics ours.)

The Supreme Court of that state held that the effect of the italicized language was to "clearly acknowledge receipt of the first premium," and that, therefore, the company would not be heard to deny payment, in so far as the binding effect of the policy was concerned. In the case of Britton v. Metropolitan Life Ins. Co., 165 N. C. 149, 80 S. E. 1072, Ann. Cas. 1915D, 363, the language used in the policy relating to the payment of the first premium was nearly identical with that used in the policy under consideration, the only difference being that here the words "in advance" are included, which makes the present case even stronger against the insurer, and in all of its essential facts that case is parallel with the one here. There the policy read:

"Endowment: * * * Semiannual premium: \$21.86. Metropolitan Insurance Company, in consideration of the application for the policy, copy of which application is attached hereto, and made part thereof, and of the payment of the semiannual premium of \$21.86, and of the payment of the like amount upon each first day of November and May hereafter until twenty (20) full years premiums shall have been paid, or until the prior death of the insured, promises to pay," etc.

The evidence offered tended to prove that, when the policy was issued, the assured asked leave to pay the premium quarterly, instead of semiannually, as required by the policy, to which the agent of the company agreed; that thereupon the assured paid only the quarterly premium in advance, which was sent by the agent to the home office of the company in New York, and the latter receipted for the premium covering only the first quarter. However, the recital in the policy of the payment of a semiannual premium was not changed. During the period of the succeeding quarter the assured died. In sustaining the ruling of the trial court in holding that the acknowledgment in the policy of the receipt of the semiannual premium estopped the company to deny the validity of the policy

on the ground of nonpayment thereof, the Supreme Court said:

"This court has held that the acknowledgment in a policy of the receipt of the premium for a definite period is something more than a receipt. It is a solemn admission, which, as long as it stands, estops the insurer from contesting the policy for nonpayment of premium. *Grier v. Insurance Co.*, 132 N. C. 543, 44 S. E. 28; *Kendrick v. Insurance Co.*, 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592. In those cases it is held that, if the premium is not paid, the acknowledgment of payment in the policy, so far as it is a receipt for money, is only prima facie, and in an action to recover the premium may be contradicted by parol evidence, as the receipt in a deed may in an action for the purchase money of land, but so far as the acknowledgment is contractual, it cannot be contradicted so as to invalidate the contract. *Rayburn v. Casualty Co.*, 138 N. C. 379, 50 S. E. 762, 107 Am. St. Rep. 548; *Waters v. Annuity Co.*, 144 N. C. 663, 57 S. E. 437, 13 L. R. A. [N. S.] 805."

And after reviewing supporting authorities, including *Basch v. Insurance Co.*, 35 N. J. Law, 429, and *Vance on Insurance*, p. 180, the court held:

"The policy sued on acknowledges receipt of premium for six months, and contains a provision that the premium is to be paid semi-annually. The law will not permit the defendant to avoid the policy in the face of such recital."

Turning to the decisions of this state, we find the following rule established as to the effect of a delivery to the assured of an insurance policy containing a recital of the payment where in fact such payment had not been made:

"And it has been repeatedly held that where any fact, which would constitute a breach of a condition precedent to any liability of the company on the policy, is fully known to an agent of the company, local or general, who is authorized to consummate the contract of insurance, the knowledge of such agent is the knowledge of the company, and his act in executing and delivering the policy, as a valid and completed contract, is an exercise of the power of the company, and constitutes a waiver by the company of such condition precedent, and also a waiver of the general requirement that waivers or conditions expressed in the policy shall be in writing indorsed on the policy." *Farnum v. Phoenix Ins. Co.*, supra, citing a number of cases.

[2] The policy in question here shows by its terms that it was a completed contract when issued at the home office of the company in Boston, that the annual premium was \$124.25, and that the policy and the application constituted the entire contract. The consideration for its execution, as specified therein, was "the payment *in advance* of the sum of one hundred and twenty-four and $\frac{25}{100}$ (124.25) dollars" (italics ours), and the policy was delivered in that form to the assured as being effective from the date of its issuance.

We therefore believe, in view of the authorities above cited and of the rule of construction that the language of an insurance contract must be interpreted most strongly against the insurer and in favor of the assured, because the insurer draws the contract (*Mah See v. North American Acc. Ins. Co.*, 190 Cal. 421, 213 P. 42, 26 A. L. R. 123; *Victoria S. S. Co. v. Western Assur. Co.*, 167 Cal. 348, 139 P. 807; *Meyerstein v. Great American Ins. Co.* [Cal. App.] 255 P. 220), that the recital on payment in the policy before us constituted, as the trial court held, an acknowledgment of the receipt of the annual premium within the meaning of said section 2598, and that, therefore, coupled with the fact that the policy was delivered to the assured as a valid and completed contract, estops the company, in so far as the binding force of the policy is concerned, to deny that full payment of the annual premium has been made.

[3] Appellant contends, however, that in the determination of the question of the application of section 2598 the court is not restricted to the terms of the policy, but must also consider as a part of the contract of insurance the notes and the receipt given at the time the policy was delivered, which affirmatively show that the annual premium was not paid. We are of the opinion that this contention is not maintainable for the reason that the policy itself declares that "this policy and the application constitute the entire contract between the parties hereto. * * *" But, assuming that the notes and the receipt could be considered as part of the contract of insurance, appellant's position would be no different because at most the forfeiture clauses in the notes and in the receipt would amount to no more than additional stipulations that the policy "shall not be binding until the premium is actually paid"; and, as already pointed out, section 2598 declares that such stipulations are not to be accepted in contradiction of an acknowledgment in the policy of the receipt of the premium. This latter proposition seems to have been definitely settled by the decision in *Palmer v. Continental Ins. Co.*, supra. There "each of the notes contained a recital that, in case of its nonpayment at maturity, the company should not be liable for loss during such default, and that the policy for which the note was given should lapse until payment was made," and it was said:

"It is contended by the defendant that the note and policy are to be considered as parts of the same transaction, and are to be construed together, and that the proviso in the note is operative to defeat its liability upon the policy, notwithstanding the provisions of section 2598" of the Civil Code. "Without determining whether the two instruments can be considered as parts of the same transaction—the note having been made May 27th, and the policy not

issued until after June 7th—if it should be so conceded the same conclusion would follow. If the two are construed as parts of the same instrument, the result would be that the policy would acknowledge the receipt of payment of the first year's premium, and would contain a stipulation in two places, one in the note and one in the agreement for insurance, that the failure to pay the note should forfeit the policy. Section 2598 is sufficiently comprehensive to include as many stipulations therein referred to, and as many different forms of such stipulation, as the insurer may express in its policy. By inserting in the section the phrase, 'notwithstanding any stipulation therein,' the Legislature intended to prevent the insurer in any action upon the policy from disputing its acknowledgment that it had received the payment. The section is not limited to a policy which contains a provision in specific language that it shall not be binding unless the premium has been 'actually paid,' but extends to any stipulation which is intended to have that effect."

Appellant has cited a number of cases upon the question of the interpretation of the recital of payment in the policy and also as to whether or not the policy itself constitutes the entire contract; but we do not deem any of those cases as controlling here. In *Reagan v. Philadelphia Life Ins. Co.*, 165 Minn. 186, 206 N. W. 162, there was no valid delivery of the policy, the Supreme Court having sustained the trial court's finding that the policy was in the possession of the assured at the time of his death merely for the purpose of allowing him to examine its terms. In *Raulet v. Northwestern Nat. Ins. Co.*, 157 Cal. 213, 107 P. 292, the recital of payment did not include the words "in advance." The cases of *Hipp v. Fidelity Mutual Life Ins. Co.*, 128 Ga. 491, 57 S. E. 892, 12 L. R. A. (N. S.) 319, and *Norris v. New England Mut. Life Ins. Co.*, 198 Ala. 41, 73 So. 377, adhere to a doctrine wholly at variance with the one established in this state by *Farnum v. Phoenix Ins. Co.*, supra, and *Palmer v. Continental Ins. Co.*, supra, and therefore those cases cannot be followed. The decisions in the other cases were apparently based upon recitals contained in documents separate from the policy, there being no provision in those policies, as there was here, that the policy and the application constituted the entire contract between the parties.

[4, 5] Nor do we find any merit in appellant's final contention that the trial court erred in not deducting from the amount of the judgment the unpaid portion of the annual premium, for the reason that appellant defended the action, as its pleadings show, upon the single theory that from and after the expiration of the first quarter the policy was void on account of the nonpayment of the subsequent premiums. Apparently, in order to be consistent in its position, appellant did not claim to be entitled to any relief whatever as a result of the execution of the notes, and therefore did not plead them as

a counterclaim. However, as shown by the authorities hereinabove cited, the fact that the recital in the policy was conclusive evidence of the payment of the annual premium, so as to make the policy binding, does not preclude a subsequent recovery upon the notes given in payment thereof.

For the reasons stated the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

DREW et al. v. LINDSAY NAT. BANK et al.*
(Civ. 3304.)

District Court of Appeal, Third District, California. Sept. 26, 1927.

Rehearing Granted Oct. 26, 1927.

1. Pleading $\S$ 245(1)—Denying motion to make fourth amendment to complaint, alleging mistake in contract set forth in complaint to which plaintiffs were not parties, held no error, especially where granting would have necessitated continuance and complaint had been filed fourteen months.

Where plaintiffs were assignees of a right of action on a contract, denying their motion to make a fourth amendment to the complaint, alleging mistake in the contract, which was fully set forth in the complaint, held not an abuse of discretion, especially where granting the motion to amend would have necessitated continuance and the complaint had already been filed for 14 months.

2. Landlord and tenant $\S$ 231(1)—Defendants had burden of proving denial in answer that rent was unpaid.

In action against lessee and bank in which lessee had deposited security against breach of lease, where the answer denied the allegation of the complaint that rent was unpaid, defendants held to have burden of proving payment.

3. Limitation of actions $\S$ 24(1)—Portion of rent due less than four years before action was brought held not barred by limitation statute (Code Civ. Proc. $\S$ 337, subd. 1).

Under Code Civ. Proc. $\S$ 337, subd. 1, providing that an action on a contract in writing must be commenced within four years, portion of rent due less than four years before action was brought was not barred, although portion due more than four years before was barred.

4. Landlord and tenant $\S$ 172(1)—Where tenant had abandoned premises, lessor's re-entry without notice was not ouster.

Where tenant had abandoned the leased premises and defaulted in payment of rent, the lessor's re-entry without notice to the tenant did not constitute an ouster.

5. Landlord and tenant $\S$ 223(5)—Damages for eviction may be set off against rent claim, but wrongful eviction is not defense to claim for accrued rent (Civ. Code, $\S$ 1935).

While any damages suffered by a tenant by reason of a wrongful eviction may be set out

as an offset to a claim for rent, the mere wrongful eviction is not a defense to a claim for accrued rent, in view of Civ. Code, $\S$ 1935.

6. Banks and banking $\S$ 153—Where contract providing for deposit as security for performance of lease was filed with bank, bank, on lessee's default, was bound to pay amount of default.

Where contract for lease providing that the lessee should deposit a sum of money in bank as security for performance of the contract was filed with the bank at the time the money was deposited, on the lessee's default, the bank was bound to pay the lessor the amount of the default and had no right to seize such security under a writ of execution to satisfy indebtedness of lessee to bank.

7. Assignments $\S$ 23—Lessor's right of action against bank for refusal, on lessee's default, to pay over security deposited by lessee, held assignable.

Lessor's right of action against bank for refusal, on default of the lessee in rent payments, to pay over deposit made in the bank by the lessee as security for performance of contract of lease, held assignable.

8. Banks and banking $\S$ 154(3)—In action against bank for security deposited for performance of lease, rent need not be established by judgment before bringing action.

In action by lessor against bank for portion of money deposited by lessee as security for performance of lease, fact that the amount due as rent was not established by judgment before action was commenced did not prejudice rights of defendant, since both lessee and bank were parties and that issue was determined at the trial.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by A. M. Drew and others against the Lindsay National Bank and others. Judgment for defendants, and plaintiffs appeal. Reversed, with directions.

Feemster & Cleary, of Visalia, and A. M. Drew, of Fresno, for appellants.

D. E. Perkins, of Visalia, for respondents.

FINCH, P. J. August 1, 1918, the plaintiffs and R. M. Carr entered into a written contract with defendant Mennillo, by the terms of which Mennillo agreed to purchase the olives grown by the other parties to the contract during the succeeding five years at an agreed price per ton therefor. The contract contained the following clause:

"It is understood and agreed that this contract is not to be binding upon the said first parties until it is indorsed by some person, or firm, or corporation as security for the carrying out of the covenants and conditions thereof by the said second party, or that a satisfactory surety bond is furnished that the said second party will carry out all of the covenants and conditions of the said lease and the said contract."

In pursuance of the provisions of the clause quoted, and for the purpose of giving effect to the contract, Mennillo caused the following indorsement upon the contract to be executed by the Santa Barbara Olive Company, B. J. Ruddle and C. R. Mennillo:

"The undersigned for and in consideration of the sum of one dollar and other valuable considerations to — running does hereby indorse this contract and guarantee the said second party will carry out all the terms, covenants and conditions thereof during the running of the lease and contract."

At the time of the execution of the contract first mentioned, the Lindsay Ripe Olive Company leased its olive packing house and equipment to Mennillo for a term of five years at the semiannual rental of \$390, payable in advance on the "first day of August and the first day of February" of each year during the term. The lease contained the following provisions:

"It is understood * * * that the said second party will use the said building for the processing of olives purchased from the members and stockholders of the said first party according to the terms and conditions of the agreement of even date herewith and hereto attached and made a part hereof, and that the said olives of the said stockholders of this corporation aforesaid shall have the first right to delivery and acceptance at such packing house according to the aforesaid agreement. It is understood, however, that the said second party shall have the right to purchase other olives from other parties on such terms and conditions as he may make and that the same shall be processed in the said house and that he may also use the said house for the packing of fruit and vegetables when not needed for olive packing."

Neither party was able to produce the lease at the trial, but the court found, from conflicting evidence, "that by the terms of said lease it was agreed that in case said F. A. Mennillo did not pay the annual rental at the time in the lease provided, that the lessors by giving 30 days' notice in writing of such default, should have the right to re-enter said premises and remove all persons therefrom and repossess and enjoy said property."

September 18, 1918, the Lindsay Ripe Olive Company, as party of the first part, and defendant Mennillo, as party of the second part, executed an instrument, which was attached to the contract of August 1, 1918, between plaintiffs and Mennillo, and which reads as follows:

"This addendum made this 25th day of September, 1918, to that certain contract dated August 1, 1918, made by the Lindsay Ripe Olive Company, first party, with F. A. Mennillo, second party, wherein the said first party, agrees to lease a certain olive packing house in the city of Lindsay to the said second party for the term of five years, and whereas the said

second party was to give a bond or indorsers to the contract sufficient to satisfy the said first party that the said second party would carry out all the terms in accordance with the conditions of said agreement and of said lease, and whereas the said second party has failed to give such bond. It is now agreed that the said second party will deposit with the Lindsay National Bank in the form of a certificate of deposit, and that the said certificate of deposit shall remain in the possession of the said Lindsay National Bank during the running of this agreement, or to such subsequent time as shall hereafter be agreed upon between the parties hereto, the said sum of twenty-five hundred (\$2,500.00) dollars, to be held as security by the said bank for the said first party to said agreement, that the said second party will carry out the covenants and conditions of the lease and the agreement required as aforesaid. * * * Should the said second party fail, neglect or refuse to carry out the provisions and conditions of the aforesaid contract the said sum of \$2,500.00 shall be delivered to the said first party, or such proportion thereof as may be necessary to meet the liquidated damages incurred by any breach of said contract."

The sum of \$2,500 was deposited in compliance with the terms of the agreement. Mennillo went into possession of the packing house and performed the covenants of the lease and of his contract to purchase plaintiffs' olives until the early part of the year 1920, when he disappeared and apparently abandoned the packing house and his business at Lindsay. It does not appear that he thereafter, at any time, asserted any right to use the premises or made any claim thereto. At the time of his departure he was heavily indebted to the defendant bank. He assigned his stock of processed olives to the bank, and the bank thereafter sold the same and applied the proceeds thereof upon the indebtedness. After such application, however, his remaining indebtedness to the bank was in excess of \$2,500. In an action thereafter brought, the bank recovered judgment against Mennillo for the balance of such indebtedness and caused the money deposited as aforesaid to be seized under a writ of execution and applied in partial satisfaction of the judgment.

About September 1, 1920, the Lindsay Ripe Olive Company re-entered into possession of the packing house. During the remainder of the time covered by the lease and the sales contract, the plaintiff and Carr were unable to sell their olives for the prices specified in the contract, and they sold them at lower prices. The court found that on September 1, 1920, Mennillo was in default in the payment of rent in the sum of \$390. The uncontradicted evidence shows that he was in default in a larger sum. Drew testified that the sum of \$800 was then due as rent. This testimony was doubtless based on his previous testimony that the lease provided for a monthly rental of \$100. He later testified

that the lease provided for a semiannual rental of \$390. A simple computation, based on such testimony, shows that the unpaid rental on September 1, 1920, amounted to \$520. The plaintiffs and Carr and the Lindsay Ripe Olive Company made demand on the defendant bank that said sum of \$2,500, deposited with the bank, be paid over to them; but the bank refused to pay any part thereof to any of them. After making such demand, Carr and the Lindsay Ripe Olive Company "assigned and transferred unto plaintiffs herein all of their claim to and all of their right, title and interest in the said \$2,500." Thereafter this suit was brought to recover the amount of the deposit. Judgment was entered in favor of defendants for costs of suit, and the plaintiffs have appealed.

Appellants contend that the deposit of \$2,500 with the defendant bank was made as security for the performance by Mennillo of the terms of the sales contract as well as those of the lease. The addendum contract of September 25, 1918, is so certain and explicit in its terms as to furnish a complete answer to this contention. It is true that the plaintiffs and Carr owned about two-thirds of the capital stock of the Lindsay Ripe Olive Company at the time the lease and other contracts were executed, but it is not perceived that that fact is at all material. Mennillo's contract with the corporation and that with the plaintiffs and Carr were independent transactions.

[1] During the progress of the trial the plaintiffs asked leave to amend their third amended complaint by alleging "that what was intended by the addendum was to make it a part of the purchase agreement"; that the failure to so provide in the addendum contract was due to the mutual mistake of the parties thereto. In asking leave to so amend, counsel for the plaintiffs stated that the granting of the request "will * * * necessitate the continuance of the case, and we are perfectly willing to take care of any expenses that have been incurred up to this time as a condition to the continuance." The court denied the motion. The trial was commenced in March, 1925. The original complaint, filed January 4, 1924, set forth the addendum contract in full. The plaintiffs were permitted to file three amended complaints. Under the circumstances stated, it was not an abuse of discretion to deny leave to file a fourth amended complaint. Further, the plaintiffs were not parties to the addendum contract. "While a court of equity will reform contracts under many varying circumstances, still it has no power to make a new contract. * * * A court of equity can neither add additional parties nor substitute other parties for those already appearing upon the face of the writing." *Mabb v. Merriam*, 129 Cal. 663, 664, 62 P. 212;

Wilson v. Shea, 194 Cal. 653, 657, 229 P. 945, 946.

[2] As stated, the court found that on September 1, 1920, Mennillo was "in default in the payment of said rent to the extent of \$390," while the uncontradicted evidence shows that he was then in default in the sum of \$520. The complaint alleges that the rent was unpaid for the year 1920, and the answer denies that allegation. The burden was on defendants to prove payment of such rental if made. 20 Cal. Jur. 952. It must be taken as established, therefore, that Mennillo paid no rent for the year 1920.

[3, 4] The court found that plaintiffs' cause of action for such rent was "barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure," to the effect that an action upon a contract in writing must be commenced within four years. The transcript on appeal does not show when the action was commenced, but it appears from the original complaint, brought up by direction of this court, that the action was commenced January 4, 1924. Under the terms of the lease, the agreed rent for the six months ending January 31, 1920, was due and payable August 1, 1919, and, if not paid, it was barred at the time the action was commenced. But the rent from February 1 to September 1, 1920, amounting to \$455, was not barred, and plaintiffs' assignor was entitled to payment of that sum out of the \$2,500 deposited by Mennillo with the defendant bank.

The court found that the "plaintiffs conspired together for the purpose of ousting said F. A. Mennillo from said packing house, * * * and in pursuance of said conspiracy, * * * caused said Lindsay Ripe Olive Company to re-enter upon said leased premises and packing house and ousted the said F. A. Mennillo therefrom," without giving him the notice required by the terms of the lease. While these findings appear to be immaterial under the issues raised by the pleadings, the defendants having made no claim for damages on account of such ouster, it is deemed proper to say that no evidence has been discovered which tends to show the existence of such a conspiracy. It may be added that the conduct of Mennillo, as shown by the uncontradicted evidence, points strongly to the conclusion that he had abandoned the premises long prior to the re-entry by the lessor, and, if such was the case, the re-entry without notice did not constitute an ouster.

[5] While any damages suffered by a tenant by reason of a wrongful eviction may be set up as an offset to a claim for rent, the mere wrongful eviction is not a defense to a claim for accrued rent. 16 R. C. L. 952; 15 Cal. Jur. 717. "When the hiring of a thing is terminated before the time originally agreed upon, the hirer must pay the due pro-

portion of the hire for such use as he has actually made of the thing, unless such use is merely nominal, and of no benefit to him." Civ. Code, § 1935.

[6-8] Respondents contend that the assignment by the Lindsay Ripe Olive Company to the plaintiffs "is insufficient to transfer to plaintiffs any right of action * * * that corporation * * * may have had to sue for the money." The addendum contract provides for the deposit of the \$2,500 "as security" for the performance of "the covenants and conditions of the lease" by Mennillo, and that upon failure of such performance by him "the said sum of \$2,500 shall be delivered to the said first party, or such proportion thereof as may be necessary to meet the liquidated damages incurred by any breach of said contract." This contract was filed with the defendant bank at the time the money was deposited, and the bank was bound by its terms. Upon Mennillo's default in payment of rent and the making of the demand by the Lindsay Ripe Olive Company for payment of such rent out of the money so deposited, it became the duty of the bank to pay the same, and, upon its refusal, an immediate cause of action accrued in favor of that corporation against the bank to compel such payment. No sound reason is advanced, and none appears, why such cause of action was not assignable, and the assignment is certainly sufficient in form to transfer any claim of the corporation against the deposit to the plaintiffs. The fact that the amount due as rent was not established by judgment prior to the commencement of this action did not prejudice the rights of the defendants, because that issue was determined in this action, to which Mennillo and the bank are both parties.

Under the provisions of section 956a of the Code of Civil Procedure, this court has jurisdiction to make findings of fact "contrary to, or in addition to, those made by the trial court." It is not deemed necessary to disturb immaterial findings, but this court hereby makes the following findings of fact, contrary to findings made by the trial court upon the issues to which said facts relate:

That by the terms of said lease of August 1, 1918, said defendant Mennillo agreed to pay to the Lindsay Ripe Olive Company a semiannual rental of \$390; that said defendant duly paid said rental up to January 1, 1920, but paid no rental for the year 1920, and that on September 1, 1920, said defendant was indebted to the Lindsay Ripe Olive Company in the sum of \$520 as rental for the first eight months of that year; that the plaintiffs' cause of action for the amount of such unpaid rent is barred to the extent of \$65 by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure, but the remaining \$455 thereof is not so barred.

As conclusions of law from the foregoing findings of fact and those not in conflict therewith made by the trial court, this court finds that the plaintiffs are entitled to judgment against the defendants in the sum of \$455, together with interest at the rate of 7 per cent. per annum on \$390 thereof from February 1, 1920, and on \$65 thereof from August 1, 1920, and for their costs of suit.

The judgment is reversed, and the trial court is directed to enter judgment in favor of the plaintiffs against the defendants in accordance with the aforesaid findings and conclusions of law, the appellants to recover their costs of appeal.

We concur: BURROUGHS, Justice pro tem.; PLUMMER, J.

86 Cal. App. 1

ORINDA PROPERTIES CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5887.)

District Court of Appeal, First District, Division 1, California. Oct. 10, 1927.

1. Master and servant ~~§~~405(4)—Evidence held to sustain finding that permanent impairment of employee's wrist resulted from accident in employment.

Evidence held to sustain Industrial Accident Commission's finding that permanent impairment of function of employee's wrist resulted from accident occurring while in employ of defendant employer.

2. Master and servant ~~§~~417(7)—Court reviewing award of Industrial Accident Commission cannot weigh effect of positive evidence.

Appellate court, in reviewing awards of Industrial Accident Commission, cannot weigh effect of positive evidence, but must assume that commission believed all evidence given which tends to sustain award made.

3. Master and servant ~~§~~417(8)—Failure to officially file medical reports held not to have deprived employer of any substantial right (Workmen's Compensation Act).

In proceedings under Workmen's Compensation Act (St. 1917, p. 831, as amended), failure to officially file two medical reports made to employer held not to have deprived employer of any substantial right, where it cannot be assumed that they were not considered by Industrial Commission in making its award, and with or without such reports finding of commission is legally supported.

4. Master and servant ~~§~~419—Permanent disability is "new and further" disability for which applicant may file claim within six months (Workmen's Compensation Act, § 11[c]).

A permanent disability is a "new and further" disability, within Workmen's Compensation Act (St. 1917, p. 841) § 11(c), and an ap-

plicant may file claim therefor at any time within six months after he becomes aware of the existence of such disability.

5. Master and servant — Application for adjustment of claim because of permanent impairment of use of wrist, held timely.

Evidence that compensation claimant, within few days after being informed that there was a permanent impairment of use of his wrist, filed application for adjustment of his claim held to show that application was filed in ample time.

Proceedings under the Workmen's Compensation Act by William Doran, employee, opposed by the Orinda Properties Company, employer, and the United States Fidelity & Guaranty Company, insurer. The Industrial Accident Commission awarded compensation, and the employer and insurer applied for certiorari to review such award. Award affirmed.

R. P. Wisecarver and Warren H. Pillsbury, both of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

KNIGHT, J. On March 9, 1927, the Industrial Accident Commission awarded the respondent Doran compensation for a permanent impairment of the function of the left wrist, which the commission found had resulted from an accident occurring on July 3, 1925, while Doran was in the employ of the petitioner Orinda Properties Company, the compensability of which the petitioner insurance company at that time recognized. Petitioners now seek to have the award annulled, claiming that the evidence fails to support the commission's findings that the impairment to Doran's wrist was due to the injury of July 3, 1925, and that his claim was barred by the provisions of the statute and by his own laches.

The following facts appear from the record: On June 4, 1925, Doran was hired as a laborer at Orinda, Cal., by the Orinda Properties Company, and on July 3, 1925, sustained a fracture of the left minor wrist by falling from a roof. Said injury caused total disability up to and including September 9, 1925, during which period Doran was given medical treatment by Dr. Cuttle, of Oakland, and was compensated therefor by the petitioner insurance company. On December 3, 1925, Doran severed his employment with the Orinda Properties Company and went to San Diego, working there at odd jobs for six months. He then proceeded to Lafayette, Cal., where, on June 8, 1926, he entered the employ of Twohy Bros., bending steel. During this latter employment and on November 3, 1926, he sprained this same wrist while cranking a gas engine. He was treated for a period of three and a half weeks by Dr.

Holcomb, during which treatment X-ray pictures were taken of the wrist, and it was discovered that the wrist was permanently impaired as the result of a previous injury, and Doran was so informed.

Within a week thereafter Doran applied to the commission for an adjustment of his claim against petitioners upon the ground that the permanent disability to his wrist from which he was then suffering, and which had been revealed to him for the first time by the X-ray pictures taken by Dr. Holcomb, was the result of the injury of July 3, 1925. He was examined by Dr. Harbaugh, assistant medical director of the commission, whose written report, dated December 1, 1926, was filed with the commission, showing a permanent impairment in the motion and grasping power of the wrist. The next day Doran filed the present petition to obtain compensation for the permanent injury. Petitioners denied liability therefor, and at the hearing, which took place on December 16, 1926, Doran testified in answer to questions propounded by the referee that, in addition to the two injuries to his wrist above mentioned, he had sprained the same wrist about 20 years before, but that he was laid off as a result of it only 2 or 3 days; that he received no medical attention at the time, and that afterwards his wrist was just as "good or better" than the right wrist; that thereafter he had performed all kinds of hard work with it, in shipyards and in handling structural steel, and it had never given him any trouble until it was broken on July 3, 1925. So far as the record shows, the only additional proof adduced at the hearing relating to Doran's permanent disability consisted of the report of Dr. Harbaugh, which, after reciting the history of the case with reference to the fracture on July 3, 1925, and the sprain in November, 1926, stated, "X-ray pictures show evidence of an old fracture of a certain small bone of the wrist;" and the report concluded:

"It seems to me that the man has some permanent disability with reference to the injury in July. * * *"

[1, 2] We are of the opinion that the foregoing evidence is sufficient to sustain the commission's finding that the permanent impairment complained of was due to the fracture of July 3, 1925. As said in *Southern Pac. Co. v. Industrial Accident Commission*, 177 Cal. 378, 170 P. 822:

"This court, in reviewing awards of the commission, is not acting as a court of appeal. It has no power to weigh the effect of positive evidence. It must assume that the commission believed all the evidence given which tends to sustain the award made. * * * The findings are not subject to review except in so far as they may have been made without any evidence whatever in support thereof. The review of the findings, even in such cases, is not based on the

theory that they are not supported by the evidence and that we are weighing evidence to determine that proposition, but upon the theory that the commission has no jurisdiction to make a finding where there is no evidence to support it."

[3] Petitioners contend, however, that they were deprived of the benefit of the contents of two medical reports made to them by Drs. Cuttle and Carlson about the time that Doran was discharged from medical treatment for the fracture of July 3, 1925, and which reports, if considered by the commission, would have placed a different aspect upon the case as to the cause of the permanent impairment of the wrist. With reference thereto the record shows that at the conclusion of the hearing on December 16, 1926, an order was made that the case remain "open 5 days for filing medical reports, otherwise submitted." Pursuant to said order petitioners forwarded to the commission the two medical reports above referred to, but it seems the same were not received by the commission until 2 days after the expiration of the time allowed, and were never officially filed as exhibits in the case. Petitioners assert that it was not until after their motion for a new trial had been denied by the commission that they discovered said reports had not been filed, and that, therefore, they make complaint thereof for the first time in this proceeding.

The first report was dated July 30, 1925, and was made by Dr. Carlson, orthopedist, to Dr. Cuttle. He stated that the X-ray pictures taken by him showed that the accident of July 3, 1925, caused a "fracture of the distal end of the radius, running into the wrist joint"; also "an old impacted fracture of the scaphoid bone;" and that the examination showed a definitely limited motion of the wrist, some of which was "no doubt associated with his injury of July 3." The second report, dated September 14, 1925, which was several days subsequent to Doran's discharge from medical treatment for the July accident, was made by Dr. Cuttle, whereby petitioners were informed that "the case was not one of simple fracture of the radius, but that on account of the previous wrist injury aggravated by the recent accident there was a considerable amount of limitation of motion in the wrist joint"; that at the time of Doran's discharge "he still had a good deal of stiffness in the affected wrist"; and that "it may be necessary to take up at a later date the question of residual stiffness."

Even though it be conceded, as petitioners contend, that said reports should have been made a part of the record herein, we find nothing contained in either of them with reference to the existence of the earlier injury substantially or materially differing from the facts as they were established at

the hearing before the commission by the testimony of Doran and the report of Dr. Harbaugh. Doran testified without hesitation that 20 years before he had sprained the same wrist; and the report of Dr. Harbaugh recites that "X-ray pictures show evidence of an old fracture of a certain small bone in the wrist"; consequently, the fact of an earlier injury was brought clearly before the commission before its award was made. No greater knowledge as to the existence of that injury could have been imparted to the commission by the contents of the reports in question, and since each report indicated that, notwithstanding the injury of 20 years previous, more or less of the stiffness which was then present and which was anticipated might continue in the future was, as Dr. Carlson expressed it, "no doubt associated with the injury of July 3," it cannot be said that the commission would have reached any different conclusion with reference to the cause of such permanent impairment had the contents of said reports come properly before it. Evidently petitioners were not taken by surprise at the testimony given by Doran, because they were informed as to the existence of the earlier injury by the reports of Drs. Cuttle and Carlson made to them some 15 months before; and if, as petitioners claim, Dr. Harbaugh had no information as to the earlier injury at the time he made his report, and therefore based his conclusion as to the cause of the permanent injury upon an erroneous assumption of facts, petitioners had ample opportunity before the hearing closed to have Dr. Harbaugh's report corrected, which they did not seek to do.

We think it cannot be assumed, however, from the mere fact that the reports of Drs. Cuttle and Carlson were not officially filed, that their contents were not considered by the commission in making its award. Admittedly the reports were in the possession of the commission for that purpose within the 7 days after the cause was heard, and were found among the records of the case at the time petitioner's motion for a new trial was made on November 20, 1926. Furthermore, petitioners concede that the failure to file said reports was doubtless due to a clerical error; that there was no order made excluding them from the record; and that the referee read them and gave them such consideration as he deemed proper in recommending a decision, which was rendered some 2½ months subsequent to the receipt of the records by the commission. From the circumstances mentioned it may be fairly inferred, we think, that, notwithstanding that the reports were not officially filed as exhibits, the commission, like the referee, gave the contents thereof such weight as it deemed proper.

For the reasons stated, we conclude that

the failure to file said reports has not operated to deprive petitioners of any substantial right, and that either with or without said reports the finding of the commission as to the cause of the permanent impairment of the use of the wrist is legally supported.

[4, 5] Equally without merit are petitioner's further contentions that Doran's claim for compensation was barred by the provisions of the statute and by his own laches. A permanent disability is deemed to be a "new and further" disability, within the meaning of section 11 (c) of the Workmen's Compensation Act, being St. 1917, p. 841 (General Acc. & Fire & Life Assur. Corp. v. Industrial Acc. Comm. [Cal. App.] 246 P. 570), and an applicant is entitled to file a claim therefor at any time within 6 months after he becomes aware of the existence of such a new and further disability (Hutchinson Lumber Co. v. Industrial Acc. Comm. [Cal. App.] 246 P. 118). The evidence here shows that although Doran was informed by Dr. Cuttle in September, 1925, that he would suffer some soreness and rheumatism as a result of the accident of July 3, 1925, it was affirmatively established that Doran did not learn that there was a permanent impairment of the use of the wrist until he was informed of such fact by Dr. Holcomb at the time the latter took the X-rays in November, 1926; and within a few days thereafter Doran filed the present application for an adjustment of his claim, which was well within 245 weeks from the date of original injury in July, 1925. Under such circumstances, his application was filed in ample time. Hutchinson Lumber Co. v. Industrial Acc. Comm., supra. The award is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

85 Cal. App. 732

PEOPLE v. MILLSAP. (Cr. 1463.) ★

District Court of Appeal, Second District, Division 1, California. Oct. 1, 1927.

Hearing Denied by Supreme Court Nov. 28, 1927.

1. Perjury § 11(3)—Complaint held to charge embezzlement, making defendant's verification of answer unnecessary, precluding prosecution for perjury if verification was false (Pen. Code, §§ 503 and 506; Code Civ. Proc. § 446).

The allegations of a complaint asserting that defendant, a fiduciary, received money in a fiduciary capacity, fraudulently appropriated it to his own use, and refused on demand of the owner to return it held sufficient to make out an embezzlement case, under Pen. Code, §§ 503 and 506, so that defendant was not required to verify his answer, under Code Civ. Proc. § 446, denying such allegations, and hence was not chargeable with perjury if verification was false.

2. Perjury § 11(3)—Verification of answer held not required, precluding charge of perjury for false verification, where complaint charged embezzlement within three years.

Verification of defendant's answer in a civil suit for the recovery of money held, in view of Code Civ. Proc. § 446, not required, and hence defendant was not chargeable with perjury for alleged false verification, where he was charged with having embezzled at least a part of the money within three years before verifying answer, since defendant's admission of the truth of such allegation would have subjected him to a criminal prosecution for embezzlement of such money.

3. Perjury § 11(3)—False verification of affirmative defenses, not required by complaint, held not ground for perjury prosecution.

Where, in view of Code Civ. Proc. §§ 446 and 437, a complaint is of such a character that defendant is not required to verify his answer to the plaintiff's allegations, he need not verify affirmative defenses which are made a part of such answer, and hence cannot be charged with perjury for alleged false verification of such defenses.

4. Perjury § 1—Not every false swearing constitutes perjury, even though it be as to material facts.

Not every false swearing constitutes perjury, even though it be as to material facts in a proceeding.

5. Perjury § 11(3)—Where nonessential verification to answer in civil action was not of nature to be used as an affidavit, prosecution for perjury could not be founded thereon.

Where defendant, in a civil action, verified his answer though verification was not required by law, prosecution for perjury could not be founded thereon, where the verified answer was not of such a nature as to be used as an affidavit.

6. Perjury § 11(3)—Where defendant verified answer unnecessarily, he could not be held to have waived nonverification right so as to be subject to perjury charge.

Where the defendant in a civil suit verified his answer although verification was not required by statute, he could not be held to have waived his right of nonverification so as to be subject to a perjury charge because of any false statements in such answer.

7. Perjury § 11(3)—Whether pleading requires verification so as to subject defendant to perjury prosecution if verification is falsely made depends entirely upon verification statute (Code Civ. Proc. § 446; Pen. Code, § 118).

Since necessity for the verification of a pleading arises from Code Civ. Proc. § 446, alone, the question whether verification is authorized or required so as to subject defendant to perjury prosecution, if verification is falsely made, must be solved entirely from the construction of such statute without regard to the provisions of Pen. Code, § 118, relative to oaths.

8. Perjury §11(1)—Taking unnecessary oath furnishes no ground for perjury charge.

Where, in a matter or proceeding in which there is no statutory requirement of an oath, a party, nevertheless, voluntarily takes an oath as to facts involved therein, this furnished no ground upon which to maintain a charge of perjury against such person.

9. Indictment and Information §159(2)—Where civil action contained no application for provisional relief, indictment for perjury for false verification of answer held not amendable to state public offense.

Where a civil action for the recovery of money contained no application for provisional relief so that a verified answer could be used as an affidavit, and indictment for perjury because of the answer held not amendable so as to state a public offense.

Appeal from Superior Court, Los Angeles County; Victor R. McClucas, Judge.

Homer C. Millsap was convicted of perjury. From an order denying his motion for a new trial, he appeals. Judgment reversed, and the appeal from the order denying a new trial dismissed.

Hearing denied by Supreme Court; Shenk, J., dissenting.

Paul W. Schenck and Leo V. Silverstein, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

SHAW, Justice pro tem. Defendant was tried and convicted upon an indictment charging perjury and appeals from the judgment and from an order denying his motion for a new trial. By demurrer to the indictment and also by motion in arrest of judgment he raised the point that the indictment does not state facts sufficient to constitute a public offense. The act charged as perjury was the verification of an answer in a civil action. The indictment set up in full the complaint in that action and the answer thereto. The complaint was filed in the superior court of Los Angeles county on June 22, 1922, by Ida A. Morgan Clark, as plaintiff, against Homer C. Millsap, the appellant in this case, Berenice Williams Millsap, and M. M. Investment Company, a corporation, as defendants, for the purpose of obtaining an accounting from the defendants. The indictment alleged that this complaint was verified by the plaintiff and that an answer thereto was filed on July 25, 1922, in behalf of Berenice Williams Millsap and Homer C. Millsap, individually and as trustee for M. M. Investment Company, which was verified on the same day by Homer C. Millsap. This verification is the perjury charged.

In support of his contention that the indictment does not state a case of perjury, appellant argues that no verification of the answer was required by law, and therefore a

false oath made in verifying it could not be perjury. The general matter of verification of pleadings in civil actions is governed by section 446 of the Code of Civil Procedure, which reads, in part, as follows:

"When the complaint is verified, or when the state, or any officer of the state in his official capacity, is plaintiff, the answer must be verified, unless an admission of the truth of the complaint might subject the party to a criminal prosecution, or, unless an officer of the state, in his official capacity, is defendant."

The complaint in this case being verified, appellant bases his claim that no verification of the answer was required upon the proposition that the complaint charged him with embezzlement and an admission of its truth would therefore subject him to a criminal prosecution. The complaint is long and complicated, alleging four causes of action. Appellant refers in support of his contention to the whole complaint and quotes with special emphasis a part of the third cause of action, in which all the facts necessary to show an embezzlement of \$20,000 of the plaintiff's money by defendant, Homer C. Millsap, are grouped together and concisely stated. Unfortunately for this reference, the embezzlement there alleged is stated to have occurred on September 8, 1914, whereas the verification in question was not made until July 25, 1922, nearly eight years later. There is no suggestion in the civil complaint or in the indictment that appellant was out of the state on September 8, 1914, or at any time thereafter. Hence it appears that when the verification was made the statute of limitations had run against a prosecution for the embezzlement charged in the part of the complaint now under consideration. This fact raises the question whether, under the circumstances, an admission of the truth of these allegations would subject appellant to a criminal prosecution. This question has not been discussed in the briefs, and decision of it is not necessary, for other allegations of the complaint are sufficient, when taken together, to charge an embezzlement occurring within the statutory period before the verification of the answer was made by appellant.

In the first cause of action the complaint alleged, among other things, the following facts: That the defendant, Homer C. Millsap, was at all times therein mentioned an attorney at law; that in May, 1913, the plaintiff employed him as her attorney at law; that he accepted the employment and it continued without interruption to January, 1922; that at his request and on his advice, she delivered and intrusted to him the property mentioned in the complaint for his care, supervision, and preservation for plaintiff; that in May, 1914, she owned certain cash, notes, and other property; that defendant,

Homer C. Millsap, advised her that said property could be more easily and effectively managed if a corporation were formed and said property transferred to it; that she assented to this, and accordingly the defendant M. M. Investment Company was incorporated in June, 1914, by Homer C. Millsap; that he was at all times one of its officers and directors until it forfeited its charter in March, 1921, at which time he became, and ever since has been, a trustee for its stockholders; that plaintiff transferred the above-mentioned property to said corporation in 1914 shortly after its organization; that thereafter the corporation and Homer C. Millsap received from said property transferred by plaintiff to the corporation, by way of rents, sales and other collections, more than \$71,201.38, the portion of said sum received by each being unknown to plaintiff; that said sum was received at dates and in amounts as follows: During the years 1914 to 1919, inclusive, \$8,500; between May 12, 1914, and November 12, 1914, \$25,945.83; March 3, 1915, \$8,000; April 20, 1915, \$2,500; February 14, 1916, \$8,000; March 9, 1916, \$8,000; April 21, 1920, \$8,500, which was the proceeds of a sale of certain property which plaintiff had transferred to the corporation; and at unspecified dates \$1,755.55; that all the property transferred by plaintiff to said corporation was the property of plaintiff, and all the money received by said defendants was at all times and now is the money of the plaintiff; that said corporation never had any business except that of obtaining, holding, and selling the said property of the plaintiff under the sole and exclusive management and control of said Homer C. Millsap, and all its books and record have always been in his possession and control, and his office was its office; that during the years 1919 and 1920 the defendant Berenice Williams Millsap was the stenographer of Homer C. Millsap and received certain of plaintiff's money without plaintiff's knowledge or consent, the amount thereof being unknown to the plaintiff. Paragraphs XV and XVII of the first cause of action read as follows:

"XV. That at the time of the assignment and transfer of plaintiff's said property as aforesaid to said defendant corporation, said defendant, Homer C. Millsap, advised plaintiff that the moneys derived and received from the sale of said properties, and each of them, would be and was invested by said defendant, Homer C. Millsap, an interest-bearing property; that said plaintiff discovered within 6 months last past, and not before, that her said moneys aforesaid had not been invested in any property, but, on the contrary, had been deposited in the personal bank account and accounts of said defendant, Homer C. Millsap, and by him unlawfully and fraudulently appropriated to his own uses and purposes, with the exception of certain of said moneys that said defendant paid out to plaintiff and for the care and preservation of said mining properties as aforesaid, and with

the further exception of certain moneys received by said Berenice Williams Millsap, as aforesaid."

"XVII. That said defendants have paid to plaintiff of said sum of \$71,201.38, as aforesaid, the sum of \$10,968.81."

The first cause of action further alleged that plaintiff has repeatedly and from time to time demanded of the defendants an accounting and the return and payment to her of her money, and has demanded such accounting since February 5, 1922, no other dates of such demands being stated; that defendant, Homer C. Millsap, promised to account, but has failed, neglected, and refused to do so; that plaintiff is not indebted to any of the defendants in any amount; and that there is due, owing, and unpaid to her from defendants approximately \$60,232.57.

In the fourth cause of action the plaintiff alleged that defendants are indebted to her in the sum of \$60,235.57 for money had and received by them and each of them to her use, as alleged in the first and third causes of action, both of which are here repeated in large part by reference; that defendants concealed from her their dealings with her property; that on April 18, 1922, she finally obtained from Homer C. Millsap a statement of account, and found it "to be untruthful and incorrect, and that large sums of money which said defendant, Homer C. Millsap, admitted had been collected by him and received by the defendants had been appropriated to his own use, as hereinbefore alleged"; that plaintiff learned for the first time on April 18, 1922, except as to the \$20,000 transaction, "that the said appropriation of said moneys had been done in secret by said defendants, as aforesaid; * * * that prior to the commencement of this action plaintiff demanded of said defendants and each of them the payment to her of said sum," and they and each of them refused to pay said sum or any part thereof to plaintiff, and it is now wholly unpaid.

[1, 2] The allegations which we have summarized from the complaint clearly show that the appellant received money of the plaintiff in said civil action in a large amount; that at the time he received it he was acting in a fiduciary capacity for her; that instead of investing and keeping it for her, which he should have done in the due and lawful execution of his trust, he fraudulently appropriated it to his own use and refused on demand to return it. This is sufficient to make out a case of embezzlement, under sections 503 and 506 of the Penal Code. 10 Cal. Jur. 265; *People v. Shearer*, 143 Cal. 66, 76 P. 813; *People v. Gordon*, 133 Cal. 328, 65 P. 746, 85 Am. St. Rep. 174; *People v. Steffner*, 67 Cal. App. 23, 227 P. 699. Although neither the date at which this misappropriation occurred nor the dates on which plaintiff demanded the return of her money

are alleged, yet a prosecution for the embezzlement was not barred by the statute, at least as to the sum of \$8,500, for that amount was received by appellant within three years before he verified the answer, and, of course, could not have been embezzled before it was received. An admission of the truth of these allegations would therefore have subjected appellant to a criminal prosecution for embezzlement, and he was not required by section 446 of the Code of Civil Procedure to verify his answer.

[3] The respondent attempts to defeat this conclusion by calling attention to the fact that the part of the answer which is the subject of the assignment of perjury, on which appellant was convicted, is not a denial of any allegation of the complaint, but is an affirmative allegation, and contends that, even though defendant might under the circumstances be excused from verifying so much of his answer as consisted of denials, he was bound to verify the affirmative allegations thereof. This contention finds no support in the Code of Civil Procedure. Section 437 of that Code, as it stood when this answer was filed divided defenses into two classes, (1) denials and (2) new matter, and as to the first class imposed stricter requirements in case of a verified complaint, but as to the second class permitted the same form of allegation whether the complaint was verified or unverified. There is, therefore, no reason to suppose that the Legislature intended to impose on the pleader any greater degree of strictness in regard to verification for such defenses than for those of the first class, nor does the language of the Code lend itself to any such differentiation. The provision of section 446 is that "when the complaint is verified, * * * the answer must be verified"; thus evidently regarding each document as a whole to be either verified or not verified, and not countenancing the splitting of either into parts or a piecemeal verification. Respondent cites no authority in support of its contention as to the verification, but concedes that the case of *Martin v. Bernheim* (Sup.) 34 N. Y. S. 784, is authority to the contrary. That case was based on a statutory provision that the verification "may be omitted" where the party pleading would be privileged from testifying as a witness concerning an allegation contained in the pleading which he answers. The court had before it a case of this kind, where the allegations of the complaint showed that the defendant was guilty of a misdemeanor, and in holding that the defendant was entitled to make an unverified answer said:

"Under the express provision of the Code, he is allowed to answer such an allegation contained in the complaint by an unverified answer. The fact that in the same answer he has the right to plead other defenses does not take away from a defendant a right to an-

swer such an allegation as is contained in this complaint without verifying the answer. All of the defenses to the action, and all facts pleaded in mitigation of damages, must be set forth in one pleading."

[4] We conclude that the exceptions made by section 446 to the requirement that the answer be verified are intended to cover the answer as a whole, including everything which under section 437 may be contained therein, and hence the verification charged in the indictment was not required by law, even as to the affirmative allegations contained in the answer.

It is not the rule that every false swearing constitutes perjury, even though it be as to material facts. As stated in *People v. Howard*, 111 Cal. 655, 658, 44 P. 342, 343:

"One of the primary essentials of the crime of perjury is that the false oath must be material or of consequence in the matter or proceeding in which it is taken (Pen. Code, § 118); and it is well established that the matter or thing sworn or testified will not be held so material where the officer or tribunal before whom the oath is taken had not jurisdiction of the subject-matter of the oath, notwithstanding there may have been general authority to administer oaths in like cases, if within the jurisdiction."

In that case it was held that the defendant was not guilty of perjury, it being alleged that he had falsely verified a criminal complaint filed in a city recorder's court, because this complaint did not show that the recorder's court had jurisdiction of the offense charged.

In the case of *Clark*, 54 Cal. App. 507, 202 P. 50, it was held that a defendant who gave false testimony at the trial of a criminal case before a justice of the peace was not guilty of perjury because the complaint in the criminal case did not state facts sufficient to constitute a crime, although the testimony given was no doubt material to the charge made, the court saying:

"In order that a charge of perjury be made out against the petitioner, it was necessary that the alleged false testimony had been given in a judicial proceeding and that the same was material to a valid issue properly made therein. If the complaint in the gaming case failed to charge a public offense, as is asserted, then the testimony of petitioner would not amount to perjury as that crime is defined by the statute."

[5] These cases do not touch the precise point involved in the present case, but we think the principle on which they are based, as stated in the *Howard Case*, is controlling here. It cannot be said here that the false oath charged was material or of consequence in the proceeding in which it was taken, for it gave the answer to which it related no standing or weight which it would not have had without the oath. Circumstances might have arisen in the action under which the verification would have been of some conse-

quence, as, for instance, if an application had been made for some provisional remedy, on which the answer could have been used as an affidavit; but the indictment charges nothing of this kind. As far as appears therefrom the answer was used solely as a pleading, and as such it was no more effective with the verification than it would have been without it.

The courts of several other states have had occasion to consider cases similar to that before us, and as far as we have discovered they have reached the same conclusion as that which we have stated. In the case of *Beecher v. Anderson*, 45 Mich. 543, 8 N. W. 539, the court was asked to issue a writ of mandamus to compel a sheriff to serve a warrant for the arrest of one Wheaton on a charge of perjury, and the court, while commenting on the extraordinary nature of the proceeding, decided the case on the theory that the sheriff might refuse to serve the warrant if the complaint upon which it was issued stated no crime, and proceeded therefore to consider the sufficiency of the complaint. The offense charged against said Wheaton was that he had as an officer of and in behalf of a certain corporation verified its answer to a bill in equity. The court in an opinion written by Judge Cooley said:

"Perjury is committed 'when a lawful oath is administered, in some judicial proceeding, to a person who swears willfully, absolutely, and falsely, in a matter material to the issue or point in question.' 3 Inst. 164; 4 Bl. Com. 137; *People v. Fox*, 25 Mich. 492. By this is meant that the oath must be material: the facts sworn to may be material, and yet the false swearing be no perjury because the oath performed no office in the case, and was wholly unimportant and immaterial. This point is well illustrated, in the case of *People v. Fox*, just referred to. Fox was informed against for having made a false affidavit in a suit at law pending in the circuit court for the county of Branch wherein he affirmed that one of the defendants in said suit did not execute the obligation sued upon. The fact sworn to was material, but it did not appear from the information that the affidavit was made to be used in the case, or that it actually was used, or that it performed or was to perform any important office whatever in the case. It did not therefore appear that the oath was of any materiality. *People v. Gaige*, 26 Mich. 30, is, if possible, still more directly in point. The alleged perjury was committed in swearing to a bill in chancery. It was averred that the facts sworn to were material, but the information did not show that the bill was one of a character required by law to be under oath, or that it was sworn to in order to be used as the foundation of any motion or other application to the court. So far as appeared, therefore, the oath was a merely idle ceremony, and its being taken in the case was of no importance. * * * The answer of a corporation is not required to be sworn to, but is put in without oath under the corporate seal. * * * It does not appear from the complaint that the answer was to be used for any purpose

for which an oath to it could be of any importance. So far as appears, therefore, the oath of Wheaton to the answer was wholly an idle ceremony. The answer was no better with it than without it; it affected the issue in no manner whatever; it strengthened no statement made by the answer, and it made no statement evidence that would not have been evidence without it, and gave no statement weight or force that it would not otherwise have possessed. As an information the complaint would therefore have been fatally defective.

The language which we have quoted from *Beecher v. Anderson* sufficiently states the holding in two other Michigan cases, *People v. Fox*, 25 Mich. 492, and *People v. Gaige*, 26 Mich. 30. It appears from the *Fox* Case that the Michigan statute defining perjury refers to the oath taken as one "required or authorized by law."

In *Silver v. State*, 17 Ohio, 365, the court held that an affidavit of the truth of an answer in equity did not constitute ground for a charge of perjury where the bill did not call for an answer under oath, saying:

"To constitute perjury, the oath or affirmation must be material, or be required by, or have some effect in law. Under the late act, an affidavit of the truth of an answer in chancery, has no legal effect, unless the bill expressly calls for such answer on oath. Unless called for on oath, the affidavit of the truth of the answer is wholly immaterial; it neither benefits the respondent or injures the complainant. The answer has the same effect, and nothing more, than it would have had, had it not been sworn to."

In *State v. Parrish*, 129 La. 547, 56 So. 503, 39 L. R. A. (N. S.) 96, it was held, quoting the syllabus in 39 L. R. A. (N. S.) 96:

"To falsely make oath before a notary public in order to obtain a saloon license is not perjury, when the law governing the issuance of such licenses does not require such an oath. An oath must be administered in accordance with the law before perjury can be charged."

In a note appended to this case a large number of authorities are cited to the proposition that perjury cannot be predicated of an oath not required by law.

In the case of *Lapley v. State*, 170 Wis. 356, 174 N. W. 913, 7 A. L. R. 1279, it was held that a charge of perjury may be based upon an oath taken in verifying a complaint in a civil action, although under the law of Wisconsin a complaint may or may not be verified, the court saying:

"A complaint in a civil action pending in a court having jurisdiction to hear the cause is a material matter in the proceeding, and an oath verifying it is one in regard to a matter before a court and is authorized by law."

The court did not state what the provisions of the Wisconsin statute were as to the effect of a verification of a complaint, but if they

were like those of the California law, the case is clearly distinguishable from the one which we now have before us. Under our statute, the law authorizes verification of a complaint and annexes certain consequences to the taking of an oath for that purpose. If the plaintiff verifies his complaint, it follows under sections 437 and 446 of the Code of Civil Procedure that the denials of the answer must be in a certain form, and that the answer must be verified. Hence it may be said of the verification of a complaint, in the words of *People v. Howard*, supra, that the oath is of consequence in the proceeding in which it is taken, and a charge of perjury can be based upon it. Upon this ground the case of *Lapley v. State* could be sustained as consistent with the other authorities. In a note to this case where reported in 7 A. L. R. 1279, the authorities on this subject are again collected and cited, and the annotator states the rule as follows:

"It is well established that where the pleading is of a character which the law does not require shall be verified by oath, perjury cannot be assigned upon a false oath made in verifying such a pleading."

[6] Respondent also argues that the exception to the rule requiring verification of an answer is in the nature of a personal privilege which may be waived by the defendant, and was waived in the case at bar by the making of the verification; and likens the case to that of a defendant in a criminal prosecution who elects to take the stand and testify in his own behalf, citing authorities to the effect that such a defendant may be convicted of perjury if he gives false testimony. But the comparison attempted is not apt. Although the defendant is not required to testify, yet if he desires to do so he must be sworn in order to exercise that privilege and the oath is therefore required by law. The two situations would be more nearly analogous if the law provided that the defendant in a criminal case might make an unsworn statement to the jury and have it considered by them as testimony. If such a provision were in the law and a defendant should then voluntarily take an oath before making his statement, we hardly think he could be held guilty of perjury. In the case before us there is no personal privilege to be waived. The word "unless" is the equivalent of "except" (*Estate of Smith*, 131 Cal. 433, 63 P. 729, 82 Am. St. Rep. 358), and the part of section 446 introduced by it is therefore an exception to the rule previously stated. The case is simply excluded by the exception from the operation of the general provision requiring verification. As to it there is no provision for verification, and the right to file an unverified answer can no more be regarded as a privilege in this case than in a case where the complaint is not verified.

Respondent bases a further argument upon the use of the word "may" in section 118 of the Penal Code, which reads as follows:

"Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such oath *may* by law be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury."

[7, 8] The point made is that the word "may" is permissive and not mandatory, and hence under this section perjury may be committed where an oath is authorized or permitted, though not required. This may be correct in cases where the law does in truth permit an oath and annexes some consequence to it, as in the case of a complaint in an ordinary civil action, which we have already discussed, but it is not correct to say as to the case before us that the law authorizes or permits any oath. The necessity for the verification of a pleading arises from the statute alone, and the question whether it is authorized or required is to be solved entirely upon the construction of section 446 of the Code of Civil Procedure. *Claiborne v. Castle*, 98 Cal. 30, 32 P. 807. In the present case, section 446, as we have already seen, does not authorize or provide for a verification of the answer in question; it is merely a case excepted from the rule requiring verification. There is no more authority of law for an oath in such an excepted case than there is in any other case where an oath is not provided for. The most that can be truthfully said is that the law does not forbid an oath in such a case, and this can be said with regard to all voluntary oaths that may be made, upon which it is well established that no charge of perjury can be maintained.

The provisions of section 118 are not materially different in this respect from the Michigan statute (Comp. Laws 1915, § 14973) under which a charge of perjury could be based on any oath "authorized * * * or * * * required by law," and yet the Michigan cases above cited held that perjury could not be committed by an oath taken in verifying a pleading where no verification was required. So, too, under a federal statute (18 USCA § 231) providing that a false oath "in any case in which a law of the United States authorizes an oath to be administered" may be the foundation of a perjury charge it was held in *United States v. Cameron* (D. C.) 282 F. 684, 689, that:

"Nothing is better settled with reference to the offense of perjury than that it may not be based upon an oath, however solemnly taken, which is not required by the law to be taken by the party charged."

The same ruling was made under the same statute in *United States v. Robertson* (D. C.) 257 F. 195.

[9] We conclude that the false oath alleged by the indictment does not support the charge of perjury. Our conclusion on this point renders it unnecessary to discuss other objections which appellant makes to the indictment, or to consider the objections upon other grounds to the judgment. The original complaint in the civil action was introduced in evidence at the trial, and contains the same allegations appearing in the copy thereof set forth in the indictment. The evidence shows that there was in the civil action no application for provisional relief, on which the answer could be or was used as an affidavit, and hence the indictment is not amendable so as to state a public offense. It thus appearing that there can be no new trial on this indictment, the appeal from the order denying the motion for a new trial has become moot and should be dismissed.

The judgment is reversed, the appeal from the order denying a new trial is dismissed, and, it appearing that the defendant has given bail, it is directed that his bail be exonerated.

We concur: CONREY, P. J.; YORK, J.

PEOPLE v. SUPERIOR COURT IN AND FOR SOLANO COUNTY.★

SAME v. ELLIS.

(Civ. 3332; Cr. 985.)

District Court of Appeal, Third District, California. Oct. 1, 1927.

Rehearing Denied Oct. 31, 1927. Hearing Granted by Supreme Court Nov. 28, 1927.

1. Criminal law §97(1)—Penal laws of California have no extraterritorial force.

Penal laws of California are not to be given any extraterritorial force, and a crime committed in another state cannot be punished under them.

2. Statutes §24(1)—Penal statutes will be not construed to reach further than their words.

No person can be made subject to penal statutes by implication; the statutes not being construed to reach further than their words.

3. Bigamy §1—Cohabitation within state, following a second marriage outside state, is not "bigamy" (Pen. Code, §§ 281, 1106).

One having a husband or wife living, who marries another person without the state and subsequently cohabits with him within the state, is not guilty of "bigamy," since meaning of Pen. Code § 281, defining bigamy cannot be extended by section 1106, providing that proof that second marriage took place without state accompa-

nied by proof of cohabitation thereafter within state is sufficient to sustain charge of bigamy; penal laws having no extraterritorial force.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bigamy.]

Appeal from Superior Court, Solano County; William T. O'Donnell, Judge.

Henry W. J. Ellis, also known as Henry J. Ellis, was charged by information with bigamy. The court dismissed the case, and the State appeals and applies for a writ of review. Order affirmed.

Hearing granted by Supreme Court; PRESTON, J., dissenting.

U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., and Brantley W. Dobbins, Dist. Atty., of San Francisco, and Leo C. Dunnell, Deputy Dist. Atty., of Richmond, for the People.

Joseph M. Raines, of Fairfield, and Russell F. O'Hara, of Vallejo, for respondents.

BURROUGHS, Justice pro tem. In the first of the above-entitled proceedings the petitioner seeks to have annulled an order of the superior court of the county of Solano dismissing a certain criminal action wherein one Ellis is charged with the crime of bigamy. The second proceeding is an appeal from the same order.

From the record it appears that the trial court granted the motion because it was of the opinion that the information did not state a public offense under the laws of this state and that the defect could not be cured by an amendment.

The charging part of the information reads as follows:

"The said Henry W. J. Ellis, also known as Henry J. Ellis, on or about the 27th day of September, A. D. nineteen hundred and twenty-six, at Kansas City, state of Missouri, and before the filing of this information, did knowingly, willfully, and feloniously marry one Ida Lou Johnson, the said defendant being then and there the lawful husband of another person, to wit Alice Burton Ellis, then and there living, the marriage of said defendant and said Alice Burton Ellis not having been annulled, dissolved, and pronounced void by the judgment of any competent court, being then and there subsisting, as the defendant well knew, and the said Alice Burton Ellis not then and there being absent from the said defendant for five successive years without being known to defendant to be living; said defendant and said Ida Lou Johnson Ellis having on or about the 2d day of October, 1926, and ever since said date cohabited together as husband and wife, in Vallejo township, in the county of Solano, state of California."

To this information the defendant entered a plea of not guilty, and the cause was set for trial for the 26th day of April, 1927, and at that time the defendant made a motion that the action be dismissed and the defendant discharged from custody. The court granted the motion. It will be observed that

the information alleges the marriage to have taken place in the state of Missouri, followed by a cohabitation of the parties in Solano county, Cal. The statute defining bigamy is section 281 of the Penal Code, which is entitled "Bigamy Defined," and reads as follows:

"Every person having a husband or wife living, who marries any other person, except in the cases specified in the next section, is guilty of bigamy."

[1] Admittedly this case does not fall within any of the exceptions contained in the next section. If the foregoing were the only section bearing upon the subject-matter, we feel confident that no contention would be advanced that the trial court erred in its order of dismissal of the action, for it is too well settled to require the citation of authorities that the laws of California can have no extraterritorial force and that a crime committed in the state of Missouri could not be punished under the laws of the state of California. But it is claimed on behalf of the petitioner that section 1106 of the Penal Code must be read in conjunction with section 281, supra, and when so read the two sections constitute the crime of bigamy as alleged in the information. Section 1106 of said Code is entitled "Evidence on a Trial for Bigamy," and reads as follows:

"Upon a trial for bigamy, it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof, but the same may be proved by such evidence as is admissible to prove a marriage in other cases; and when the second marriage took place out of this state, proof of that fact, accompanied with proof of cohabitation thereafter in this state, is sufficient to sustain the charge."

It is further claimed that when the Penal Code of 1872 was enacted by the Legislature it was intended by the Legislature to re-enact or continue in existence the same definition of bigamy which had theretofore existed in our law. To a better understanding of the foregoing contention it is necessary to examine the law as it had previously existed. The Legislature of 1850, under the title of "Offenses Against Public Morality, Health, and Police" (Stat. 1850, p. 244, § 121), defined bigamy in the following language:

"Bigamy consists in having two wives or two husbands at one and the same time, knowing that the former husband or wife is still alive, * * * and when such second marriage shall have taken place without this state, cohabitation in this state, after such second marriage shall be deemed the commission of the crime of bigamy."

[2] The foregoing act was amended by the Legislature May 11, 1861 (St. 1861, p. 415), but did not alter the portion of the act above quoted. In 1872 the crime of bigamy was codified in section 281 of the Penal Code as

it now stands and that portion of the Crimes and Punishment Act of 1850 and 1861, supra, relating to marriage without the state followed by cohabitation within this state, was omitted. Comparing the act of 1850 and the act of 1861 with section 281 of the Penal Code as it now stands, it appears that in both the former acts that when the second marriage was contracted without the state of California cohabitation in this state after such second marriage constituted the commission of the crime of bigamy, while in section 281 of the Penal Code all reference to a marriage contracted out of the state followed by cohabitation within this state is omitted. Section 1106 of the Penal Code provides that when the second marriage took place out of the state proof of that fact, accompanied by proof of cohabitation thereafter in this state, is sufficient to sustain the charge. The earlier statutes define a bigamous marriage out of the state followed by cohabitation within this state as constituting the crime of bigamy, while section 1106 merely states that it is sufficient to sustain the charge of bigamy, but does not undertake to make such facts constitute the crime. In our opinion there is a broad distinction between the earlier acts and section 281, even when read with section 1106, supra. In *re Twing*, 188 Cal. 261, 204 P. 1082, it was held that:

"Penal statutes will be construed to reach no further than their words; no person can be made subject to them by implication."

[3] The Penal Code is divided into three parts. The title of part 1 is "Crimes and Punishments." It covers sections 26 to 681a of the Code. Therein the various crimes are defined and punishment provided for. Crimes are classified therein and each title deals with crimes of one class or of a similar nature. Therein the substantive law and definitions of crimes are found. The title to title 9 of part 1 is "Crimes Against the Person and Against Public Decency and Good Morals." This covers section 261 to 267 of the Code. Chapter 5 of said title 9 is entitled "Bigamy, Incest," etc. It includes sections 281 to 288 of the Penal Code, which includes the definition of the crime of bigamy, as hereinbefore set out. The title to part 2 of the Code is "Criminal Procedure." It includes sections 681 to 1570. Therein matters of procedure are dealt with, including commitments, trials, appeals, and special proceedings. Part 2 is divided into various titles. The title of title 7 is "Proceedings After the Commencement of the Trial and Before Judgment." The title of chapter 2 of title 7 is "The trial." Therein we find section 1106, supra, dealing with evidence on the trial of a charge of bigamy. In *Kerr's Cyc.*, Penal Code of 1920 (2d Ed.), the author says of section 1106 of the Penal Code:

"The latter portion of above section, relating to proof where second marriage takes place out

of state, undoubtedly is, at most, rule of evidence, and cannot be deemed to extend scope of section 281, ante, defining bigamy in this state. Under section 281, ante, second marriage is gravamen of offense of bigamy. * * * This being so, it would seem that whenever second marriage is contracted, offense is then complete, and is offense against state in which overt act is committed. As laws of state can have no extraterritorial force, provisions such as that contained in this section cannot alone warrant punishment of offense committed in another state."

Counsel for petitioner cites in support of his contention that the information states a public offense. *People v. Martin*, 188 Cal. 281, 205 P. 121, 21 A. L. R. 1399. In that case the defendant was charged by indictment in the superior court of San Diego county with the crime of bigamy which was alleged to have been committed in the county of Orange, but the case is not analogous to the one now before the court, for the reason that section 785 of the Penal Code provides that, when the offense of bigamy is committed in one county and the defendant is apprehended in another county, the jurisdiction is in either county, and in the *Martin* case the defendant was apprehended in the county of San Diego.

Many other cases are cited by both parties, but a reading of section 281 of the Penal Code, which defines the crime of bigamy, cannot be extended by section 1106 of the Penal Code, especially in view of the fact that the latter section does not undertake to define the crime of bigamy, but merely establishes a rule of evidence. A further examination of the authorities cited would serve no useful purpose.

Some question has been raised as to the proper remedy, whether it should be by appeal or by writ of review, but, as in either case the order must be affirmed, that question becomes immaterial.

The order is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

85 Cal. App. 525

GEORGE et al. v. BEATY et al. (Civ. 5777.)★

District Court of Appeal, Second District, Division 2, California. Sept. 21, 1927.

Rehearing Denied with Modifications Oct. 20, 1927. Hearing Denied by Supreme Court Nov. 17, 1927.

1. Pleading ☞129(1)—Where respondents neither admit nor deny material allegations of petition, they stand admitted.

In original proceeding in mandamus, admission of truth of material allegations of petition follows as legal conclusion from respondents' failure to traverse them, even in case where

they neither admit nor deny averments by petitioners.

2. Mandamus ☞168(2)—Court cannot presume that supervisors of flood control district will not continue to do all things required in pending mandamus proceeding (Code Civ. Proc. § 1963, subsec. 15).

Where board of supervisors of flood control district who were defendants in mandamus proceeding took all action that they might be compelled to take in such proceeding, court cannot assume they will not continue to do so, in view of Code Civ. Proc. § 1963, subsec. 15, relative to presumption that official duty will be regularly performed.

3. Mandamus ☞14(3)—Where respondents showed willingness to perform duty without coercion of writ, peremptory writ of mandamus will not issue.

Where board of supervisors of flood control district, who were respondents in mandamus proceeding, took all action that they might be compelled to take in such proceeding, peremptory writ will not be issued, since remedy of mandamus will not be employed where respondents show willingness to perform duty without coercion of writ.

4. Levees and flood control ☞9—Supervisors of Los Angeles flood control district have exclusive authority to determine whether change of conditions in relation to improvements existed authorizing change in improvement (St. 1915, p. 1502, § 15).

Under St. 1915, p. 1502, § 15, relative to improvements in Los Angeles flood control district, duty and authority of determining whether there has been change of conditions in relation to improvements authorizing change in improvement is on board of supervisors of district, and courts cannot prevent free and unhampered discharge of such duty.

5. Mandamus ☞14(3)—Mandamus is never granted until there has been actual refusal to perform act.

Mandamus is never granted to compel performance of act until there has been actual as distinguished from anticipated refusal.

6. Mandamus ☞19—Writ of "mandamus" being directed to person would not apply to persons becoming members of board of supervisors of flood control district after its issuance.

Writ of "mandamus" is command to person as distinguished from office so that writ would be inapplicable to new members elected to board of supervisors of flood control district after its issuance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mandamus.]

7. Mandamus ☞16(1)—Peremptory writ of mandamus should not issue where there has been compliance with alternative writ, question being moot.

Peremptory writ of mandamus should not issue as matter of course, where there has been compliance with alternative writ, since by rea-

son of such compliance question has become moot.

Application by R. W. George and others for a writ of mandate, prayed to be directed to Fred T. Beaty and others, as the Board of Supervisors of the Los Angeles Flood Control District, requiring them to proceed with the construction of a dam at San Gabriel Canyon damsite. Writ denied.

Anderson & Anderson and Haas & Dunigan, all of Los Angeles, Nowland M. Reid, of Long Beach, and Arthur G. Wray, of Whittier, for petitioners.

Everett W. Mattoon, Co. Counsel, Roy W. Dowds, and Hill, Morgan & Bledsoe, all of Los Angeles, for respondents.

THOMPSON, J. In this original proceeding in mandamus the petitioners seek the peremptory writ compelling the respondents, as the board of supervisors of the Los Angeles flood control district, to proceed to construct a dam at the San Gabriel Canyon damsite of the height of 425 feet above the bed of the stream, with a storage capacity of 240,000 acre feet of water, or to construct to completion a dam of such height and capacity as can be constructed for the sum of \$25,000,000. It is made to appear by the allegations of the petition that at a special election called for that purpose on May 24, 1924, the voters of the Los Angeles flood control district authorized bonds in the sum of \$25,000,000 for the purpose of constructing a dam at the forks of the San Gabriel river of the height and capacity just mentioned, in accordance with a report of the engineer employed by the board of supervisors to make a report thereon and at the estimated cost of \$25,000,000; that on May 18, 1927, the board passed a resolution reciting that subsequent exploration studies had demonstrated that a dam 385 feet high and with a capacity of 180,000 acre feet would be sufficient, and changed the plans and specifications and adopted plans and specifications for the smaller dam.

[1] From the return of the respondents it appears that subsequent to the issuance and service of the alternative writ, the board of supervisors, by resolution passed on August 1, 1927, rescinded the action of May 18, 1927, and ordered "that the dam in San Gabriel Canyon be constructed at the site and of the size and impounding capacity as provided in the report of the chief engineer of said district, adopted April 1, 1924, and for the construction of which bonds were duly and regularly voted by the voters of said district on May 6, 1924, and that the chief engineer of said district be instructed to present plans and specifications to this board for the construction of a dam in accordance therewith.

* * * It is also alleged that the board is "now proceeding as fast as possible to construct to completion a dam at the San Gabriel

damsite according to the plans and specifications and of the height and capacity authorized by the voters of said district," and that "they are now expressly and in every detail complying with the command set forth in the alternative writ of mandate in this case." No allegation of the petition is denied in the return, but the respondents make their allegations with the attempted reservation that they neither admit nor deny the averments by petitioners. Therefore all of the material allegations of the petition, in the eyes of the law, stand admitted. As stated by the court in the case of *People v. Crabb*, 156 Ill. 155, 40 N. E. 319, which was a proceeding in mandamus where a similar effort was made:

"The admission of their truth [allegations of the petition] follows as a legal conclusion from the defendants' failure to traverse them; and such conclusion is not obviated by a protestation on the part of the defendants that their truth is not admitted."

[2, 3] With the situation thus clearly before us the sole question is whether the peremptory writ should issue or the petition be dismissed with costs to petitioners. Originally the "writ of mandamus is a high prerogative writ issuing in the name of the sovereign power * * *" (*Calaveras County v. Brockway*, 30 Cal. 325, 336), and with that historical background it would seem the writ could not be invoked except for the accomplishment of some useful purpose. It has accordingly been determined that it will not issue "where it would be of no benefit to the applicant, or to enforce a mere abstract right, unattended by any substantial benefit to the petitioner." *Spotton v. Superior Court*, 177 Cal. 719, 171 P. 801. What would be accomplished in this proceeding by the issuance of the peremptory writ? It is certain that had the resolution of August 1, 1927, preceded the filing of the petition the alternative writ would not have issued. The board of supervisors have taken all action which we might at this time compel them to take and we cannot assume that they will not continue in accordance with their allegations "to construct to completion a dam at the San Gabriel damsite" of the height and capacity determined by the voters. In fact we are bound to presume, in line with the presumption contained in subsection 15 of section 1963 of the Code of Civil Procedure, "that official duty" will be "regularly performed." There is a long line of authorities which hold that the remedy of mandamus will not be employed where the respondents show that they are willing to perform the duty without the coercion of the writ. As an example we quote from *People v. Dulaney*, 96 Ill. 503-506, a proceeding against the commission of the Illinois state penitentiary at Joliet:

"As respects the first contract, respondents admit its validity and their willingness to perform it, so far as it is practicable for them to

do it. Waiving, for the present, the question made as to the jurisdiction of this court to * * * compel the execution of such a contract, there can be no occasion for a writ to compel respondents to do that which they admit, on the record, they are willing to do without coercion. The law will not do a useless thing."

And again in *State v. Nash*, 134 Minn. 73, 158 N. W. 730, it is said:

"Mandamus will not issue to compel the doing of an act which has already been done, or which the respondent is willing to do without coercion." 19 Am. & Eng. Enc. (2d Ed.) 758. Neither will it issue to compel the revocation of a building permit for a defect which has been corrected, or which the parties concerned are ready and willing to correct." (Italics ours.)

To the same effect see *State ex rel. Good v. Howard*, 174 Ind. 358, 92 N. E. 115; *American Eng. Co. v. Metropolitan By-Products Co.* (C. C. A.) 280 F. 677; *St. Louis & S. F. R. Co. v. Messenger*, 26 Okl. 590, 110 P. 893; and *Double v. McQueen*, 96 Mich. 39, 55 N. W. 564.

[4] Counsel for petitioners argue that the board may change its mind in the future and rescind the action of August 1, 1927. The presumption to which we have adverted concerning the performance of official duty answers this contention. It must be remembered that by section 15 of the law creating the district (Stats. 1915, p. 1502) it is provided:

"That any improvement for which bonds are voted under the provisions of this act, shall be made in conformity with the report, plans, specifications and map theretofore adopted, * * * unless the doing of any of such work described in said report shall be prohibited by law, or be rendered contrary to the best interests of said district by some change of conditions in relation thereto, in which event said board of supervisors may, by a vote of four-fifths of all the members thereof, order necessary changes made in such proposed work or improvements. * * *

[5] It will be observed that only where the doing of the work is prohibited by law or when by reason of some change of conditions in relation thereto it is not for the best interests of the district that the board is authorized not to proceed in accordance with the original plans. It will not and cannot be questioned that under the provisions just quoted the duty and authority of determining whether there has been "a change of conditions in relation" to the improvements has been cast upon the board by the Legislature, and the courts cannot prevent the free and unhampered discharge of that duty. Counsel do not assert that the board has not the right and the duty to change its mind in the event that a "change of conditions" actually takes place, but that, regardless of such a change, they might arbitrarily adopt a different policy. We cannot, in a proceeding of this

character, indulge in such presumptions, particularly where, as here, conditions may arise where it is their duty to determine in the first instance, at least, that they are authorized by law, by virtue of different conditions actually arising, to adopt a change of plans. We are not justified in endeavoring to control the future action of public officials where their present actions are in line with their duty. Let us suppose that an alternative writ were sought directed to a public board which was proceeding to discharge its duty as enjoined by law; it certainly would not be argued that because the board might change its mind the writ should issue. It is suggested that in the event that the board of supervisors, acting honestly and in a conscientious endeavor to discharge the duty imposed upon it by section 15 of the act of 1915, should determine erroneously that there was a change of conditions occurring subsequent hereto and should cease construction of the dam before it had reached the required height or before the fixed amount of money had been expended, the question should then be tried in a contempt proceeding rather than to require petitioner to institute a new proceeding in mandamus. One consideration announced in *State v. Public Service Commission*, 44 Nev. 102, 190 P. 284, concludes the claim that petitioners are entitled to a peremptory writ, in order that they be not compelled to begin a new proceeding like the instant one, should the respondent board again try to alter the construction plan ordered by the voters. We refer to the principle that mandamus is never granted to compel the performance of an act until there has been an actual as distinguished from an anticipated refusal, yet that is the only purpose which a peremptory writ would serve in this proceeding. The rule which limits the use of mandamus to compel official action enjoined by law when its performance is refused may enjoin continued vigilance upon the interested taxpayers. However, if it were otherwise courts might be continually called upon to direct and supervise the conduct of public officials vested with ministerial powers. This might occur in any and all instances where an interested petitioner might entertain a doubt as to the official's intention to in good faith perform his legal duty. It is said in *State v. Public Service Commission*, supra:

"As the writ will not lie against the commission, neither will it go against the company, primarily for the reason that the petition does not show that the company has discontinued its service. Its application to the commission, and the order of the latter permitting the discontinuance, afford a strong presumption that it will do so, but, as previously stated, the writ of mandamus is in no sense a preventive [sic] remedy. Its function is to enforce action—to compel the performance of a duty or obligation which is enjoined by law. Mandamus is never granted in anticipation of a supposed omission

of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives. High's Extraordinary Legal Remedies (3d Ed.) § 12."

And in keeping with this statement is a similar one found in *State v. Gracey*, 11 Nev. 223-233:

"It is incumbent on the relator to show, not only that the respondent has failed to perform the required duty, but that the performance thereof is actually due from him at the time of the application."

[6] There exists another very cogent reason why the argument, advanced by petitioner, that the election of new members to the board might cause a change of mind on its part, should have no weight in our consideration of this problem. We read in 16 Cal. Jur. 766, concerning the distinction between prohibition and mandamus, that "one is prohibitory and the other mandatory; one acts upon the person, the other acts upon the tribunal," which language we find approved in *City of Coronado v. San Diego*, 97 Cal. 440, 32 P. 518. Accordingly it has been held that the peremptory writ of mandate does not constitute an enforceable judgment against the successor in office who has not been made a party to the proceeding. *Ex parte Tinkum*, 54 Cal. 201, and *Bauter v. Superior Court*, 6 Cal. App. 195, 91 P. 749. For the purpose of a clearer concept of the original character of the writ of mandamus in relation to its command to a person as distinguished from that of an office, we quote from the opinion of Mr. Justice Strong in the case of *United States v. Boutwell*, 17 Wall. 604, 21 L. Ed. 721:

"The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right."

[7] The question then remains whether the peremptory writ should issue, as a matter of course, where there has been compliance with the alternative writ. This has been answered, not only by the authorities deciding that it will not issue except to accomplish a useful purpose, but also by those decisions wherein it is held that where the return to the alternative writ shows a compliance therewith, the petition will be dismissed. Such are the cases of *Talmage v. Monroe* (Cal. App.) 119 P. 526; *Thornton v. Hoge*, 84 Cal. 231, 23 P. 1112; *O'Brien v. Superior Court*, 189 Cal. 78, 207 P. 549; *Wait v. Superior Court*, 35 Cal. App. 330, 169 P. 916; *Grinbaum v. Superior Court*, 192 Cal. 783, 221 P. 653. These authorities are based upon the principle that the question originally involved has become moot. By reason of the

board's compliance with the alternative writ in this case the question has become moot.

The petitioners, however, upon the authority of *Talmage v. Monroe*, supra, are entitled to their costs.

The writ is discharged and the proceeding is dismissed, the petitioners to recover their costs herein.

We concur: WORKS, P. J.; CRAIG, J.

86 Cal. App. 30

PEOPLE v. STRINGER. (Cr. 1531.)

District Court of Appeal, Second District, Division 2, California. Oct. 11, 1927.

1. Criminal law §695(1)—Permitting answer to question whether accused had been convicted of felony held not error, where trial court was not informed of appeal therefrom.

Where accused took stand and on being asked if he had been convicted of felony stated he had not, and in answer to later question stated he had, permitting answer to question held not error, where it was not called to attention of trial court that an appeal was pending from conviction to which accused referred, or that time for taking appeal had not expired.

2. Criminal law §692—Where harm arose through questions to which no objection was interposed, permitting answer to previous similar question held not error.

Where accused took stand and was asked if he had been convicted of felony and stated he had not, and in answer to next question stated he had, entire harm done to defense arose through second question, to which no objection was interposed, and permitting answer to first question was not error.

3. Witnesses §350—Permitting question whether accused had been convicted of felony held not error, where question was proper at time it was put.

Permitting question to accused who took stand whether he had been convicted of felony held not error, where question was entirely proper at time it was put, though harm resulted to defense from answer to subsequent question asking if he had not been convicted of certain crime in that very courtroom.

4. Criminal law §1037(1)—No error could be predicated upon alleged misconduct of prosecuting attorney, where there was no assignment of wrongdoing, nor request for admonition.

No error could be predicated on alleged misconduct of prosecuting attorney in asking accused if he had been convicted of felony, where there was no assignment of wrongdoing, nor any request for admonition to undo it.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Louis C. Stringer was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

Thomas J. Martin, John A. Deweese, and Josiah Coombs, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, for the People.

WORKS, P. J. This is an appeal from a judgment convicting defendant of the crime of obtaining money by false pretenses. Defendant also appeals from an order denying his motion for a new trial.

Appellant took the stand as a witness in his own behalf. On his cross-examination the record shows the following:

"Q. Have you ever been convicted of a felony? A. I have not.

"Counsel for Appellant: That is objected to as incompetent, irrelevant, and immaterial, no foundation having been laid and not the best evidence.

"The Court: Overruled. He may answer yes or no. A. I certainly have not."

The only point upon which appellant contends for a reversal is that the court erred in permitting an answer to the question asked, and that the district attorney was guilty of misconduct in putting it, although it will be observed that the answer was favorable to appellant. A further excerpt from the record is necessary in order fully to present the point for which appellant contends. Following immediately the quotation above made, the cross-examination continued:

"Q. Weren't you convicted of the crime of obtaining money by false pretenses in this very courtroom? A. I want to beg your pardon. Pardon me, please; in connection with this case, yes, recently. I beg your pardon.

"Counsel for Appellant: Growing out of this same transaction? A. Yes; this same deal."

[1-4] It is insisted by appellant that the question to which he objected was improper for the reason, as he asserts in his brief, that at the time when it was asked an appeal was pending from the judgment of conviction which he had "recently" suffered. There are several answers to the point thus made. In the first place, appellant does not show that it was called to the attention of the trial court that an appeal was pending from the conviction to which he, as a witness, referred, or that the time for taking an appeal had not expired. Secondly, the entire harm which was done to the defense by the part of the record above set forth arose through questions to which no objection was interposed. Thirdly, the question to which objection was made was entirely proper at the time it was put, so far as the mere question of error is concerned. There is nothing in the record up to that time which showed the trial judge what particular conviction was being inquired about, nor, in truth, to indicate that the district attorney had any particular conviction in mind in asking the question. Again, and on the score of misconduct, there was no assignment of wrongdoing nor any request for admonition to undo it.

Judgment and order affirmed.

We concur: CRAIG, J.; THOMPSON, J.

88 Cal. App. 97

PEOPLE v. GARZA. (Cr. 994.)

District Court of Appeal, Third District, California. Oct. 14, 1927.

1. Criminal law §1130(4)—Failure to support appeal by briefs or argument is deemed abandonment of appeal.

Failure of party taking an appeal to support the appeal by briefs or oral argument is to be taken as an abandonment of such appeal.

2. Criminal law §1130(4)—That accused is without means to prepare briefs for appeal does not change rule requiring briefs on penalty of dismissal or affirmance (Appellate Court Rule 5).

That defendant, who has taken an appeal from a judgment of conviction, is without the necessary financial means to defray the expense incident to the preparation and printing of briefs in support of his appeal, does not change Appellate Court Rule 5, requiring briefs to be filed in such cases, or in default thereof suffer a dismissal of appeal or an affirmance of the judgment or order from which the appeal is taken, particularly where the record is voluminous.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Joaquin Garza was convicted of manslaughter, and he appeals. Affirmed.

Herbert C. Coblenz and George Stahlman, both of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, Acting P. J. This is an appeal by the defendant from a judgment of conviction of manslaughter under an information charging him with the crime of murder.

The defendant has filed herein a document designated as, and purporting to be, a brief. All that said document contains, so far as it relates in any way to the merits of the appeal, is the following:

"Appellant has not funds sufficient to enable him to employ attorneys to make an extensive analysis of the transcript on appeal, and all that the attorneys for appellant are doing on this appeal is done voluntarily and without compensation. In order to adequately present a brief in this case it would be necessary for appellant's attorneys to analyze the testimony and write a very extensive brief, as the entire transcript is the main basis of the appeal."

The remainder of the "brief" is devoted entirely to a reply to the motion of the Attorney General to dismiss the appeal on the ground that the defendant, on taking the appeal, failed to comply with the requirements of section 1247 of the Penal Code in his application for a transcription of such testimony received and any other proceedings had at the trial as might be deemed necessary "to fairly present the points relied upon" for a reversal. Nor did the defendant, through his counsel, or otherwise, appear in court and offer or make an oral argument in support of the appeal, although the cause was placed upon the calendar of the October term of this court for hearing and decision, and counsel given due notice thereof by the clerk of this court.

[1, 2] Regardless of whether the motion of the Attorney General to dismiss is or is not tenable, it is clear that the judgment must be affirmed for failure on the part of the accused to file, or cause to be filed, a brief or to present an oral argument, pointing out the errors upon which he intended to base his demand for a reversal. Rule 5 of this court explicitly authorizes this course in cases in which the appellant or his counsel is guilty of such delinquency, and our courts of review have in many cases emphatically sanctioned the enforcement of the rule. This is so because, as the cases have explained, the courts of appeal are not required to assume the labor which it is the duty of attorneys to perform in the presentation of appeals, by groping through the record in search of possible errors of sufficient gravity in their effect upon the rights of the party complaining on appeal to compel a reversal of the judgment or order or both. Moreover, the fact of the failure by a party taking an appeal to support the appeal by briefs or oral argument is to be taken as an abandonment of such appeal. The fact that a defendant in a criminal case who has taken an appeal from a judgment of conviction is without the necessary financial means to defray the expense incident to the preparation and the printing of briefs in support of his appeal does not change the rule requiring briefs to be filed in such cases or, in default thereof, suffer a dismissal of his appeal or an affirmation of the judgment or order from which the appeal is taken. In such case, if the record be small, or the evidence be brief, a review court might excuse the default and examine the record; but even then the court is not required to do so, but, as in any other case, may dismiss the appeal or affirm the judgment. In the instant case the record is quite voluminous, and we will not, therefore, without the aid of counsel for defendant, be considerate enough to wade through the record in search of errors which it is declared in general language are submerged therein. No

motion to dismiss the appeal was made in this case, but the cause was submitted upon the record and the briefs on file. Rule 5 is sufficient authority, if, indeed, express authority is required in such a case, for affirming the judgment appealed from for the omission to file a brief or to present an oral argument in support of the appeal.

The judgment and the order are affirmed.

We concur: PLUMMER, J.; WEYAND, Justice pro tem.

86 Cal. App. 84

PEOPLE v. KHAN. (Cr. 1463.)

District Court of Appeal, Second District, Division 1, California. Oct. 14, 1927.

1. Criminal law $\S$ 511(2)—Testimony corroborating accomplice is sufficient if it tends to connect defendant with commission of offense (Pen. Code, $\S$ 1111).

Under Pen. Code, $\S$ 1111, requiring testimony of accomplice to be corroborated to support conviction, it is unnecessary that such evidence standing alone be corroborative of each and every fact testified to by accomplice, but if it tends to connect defendant with commission of offense it is sufficient, even though it is not absolutely convincing, but on contrary it may be slight and of itself entitled to but little weight.

2. Sodomy $\S$ 6—Evidence corroborating alleged accomplice held to support conviction for infamous crime against nature (Pen. Code, $\S$ 1111).

In prosecution for infamous crime against nature, even if prosecuting witness should be considered accomplice, evidence corroborating him held sufficient under Pen. Code, $\S$ 1111, to support conviction.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Hamit Khan was convicted of an infamous crime against nature, and he appeals. Affirmed.

Ugene U. Blalock, of Porterville, for appellant.

U. S. Webb, Atty. Gen., and Lionel B. Browne, of San Francisco, for the People.

HOUSER, J. This appeal is prosecuted from a judgment of conviction of defendant for the commission of the "infamous crime against nature." The victim of the assault was a boy of the age of 14 years, whose testimony with reference to the commission of the offense was to the effect that on several separate occasions, in the nighttime, and in sleeping quarters provided by defendant, wherein the prosecuting witness, another boy, and defendant were all occupying one bed, defendant had been guilty of the crime of which he was accused in the information presented against him.

Appellant attacks the judgment on the sole grounds that the prosecuting witness was an accomplice of defendant; that under the provisions of section 1111 of the Penal Code "a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense"; and that the record of the trial herein fails to disclose a sufficient corroboration of the testimony of the accomplice. But while considering the particular circumstances surrounding the commission of the offense, as disclosed by the testimony of the prosecuting witness, together with judicial construction of the statute, as shown by cases decided by the Supreme and Appellate Courts of this state, a correct determination of the question of whether the prosecuting witness was an accomplice of the defendant possibly may be in accordance with the conclusions reached by appellant thereon—in view of the corroborative evidence adduced on behalf of the prosecution, which tended to connect defendant with the commission of the offense, it becomes unnecessary to rule directly upon the contention made by appellant to the effect that defendant and the prosecuting witness were accomplices.

As hereinbefore indicated, the prosecuting witness testified that the criminal act of the defendant took place at night on an occasion when defendant, the prosecuting witness, and another boy were occupying a certain bed belonging to defendant; also, that in the perpetration of the offense defendant made use of some vaseline which he kept in a can or bottle under his pillow on the bed, and that such receptacle had a screw-top lid or cover. The boy who occupied the bed with defendant and the prosecuting witness testified that he slept on one side of the bed, the prosecuting witness on the other side, and defendant occupied the middle portion thereof; that at about the time charged in the information he heard defendant take the lid or top off the vaseline bottle, which he kept under his pillow, and thereafter for "about three minutes or maybe longer" he could feel the bed shake. Another witness, who was the arresting officer, testified that he found a bottle of vaseline under the pillow of a bed in the home of defendant. Each of two physicians testified in substance that from a physical examination made by him of the prosecuting witness it appeared that the lower portion of his rectum had been dilated or enlarged from its normal size, and that the mucous membrane lining thereof, which in a normal state is made up of folds, was quite smooth. Each of the same doctors also testified that basing his testimony on his physical examination of defendant it would have been possible for defendant to commit the act of which he was accused. The father of the prosecuting wit-

ness testified that no operation had ever been performed on the rectum of the boy, nor had he ever taken a rectal treatment of any kind. It also appeared from the evidence that at the time the offense was committed the prosecuting witness was in the employ of defendant, and that theretofore, although defendant and the prosecuting witness were unrelated to each other, defendant had shown the prosecuting witness unusual courtesies and attentions in various ways.

[1, 2] In the case of *People v. Kelly*, 69 Cal. App. 558, 570, 231 P. 767, the rule relating to the sufficiency of corroborative evidence to sustain a conviction based primarily upon the testimony of an accomplice is discussed and the authorities cited. As to such evidence, among other things, it is there pointed out, as theretofore decided by the courts of this state, that it is unnecessary that such incriminating evidence, standing alone, be corroborative of each and every fact testified to by the accomplice, but that the statutory requirement simply is that it tend to connect the defendant with the commission of the offense; that it need not be absolutely convincing, but, to the contrary, it may be slight and of itself entitled to but little weight or consideration. Measured by such standards, it is manifest that even assuming that the prosecuting witness was an accomplice of defendant, the other evidence in the case, to which brief reference has been had herein, was sufficiently corroborative of the testimony of the prosecuting witness to meet the demands of the statute.

It is ordered that the judgment be and it is affirmed.

We concur: CONREY, P. J.; YORK, J.

86 Cal. App. 80

DE LONG et al. v. BLACK'S PACKAGE CO.
(Civ. 5742.)

District Court of Appeal, First District, Division 2, California. Oct. 14, 1927.

1. Landlord and tenant §134(2)—Tenant's incidental use of basement of building, leased for general mercantile purposes only, for delicatessen kitchen was not breach of lease.

Tenant's incidental use of basement of premises, leased for general mercantile purposes only, in preparing meats, vegetables, jams, and salads for delicatessen department of store held not a breach of covenant of lease regarding use.

2. Landlord and tenant §134(1)—Incidental activities, necessary for complete enjoyment of premises for purpose for which they are leased, are permitted.

Incidental activities, which are necessary for complete enjoyment of premises for purpose for which they are leased, are permitted.

3. Landlord and tenant ⇨134(6)—Whether activities incidental to purposes for which premises were leased have assumed disproportionate relation is question of fact to be determined from circumstances.

Question whether or not activities incidental to and necessary for complete enjoyment of premises for purposes for which they were leased have assumed too large and disproportionate relation to object for which premises were let is question of fact, which may be decided differently under varying circumstances.

4. Landlord and tenant ⇨134(2)—Clause "general mercantile business" in lease embraces all commodities purchased and sold by merchants, including fireworks and gunpowder.

Clause "general mercantile business" in lease, as referring to purposes for which premises may be used, embraces all commodities that are purchased and sold by merchants, wholesale or retail, and includes fireworks and gunpowder.

5. Landlord and tenant ⇨103(1)—Forfeiture of lease is enforced only where there is such breach shown as it was clear intention of parties to provide for (Civ. Code, § 1442).

Under Civ. Code, § 1442, a forfeiture of lease is not favored and is enforced only where there is such breach shown as it was clear and manifest intention of parties to provide for.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action of unlawful detainer by C. E. De Long and another against the Black's Package Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Peckinpah & Carter, of Fresno, for appellants.

Frank Kauke, of Fresno, for respondent.

KOFORD, P. J. This is an action of unlawful detainer, based upon the defendant's alleged violation of a covenant in its lease. The lease provided that the lessee should have the right to use said premises only "for the purpose of carrying on a general mercantile business." Judgment was for the defendant. It was and is the contention of plaintiffs that this condition of the lease was violated by the defendant by maintaining in a portion of the basement of the said demised premises a place where meats, vegetables, jams, and salads were cooked and prepared to be sold in a delicatessen department or counter in the store in the demised premises, and to some extent sold in two other stores conducted by defendant in the city of Fresno.

The evidence given at the trial shows with considerable particularity the kinds, quantities, and the manner in which the foods sold in the delicatessen department were prepared. The frontage of the whole store was approximately 50 feet. The number of employees

in the store varied from 60 to 75, and sometimes a greater number was employed on special occasions. The number employed in the basement in preparation of foods was about 5 to 7, and they on occasion helped in the sale of goods in the store proper. It was a store for the sale of all kinds of foods which must mean substantially a grocery store. Its general nature, as it appeared to customers and others coming in and out, was clearly that of a general mercantile business. The landlords and their predecessors visited the store at different times, and, although the delicatessen department was established as early as 1913 in a small way and thereafter steadily grew and expanded, it was not until 1925 that they discovered the operations in the basement upon which they predicate the claim that the lessee had violated the conditions of the lease. The record shows that only a portion of the basement was used for the preparation of foods, and that the balance of it was used for storage and cold storage.

Appellants readily admit that respondent is carrying on a general mercantile business, but assert that in addition to that it is operating a factory, be it large or small, in violation of the terms of the lease.

The complaint alleged that the defendant carried on a business other than a general mercantile business, to wit, a delicatessen kitchen, condiment and jam factory. The court found this allegation to be untrue, but found that defendant had prepared various delicatessen products, condiments, and jams in the basement of said premises, using for that purpose, with the exception of certain meats, materials taken from the general stock in trade of the store. It found that this was done only in the course of the general mercantile business of purchasing and selling food products, and that such business at all times was in the usual and customary manner of purchasing products at wholesale, and preparing and placing the same in an appropriate and convenient manner for sale at retail. It is the contention of appellants that this finding is unwarranted. They do not claim it is unwarranted by the evidence, but that it is unwarranted by law. They state that if this reasoning is followed out, it would mean that the tenant here could just as well convert the whole of the premises into a factory to produce or prepare food for other stores throughout the city. On the other hand, respondent claims that if this reasoning is not followed it would result that the grocery man, who roasted and ground his own coffee for sale as a part of his grocery business, would thereby forfeit his leasehold if it was held for general mercantile business only. The determining question is not whether a particular isolated part of the store taken by itself and enlarged so

as to occupy the entire store to the exclusion of all other activities there would constitute a business other than a general mercantile business, but whether that store as it exists is or is not permitted under the clause of the lease given for general mercantile purposes only.

[1-3] The finding that the tenant's activities in the basement were incidental to and a part of the general mercantile business was supported by the fact that its extent was small in comparison with the whole, by its nature, which was ancillary to the sale of foods, and by the frequent practice of selling delicatessen articles in grocery stores. There must necessarily be certain activities conducted in the grocery business, such as delivery, bookkeeping, coffee grinding, and refrigeration, which are not strictly buying and selling, but which are necessary to carry on the buying and selling of merchandise. Incidental activities necessary for the complete enjoyment of the premises for the purpose for which they were leased are permitted. *Meredith v. McCormick*, 208 Mich. 563, 175 N. W. 280, 3 A. L. R. 669. Whether or not such activities in any given case have assumed too large and disproportionate relation to the object for which the premises were let must necessarily be a question of fact, which may be decided differently under varying circumstances.

[4] The clause "general mercantile business" is a liberal one. It embraces all commodities that are purchased and sold by merchants, wholesale or retail. We may mention that it includes fireworks and gunpowder, inasmuch as appellants justify their complaint against the gas plates upon the ground that they increase the fire hazard.

[5] A forfeiture is not favored. It is enforced only where there is such a breach shown as it was the clear and manifest intention of the parties to provide for. *Randol v. Scott*, 110 Cal. 590, 42 P. 976 (citing *Taylor on Landlord and Tenant* [8th Ed.] § 590; Civ. Code, § 1442).

We conclude that the court's finding of no breach is sustained by the evidence and the law. The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

86 Cal. App. 95

PEOPLE v. PADILLA. (Cr. 1512.)★

District Court of Appeal, Second District, Division 1, California. Oct. 14, 1927.

Hearing Denied by Supreme Court Dec. 12, 1927.

1. Criminal law § 304(1)—Evidence held to support allegation of venue of larceny of wheat.

In prosecution for larceny of wheat, evidence held to support allegation as to place where offense took place.

2. Criminal law § 304(6)—Court takes judicial notice of location of towns and of counties in which townships are located.

In prosecution for larceny, evidence showing in what county township of which witness was constable was located was not necessary, since court will take judicial cognizance of its location, and could have instructed jury that certain town was in such township.

3. Criminal law § 111—Even if larceny was committed near boundary line between counties, prosecution in one of counties was proper (Pen. Code, §§ 777, 782).

Under Pen. Code, § 782, providing that jurisdiction of offense committed on boundary line of two or more counties or within 500 yards thereof is in either county, even if larceny of wheat was committed at or on boundary line between two counties, prosecution in one of them was proper, regardless of section 777, relating to venue.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Fred Padilla was convicted of petit larceny with prior conviction, and he appeals. Affirmed.

J. C. Thomas, of Visalia, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

YORK, J. [1] The principal contentions of appellant are, first, that the county in which the offense is alleged to have occurred was not proven on the trial, and, second, that there was no evidence that defendant took the wheat as charged.

As to the first question: The Attorney General's brief apparently quoted certain words as to Alpaugh being "in the county of Tulare," which we do not find in the transcript before us. However, there is evidence following this statement as to Alpaugh and as to the location of the ranch from which the wheat was taken, and as to the distances and as to the county line; and a map of Tulare county was before the jury when the owner was asked as to the location of the land from which his wheat was abstracted, part of the evidence being:

"Q. And whereabouts is the county line? A. Right at the west edge.

"Q. This is over right east of the county line? A. Joins the county line on the east."

This statement and this line of questioning at the trial having taken place in the county of Tulare, and the court taking judicial cognizance of the fact that Alpaugh is in the county of Tulare, the proper and only inference that can be drawn from the record is that the land from which the grain was abstracted was in the county of Tulare, near the west edge of the county and on the east side of the county line of the county of Tulare.

[2, 3] Concerning the testimony of D. O. Howard as to the town of Earlimart being located in the township of which he was constable, to wit, Allila, it was not necessary that there should have been any testimony showing in what county said township was located. The court will take judicial cognizance of its location and could have properly instructed the jury that the said town was in said township. We believe that the case of *People v. Wright* (Cal. App.) 250 P. 204, properly sets forth the law as to judicial cognizance, in spite of the fact that possibly some attorneys still think that the judicial procedure known as a trial is merely a chance for a display of their forensic effort and technical by-play. The law fortunately does not require a useless thing, although it is true that, in the absence of technical objection thereto, the simplest way to prove the venue was to have witnesses testify as to what county the grain was located in at the time it was stolen. However, it clearly appears from the record, independent of the judicial cognizance which the court had a right to rely on, that the property from which the grain was abstracted was in the county of Tulare. Even stretching the evidence to the point appellant desires, it might be construed that the offense was committed at or on the boundary line between Tulare county and the adjoining county; but reference is made by appellant to section 777 of the Penal Code only, no reference being made by appellant to section 782 of the Penal Code, which provides:

"When a public offense is committed on the boundary of two or more counties, or within five hundred yards thereof, the jurisdiction is in either county."

The proof of theft is circumstantial, but, nevertheless, sufficient.

The other points raised are not worthy of discussion.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

86 Cal. App. 41

INGRAM et ux. v. PANTAGES. (Civ. 5954.)

District Court of Appeal, First District, Division 2, California. Oct. 13, 1927.

1. Landlord and tenant §157(1)—Lessors held not entitled to damages for failure of lessee to make deposit required as guaranty of performance of building clause.

Where lease provided for deposit by lessee in lieu of commencing construction of building during first year of lease, which should be returned when construction was begun, if within four-year period provided in lease, but if not begun within four-year period, or if lessee did not exercise option to purchase, deposit was

to be property of lessors, title to such deposit did not pass to lessors until lessee had failed to commence construction of building within four-year period, or to purchase property before certain date; and where such construction was begun within four-year period lessors were not entitled to recover damages for failure to make deposit on theory that they could have lent deposit and received interest thereon.

2. Landlord and tenant §157(1)—Lessor held not entitled to use or invest deposit made by lessee as guaranty of performance or to receive or keep earnings therefrom.

Lease requiring lessee to make deposit as guaranty of performance of building clause held not to entitle lessor to use or employ or invest sum deposited or any part thereof or to receive or retain any earnings therefrom.

Appeal from Superior Court, Los Angeles County; George F. Buck, Judge.

Action by J. C. Ingram and wife against Alexander Pantages. From a judgment for defendant, plaintiffs appeal. Affirmed.

Farrand & Slosson, of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondent.

PRESTON, Justice pro tem. This is an action for damages for breach of contract. This case was tried by the court sitting without a jury, and judgment was entered in favor of the defendant, from which judgment plaintiffs prosecute this appeal, based on the judgment roll alone.

[1] The facts are not in dispute, and are briefly these: Appellants were the owners of certain real property in the city of Fort Worth, state of Texas, and on November 18, 1919, they entered into a written lease and agreement with the respondent wherein appellants agreed to lease to respondent their property in Fort Worth, Tex., for a period of 30 years from January 1, 1920, at an annual rental of \$15,000. Respondent immediately went into possession of the property under the lease and was in possession on the date of the trial of this cause in the superior court.

Said lease and agreement provides, among other things, that the lessee (respondent herein) should construct a building on said leased property within four years from January 1, 1920, at a cost of not less than \$100,000; and, if respondent did not begin the construction of said building on said leased premises within the first year of the lease, that is, on or before January 1, 1921, he would deposit with the appellants (the lessors herein) the sum of \$12,000, which sum appellants agreed to return to respondent immediately upon his beginning the construction of said building, if begun within the four-year period. Said lease also provided that respondent should have the exclusive right and option to pur-

chase said leased property for the sum of \$250,000 at any time on or before January 1, 1924. The provision of the lease with reference to the deposit of \$12,000, and the return thereof, is set forth in article VI of the lease, and is as follows:

"If lessee does not begin the construction of said building within the first year of this lease, then lessee shall deposit with lessors the sum of twelve thousand dollars (\$12,000.00), which shall be immediately returned to lessee upon his beginning the construction of said building within the four-year period herein provided for, or his exercising his option to purchase hereinafter provided for, but if said building is not begun within said four-year period or said option to purchase exercised, then this twelve thousand dollars (\$12,000.00) shall belong to lessors."

Respondent did not deposit the \$12,000, or any part thereof, with appellants, and did not begin the construction of the said building within the first year of said four-year period, but did begin the actual construction of same in December, 1923, which was the last month of the four-year period within which the building should be constructed, according to the lease. Respondent also failed to exercise the option to purchase given him by the lease. Appellants, immediately after the expiration of the first year, demanded of the respondent that said sum of \$12,000 be deposited, which demand was not complied with.

Appellants contend that by reason of respondent's failure to deposit the \$12,000, as provided in said lease, they have been damaged to the extent of \$2,450; claiming that they could have earned 7 per cent. interest on \$12,000 from January 1, 1921, the date said \$12,000 should have been deposited, until December, 1923, the date that respondent actually began the construction of the building on said leased premises; or, in other words, appellants contend that they are entitled to interest on said \$12,000 at the rate of 7 per cent. for two years and eleven months, being the time intervening between the date said \$12,000 should have been deposited and the actual commencement of the construction of the building. The court found that appellants could have earned and received 7 per cent. per annum on \$12,000 for the period from the expiration of the first year of the lease until the commencement of the construction of said building.

Therefore, the sole question presented is this: Would appellants have been entitled to employ and retain the earnings on this \$12,-

000, at the rate of 7 per cent. per annum during the period it should have been on deposit with appellants, according to the lease? We think this question must be answered in the negative.

The portion of the lease above quoted plainly provides that if the lessee (respondent herein) did not begin the construction of the building within the first year of the lease, he was then to deposit with the lessors (appellants herein) the sum of \$12,000, which was to be returned to him immediately upon his beginning construction of the building at any time within the four-year period, and further provided that said sum was to be returned to respondent if he exercised the option to purchase at any time before January 1, 1924, and provided that if the said building was not begun within the said four-year period of said lease, and said option was not exercised to purchase, then, and in that event, this \$12,000 was to belong to the lessors. In other words, the lease provided that the title to said deposit of \$12,000 should not pass from respondent to appellants until respondent had failed to do two things: (1) To commence the actual construction of said building within four years from January 1, 1920; (2) to purchase the property on or before January 1, 1924.

There is no provision in the lease and agreement which provides that the lessors are to use or acquire any benefit whatever from the \$12,000 during the time it is on deposit with them. The lease merely provides for the deposit of \$12,000 by the lessee in lieu of commencing the actual construction of said building during the first year of said lease, and the lessee was entitled to an immediate return of said \$12,000 the very moment he began the construction of the building, if begun within the four-year period provided in the lease. Certainly, under such an arrangement, appellants would have no right to use this money or retain the earnings therefrom, until respondent had forfeited his ownership thereto by failing to comply with the terms of said lease above set forth.

[2] It seems too clear to admit of argument that appellants, under the plain provisions of the lease, would not have been entitled to use, or employ, or invest, said sum of \$12,000, or any part thereof, or to receive or retain the earnings therefrom, if it had been deposited.

The judgment is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

85 Cal. App. 769

PEOPLE v. McKELVEY. (Cr. 1547.)

District Court of Appeal, Second District, Division 1, California. Oct. 5, 1927.

1. Criminal law — 376—Testimony regarding accused's bad reputation is admissible only when accused has introduced evidence regarding good reputation for traits involved in charge.

Evidence regarding accused's bad reputation is admissible on part of prosecution only when defendant has himself opened door for such evidence by endeavoring to establish his good reputation for traits involved in charge against him.

2. Criminal law — 1169(5)—Generally, admission of improper evidence is harmless where stricken out and jury instructed to disregard it.

General rule is that, under ordinary circumstances, admission of improper evidence is harmless if subsequently stricken out and jury instructed to disregard it.

3. Criminal law — 1169(5)—Admitting evidence of bad reputation of accused held prejudicial error, although court instructed jury to disregard it (Pen. Code, § 288).

In prosecution for crime of violation of Pen. Code, § 288, where accused introduced no evidence as to his good character, admitting evidence that accused's reputation for morality and virtue was bad held prejudicial error resulting in miscarriage of justice, although court struck testimony from record and instructed jury to disregard all questions as to defendant's reputation for morality in community.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

James McKelvey was convicted of violating Pen. Code, § 288, and he appeals. Reversed and remanded.

Rush & Beirne, Jud. R. Rush, and William B. Beirne, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

McLUCAS, Justice pro tem. The defendant was convicted of the crime of violation of section 288 of the Penal Code, and appeals from the judgment and from the order denying his motion for a new trial.

Appellant did not introduce any evidence as to defendant's general reputation in the community for the traits involved in the charge against him; but the prosecution in rebuttal was permitted to introduce the testimony of five witnesses that defendant's reputation for morality and virtue was bad. Defendant objected to each question propounded to each of these five witnesses, but the objections were all overruled. Appellant then assigned the asking of each question as misconduct on the part of the district attorney and requested the court to instruct the jury to disregard both the questions and the answers, which was denied by

the court. Appellant then moved that all of the testimony of these five witnesses be stricken, which motion was also denied. When court convened for the afternoon session, the court informed the jury that it had admitted the character evidence offered by the prosecution while under a misapprehension as to the state of the record, and then struck from the record all of the testimony given by said five witnesses, sustained appellant's objection to all of the questions asked said witnesses, and instructed the jury to disregard all questions as to defendant's reputation for morality and chastity in the community and all of the answers given by said witnesses to those questions, and to treat their testimony as though they had never heard it. Similar instructions were given at the close of the trial. The jury was instructed that the defendant was presumed in law to be of good moral character and that the evidence in the case was to be considered by the jury in the light of that presumption.

[1-3] It is elementary that such testimony is admissible upon the part of the prosecution only when the defendant has himself opened the door for such evidence by endeavoring to establish his good reputation for the traits involved in the charge against him. In the case at bar no evidence was introduced by the appellant as to his good character, and under the rule as stated it was clearly prejudicial error for the court to admit the testimony of the five witnesses who testified for the state on rebuttal that the appellant's reputation for morality and virtue was bad. Moreover, such error was not cured by the fact that the trial judge after examination of the record did everything in his power to correct his former ruling by sustaining appellant's objections, granting appellant's motions to strike from the record, and instructing the jury to disregard the testimony as though it had never heard it. It was an intellectual impossibility for the jury to wholly erase such testimony from their memory and to disregard it as though they had never heard it. They had before them the testimony of five apparently credible witnesses that appellant's reputation for the traits involved in the charge was bad. Upon the strength of this testimony, if the case was closely balanced, the jury might have been convinced that there was more likelihood of the defendant's guilt than of his innocence. If any juror had a reasonable doubt as to defendant's guilt after a consideration of the rest of the evidence, then surely this additional evidence offered on behalf of the prosecution upon an issue vital to appellant's case, and overturning as it did the presumption of good moral character, might have turned the scales against the appellant.

It is a general rule that under ordinary circumstances the admission of improper evidence is harmless if subsequently stricken out and the jury instructed to disregard it. It has also been held that in certain cases where the incompetent evidence goes to the main issue, and where the proof of defendant's guilt is not clear and convincing, the error in admitting the incompetent evidence cannot be cured by striking out and instructing the jury to disregard that evidence. From a review of the evidence in the case at bar it cannot be said that the proof of defendant's guilt was clear and convincing. The evidence was in sharp conflict. It would serve no good purpose to relate the details of the evidence submitted; but suffice it to say that the evidence offered by the prosecution consisted of the testimony of the prosecuting witness, a six year old girl, that the defendant committed the acts as charged in the information on April 8, 1927, while passing through a school-crossing tunnel and later at the defendant's home, where the prosecuting witness was taken by the defendant. She testified that she saw no one present in the defendant's home on the day these acts were committed. The testimony of the prosecuting witness was corroborated by the evidence that she complained to her mother that defendant had taken her to his home and had hurt her. These complaints were not sufficiently definite to cause any investigation to be made by the girl's mother until April 20th, when the mother requested a police woman to make such investigation. There was also testimony by police officers that certain admissions were made by the defendant. Defendant testified that he did not commit the acts charged against him, and denied any admissions to the police officers. He testified that he met the prosecuting witness near the entrance of the school tunnel, where she fell down crying; that he talked with her and consoled her and then took her home with him to play with his niece; that when he went home his mother, sister, and niece were present in the house, and that the prosecuting witness played with his niece; that when the prosecuting witness left, defendant's sister requested him to button a portion of the clothing of the prosecuting witness which had become unbuttoned, which he did in the presence of the sister and at her request. He was corroborated in this respect by the testimony of his sister. Much of the testimony of the defendant was corroborated by that of his sister and other witnesses. The defendant's mother testified that she was in her house when the defendant brought the prosecuting witness, and that her daughter and defendant's niece were also present. It also appears that defendant was ill on April 8th, the day of the alleged crime, and was returning from his doctor's office at the time he met the prosecuting witness; that on the next day his

physician lanced his throat, which was infected. An affidavit was filed by appellant on his motion for a new trial, in which the deponent stated that she saw the defendant help the prosecuting witness to her feet at the entrance to the tunnel and then take her by the hand and guide her to his home; that she immediately went to defendant's home to visit defendant's sister, and there saw the defendant, his sister, and the two little girls, the prosecuting witness and the defendant's niece, all in the front room; that she later saw defendant's mother in the dining room. The witness was pregnant at the time of the trial and could not be called. It thus appears that the testimony of defendant's mother and sister and the affidavit filed on the motion for a new trial directly contradicted the testimony of the prosecuting witness that no person was present in the defendant's home at the time she was taken there by the defendant.

The case of *People v. Anthony*, 185 Cal. 152, 196 P. 47, is particularly pertinent to the instant case. While the facts are to be distinguished yet the governing principle of law is identical in the two cases. In that case the court said, page 158 (196 P. 49):

"Where, however, a series of questions were asked, as they were here, each suggesting to the court and to the jury that the district attorney was advised that this man was guilty of lewd and lascivious conduct with numbers of his young female charges and that he had had sexual intercourse with several of them, one as young as nine years, it is a psychological impossibility for the jury to wholly eradicate the impression made by such questions from their minds in weighing the evidence as to the guilt or innocence of the defendant on the particular item charged. * * * A district attorney is charged with the public duty of seeing that the defendant has a fair trial. The jury is aware of this fact and must have assumed that he had information which justified the question. The question of the district attorney asked of the defendant amounted to a charge against the defendant that he had been guilty of the offense of rape committed upon two small girls in his custody. The human mind is not so constructed that a thing of that kind can be either forgotten or overlooked by a jury. We are not called upon to consider the good intentions of the district attorney in asking the question. The good faith of the district attorney in asking questions upon debatable ground is always an element to be considered. But the good faith of the district attorney in a case of this kind in asking questions that are clearly improper does not take away from the question the prejudicial effect resulting to the defendant. The real question is, Has the defendant had a fair trial? It is clear under the circumstances of this case where the evidence and the conflicting considerations are so evenly balanced that if the jury attached the slightest weight to the innuendoes of the district attorney, that this weight might be sufficient to turn the scales. Ordinarily, the prompt sustaining of objections to improper questions, coupled with instructions to the jury to disregard the question, will cure an error of

this kind. But where the offense has been repeated in various forms and where the evidence is so evenly balanced and the district attorney after being warned by the court continues in his course, we must hold that the misconduct was so prejudicial as to entitle the defendant to a new trial."

People v. George, 72 Cal. App. 124, 236 P. 934, was another case where the defendant was accused of lewd and lascivious acts with a six year old girl, and the district attorney sought to introduce incompetent evidence. In that case the court said, page 130 (236 P. 936):

"When we recall the nature of the case; the extreme danger, as shown by experience, of convicting men on the testimony of a child of the tender years of Etta Peterson unless strongly corroborated by competent evidence, and how little is required to turn the scale in the minds of the jurors, naturally inflamed by the revolting character of the offense charged, we cannot but believe that this testimony did have a profound effect upon the jury, and that, as a fair probability, it outweighed in their minds the testimony of the appellant in denial, the evidence of his previous good character, his associations and employment, his domestic situation and the inherent improbability that he, in view of these facts, would commit the crime charged."

In *People v. Edgar*, 34 Cal App. 459, 471, 167 P. 891, 895, the court said:

"While it is the general rule that if it can fairly be said, from all of the circumstances of the case considered in conjunction with the nature and extent of the assigned misconduct, that an admonition of the court had the desired effect, there can be no just cause for complaint, nevertheless it is a recognized exception to that rule that, where, as here, in a closely balanced criminal case, misconduct is repeated and persisted in, despite the warnings and admonitions of the trial court, and is so pronounced and pernicious that it is not in human nature to forget or disregard its prejudicial effect, then manifestly a mere admonition or any number of admonitions will not suffice to right the wrong done, and the only remedy remaining is to be found in a reversal of the judgment."

We conclude that the error complained of prevented the defendant from having a fair trial. After a review of the entire cause, including the evidence, we are of the opinion that such error resulted in a miscarriage of justice.

By reason of the foregoing it becomes unnecessary to discuss the appellant's contentions that the trial court erred in permitting the complaining witness to testify because it is alleged she appeared incapable of receiving a just impression of facts respecting which she was examined, or of relating them truly, as required by section 1880 of the Code of Civil Procedure, and in denying appellant's motion to strike such testimony.

The judgment and the order appealed from

are reversed and cause remanded for a new trial.

We concur: HOUSER, J., Acting P. J.; YORK, J.

85 Cal. App. 786

PEASE, KOLBERG & CO., Inc., v. BATES.
(Civ. 5785.)

District Court of Appeal, Second District, Division 1, California. Oct. 6, 1927.

1. Corporations ⇨308(11)—Evidence held sufficient to support finding as to reasonable value of defendant's services as secretary of corporation.

In action for goods sold and delivered, in which defendant filed counterclaim for value of services as secretary of plaintiff corporation, evidence held sufficient to support court's finding that reasonable value of defendant's services as secretary was \$1,105.68.

2. Corporations ⇨308(1)—That one employed as secretary of corporation became stockholder did not affect right to compensation.

That one employed as secretary of corporation became stockholder did not affect his right to compensation for services as secretary.

3. Corporations ⇨308(1)—Implied obligation arose out of appointment of secretary to pay reasonable worth of services, in absence of circumstances showing different understanding, though compensation was not fixed as required by corporation's by-laws.

Where by-laws of corporation provided that compensation of officers of corporation should be fixed by by-laws, implied obligation arose out of defendant's appointment as secretary to pay reasonable worth of his services unless services were performed under circumstances showing understanding that they were to be gratuitous, even though no by-law was adopted fixing his compensation.

4. Corporations ⇨308(11)—Evidence supported conclusion that circumstances of employment did not show understanding that defendant's services as corporation's secretary were to be gratuitous.

In action for goods sold and delivered in which defendant filed counterclaim for value of services as secretary of plaintiff corporation, evidence held sufficient to support conclusion that circumstances of employment did not show understanding that defendant's services were to be given gratuitously.

5. Appeal and error ⇨1058(1)—Excluding evidence of custom of corporation regarding compensation of officers held not prejudicial, in view of evidence later introduced.

In action for goods sold and delivered in which defendant filed counterclaim for value of services as secretary of plaintiff corporation, excluding evidence that it was custom and usage of plaintiff corporation that no compensation should be paid to officers held not prejudicial, where evidence was later introduced that president and vice president of corporation both received salary.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by Pease, Kolberg & Co., Inc., against George L. Bates to recover the balance due on an open account for goods, wares, and merchandise sold and delivered, in which defendant filed a counterclaim. From a judgment for defendant, plaintiff appeals. Affirmed.

Head, Rutan & Scovel, of Santa Ana, for appellant.

L. F. Coburn, of Orange, for respondent.

McLUCAS, Justice pro tem. Plaintiff brought suit for the sum of \$1,305.68, balance due on an open account for goods, wares, and merchandise sold and delivered to the defendant. Defendant answered, alleging payment in full, and filed a counterclaim, alleging that defendant had become indebted to plaintiff in the sum of \$1,390.53 and no more; that defendant had paid to plaintiff on said account the sum of \$384.85; that defendant performed work, labor, and services as secretary of said plaintiff of the reasonable value of \$1,583.33; that plaintiff was indebted to defendant in the sum of \$577.65 for the balance of a mutual, open, and current account. Judgment was rendered that plaintiff and defendant take nothing. From this judgment plaintiff appeals.

[1] Defendant acted as secretary of plaintiff corporation for a period of about 16 months. He purchased one share of stock in the corporation when he assumed office. The defendant testified the president of the plaintiff corporation assured him that it would be worth his while to act as secretary, that he would be given a discount on building material, but that no such discount was ever given. The by-laws of plaintiff corporation, with which defendant became familiar, provided that the salaries of all officers should be fixed and determined by the by-laws. No provision was made in the by-laws for any compensation for the office of secretary. Defendant testified that while acting as secretary of the corporation he attended directors' meetings, wrote the minutes, completed the minutes of former meetings, made thirty entries in the corporation stock book, corrected twelve stock certificates, made a report to the state board of equalization and a capital stock tax return; that he negotiated the sale of a packing house owned by plaintiff for the sum of \$40,000, and negotiated for the exchange of another property worth \$7,500, and for the purchase of a lot at \$1,100. He further testified that the reasonable value of his services as secretary was \$1,600. Witnesses testified that the reasonable value of the secretary's work was approximately \$800, and that a reasonable commission on the real estate transactions aggregated \$1,212.25. Defendant, however, did not claim that he was entitled to the regular commission for his

services. The evidence is sufficient to support the finding of the court that the reasonable value of defendant's services was the sum of \$1,105.68, as determined by the trial court.

Appellant contends that the respondent is bound by his testimony that the only compensation he was to receive was in discounts on material purchased by him and extended credit, and he failed to prove what discounts he was entitled to, if any. We do not so interpret respondent's testimony that such considerations were to be his only compensation.

[2, 3] The following provisions appear in the by-laws of appellant corporation:

"The compensation and terms of office of all the officers of the corporation other than the directors shall be fixed and determined by the by-laws."

No by-law was ever adopted fixing the compensation of the defendant as secretary. Appellant contends that respondent is entitled to no compensation for his services unless fixed by appellant corporation's by-laws. We cannot agree with this contention. Respondent at the time of his employment was a stranger to the plaintiff corporation. He was neither a stockholder nor a director. It was thought necessary in order to qualify him for the office of secretary that he become a stockholder, and respondent bought one share of stock of the appellant corporation. The fact that respondent became a stockholder of appellant corporation can make no difference as to his right of compensation. *Rosborough v. The Shasta River Canal Co.*, 22 Cal. 557, 562. Unless the services were performed under circumstances which showed an understanding that they were to be gratuitous, an implied obligation would arise out of his appointment to pay respondent what his services as secretary were reasonably worth. *McCarthy v. Mount Tecarte Land & Water Co.*, 111 Cal. 328, 341, 43 P. 956; *Bassett v. Fairchild*, 132 Cal. 637, 641, 64 P. 1082, 52 L. R. A. 611; *Rosborough v. The Shasta River Canal Co.*, supra.

[4] We believe the evidence sufficient to support the trial court in concluding that the circumstances of employment did not show an understanding that respondent's services were to be given gratuitously.

[5] While it was error for the trial court to refuse to permit appellant, corporation, to prove that it was the custom and usage of appellant, corporation, that no compensation should be paid to the officers, yet such error was not prejudicial, in view of the fact that evidence was later introduced that the president and vice president of the corporation both received a salary.

There being no prejudicial error, it is ordered that the judgment be affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

202 Cal. 341

Ex parte WILSON. (Cr. 3046.)

Supreme Court of California. Oct. 27, 1927.

1. Criminal law §999(1)—Prisoner, incarcerated under two commitments for same offense, held not entitled to release on habeas corpus where one commitment was valid.

In habeas corpus proceeding, prisoner, incarcerated in a state institution, held not entitled to release from custody on the ground that his commitment thereto was void, where it was shown that he had been committed twice for the same offense, and was being held on both commitments, the first of which was valid.

2. Criminal law §1216(1)—Prisoner's removal from prison to jail through habeas corpus did not vacate original judgment; hence, upon recommitment, sentence held begun upon first commitment.

Where prisoner was released from the state prison through habeas corpus proceedings and resentenced to the county jail, the original judgment was not vacated thereby; hence upon recommitment to the state institution, his sentence should be considered to have begun upon his first commitment and to have continued at least up to the time of his removal to the county jail.

In Bank.

Application by William Wilson for a writ of habeas corpus against the Warden of Folsom State Prison. Writ denied, and petitioner remanded.

E. B. D. Spagnoli and Walter F. Lynch, both of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and F. W. Richards, Dep. Atty. Gen., for respondent.

CURTIS, J. Petition for writ of habeas corpus by William Wilson, wherein said petitioner, among other matters, alleges as follows:

"On or about February 21, 1922, petitioner pleaded guilty to an information filed against him in the superior court of Kings county, charging him with violation of section 464 of the Penal Code, namely, burglary with explosives, and that by reason of said imprisonment (plea) he was sentenced, on or about February 21, 1922, to be imprisoned in the state prison, and was removed to the state prison and there confined.

"Thereafter, and on or about December 29, 1924, petitioner was discharged from said state prison, where he was confined because of said conviction. That said discharge was ordered by the superior court of Sacramento county in a habeas corpus proceeding pending before said court. That said superior court of Sacramento county ordered petitioner returned to the superior court of Kings county for resentencing to the county jail because of said conviction, and, in conformity with the decision of the honorable the District Court of Appeal of the State of California, First District, Division Two, in the case of *In re Schiaffino*, 232 P. 719, 70 Cal. App. 65, which latter

case held that the crime of burglary with explosives was a misdemeanor and not a felony and that accordingly a person convicted of said offense could not be imprisoned in a state prison.

"That thereafter, and on or about December 31, 1924, said superior court of Kings county resentenced petitioner to be imprisoned in the county jail of Kings county for the term of 25 years.

"That thereafter the petitioner applied to this honorable court for a writ of habeas corpus, claiming that his imprisonment in the county jail was illegal for various reasons, and that this honorable court, in its decision made on July 29, 1925, reported in 196 Cal. 517, 238 P. 359, discharged the writ of habeas corpus and remanded petitioner to the custody of the sheriff of Kings county, and ordered the superior court of Kings county to vacate and set aside the judgment of sentence that petitioner be imprisoned in the county jail, and ordered that a new judgment be pronounced and entered against petitioner according to law and the views expressed in its decision, namely that petitioner be sentenced to be imprisoned in the state prison. That thereafter, to wit, on or about August 12, 1925, and because of the said decision of this honorable court, the said superior court of Kings county did resentence petitioner to be confined in the state prison by reason of said conviction (of February 21, 1922), and that the petitioner has ever since been confined in the state prison solely by reason of said sentence last mentioned.

"That the petitioner's confinement in the state prison ever since on or about August 12, 1925, is illegal, for the reason that said judgment of sentence, pronounced and entered by the superior court of Kings county, on or about August 12, 1925, is void because the said judgment of the superior court of Kings county, made and entered on or about February 21, 1922, was at all times and is valid and in full force and effect."

Upon the presentation and filing of this petition, this court ordered that a writ of habeas corpus as prayed for therein be issued. The return to said writ by the warden of the state prison sets forth that he held said William Wilson under two commitments issued out of the superior court of the county of Kings; one upon the judgment of conviction of date February 21, 1922, and the other upon the judgment of conviction of date August 12, 1925.

[1] It is first contended by petitioner that the judgment of conviction entered by said superior court on the 12th day of August, 1925, is illegal and void for the reason that the law does not compel nor countenance two distinct final judgments covering the same matter. This contention appears to be sustained by the ruling of this court in the case of *People v. Mess*, 65 Cal. 174. In that action facts quite similar in principle to those in the present proceeding were before the court. It was there held that:

"The judgment of October 27, 1883, is a valid judgment, and that the defendant is legally in

custody under it. It results that the proceedings subsequently taken in the superior court, looking to a resentence of the defendant, were void."

Assuming that the judgment of August 12, 1925, is void and the commitment issued thereon of no greater validity, there still remains the prior judgment of date February 21, 1922. The return of the warden in this proceeding shows that petitioner is held under a commitment issued under this judgment as well as upon the one issued upon the latter judgment. That being the case, his imprisonment is legal, and he is not entitled to be discharged therefrom. It is true that petitioner claims that the commitment issued upon the second judgment is the "sole warrant" for the present detention, but the return of the warden shows otherwise.

In another portion of petitioner's brief he states:

"In the instant case the judgment of February 21, 1922, was the only valid judgment in the case. If it were void a different situation would be presented. The superior court of Sacramento county, in ordering the petitioner to be taken to Kings county for resentence to the county jail simply interrupted the execution of said judgment of February 21, 1922. It did not vacate, set aside, or annul said judgment. Habeas corpus proceedings attack a judgment collaterally only. They simply grant relief against alleged unlawful restraints. Judgments can only be vacated and annulled by direct attack, such as motion to vacate, etc. The judgment of February 21, 1922, still being in full force and effect, petitioner's present sentence should commence from his original delivery to the state prison under the first judgment and he not be held to have lost nearly 3½ years' service credit on his sentence by reason of his present confinement solely under said second void judgment of August 12, 1925. The Supreme Court has heretofore held that the judgment of February 21, 1922, was valid."

[2] This statement we think in the main fairly sets forth the true status of petitioner's imprisonment. The judgment of February 21, 1922, is valid. The order of the superior court of Sacramento county did not vacate it or annul it. The commitment issued upon this judgment, and by virtue of which the warden is holding petitioner, is legal and valid and constitutes a legal warrant on the part of the officer for the imprisonment of petitioner. His imprisonment would commence to run from the date of his delivery to the prison authorities under this commitment, and he is entitled, at least, to credit for the time served thereunder from the date of his first delivery to the prison by virtue of said judgment of February 21, 1922, until the date when he was removed therefrom by order of the superior court of the county of Sacramento. As to the time spent in the county jail of Kings county under the judgment of date December 31, 1924,

while he may not be legally entitled to credit therefor upon his imprisonment in the state's prison, it is a circumstance which the state board of prison directors may well consider when fixing his time of imprisonment.

The writ is denied, and the petitioner is remanded to the custody of said warden.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

202 Cal. 308

In re STUMP'S ESTATE. (S. F. 11911.)

Supreme Court of California. Oct. 20, 1927.

1. Wills $\S$ 293(4)—Contents of testatrix's former will held properly admitted in will contest to show permanent state of mind regarding plan for disposition of estate.

Where testatrix and husband had previously made wills, giving all their property to each other for life, with remainder to nephew and wife, and, after husband's death, testatrix made new will, leaving her property to nephew and wife, contents of former will held properly admitted in will contest case to show permanent and fixed state of mind with regard to testatrix's plan for disposition and administration of her estate.

2. Wills $\S$ 45, 47—Wills of aged and infirm or ill people must be upheld, if, notwithstanding their enfeeblement, testamentary capacity is shown.

Wills of aged and infirm people, or people sick in mind as well as body, must be upheld as in other cases, if, notwithstanding their enfeeblement, testamentary capacity is shown.

3. Wills $\S$ 324(1)—Where it would have been duty of trial court to set aside verdict for will contestants, it was its duty to withdraw issue from jury's consideration.

Where, had jury found in favor of will contestants on issue, it would have been duty of trial court to set aside such verdict, it was its duty in first instance to withdraw issue from consideration of jury.

4. Wills $\S$ 166(7)—Mere proof of opportunity to influence mind of testatrix, coupled with motive to do so does not sustain finding of undue influence.

Mere proof of opportunity to influence mind of testatrix, even though shown to be coupled with an interest or motive to do so, does not sustain finding of undue influence, in absence of testimony showing that there was pressure operating directly on testamentary act.

In Bank.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Proceeding by David S. Zediker and others contesting the probate of the will of Emma A. Stump, deceased. From a judgment sustaining the will, contestants appeal. Affirmed.

Hugh P. Graves and Stanley Moffatt, both of Fresno, for appellants.

Charles A. Hill, of Fresno, for respondents.

WASTE, C. J. Emma A. Stump, a widow, died, leaving a will by which she gave the sum of \$1 to each of her eight brothers and sisters, and the remainder of her property to a nephew, Roy Zediker, and his wife, in joint tenancy. After the document was admitted to probate, David S. Zediker, a brother, Laura All, Susan Woodward, and Carrie Foster, sisters, instituted a contest, alleging as grounds of opposition the mental incompetency of the decedent; that the will was not executed in the manner required by law; that it was the product of coercion and undue influence exerted by Roy Zediker upon the mind and will of the decedent; and that it was obtained through fraud, connivance, and conspiracy of the nephew and other persons practiced upon and against the decedent. Upon the conclusion of the testimony the trial court, over the objection of contestants, directed the jury to return answers favorable to the proponents on all the special issues about to be submitted to it relating to the mental competency of the decedent, and the due execution of the will, thereby leaving for the consideration of the jury only the questions as to undue influence and fraud alleged to have been practiced upon the decedent. On these issues the jury also rendered its verdict in favor of the proponents. Judgment was thereupon entered sustaining the will, and the contestants have appealed.

[1] The decedent had resided on a ranch in Fresno county with her husband, Allen E. Stump, for a period of approximately 20 years. She had been an invalid, and practically helpless for 2 or 3 years prior to her death, and was confined to her bed during the last illness of her husband, who died in October, 1923. Shortly before his death, the husband and wife executed wills, giving all of their property each to the other for life, with remainder over to the nephew of Mrs. Stump, Roy V. Zediker, and his wife, jointly, no other legatees being named. W. J. Lohman, cashier of the First National Bank of Parlier, was named as the executor of each will. Some time after the death of her husband, Mrs. Stump executed another will, the one here in question. The instrument was prepared by the attorney for the First National Bank of Parlier, who was also the attorney for the executor of the estate of Allen E. Stump. It was executed in the presence of the attorney, the family physician, and W. J. Lohman, the executor of the husband's will, who was again named as executor by Mrs. Stump. The testimony is clear and without contradiction that the will was properly executed, and that at the time of its execution the testatrix was in possession of her faculties, and comprehended the nature

of her testamentary act. The will is not unnatural. The testatrix was childless, and her nephew and his wife had looked after the affairs of her husband and herself for 2 or 3 years before Mr. Stump died, and had cared for her after her husband's death, and managed her property. The trial court very properly admitted the contents of the former will of the testatrix as tending to show a permanent and fixed state of mind with regard to her plan for the disposition and administration of her estate. *Estate of Arnold*, 147 Cal. 583, 593, 82 P. 252.

[2, 3] The principal assignments of error relied on by the appellants relate to the granting of the motion for a directed verdict on the question of testamentary capacity and the instructions given on the subject of undue influence. Our examination of the record, however, convinces us that, while the testatrix was no doubt subject to the infirmities and idiosyncracies of old age, she was nevertheless, clearly possessed of sufficient soundness of mind to make a legal disposition of her property. The wills of aged and infirm people, or people sick in mind as well as in body, must be upheld as in other cases, if, notwithstanding their enfeeblement, testamentary capacity is shown. *Estate of Chevallier*, 159 Cal. 161, 168, 113 P. 130. While there is evidence in this case from which it might be reasoned that Mrs. Stump was enfeebled in body and mind, the evidence falls far short of establishing that the will itself was the creature or product of any hallucination or delusion, or that any of the mental infirmities of the testatrix bore directly upon, and influenced, the creation and terms of the testamentary instrument. The conflict, which appellants argue is raised by the evidence introduced by them, was not of such substantial character as to deprive the court below of the right to direct a verdict on the issue of the testamentary capacity of the decedent. Had the jury found in favor of the contestants on that issue, it would have been the duty of the trial court to set such verdict aside. It was therefore its duty, in the first instance, to withdraw the issue from the consideration of the jury.

Appellants contend that the jury should have found for contestants on the issues of undue influence and fraud claimed to have been practiced on the testatrix by Roy V. Zediker and others. The most that need be said on that point is that the evidence, while contradictory as to certain matters, falls short of the effect claimed for it by appellants. Considered in its entirety, the evidence amply supports the conclusion arrived at by the jury.

[4] Appellants further contend that the court erred in its instructions relating to the issues of undue influence and fraud alleged to have been practiced on the testatrix. Mere proof of opportunity to influence the

mind of a testatrix, even though shown to be coupled with an interest, or a motive to do so, does not sustain a finding of undue influence in the absence of testimony showing that there was pressure operating directly on the testamentary act. *Estate of Graves* (Cal. Sup.) 259 P. 935; *Estate of Morcel*, 162 Cal. 188, 191, 121 P. 733. While a presumption of undue influence may arise from proof of the existence of a confidential relation between the testator and the beneficiaries, coupled with activity on the part of the latter in the preparation of the will, we are unable to agree with the appellants that there was in this case such an actual and active participation in procuring the execution of the will on the part of Roy V. Zediker and his wife as to place on them the burden of showing that the will was not induced by coercion or fraud. For these reasons the instructions complained of by the appellants were not improperly given.

The judgment is affirmed.

We concur: LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

202 Cal. 312

METROPOLITAN LIFE INS. CO. v. WELCH
et al. (S. F. 11637.)

Supreme Court of California. Oct. 21, 1927.

1. Judgment ⇨117—Where there is no answer, prayer for general relief cannot enlarge power to grant relief not specifically prayed for (Code Civ. Proc. § 580).

Under Code Civ. Proc. § 580, where there is no answer, prayer for general relief cannot enlarge power of court to grant relief not specifically prayed for.

2. Divorce ⇨254—Judgment awarding wife all community property held effective only to award her community property specifically described in complaint.

In wife's action for divorce with prayer to be awarded community property, alleged to consist only of household furniture, judgment which awarded to her all community property was a nullity and without effect to award her any community property except that specifically described, which did not include a life insurance policy, because mention thereof was not made in pleadings, findings, or decree.

3. Divorce ⇨255—Decree, silent as to other community property, operated as adjudication that other property was separate property of spouses.

Where in divorce petition wife prayed to be awarded community property, alleged to consist of household furniture only, and decree set aside for her all community property of parties, since it was silent as to other property than that named in her complaint it operated as an adjudication that at time action was begun there was no other community property, and hence other property owned by the parties in so

far as concerned its community character was thereby determined to be separate property of the spouse in whose name it was held.

4. Divorce ⇨255—Judgment in divorce action held conclusive determination of rights of parties not only to community property, but all property owned by either.

Where, in wife's divorce action, parties had opportunity to litigate question as to what portion of their property was community property and having obtained final decree establishing respective rights thereto, decree was conclusive determination of their rights not only to community property described in the complaint as consisting only of household furniture, but to all property owned by either.

5. Insurance ⇨585(6)—Husband was not estopped from claiming wife had no interest in insurance policy, notwithstanding her payment of premiums after divorce.

Where life insurance policy provided for payment of principal to wife in event of husband's death and for cash surrender to him at expiration of 20 years, husband was not estopped from claiming she had no interest in policy, notwithstanding her payment of premiums thereon after divorce, since her payments were to protect her rights therein if he had died before expiration of the 20-year period.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Interpleader by the Metropolitan Life Insurance Company against Lawrence J. Welch and Marietta Gross, formerly Marietta Welch. From a judgment for defendant Lawrence J. Welch, defendant Marietta Gross appeals. Affirmed.

W. T. Plunkett and Knight, Boland, Hutchinson & Christin, all of San Francisco, for appellant.

Walter Christie, F. J. Kilmartin, and Roland Becsey, all of San Francisco, for respondent.

CURTIS, J. This is an action in interpleader instituted by the Metropolitan Life Insurance Company against the appellant, Marietta Gross, and the respondent, Lawrence J. Welch, who were formerly husband and wife. On October 28, 1903, and while appellant and respondent were husband and wife, a policy of insurance was issued by the plaintiff, the Metropolitan Life Insurance Company. This policy provided that on payment of the annual premiums therein called for said insurance company would pay to appellant, then Marietta Welch, the sum of \$1,500 on the death of respondent, provided his death should occur within 20 years after the date of said policy of insurance. If, however, said Welch should be alive at the expiration of said period of 20 years, said policy provided that the cash surrender value of said policy should be paid to him at the expiration of said period. All premiums on said policy

falling due during said period of 20 years were paid, and at the expiration thereof the said Lawrence J. Welch, the respondent herein, was living and the cash surrender value of said policy was then the sum of \$1,241.74. In the meantime, however, the appellant, under her then name of Marietta Welch, instituted an action of divorce in the superior court of the city and county of San Francisco against the said Lawrence J. Welch, in which said action said court, on the 14th day of November, 1912, entered its decree in favor of the plaintiff therein and against the defendant therein, in which decree the said plaintiff was awarded an interlocutory decree of divorce, the custody of the minor children, the household furniture as community property, and "all of the community property of plaintiff and defendant." On January 8, 1914, said court entered a final decree of divorce in said action, the terms of which, in all respects material for the purpose of the present action, followed those contained in the interlocutory decree. The defendant in said divorce action, the said Lawrence J. Welch, after being regularly served with process, made no appearance in said action, and the judgment therein rendered was accordingly by default. In the complaint it was alleged "that plaintiff and defendant had acquired the following community property, to wit, all of the household furniture, etc., contained in the dwelling house at 1529 Hudson avenue, San Francisco, occupied by plaintiff and defendant," and the prayer of said complaint asked that plaintiff therein "be awarded said community property" and for general relief. Said divorce decree was granted upon two grounds, one of which was extreme cruelty.

[1] In an action wherein the judgment is entered by reason of the failure of the defendant to appear and answer the complaint therein, the relief granted cannot exceed that which is demanded in the complaint. Code Civ. Proc. § 580; *Brooks v. Forington*, 117 Cal. 219, 48 P. 1073; *Mudge v. Steinhart*, 78 Cal. 34, 20 P. 147, 12 Am. St. Rep. 17. "And where relief is given beyond the scope of that asked for, it is a nullity, and may be attacked collaterally, or its effect avoided under the doctrine that it is not *res adjudicata*." *Lang v. Lang*, 182 Cal. 765, 769, 190 P. 181, 182. Where there is no answer, the prayer for general relief cannot enlarge the power of the court to grant relief not specifically prayed for. *Staacke v. Bell*, 125 Cal. 309, 312, 57 P. 1012.

[2] That part of the judgment in the divorce case of *Welch v. Welch* purporting to set aside to plaintiff therein "all of the community property of plaintiff and defendant" is therefore a nullity, and said judgment cannot be held to have had the effect of awarding to plaintiff in said action any of the community property of said parties except

that specifically described in the complaint, which did not include the life insurance policy, the proceeds of which are in controversy in this action. No mention of said life insurance policy was made in the pleadings, findings or either of the decrees in said divorce action. There is nothing in the case of *White v. White*, 86 Cal. 212, 219, 24 P. 996, cited by appellant, inconsistent with the foregoing conclusion. The appellant therefore acquired no right to said insurance policy by virtue of the decree of divorce awarding to her "all of the community property of plaintiff and defendant," or by any other provision of said decree. If she has any right to said policy or its proceeds, it must be by virtue of some interest therein acquired while she and the defendant were husband and wife, and which was not determined by said decree of divorce. The trial court, however, held that the decree of divorce was an adjudication in favor of respondent that he was the owner of said policy of insurance, and accordingly gave judgment in his favor for the full amount of the proceeds thereof.

[3] In support of said judgment respondent contends that the appellant having in her complaint in the divorce action specifically described the community property belonging to her and her then husband, and the court having found said community property to consist of the articles so described in her complaint, and having made an award of said community property by the final decree in accordance with and based upon the allegations of said complaint, said final decree is a complete adjudication and determination of the character and extent of the community property belonging to them at the commencement of said action and establishes the status of all property belonging to them or either of them at the commencement of said action as to whether it is community or separate property. In support of this contention respondent relies upon the two cases of *Brown v. Brown*, reported in 170 Cal. at pages 1 and 8 (147 P. 1168, 1171), respectively, wherein the court held that where a plaintiff in a divorce action had alleged in her complaint that there was no community property and a default judgment had been entered in her favor based upon said complaint, she could not thereafter claim that certain property acquired by herself and husband prior to the filing of said complaint was community property. The court held in the second of said two cases, page 9 (147 P. 1172) thereof, that:

"The judgment of divorce, based upon the complaint declaring that there was no community property, is a conclusive determination against the plaintiff that this property is not community property, and by said judgment she is estopped from claiming any interest whatever in this part of the estate of *Brown*."

In that action it appeared that the property in question was an insurance policy issued

upon the life of plaintiff's former husband, who had died after the entry of the final decree in said divorce action. Thereafter, Mrs. Brown, the plaintiff in said divorce action, instituted an action against the estate of her former husband and sought therein to recover from the estate a portion of the proceeds of said life insurance policy. The trial court denied any relief to plaintiff in said action, and the Supreme Court affirmed the judgment. In the first of said cases, *Brown v. Brown*, supra, at page 5 (147 P. 1170) thereof, Mr. Justice Shaw, speaking for the court, said:

"It is earnestly contended by the respondent that the final decree is of no force whatever upon the right of the plaintiff in the property of the husband. In this we think the plaintiff is mistaken. Where a defendant is served with a summons and complaint stating the facts upon which he is required to act, and he makes default, he is presumed to admit all the facts which are well pleaded in the complaint. The judgment which follows upon this sort of admission is, in contemplation of law, a complete adjudication of all the rights of the parties embraced in the prayer for relief and arising from the facts stated in the complaint, including the facts in his favor as well as those against him. The defendant here is presumed to have acceded to the proposition embraced in the complaint and to have consented that plaintiff should obtain the relief therein prayed for, upon the conditions and facts set forth in the complaint. The proceeding is equivalent to a statement by Brown to plaintiff that he did not object to a divorce for the cause alleged, based upon the theory that there was no community property existing at the time the action was begun. When judgment is rendered upon such a complaint and default, it becomes, in effect, a contract between the parties that the judgment shall be final with respect to everything properly embraced within the allegations of the complaint and in the prayer for relief. 1 Freeman on Judgments, § 330; *Hoh v. Hoh*, 84 Wis. 378, 54 N. W. 731. Although the final decree is silent as to property, it nevertheless operates as an adjudication that at the time the action was begun there was no community property. *Thompson v. McKay*, 41 Cal. 227; *Champion v. Wood [Woods]*, 79 Cal. 17, 21 P. 534, 12 Am. St. Rep. 126."

In the present proceeding we find that the trial court in the divorce action, following the allegations of the complaint therein, found that the parties thereto had acquired as community property the property described in said complaint, and in the final decree of divorce this property was awarded to the plaintiff in said action as community property. While the decree is silent as to any other property either of said parties may have then owned or have been interested in, yet we think from what was said in the case of *Brown v. Brown*, supra, that said decree operates as an adjudication that at the time said action was begun there was no other community property. Therefore whatever other property either of said parties then

owned or was interested in, in so far as its community character was concerned, was by said decree determined to be the separate property of the particular spouse in whose name it was then held. Not only would this be so from the reasoning of the court in *Brown v. Brown*, supra, but for other reasons as well. Unless the property rights of the parties in a divorce action are conclusively settled by a decree like that rendered in *Welch v. Welch*, neither of the parties thereto would, after the rendition of such a decree, at least before the intervening of the statute of limitations, be certain as to his or her rights in any property owned at the commencement of the divorce action, except that described in the divorce proceedings, and either would be subject to the suit of the other to account for any or all property held by the former at the time of the commencement of said divorce action.

[4] The parties having had an opportunity to litigate the question as to what part or portion of their property is community property, and having actually, under proceedings in which all of the community property apparently was involved, obtained a final decree establishing and determining the respective rights of the parties to said community property, said decree must be held to be a conclusive determination of all the rights of said parties in and to not only the community property described therein, but in and to all property owned by either of them. This rule, of course, would not be applicable when the final decree makes no disposition whatever of the community property. In such a case the former spouses become tenants in common in the community property, and their rights thereto could be determined in a subsequent action. *Estate of Brix*, 181 Cal. 667, 676, 186 P. 135.

Again referring to the second of the *Brown* Cases, supra, where the court was referring to the life insurance policy and in which it was held that the judgment which described no property whatever, but which was based upon a complaint that there was no community property, was "a conclusive determination against the plaintiff that this property is not community property," then upon the same principle the judgment in the present action awarding to plaintiff all the property described in her complaint and claimed by her as community property is a conclusive determination as against plaintiff that the life insurance policy in the present action, not being mentioned in said final decree, is not community property. By its terms it was made payable to respondent in case he survived the 20-year period mentioned therein. Being alive at the end of said period the proceeds thereof legally belong to him, and the appellant by the judgment in the divorce action is estopped from claiming said proceeds or any part thereof.

[5] Appellant further contends that the evidence shows that after the divorce proceedings were terminated she paid all premiums falling due on the policy, and therefore the respondent is estopped from claiming that she has no interest therein. We are unable to see how the principle of estoppel can apply under these facts. Appellant undoubtedly had an interest in the policy during the time she paid the said premiums. Had respondent died before the expiration of said 20-year period, she would have been entitled to the face of said policy upon his death. It was to protect this right in part, at least, that she kept the premiums paid up, and the fact that respondent knew that she was making these payments and permitted her to do so cannot in any way be held to estop him from asserting whatever rights he may have under said policy, when by the terms thereof they shall have matured.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.

202 Cal. 290

JEFFREYS v. POINT RICHMOND CANAL & LAND CO. et al. (S. F. 11426.) ★

Supreme Court of California. Oct. 18, 1927.

Rehearing Denied Nov. 17, 1927.

1. Constitutional law § 143—Statute, authorizing holder of street improvement bond to foreclose lien, applied only to bonds issued after enactment; otherwise, contract obligations were impaired (Street Improvement Act, § 76, as amended by St. 1921, p. 297, § 10).

Street Improvement Act (St. 1911, p. 763) § 76, as amended by St. 1921, p. 297, § 10, providing that holder of street improvement bond may file and maintain suit to foreclose lien thereof in same manner as provided for the foreclosure of the lien of delinquent assessments, applies only to bonds issued after its enactment, and not to bonds issued before its enactment and unpaid, since a construction rendering it applicable to the latter bonds would impair the obligation of contracts.

2. Constitutional law § 48—Construction of act rendering it constitutional must be adopted in preference to construction which would impair obligation of contracts (Street Improvement Act, § 76, as amended by St. 1921, p. 297, § 10).

Court must adopt construction of Street Improvement Act (St. 1911, p. 763), § 76, as amended by St. 1921, p. 297, § 10, providing that holder of street improvement bond may maintain suit to foreclose lien thereof, which will render statute constitutional as applying only to bonds issued after its enactment, rather than a construction which would make it impair obligation of contracts as applying to bonds issued before its enactment and unpaid.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action on street improvement bonds, brought by W. M. Jeffreys against the Point Richmond Canal & Land Company and others. From a judgment in favor of plaintiff, the defendant Mintzer Estate Company appealed to the District Court of Appeal, which affirmed the judgment (255 P. 848). On hearing in Supreme Court. Judgment of trial court reversed.

Rehearing denied; PRESTON, J., dissenting.

McCutchen, Olney, Mannon & Greene and John F. Cassell, all of San Francisco, for appellant.

Rufus H. Kimball, of San Francisco, and A. F. Bray, of Martinez, for respondent.

Ernest A. Wilson, of San Mateo, amicus curiæ.

LANGDON, J. [1] Plaintiff sued as the purchaser for value of over 200 street bonds issued by the city of Richmond in the year 1917 under the Street Improvement Act of 1911 (Stats. 1911, p. 730). Judgment went for the plaintiff for the amount prayed and also for the foreclosure of separate liens upon the lots involved. The defendant Mintzer Estate Company was the owner of a mortgage upon the property upon which the bonds were a prior lien, and said company is the only defendant who has appealed from the judgment.

The facts are undisputed. The appellant is the holder of two promissory notes from the owner of the lots involved, which were secured by a mortgage on the lots, and which were taken in the year 1920, subsequent to the issue and delivery of all the bonds and at a time when the owner of the lots was in the hands of a receiver. Both notes were taken by the appellant to secure payment of a past-due indebtedness and both the notes and the mortgage were taken at a time when the corporation debtor was insolvent.

No question is raised on this appeal affecting the validity of the proceedings under the Street Improvement Act by which the bonds were issued and no suggestion is made that the work, in payment for which the bonds were issued, was not properly done in accordance with the contract.

The action was brought in 1923. Between the date of the issuance of the bonds in 1917 and the commencement of the action, the act under which the bonds were issued had been amended (St. 1921, p. 297, § 10), providing for foreclosure proceedings in court in the event of default in payment of principal or interest. Prior to this amendment, the Street Improvement Act provided two distinct remedies against the delinquent property owner: First, a summary sale of the property by the city treasurer on demand of the bondholder; and second, a foreclosure of the lien of

the assessment at the suit of the contractor. By the amendment to section 76 of the act made in 1921, it was expressly provided that:

"By way of a separate, distinct and cumulative remedy, the holder of any bond * * * may file and maintain a suit to foreclose the lien of the bond in the same manner provided in this act for the foreclosure of the lien of delinquent assessments."

The amendment also provided for a simple method of pleading and proof in such cases, for substituted service of process where the lot owner could not be found, for the foreclosure of the lien of the bond, and for attorney's fees and costs. The right of redemption of the property after sale was preserved "as in other cases."

It is contended upon the appeal (1) that the amendment of 1921 is not retroactive and was not intended to apply to bonds issued before its enactment, and (2) if the amendment is retroactive, it is unconstitutional, in that it impairs the obligation of a contract. While the language is somewhat general and does not specifically refer to existing bonds, it does purport to give a remedy to "the holder of any bond." This may well apply to bonds outstanding and unpaid, as well as those issued in the future. However, we are of the opinion that to so construe the amendment would render it inoperative as impairing the obligation of a contract.

In the case of *Chapman v. Jocelyn*, 182 Cal. 294, 187 P. 962, it was held that:

"A street assessment is a contract and the provisions of the statute in force at the time prescribing the manner of its enforcement are a part of such contract. *Creighton v. Pragg*, 21 Cal. 115; *Houston v. McKenna*, 22 Cal. 553. The bond issued upon such assessment, by reason of the failure of the owner to pay the same within the 30 days allowed to the contractor for the work to collect the same, must therefore also constitute a contract. * * * The Constitution forbids the passage of a law impairing the obligation of a contract. Article 1, § 16. It follows that a law enacted after such contract is made, and which materially alters the remedy of the bondholder to enforce his lien by means of a sale, or the rights of the owner under the law existing at the time the bond was issued, cannot apply to previous contracts and can have only a prospective effect. *Houston v. McKenna*, supra. The case in this aspect is not distinguishable from *Welsh v. Cross*, 146 Cal. 621, 81 P. 229, 106 Am. St. Rep. 63, 2 Ann. Cas. 796, wherein it was held that a law extending the time for redemption from a foreclosure sale impaired the obligation of a mortgage executed before its enactment."

The case of *Johnson v. Taylor*, 150 Cal. 201, 88 P. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181, is also authority for the general proposition that the law in force at the time of a sale for taxes regulates the right of redemption therefrom, and it is not within the power of the Legislature to take away that right, or prejudicially to affect it, by subsequent legislation. In that case the court quoted from an earlier case (*Teralta Land, etc., Co. v. Shaffer*, 116 Cal. 518, 48 P. 613, 58 Am. St. Rep. 194) the following language:

"The right of property acquired by the purchaser at this sale and the right of redemption remaining to the owner must both be governed by the law in force at the time of sale. Neither, in our judgment, could be either abridged or enlarged by subsequent legislation. This is unquestionably so as to the right of the purchaser. The same rule ought to apply in favor of the owner as against any statute shortening the time to redeem, as it is equally unjust to legislate against the owner of the land as in his favor."

[2] Since we have reached the conclusion that the amendment in question would be unconstitutional if construed to apply to bonds outstanding and unpaid at the date of the amendment, but issued prior thereto, and since it is possible to construe it in a manner which will render it legal and operative, and not unconstitutional and void, it is our duty to place the latter construction upon the amendment.

The rights of property owners against whose property assessments were levied and bonds issued under the "Improvement Act of 1911" prior to the amendment of 1921 became vested under a statute which did not render them subject to any suit whatever in any court at the hands of a bondholder. While the Legislature had power to make retroactive a law relating purely to a remedy, it could not alter the substantive rights of the property owners or their successors in interest. The amendment we are considering, although nominally aimed solely at providing a remedy, in fact, changes a substantive right of the property owner, and therefore impairs, to the detriment of the property owner, the contract rights which became fixed when the street proceedings were taken and the bonds issued.

The judgment appealed from its reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

202 Cal. 333

SETZER v. MOORE. (S. F. 11644.)

Supreme Court of California. Oct. 27, 1927.

1. Attorney and client $\S$ 144—In agreement for attorney's fees on date action was settled, meaning of "settled" was determinable from context and circumstances.

Where agreement settling compensation to be paid attorney provided that last payment was payable upon date action was settled, meaning of word "settled," not having acquired well-defined meaning enabling courts to interpret intent of parties, and to be determined from context of written agreement between the parties, circumstances under which agreement was made, and from conferences and correspondence between parties pending negotiation of agreement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Settlement.]

2. Attorney and client $\S$ 144—Under agreement for payment of attorney on date action was "settled," compensation was due on dismissal by plaintiff without prejudice.

Where agreement settling amount of compensation due attorney provided for payment of \$5,000 on execution of agreement, and \$5,000 on date of commencement of certain action, or upon date said action was "settled," and litigation in which such attorney was employed was incidental to main litigation between parties being conducted in New York, second \$5,000 was due upon date of dismissal of action by plaintiff without prejudice, since client could not claim that dismissal was not predicated upon sufficient consideration.

3. Attorney and client $\S$ 144—That action was dismissed without prejudice to plaintiff could not deprive attorney of right to compensation, under agreement for payment when action was "settled."

That action was dismissed without prejudice to right of plaintiff to commence another action could not deprive attorney of right to compensation, under agreement providing for payment of second installment upon date action was "settled," since services of attorney were to be limited to pending action and were to be terminated when it came to an end.

4. Appeal and error $\S$ 101(1)—Supreme Court will not interfere with conclusion of trial court on conflicting evidence.

Supreme Court will not interfere with conclusion reached by trial court on conflicting evidence.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action upon a contract for legal services by Abraham Setzer against George Gordon Moore. From a judgment for plaintiff, defendant appeals. Affirmed.

F. V. Keesling and C. A. S. Frost, both of San Francisco, and Ross & Ross, of Redwood City, for appellant.

Sullivan & Sullivan and Theo. J. Roche, and Leo J. Rabinowitz, all of San Francisco, for respondent.

RICHARDS, J. This appeal is from a judgment rendered and entered by the superior court in and for the county of San Mateo in favor of the plaintiff as the assignee of Archibald M. Johnson and against the defendant, for the sum of \$4,911.79 principal, \$220.71 interest, and \$41.10 costs. The action for the recovery of said sum was founded upon a contract in writing between the defendant and plaintiff's assignor, dated July 6, 1923, which had for its purpose, as expressed by its terms, that of definitely settling the compensation to which said Archibald M. Johnson was entitled to receive for professional services which had been rendered and were to be rendered in the matter of certain litigation which had theretofore been commenced and was then pending in the courts of California, wherein said Archibald M. Johnson was to act thereafter as one of the attorneys of record for the defendant, George Gordon Moore. The relation of attorney and client between said parties which had preceded and led up to the making of said contract may be briefly stated as follows: On May 4, 1922, an action was instituted in the superior court of the state of California, in and for the city and county of San Francisco, wherein Equitable Trust Company of New York, a corporation, was plaintiff and George Gordon Moore was defendant, which had for its purpose the recovery on the part of the plaintiff of the sum of \$9,819.41, with interest and costs, alleged to be due to it from Moore. In said action an attachment had been issued and levied upon the property of the defendant, situate in the county of San Mateo. On May 12, 1922, another action was instituted in said superior court wherein Investment Registry of America, a corporation, was plaintiff and said Moore was defendant, which action had for its purpose the recovery of a judgment against the defendant for the sum of \$49,600, with interest and costs.

Upon the institution of these two actions the defendant therein, who was then in New York, acting through his duly authorized attorney at law and in fact, also residing in said city, entered into negotiations for the employment of Archibald M. Johnson and R. P. Henshall, who were each duly licensed attorneys in the state of California, with a view to having them represent said Moore in each of said actions above referred to, and also on his behalf to commence and prosecute an action against the Equitable Trust Company of New York and certain other defendants to recover damages alleged to have been sustained by said Moore by reason of the alleged false and malicious issuance and

levy of the attachment which had been issued in the first above-named action. The result of these negotiations was the making of an agreement, in writing, for the employment of said California attorneys for the purposes of the foregoing litigation, by the terms of which it was agreed that said Moore was to pay said attorneys a retainer of \$10,000 for the handling of the foregoing cases, and was to further compensate them for their services therein by the payment of the reasonable value of their services thereafter to be performed. Upon the execution of this agreement Messrs. Johnson and Henshall proceeded to render such legal services as were necessary to adequately conserve and protect the interests of their client, in the course of which they instituted on his behalf an action for damages against the Equitable Trust Company of New York, above referred to. After the litigation in these several matters had progressed for some time Mr. Johnson apparently concluded that the nature, importance, and extent of his legal services during that period were such as to entitle him to a further payment on account of his fee, and accordingly entered into a correspondence between himself and his client, Moore, and the latter's eastern attorney, which ran through several months of both correspondence and conferences, and which finally terminated on July 6, 1923, in the making of the supplemental contract which came to form the basis of this action. By the terms of said contract the said George Gordon Moore—

"has agreed to pay and the said Archibald M. Johnson has agreed to accept the sum of \$10,000, payable at the times and in the manner following:

"(1) Five thousand dollars (\$5,000) payable on the execution of this agreement. * * *

"(2) Five thousand dollars (\$5,000) payable upon the date of commencement of the trial of said action of George Gordon Moore v. Equitable Trust Company et al., hereinabove referred to, or upon the date said action is settled."

The first installment of \$5,000 due under the foregoing agreement was paid by Moore, and said litigation proceeded in its various phases until June 4, 1924, when said action of Moore v. Equitable Trust Company et al. was dismissed by virtue of a stipulation entered into between the several parties to said action and also between their counsel, which stipulation read as follows:

"It is hereby stipulated that the above-entitled action may be dismissed without prejudice to the rights of the plaintiff herein to commence another action if he so desires."

It may be well at this point to state that the litigation which has hereinbefore been referred to as being instituted and conducted in the state of California was complicated with other litigation between the parties thereto which was at the same time pending

in the courts of New York, and wherein George Gordon Moore was seeking to recover certain large sums of money from the said Investment Registry of America, and which eastern litigation had resulted in a judgment or judgments in favor of said Moore prior to the time of the dismissal of the action of Moore v. Equitable Trust Company et al., on June 4, 1924, in the California court. Upon the dismissal of said action Mr. Johnson began to make demands for the payment of the balance of his counsel fees provided for in the aforesaid agreement, which demand after considerable correspondence being refused resulted in the institution of the present action for the recovery of the balance alleged to be due on account of said fees. The complaint herein was stated in three counts or causes of action—the first being upon an account stated; the second upon a common count based upon the foregoing express agreement; and the third count upon a statement at length of the circumstances which had led up to the making of said contract, as a result of which it was alleged that a balance of \$4,911.79 was due to the plaintiff's assignor. It is conceded that each of these counts or causes of action relate to the same transaction, and it is further expressly conceded by counsel for the appellant that "neither the quantity of services rendered by attorney Johnson nor the value of his services were in any way to be brought into the action." The answer of the defendant consisted in denials that any account had ever been stated between the parties, and that any sum whatever was due, owing, or unpaid to said Johnson or his assignee under the terms of the agreement, which was set forth in full in the complaint. Upon the trial of the case the respective parties went quite fully into the relation and correspondence of the parties which had preceded and resulted in the institution of said litigation, and upon the conclusion of the trial court made and filed its findings of fact and conclusions of law, in the course of which the trial court found against the plaintiff upon the first alleged cause of action upon an account stated, but found in the plaintiff's favor upon the other two causes of action treated as having relation to one and the same transaction, and accordingly rendered judgment in the plaintiff's favor for said amount sued for in his complaint. A judgment having been entered for said amount, this appeal has been taken and is being prosecuted by defendant, Moore, against said judgment.

[1-3] The main contention upon which the appellant relies for a reversal of the judgment depends upon the interpretation which this court is asked to place upon the terms of said contract of July 6, 1923, wherein the appellant agrees to pay "five thousand dollars (\$5,000) payable upon the date of the commencement of the trial of said action of

George Gordon Moore v. Equitable Trust Company et al., hereinabove referred to, *or upon the date said action is settled.*" It is the contention of the appellant that the dismissal of the action at his instance and by stipulation entered into between himself as plaintiff and the several defendants in said action is not to be considered to be such a settlement of the action as would entitle plaintiff's assignor to the payment of the balance of his counsel fees under the terms of said agreement, and for the recovery of which this action was brought. In making this contention the appellant insists that a proper interpretation of the phrase "settled" would contemplate the prior or contemporaneous payment to the plaintiff in the action to which said contract relates of a substantial sum of money as a basis for the dismissal of said action, and that, since it nowhere appears herein that any sum of money was received by Moore as a consideration for his dismissal of the action, the same has not been "settled," within the proper meaning of that term. We are unable to give our concurrence to this interpretation of the terms of said agreement. It would seem to be established by the authorities that the term "settled," when used with relation to pending litigation, has not acquired such a well-defined meaning as would enable the courts to interpret the intent of the parties in making use of said term in connection with the ending of such litigation without the aid of extrinsic evidence. *Walsh v. New York C. & H. R. R. Co.*, 204 N. Y. 58, 97 N. E. 408, 37 L. R. A. (N. S.) 1137-1140; *Williams v. Marine Bank of Norfolk*, 132 Va. 379, 111 S. E. 94, 95; *Adam v. Columbian Nat., etc., Co.*, 191 Ill. App. 378; *Wright v. Takito*, 210 Ill. App. 58-60; *Michael v. Donohoe*, 86 W. Va. 34, 102 S. E. 803. This being so, the courts must have recourse to the context of the written agreement between the parties in which said term is employed, to the circumstances under which the agreement was made, including the state and various phases of the litigation to which the agreement relates, and to the conferences and correspondence between the parties pending the negotiation of the agreement wherein said term is employed. When we look to the context of the agreement, we discover that the purpose of the parties as therein expressed had relation to a particular action, and that the intent of the parties was to "definitely settle the compensation which the said Archibald M. Johnson is entitled to for services that have been rendered and are to be rendered in connection with" said action, and we further learn that the sum of \$10,000 was the sum thus definitely fixed upon as and for the amount of such compensation. The delayed half of such definite sum was by the terms of said agreement to be paid to said Johnson upon the happening of one of two events; the first of which was

the commencement of the trial of said action, upon the date of which Johnson was to be paid said final sum. The other definite date upon which said final payment was to be made was "the date said action is settled." It would thus appear by reasonable intentment that said Johnson was to be paid this final portion of his fee either at a date prior to the termination of said action, or at the date when said action was terminated and ended without a trial.

When we look beyond the context of said agreement for light upon the meaning of the term "settled" as employed therein, we find that George Gordon Moore had become involved in a quite tangled web of litigation, both in the New York and California courts, arising out of his business relations with the Equitable Trust Company and the Investment Registry of America, each apparently being a New York corporation, involving claims and counterclaims of large sums of money; that the California litigation in which his said local counsel were employed was in a large measure incidental to the main litigation between the parties which was being conducted and carried on in New York during the period between the date of the employment of said California counsel and the final termination of said litigation in the New York courts. It is also fairly inferable that the termination and dismissal of the case of *Moore v. Equitable Trust Company*, which up to said latter date had been pending here, depended in a large measure upon the result of the New York litigation. It is quite apparent from the record herein that the dismissal of the case of *Moore v. Equitable Trust Company* in California was a matter agreed upon between Moore and his opponents in that litigation in New York and after the main differences of said parties had been or were about to be adjusted there. This being so, it may not fairly be argued by the appellant herein that the stipulation for the dismissal of the California action was not based upon considerations which would be equally or even more valuable to the plaintiff, Moore, than would have been the payment of a sum of money to him by way of damages as a basis for the dismissal of the California case. But, however this may be, we are of the opinion that it does not lie in the mouth of Moore to say, under such circumstances, that the dismissal thereof upon his own initiative and by his direction to his California counsel, was not predicated upon such a sufficient consideration as would have justified him in agreeing to a termination of said action without a trial thereof upon the merits; and, if this is taken to be true, the conclusion is inevitable that his direction to his California counsel to terminate said action by dismissal amounted to such a settlement thereof in his favor as would, under the terms of said agreement, have entitled the plaintiff's assignor

to recover the remainder of his fee. The mere fact that in the stipulation for the dismissal of said action there was a provision that such dismissal was to be without prejudice to the right of the plaintiff to commence another action cannot be held to qualify the agreement therein for the termination of the particular action to which such stipulation related. Both of the agreements entered into between the defendant herein and plaintiff's assignor had reference to this particular action, and not to whatever cause of action said Moore may have had against his opponents in the entire litigation. A fair interpretation of said agreement leads us to the conclusion that the agreed services of plaintiff's assignor were to be limited to the then pending action and were to be terminated when it came to an end, either by its trial or by its dismissal without trial, and that neither the services nor the fee of plaintiff's assignor was to be extended or to depend upon the institution of any later action or actions after the termination of the pending one.

[4] In conclusion, it may be stated that the evidence presented before the trial court in this case was quite conflicting in so far as it related to the intent of the parties to the contract sued upon, with reference to the meaning of the term "settled" as employed therein. This being so, and the trial court having resolved such conflict in favor of the interpretation of said term insisted upon by the plaintiff's assignor, we are not disposed to interfere with the conclusion reached by the trial court in that regard.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

202 Cal. 326

BRIDGE v. RUGGLES. (S. F. 11646.)★

Supreme Court of California. Oct. 27, 1927.

Rehearing Denied Nov. 23, 1927.

1. Bills and notes $\S$ 94(1)—Pre-existing debt was sufficient consideration for debtor's note to creditor (Civ. Code, $\S$ 3106).

Where maker was indebted to payee before note was given, such pre-existing indebtedness was, under Civ. Code, $\S$ 3106, sufficient consideration for the note.

2. Bills and notes $\S$ 92(3)—Extension of time or forbearance to sue held sufficient consideration for note.

Where the maker was indebted to the payee and gave a note because of such debt, extension of time or payee's forbearance to sue on original debt was sufficient consideration for the note given.

3. Bills and notes $\S$ 371—Accommodation indorser was liable to payee as ordinary indorser, where payee was holder for value (Civ. Code, $\S$ 3110).

Where note payee was holder for value, accommodation indorser was, because of Civ. Code, $\S$ 3110, liable to such holder as an ordinary indorser.

4. Bills and notes $\S$ 489(1)—Allegations and proof did not make issue of duress in obtaining signatures of maker and accommodation indorser so as to make evidence of state of mind admissible as exception to hearsay rule (Civ. Code, $\S$ 1569).

Where, in payee's action against maker and accommodation indorser of note, indorser sought to introduce, for purpose of showing payee's duress in obtaining signature and indorsement, evidence of a conversation such indorser had had with maker on date of signing, not in presence of payee, in which maker had urged that payee was threatening criminal action against him that would result in injury both to maker and indorser unless latter indorsed maker's note to payee, such evidence held properly refused, as not within exception to hearsay rule making hearsay evidence admissible to show one's state of mind, since, under Civ. Code, $\S$ 1569, defining duress, no issue thereof was made by pleading and proof offered.

5. Evidence $\S$ 314(1)—Hearsay evidence relative to accommodation indorser's state of mind when indorsing was incompetent to show maker executed note because of menace practiced on him (Civ. Code, $\S$ 1570).

In an action on a note, hearsay evidence relative to the accommodation indorser's state of mind when indorsing the instrument was incompetent to show that the maker executed the note because of menace, as understand either generally, or defined by Civ. Code, $\S$ 1570, practiced on him.

6. Witnesses $\S$ 388(3)—Accommodation indorser, sued on note, could not show custom of district attorney's office to impeach plaintiff's testimony without first laying foundation (Code Civ. Proc. $\S$ 2052).

Where payee sued accommodation indorser of note who set up duress in obtaining signatures of maker and indorser in applying for citation to issue to maker from district attorney's office, which maker denied, though his name appeared in citation, evidence, in impeachment, of custom of district attorney's office to insert in citations name of applicant, was not admissible without first laying foundation for impeachment, as required by Code Civ. Proc. $\S$ 2052.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by H. S. Bridge against Mary A. Ruggles and another. Judgment for plaintiff, and defendant Ruggles appeals. Affirmed.

R. P. Henshall and Robert R. Moody, both of San Francisco, for appellant.

Edwin T. Cooper and Charles T. White, both of San Francisco, for respondent.

SHENK, J. This is an appeal from a judgment in an action by the payee against the maker and indorser of a promissory note for \$4,000. The maker, L. D. Allen, defaulted in the action, and after a trial of the issues framed by the complaint and the amended answer of the indorser, Mary A. Ruggles, the trial court, sitting without a jury, gave judgment for the plaintiff for the principal sum, interest, and costs. From that judgment the defendant Mary A. Ruggles appeals.

The fact of the making of the note, dated August 14, 1922, and the signature of Mrs. Ruggles as accommodation indorser are undisputed. The appellant, however, contends (1) that there was no consideration for the note; (2) that there was no consideration for the indorsement; and (3) that the execution and delivery of the note by defendant Allen and the indorsement of Mrs. Ruggles were obtained by duress.

[1-3] At the trial the evidence disclosed that Mrs. Ruggles had advanced to Allen about \$25,000 to be used in real estate transactions, and that Allen had been indebted for some time to plaintiff, Bridge, in the sum of \$4,000, to cover which the note in question was given. Any question as to the sufficiency of the consideration for the note and for Mrs. Ruggles' signature as accommodation indorser may be dismissed at once, as the pre-existing debt was sufficient consideration for the note (Civ. Code, § 3106); and an extension of time or forbearance to sue was also a sufficient consideration. *Whelan v. Swain*, 132 Cal. 389, 64 P. 560; *Mahana v. Van Alstyne*, 179 Cal. 725, 178 P. 853. The court found on sufficient evidence that the plaintiff was a holder for value, and under the provisions of section 3110 of the Civil Code an accommodation indorser is liable to such a holder as an indorser.

In her answer the defendant Ruggles alleged that on the 11th day of August, 1922, Allen called upon her and told her that plaintiff had procured the issuance of a citation for him to appear before the warrant and bond department of the district attorney's office to show cause why a warrant should not be issued for his arrest on a criminal charge; that if said warrant was issued it would immediately stop all his work in the matter of subdividing and improving the properties he had purchased with moneys loaned by Mrs. Ruggles, and that there would be a complete and irretrievable loss of the moneys so expended unless he executed and delivered a note indorsed by Mrs. Ruggles to said Bridge forthwith to prevent him from carrying out his threat to have him arrested; that said Bridge would grant no further time to pay the indebtedness; that the plaintiff

knew that Mrs. Ruggles had advanced a large sum of money to Allen for the above purposes; that by reason of said threats communicated to her by said Allen and by reason of the fear and oppression thereby engendered, and her belief that the arrest of Allen would cause her great and irreparable financial loss, she was deprived of the free exercise of her will; and that by reason of the duress, compulsion, intimidation, and coercion to which she was so subjected, and not otherwise, she indorsed said note.

The court ordered judgment for the plaintiff and later made its findings of fact and conclusions of law resolving the disputed questions of fact in favor of the plaintiff. Therein the court found and decided that Allen did not sign the note, nor did Mrs. Ruggles indorse the same as the result of duress or compulsion. It is not contended that the evidence was insufficient to support the findings, but it is insisted that the court committed prejudicial error in two instances: First, it is urged that such error was committed in granting the motion to strike out the testimony of Mrs. Ruggles and Mrs. Louise Thomas relating to a conversation between Mrs. Ruggles and Allen two or three days before the note was signed and indorsed. This conversation took place at the home of Mrs. Ruggles, not, however, in the presence of the plaintiff. Concerning it Mrs. Ruggles testified as follows:

"Mr. Allen came to my home in the morning, and he said, 'Well, I fear trouble this morning. He (Mr. Bridge) has a citation out for my arrest, and unless I satisfy him in some way, by having you sign a note for me, why, he is going to throw me in jail;' and I said, 'Oh, he will never think of doing a thing like that, Mr. Allen;' and he said, 'Yes; he would do it; that is just what he is going to do;' and he said, 'If I am in jail, why I can't do anything in real estate.' I said, 'That is quite true, Mr. Allen;' and he said, 'Then, we are all going to lose—you are going to lose all the money you put in there;' and he walked around the room in a terrible state of mind, and he had me very much worked up; and I said, 'My goodness, you must try to do something about it, Mr. Allen;' and he said, 'No; he won't let me off; I have to have that note signed by you;' and then he said, 'If you will come down with me and sign that note;' and I said, 'Why, yes, I will go down.'

"Q. Did Mr. Allen at that time say anything to you regarding the conversation he had with Mr. Bridge prior to going to your house? A. Yes; * * * he said that he had a talk with Mr. Bridge, and Mr. Bridge wanted me to sign that note, or he would have him arrested.

"Q. Did he say whether or not if Mr. Bridge knew that he was going up to your house? A. He said Mr. Bridge knew he was coming up.

"Q. What did he say about it? A. Well, he wanted—he was talking to me about going back there and signing that note for him.

"Q. Did you believe those statements made to you by Mr. Allen? A. Why, I certainly did."

[4, 5] The testimony of Mrs. Thomas, by deposition, corroborated that of Mrs. Ruggles. The testimony of both was received in evidence, subject to a motion to strike it out. Before the close of the trial the court granted the plaintiff's motion to strike it from the record. The plaintiff, as a witness in his own behalf, denied that he had ever threatened the arrest of Allen, and denied that he had made the statements attributed to him by Allen concerning the alleged threatened arrest. It is the plaintiff's position that the evidence of Mrs. Ruggles and Mrs. Thomas was properly stricken as hearsay. It is the contention of the defendant Ruggles that, as said evidence was offered not for the purpose of proving the truth or falsity of the statements of Allen to her, but for the purpose of proving her state of mind at the time she indorsed the note, it was competent as proof for the latter purpose.

It is a well settled exception to the hearsay rule that, when the belief, feeling, and mental state of a person at a particular time is material to the issue, evidence of such person's declarations indicative of his then mental state are admissible, and it is immaterial whether or not such declarations were made in the presence of the adverse party or what the character of the litigation may be so long as evidence of such state of mind is material to the issue. *Adkins v. Brett*, 184 Cal. 252, pp. 255, 256, 193 P. 251; *Estate of Carson*, 184 Cal. 437, 445, 194 P. 5, 17 A. L. R. 239; *Kyle v. Craig*, 125 Cal. 107, 57 P. 791; 3 *Wigmore on Evidence*, § 1790. See 10 Cal. Jur. pp. 1073, 1074. Such evidence is admissible, not to prove the truth of the statements made, for which it is incompetent, but for the purpose of supporting the issue to which proof of state of mind is material. *Adkins v. Brett*, supra; 10 Cal. Jur. p. 1078 et seq. It becomes, then, of vital importance to determine whether proof of the state of mind of Mrs. Ruggles was relevant to any issue presented. The issue to which it is claimed to be competent is that of duress. In this connection it is alleged that:

The "plaintiff procured the said alleged note to be executed and delivered by the defendant L. D. Allen and indorsed by this defendant Mrs. Ruggles by duress."

Section 1569 of the Civil Code defines "duress" as (1) the unlawful confinement of the persons mentioned in the first subdivision of the section, (2) the unlawful detention of the property of any such person, and (3) the "confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harrassing or oppressive." It is readily perceived that the allegations of the answer do not bring the issue within the scope of duress as thus defined, for the reason that none of the acts of which duress is there declared to consist are alleged. Nor did the

proof received or afforded tender an issue of duress as thus defined. Nor did Allen or Mrs. Ruggles come within the classes mentioned in the section. If the facts alleged might be said more appropriately to justify the charge of "menace," we find that term defined in section 1570 of the Civil Code, and the defendant Ruggles has not presented an issue either by pleading or proof coming within that definition. Under that section "menace" consists, among other things not material here, of a threat of "injury to the character of" the persons mentioned in the section defining duress. Although neither the defendant Allen nor the defendant Ruggles comes within the literal classification of the persons so defined, it is well settled generally that a threat of arrest on a criminal charge in aid of the collection of a debt constitutes menace. In criminal law it is extortion and amounts to a felony. Pen. Code, § 518-520. On the civil side it warrants rescission and may be set up in defense in an action on debt, and the defense is available, even though the person threatened be subject to a criminal charge, as a threat of arrest is a gross perversion and abuse of criminal process, and no court will permit it to be used to enforce a settlement of a civil claim. *Morrill v. Nightingale*, 93 Cal. 452, 28 P. 1068, 27 Am. St. Rep. 207; 6 Cal. Jur. 67.

But the alleged threat of arrest in the present case was directed not to Mrs. Ruggles, but to Allen. Notwithstanding the default of Allen and the consequent waiver by him of the defense of menace, and assuming that it would be competent for Mrs. Ruggles to allege and prove as a complete defense as to herself that the threatened arrest of Allen had rendered the note void, we are unable to see how proof of her state of mind at the time of the indorsement would be competent to prove menace practiced on Allen. Mrs. Ruggles was not threatened with arrest, and the evidence excluded was offered to prove her state of mind and not the state of mind of Allen, who was alleged to have been threatened. As before stated the court found on sufficient evidentiary proof that Allen was not so threatened. The cases relied on by appellant proceed on the proposition that it is competent to show a state of mind of the person on whom duress, menace, undue influence, etc., are alleged to have been practiced to prove the effect on such person of the action threatened or accomplished, but no authority has been cited holding that the state of mind of another person, against whom no threat of arrest is made, is relevant to the issue. We therefore conclude, on the record presented, that proof of the state of mind of Mrs. Ruggles was incompetent evidence on the issue tendered, and that no error was committed in excluding the same.

[6] The witness Sheridan, a deputy in the office of the warrant and bond department of

the district attorney's office, produced from his office records a copy of a document dated at San Francisco, August 3, 1922, addressed to L. D. Allen, signed "Sol. N. Sheridan," and reading, in part, as follows:

"Kindly call at this office on the 7th day of August, 1922, at 11 o'clock a. m., relative to a complaint which has been made against you by H. S. Bridge."

The plaintiff denied that he had lodged the complaint. At the time of the trial in February, 1925, Sheridan testified that he did not remember that the plaintiff had called at his office in August, 1922, to request this citation, and Allen testified that the citation had never been served upon him. This document was received in evidence, but there was no showing that it had ever been issued. For the purpose of proving that the plaintiff had applied for the citation, the appellant sought to show that it was the custom of the warrant and bond department to insert in the citation the name of the person who applied for the same. The court excluded evidence of the alleged custom, and this is the second specification of error. The document and the proof of the alleged custom were offered for the purpose of impeaching the testimony of the plaintiff. If it was intended to prove that the document was made out in his presence and at his direction, no foundation for its introduction was laid as required by section 2052 of the Code of Civil Procedure. Furthermore, no satisfactory reason has been advanced in support of proof of a custom in the district attorney's office which would serve as a substitute for proof of what was actually done at the time in question, in this particular case in order that the plaintiff be bound.

We find no error in the record. The findings of the trial court, which we do not feel at liberty to disturb, resolve the controverted questions of fact in favor of the plaintiff. The judgment must therefore be affirmed, and it is so ordered.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; RICHARDS, J.; SEAWELL, J.

88 Cal. App. 165

CONTOS v. MANETAS et al. (Civ. 6033.)

District Court of Appeal, First District, Division 1, California. Oct. 18, 1927.

Appeal and error  776—Where principals filed dismissals of appeal and deposited money to cover judgment against them and surety, appeal was dismissed, notwithstanding surety's opposition.

In action upon laborer's lien where principals filed dismissals of appeal and deposited money to cover judgment against them and

surety, and plaintiff's counsel stipulated that the amount deposited would be accepted in full settlement, appeal was dismissed, notwithstanding surety opposed the dismissal, since the surety could not be prejudiced.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by James Contos against Theodore Manetas, the Fidelity & Deposit Company of Maryland, and others. Judgment for plaintiff, and defendants appeal. All defendants filed dismissals of the appeal, except defendant Fidelity & Deposit Company of Maryland, which opposes dismissal. Appeal dismissed.

Melvin, Dingley & Stevick, Melvin & Dingley, and Melvin & Sullivan, all of San Francisco, for appellant Fidelity & Deposit Co. of Maryland.

L. L. James, Jr., of San Francisco, for appellant Theodore Manetas.

Joseph Edward Connolly, of San Francisco, for appellants J. Wilmshurst, Theodore Manetas, and Wilmshurst-Manetas.

Heidelberg & Murasky, of San Francisco, for respondent.

CAMPBELL, Justice pro tem. In this action plaintiff brought suit against defendants on a claim for money due for services performed as a laborer by himself and certain co-laborers who assigned their claims to him, which labor and services were performed for defendants J. Wilmshurst and Theodore Manetas in the construction of a certain highway. The defendant Fidelity & Deposit Company of Maryland, a corporation, was made a party defendant by reason of its having as surety made and executed a bond to secure payment of all claims for labor and materials in and about the construction of such highway. Judgment was entered in favor of plaintiff and against defendant Theodore Manetas and J. Wilmshurst individually and as copartners and Fidelity & Deposit Company of Maryland, a corporation, and each of such defendants, for the sum of \$11,402.20 and costs amounting to \$28. From this judgment defendants appealed.

All of the defendants, excepting defendant Fidelity & Deposit Company of Maryland, a corporation, have filed in this court dismissals of the appeal. The dismissal of the appeal is opposed by appellant Fidelity & Deposit Company of Maryland.

It appears from affidavits on file and which are not disputed that prior to an appeal being taken Henry Heidelberg, attorney of record for plaintiff, agreed with Bradford M. Melvin, attorney of record for defendant Fidelity & Deposit Company of Maryland, that no execution would issue as against the bonding company, and that no bond on appeal

would be demanded from defendants and appellants, if a sufficient sum of money was deposited in lieu of such bond in the San Francisco Bank, and that the sum of \$11,869, agreed upon as a sufficient amount, belonging to Wilmshurst-Manetas was so deposited.

Appellants Theodore Manetas and J. Wilmshurst individually and as copartners desire the appeal dismissed and the money deposited in lieu of a bond on appeal applied in satisfaction of the judgment, which appears to be sufficient in amount to hold the bonding company free from any liability, but, in the event that there should for any unforeseen cause be a deficiency, counsel for respondent has stipulated here in open court on the argument of this matter to accept such sum in full of all claims and demands of any nature.

It appears, therefore, that appellant Fidelity & Deposit Company of Maryland, a corporation, will not be prejudiced by a dismissal of the appeal, and it is ordered that the same be and it is hereby dismissed.

We concur: TYLER, P. J., CASHIN, J.

86 Cal. App. 187

**RIO GRANDE OIL CO. v. SUPERIOR
COURT OF LOS ANGELES COUN-
TY et al. (Civ. 5882.)**

District Court of Appeal, Second District, Division 1, California. Oct. 19, 1927.

1. Certiorari ⇨28(2)—Superior court did not exceed jurisdiction so as to warrant writ of review, notwithstanding error, if any, in judgment.

Superior court *held* not to have exceeded jurisdiction in reversing judgment of municipal court so as to authorize issuance of writ of review, notwithstanding error, if any, in its judgment.

2. Appeal and error ⇨43—Judgment of superior court reversing judgment of municipal court for defendants in action for \$750 for rent on land held appealable.

District Court of Appeal *held* to have jurisdiction over appeal from judgment of superior court reversing judgment of municipal court in favor of defendants in action to recover \$750 for arrears of rent on leased land.

Proceeding for writ of review by Rio Grande Oil Company against the Superior Court of the County of Los Angeles, Hon. K. S. Mahon, Judge of said Court, and others, to annul a judgment of the named court reversing a judgment of the municipal court of the city of Los Angeles. Writ denied.

Haas & Dunnigan, of Los Angeles, for petitioner.

CONREY, P. J. [1] In an action brought in the municipal court of the city of Los Angeles against Rio Grande Oil Company and others to recover \$750 for arrears of rent on leased land, judgment was rendered in favor of defendant company. The plaintiff thereupon appealed to the superior court. That appeal was heard upon a statement of the case, including the evidence received in the municipal court and certain rulings of that court concerning the admissibility of offered evidence. The superior court reversed the judgment. The company now applies to this court for a writ of review, and contends that the superior court exceeded its jurisdiction. The gist of the contention on behalf of petitioner seems to be that the evidence shown in the statement on appeal established without conflict certain facts which entitled petitioner as defendant in the municipal court and as respondent in the superior court to a judgment in its favor; that the superior court, in ignoring this evidence, and in assuming the facts to be contrary thereto, and in its resulting reversal of the municipal court judgment, exceeded the appellate power conferred upon the superior court. Counsel for petitioner insist that the superior court must have assumed certain facts which were contrary to the record and findings of the municipal court, and that the superior court exceeded its jurisdiction, because, as contended, it acted upon something outside of the record or some conclusion or inference improper to be drawn from the record.

We think that the petition is without merit. If the superior court was wrong in its judgment, this was nothing other than an error committed within the exercise of its jurisdiction over the appeal brought before it from the municipal court. Counsel for petitioner refer to *Goodall v. Superior Court*, 37 Cal. App. 723, 174 P. 924, as the leading case upon the question. In that case, this court annulled an order made in a contempt proceeding. The court there applied the rule that, where the power to make the order depends upon the existence of facts as to which there is no evidence whatever, the question presented is one of law, and subject to review by direct attack on writ of certiorari. This rule has been often applied, especially in proceedings for review of awards made by the Industrial Accident Commission. But those cases also rest upon principles which directly affect the power of the commission. "The findings are not subject to review except in so far as they may have been made without any evidence whatever in support thereof. The review of the findings, even in such cases, is not based on the theory that they are not supported by the evidence and that we are weighing evidence to determine that proposition, but upon the theory

that the commission has no jurisdiction to make a finding where there is no evidence to support it." *Southern Pac. Co. v. Industrial Acc. Com.*, 177 Cal. 378, 170 P. 822.

In the case at bar, the superior court may or may not have erred in reversing the municipal court judgment. We are not called upon to determine that question. It suffices that the superior court in rendering its judgment was acting within its jurisdiction, since it was merely exercising its undoubted right to hear and determine the appeal.

[2] So far we have assumed, in accordance with petitioner's allegation, that there is no right of appeal from a superior court judgment rendered on appeal from a municipal court. But we think that the law gives such right of appeal in certain cases, and that the case in question falls within the appealable class. *Scott v. Larson* (Cal. App.) 255 P. 248.

The petition is denied.

We concur: HOUSER J.; YORK, J.

86 Cal. App. 8

PEOPLE v. GILBERT. (Cr. 1392.)

District Court of Appeal, First District, Division 1, California. Oct. 11, 1927.

1. Criminal law §517(4)—Extrajudicial statements, admissions, or confessions of accused may be admitted after prima facie proof of corpus delicti.

While extrajudicial confessions of accused must be corroborated by proof aliunde of the corpus delicti, extrajudicial statements, admissions, or confessions of accused may be admitted in evidence after prima facie proof of the corpus delicti is made.

2. Criminal law §409, 538(3)—Defendant's extrajudicial statements, admissions, or confessions once admitted may be considered with other evidence in determining whether elements of crime and defendant's connection therewith have been established.

Extrajudicial statements, admissions, or confessions of defendant may be admitted on prima facie proof of corpus delicti, and, after admission, may be considered by jury with all the other evidence in determining whether all of the elements of the crime and defendant's connection therewith have been established beyond reasonable doubt.

3. Criminal law §44—Offense of "attempt to commit crime" must be manifested by acts which would end in commission of attempted crime, but for circumstances independent of defendant's will.

In order to constitute the offense of "attempt to commit crime," there must be acts which would end in the consummation of the attempted crime, but for the intervention of cir-

cumstances independent of the will of defendant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Attempt to Commit Crime.]

4. Criminal law §517(4)—Admitting extrajudicial statement held not error, where elements of offense were prima facie otherwise established.

Admission of evidence of extrajudicial statements in prosecution for attempted burglary held not error, where evidence was sufficient without aid of the extrajudicial statements to establish prima facie the elements of the offense charged.

5. Burglary §41(10) Conviction of attempt to commit burglary held sustained by evidence.

In prosecution for attempt to commit burglary, evidence held sufficient to sustain conviction.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Harry Gilbert was convicted of attempt to commit burglary, and he appeals. Affirmed.

Ernest S. Leslie, of Oakland, and Frank W. Greely, for appellant.

U. S. Webb, Atty. Gen., and Lionel B. Browne, Deputy Atty. Gen., for the People.

CASHIN, J. The defendant was charged by an information filed in the superior court of Alameda county with a felony, to wit, an attempt to commit burglary, and was convicted. An appeal was taken from the judgment and from an order denying a motion for a new trial; and it is claimed that the evidence was insufficient to support the verdict.

The offense was alleged to have been committed at a dwelling house in Berkeley, and the testimony shows that at about 11 o'clock p. m. on October 25, 1926, the occupants of the dwelling, whose bedroom in the second story opened upon a balcony, observed a person who climbed over the balcony and approached the doors which led therefrom into the bedroom. Upon the occupants becoming aroused, the intruder dropped from the balcony to escape. The police were notified, and about 30 minutes after the occurrence the defendant was arrested in the vicinity, and brought to the dwelling, where he was identified by one of the occupants as the person seen upon the balcony. It was a moonlight night, and the identification was based upon the size and build of the person observed, the color of his clothes, and the fact that a gray cap was worn—all of which corresponded with the appearance of the defendant. Subsequently, according to the testimony of another of the occupants of the dwelling, the defendant, who was then in jail, stated to the witness that he was the person seen upon the balcony, and that it was his intention to enter the dwelling for the purpose of obtaining some-

thing by the sale of which he might procure food, and this statement was repeated by the defendant in a written confession signed by him. The record sufficiently shows that the statement and confession were freely and voluntarily given without inducement or intimidation, and both were properly admitted in evidence.

Defendant contends that, aside from the statements mentioned, the evidence was insufficient to prove the corpus delicti, and that the verdict is therefore unsupported.

[1, 2] Although no conviction may be had upon the extrajudicial confessions of a defendant, unless such confessions be corroborated by proof aliunde of the corpus delicti, it is held in the following cases that upon prima facie proof of the corpus delicti the extrajudicial statements, admissions or confessions of the accused may be admitted in evidence; and, having been so admitted, may, with other evidence, be considered by the jury in its determination whether or not all the elements of the crime and the defendant's connection therewith have been established beyond a reasonable doubt. *People v. Selby*, 198 Cal. 426, 245 P. 426; *People v. Domenighini* (Cal. App.) 254 P. 292.

[3, 4] In order to constitute the offense of an attempt to commit a crime, the attempt must be manifested by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party. *People v. Murray*, 14 Cal. 159. While mere intention to commit a crime followed by no overt act is not an offense, here the evidence showed an overt act from which, in view of the circumstances, an intention to commit the crime of burglary might reasonably be inferred; and the evidence was sufficient without the aid of the extrajudicial statements to establish prima facie the elements of the offense charged.

[5] The verdict of the jury was fully supported by the evidence, and, no error being shown, the judgment and order are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

86 Cal. App. 58

GLENN v. BACON. (Civ. 5520.)

District Court of Appeal, Second District, Division 2, California. Oct. 13, 1927.

1. Landlord and tenant ⇨86(1)—Recital demising premises for one year, "with option of four years more," if standing alone, would give right to exercise option to lessee only.

Provision of lease, reciting lease of premises to party of second part for term of one year, "with option of four more years," if standing alone, would give option to renew for additional four years to lessee only.

2. Landlord and tenant ⇨86(1)—Provision that lease shall run at option of the parties for five years held nugatory so far as it attempts to authorize lessor to nullify previous option to renew given lessee.

Recital in lease for one year that "lease shall run at the option of the parties for five years" held nugatory and meaningless in so far as it attempts to confer any rights on lessor to nullify option given lessee in previous clause to renew for further period of four years.

3. Landlord and tenant ⇨37—Any doubt as to meaning of lease must be resolved in favor of lessee (Civ. Code, § 1654).

Under Civ. Code, § 1654, any doubt as to meaning of provisions of lease because of ambiguity or uncertainty must be resolved in favor of lessee and against lessor who prepared lease.

4. Landlord and tenant ⇨86(1)—Lease for one year, to run at option of parties for five years, held not to authorize lessor to terminate it in face of lessee's option to renew.

Lease for one year, "with option of four years more," further providing that "lease shall run at the option of the parties hereto for five years from date hereof, the rental for the first two years and six months shall be \$45 per month after which the rental shall be rated in accordance to the conditions of the rents in that community," held to run "four years more" at the option of either lessor or lessee, but did not give lessor the right to terminate it in the face of lessee's election to take the additional term.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by W. W. Glenn against Henry Bacon. Judgment for defendant, and plaintiff appeals. Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

Clarence A. Jones, of Los Angeles, for respondent.

COLLIER, Justice pro tem. This is an action in unlawful detainer. On July 2, 1923, appellant and respondent entered into a written contract, drawn by appellant, wherein W. W. Glenn leased to Henry Bacon certain premises in the city of Los Angeles in the following words:

"* * * Said party of the first part do hereby lease, demise and let, unto said party of the second part (certain premises, describing them) for the term of one year, with option of four more years commencing on the 19th day of July, 1923, and ending on the 18th day of July, 1924 (which clause is hereafter referred to as clause 1). * * * (Here follows considerable matter extraneous to the issues presented herein.) It is expressly agreed and understood that the said lease shall run at the option of the parties hereto for five years from date hereof (which clause we shall hereafter refer to as clause 2), the rental for the first two years and six months shall be \$45 per month, after which the rental shall be rated in accordance to the

conditions of the rents in that community. * * * That said W. W. Glenn agrees *after the first year* to have constructed in said house a bath tub and fixtures at his own expense. * * * And that, at the expiration of said term * * * the party of the second part (Bacon) will quit and surrender. * * * And if said party of the second part shall hold over the said term * * * such holding shall be construed to be a tenancy only from month to month. * * * " (Italics ours.)

Before the expiration of the first year, Bacon gave Glenn notice that he (Bacon) elected to exercise his option to continue the lease for the period of four years more. On August 15, 1924, Glenn notified Bacon that he (Glenn) would not permit said Bacon to occupy said premises after September 18, 1924, and demanded the possession thereof. On October 30, 1924, Glenn served on Bacon a demand for possession, alleging, among other things, that "your tenancy at said premises has been legally and rightfully terminated heretofore"—evidently referring to said notice of August 13, 1924.

Plaintiff raises two contentions:

(1) That the lease by its terms has expired. Defendant denies the expiration of the lease and contends that it had and has four years to run after July 18, 1924.

(2) During the trial the court overruled plaintiff's objections and permitted evidence to be introduced to show the intentions of the parties at the time of and in the execution of the lease. This action of the court is assigned as error, in that it is claimed that the evidence tended to vary the terms of a written instrument and was not responsive to any issues pleaded.

These are the only points in the case.

The trial court found and adjudged that, by error of the scrivener of the lease, the words, "it is expressly agreed and understood that the said lease shall run at the option of the parties," were used instead of "at the option of the party of the second part," and that it was intended by the lessor and lessee that said option for a further term of four years should, *by the terms of the lease*, be given to Bacon, and that the plaintiff was entitled to no relief. From said judgment and rulings plaintiff appeals.

[1] Let us first consider clause 1:

"* * * Said party of the first part do hereby lease, demise and let, unto said party of the second part (certain premises, describing them) for the term of one year, with option of four more years commencing on the 19th day of July, 1923, and ending on the 18th day of July, 1924."

Had the lease stopped there no question would have arisen that the option was to be exercised by Bacon only. 35 C. J. 1012, § 130 (2) (a); Sheppard v. Rosenkrans, 109 Wis. 58, 85 N. W. 199, 83 Am. St. Rep. 886; Rogers v. National, etc., Co., 23 Ont. Law Rep. 234; Boston Clothing Co. v. Solberg, 28 Wash. 262,

68 P. 715; Gates v. Investment Co., 88 Wash. 522, 153 P. 322, 324. We quote from the opinion in the Rogers Case, supra:

"Mitchell, the owner in fee of the property in question, entered into an agreement with one Pearce to let the same to Pearce for five years from the 1st of September, 1905, to be used as a drug store and dwelling. The agreement sets out certain terms, and finishes thus: 'And the lessor further agrees with the said lessee that he will at the end of the term of five years give the said lessee the option of a further term of five years and the lessor further agrees that, in case of sale, he will give the said lessee the first option to purchase.' Pearce accepted this, and entered into possession. In July, 1907, Mitchell sold and conveyed the property to the plaintiff; before doing so, however, he offered the land to Pearce, but Pearce refused to buy. Pearce, in August, 1907, assigned all his interest in the agreement to one Smuck; and he, in October, 1908, assigned all his interest in the property to the defendants, who entered and paid rent to the plaintiff until the end of August, 1910. On the last day of August, 1910, the defendants wrote the plaintiff: 'We hereby give you notice that we accept the lease for a further term of five (5) years, as provided in the said lease.' On the 1st September, 1910, the plaintiff demanded possession, which was refused. Action was brought on the 18th October, 1910, and the case came on for argument upon the admitted facts.

"The interpretation and legal effect of the last clause is the crux of the case. I think it clear that what is meant is: (1) That, upon sale by Mitchell, the lessee, Pearce, was to have the first chance to buy—this was done, and nothing turns upon that provision. (2) The lessee was, at the end of the period, to have an option of a renewal of the lease for five years longer. 'Option' is used here, I think, with a somewhat different connotation from that of its previous use—and I read the clause as though it said 'give the said lessee a renewal of this lease for a further term of five years at his option.' It was argued that all that was meant was that the lessee should have an opportunity of making arrangements with the lessor for a new lease for five years, upon terms which would be satisfactory to both; but that, it seems to me, is not what the parties meant. If, then, the clause contained an 'option' for a renewal for five years, it is clear that the lessee had a right to a term of five years, beginning at the end of the previous term, and upon the same terms with the exception of the right to renew." Affirmed in 24 Ont. Law Rep. 486.

Whatever uncertainty there is in the instant case comes from clause 2, which, as we have seen, follows clause 1, but with other matter intervening the two clauses. Clause 2 provides:

"It is expressly agreed and understood that said lease shall run *at the option of the parties* hereto for five years from date hereof."

The uncertainty occurs from the use of the words "at the option of the parties," which is interpreted by the appellant to mean that the additional term should only become effective upon the *joint* agreement of Glenn.

and Bacon. Appellant cites the following language from 35 C. J. 1012:

"It is of course permissible to provide by contract that the lessor shall be given the privilege to extend or renew the lease, in which event he cannot be required to do so."

Unless otherwise limited by contract, the landlord always had and has that right. To so state in the contract gives no additional right to him. This is apparent from the following decisions:

In the case of *Gray v. Maier, etc.*, 2 Cal. App. 653, 84 P. 280, the court was considering a clause that, at the expiration of the lease, the party of the *first part* (the lessor) should have the privilege of leasing said premises for a further term of one year. The court said, at page 656 (84 P. 281) et seq.:

"A most casual reading of the lease will demonstrate that an error was made in the designation of the parties to whom the option was granted. Reading the lease literally, it sought to confer an optional right upon the first party [the lessor] which she possessed under all circumstances; *one needs no optional or other contract right to confer the privilege to grant a lease of his own.* In addition, the right 'to lease' by the ordinarily accepted meaning of terms is unto the lessee. The owner or first party grants the lease, lets or demises the leased premises, and it is the second party who leases. These considerations would lead any one examining the lease to see at once that the intention was to grant an optional right to the second party, and that the word 'first' was an error of the scrivener. * * * That an option to lease for another year was the subject of the contract is evident; that to give such option to the first party would be meaningless. To give it effect as a contract, therefore, it would necessarily follow that the intention was to give the option to the party who alone could be affected in his status with relation to the property by such option. 'It is not the practice of courts of justice to divest persons of their estates * * * by a strict interpretation of the language of an instrument, when the sense in which the words were used is apparent from other portions of the instrument, viewed in the light of attending facts. To ascertain the real intention of the parties, we view the whole contract and all of its provisions, together with the relations of the parties toward each other * * * and effect will be given to the intent thus ascertained, *however clumsily the instrument may be worded*' (Sprague v. Edwards, 48 Cal. 249), 'and will be so read in an action at law, and resort need not be had to a court of equity for reformation.'" (Italics ours.)

Supplementing the language of our own appellate court above quoted is the very apt wording of Owen, J., in *Nelson v. Nelson*, 168 Wis. 115, 169 N. W. 278:

"The plaintiff contends that from February 10, 1916, to February 10, 1917, defendants were tenants from year to year, under the statute, resulting from a holding over after their term under the lease had expired. The defendants claim that they were holding over under the lease. The character of their possession, as to wheth-

er they were tenants holding over under the statute or tenants under the lease is the principal question to be considered. This involves, first, a construction of the marginal clause appearing on the lease in the following words: 'It is further agreed and made a part of this contract that at the option of the party of the first part or the party of the second part this lease can be extended for one (1) year and at the end of each year leased for a period of five years from the date of this lease.' The plaintiff contends that this option is meaningless and void, because it gives the same option to either party and the exercise of the option by one party automatically destroys the option accorded to the other. The word 'option' is defined by lexicographers as the right, power, or liberty of choosing; liberty to elect between alternatives; election; choice; preference. *It is apparent that, if the word 'option' is to be accorded its literal meaning, the exercise of the option by either party, either to continue or not to continue the lease for a further period, would nullify the exercise of a contrary option on the part of the other. It is obvious that both parties cannot exercise the option unless they both exercise it in the same way.* If the lessee desires to continue the lease, and the lessor desires to discontinue it, both options cannot be exercised. One must give way to the other. This makes it very apparent that the word 'option,' in the marginal clause, was not used by the parties in its literal sense. That clause, manifestly, was inserted for a purpose. To accord to the term 'option' as therein used, *its literal meaning would be to construe the acts of the parties in inserting it, as purposeless, and would be an abandonment of all effort to ascertain and to give effect to the intention of the parties.*

"It is fundamental that in construing contracts the intention of the parties should be ascertained and enforced. We have little doubt that this marginal note was inserted for the purpose of giving to *either party* the right or privilege of continuing the lease as therein provided. A provision in a lease according to one or both of the parties a right of continuing the same is not at all unusual. This, it seems clear to us, is the thought that the parties to this lease had in mind, and it was to accomplish this purpose that the clause was inserted. We so construe it." (Italics ours.)

In the instant case we are of the opinion that, to accord to the term "option," as used in clause 2, the meaning as claimed for it by appellant, would be to construe the acts of the parties in inserting it as purposeless, and would be an abandonment of all effort to ascertain and to give effect to the intention of the parties.

The case of *Stetler v. North Branch Transit Co.*, 258 Pa. 299, 101 A. 980, is instructive, not only with reference to clause 2, but also to clause 1. In its opinion the court says:

"The lease contemplated the use and improvement of the land as a place of entertainment and amusement for the public, and it contained the following clause: 'It is further agreed and understood that if at the expiration of this lease the party of the second part, its successors and assigns shall desire to re-lease the said prem-

ises for a further period of ten years it or they shall have the first privilege of re-leasing the same at the rental and upon the terms herein contained.' The controversy turns upon the construction to be given to the words 'first privilege' in the above clause. Counsel for plaintiff contends the words mean that at the end of the ten-year term the lessee has nothing more than the first right to re-lease the premises for another term, provided the lessor was willing at that time to lease to anyone.

* * * But as the court below well says: 'If the plaintiff's theory as to the meaning of the paragraph is to be accepted, it would, so far as the lessee is concerned, become wholly meaningless, and might as well have been omitted.'

"We are not to suppose that the parties intended such a result. An inspection of the clause shows that if the word 'first' had not been used in connection with the word 'privilege', the right of the lessee to a renewal could not be questioned. Did the privilege of renewal then become any the less a privilege by being termed a 'first' privilege? The expression is awkward and perplexing, but we think it is more consistent with the expressed purpose of the lease to hold that the renewal was dependent upon the desire of the lessee, and that the expression of that desire was to give to it the first privilege of re-leasing, that is, priority of privilege over anyone else. The thought was not well expressed, but we feel that the words 'first privilege' in this connection should not be so construed as to nullify a valuable right in the hands of the lessee, which, under the paragraph as a whole, was evidently intended to be created. *It was of no possible use to make provision merely that one party should enjoy a certain right, if the other party should consent thereto.* The settled rule of construction is, that any uncertainty as to the meaning of a clause in a lease is to be determined in favor of the lessee." (Italics ours.)

See, also, the case of *Pause v. City of Atlanta*, 98 Ga. 92, 105, 26 S. E. 489, 493, 58 Am. St. Rep. 290, where it is said:

"Nor was it competent upon the part of the leaseholder to prove that she had an option upon the premises for a term of years longer than three, it appearing that the option was not to be exercised at her will alone, but was dependent likewise upon the concurrence of the landlord. Such testimony would be irrelevant, as, under the peculiar terms of the option claimed in the present case, the leaseholder acquired no interest, but only a privilege of making a new contract with her landlord at the termination of her lease, the new contract being dependent upon the consent of the landlord; and *this she would have had the right to have done with or without the alleged option.*" (Italics ours.)

See, also, *Winston, etc., Co. v. Union Guano Co.*, 162 N. C. 87, 77 S. E. 1106.

Mr. Tiffany, in his work on *Landlord and Tenant*, has this to say:

"An 'option' in the lessee to renew on such terms as may be satisfactory to both parties is *obviously nugatory*; it giving him merely the right to enter into a new contract with the owner of the reversion, which right he would have had without any such privilege." 2 Tiffany, *Landlord and Tenant*, 1521. (Italics ours.)

[2] We therefore conclude that clause 2, "that said lease shall run at the option of the parties for five years," is nugatory and "meaningless" in so far as it attempts to confer any rights upon the appellant, Glenn, to nullify the option previously given to respondent, Bacon, in clause 1.

Appellant relies on the case of *Gardella v. Greenburg*, 242 Mass. 405, 136 N. E. 106, 26 A. L. R. 1411, and which is the sole authority for the quotation from *Corpus Juris*, also relied upon by appellant and set forth supra. In that case the clause involved was as follows:

"It is agreed that six months' written notice before the termination of this lease shall be given by either of said parties to the other in event that either of said parties desire[s] a renewal of said lease, and *failure to give said notice shall be regarded as an intention on the part of the parties failing to give the same, that said lease shall not be renewed.*"

Construing that clause, the court said:

"A desire to have a lease is not equivalent to a right thereto. Not only is provision made for the manifestation of this wish, but it is declared with equal definiteness that the failure to give notice shall be 'regarded as an intention' that the lease shall not be renewed. The negative intent manifested by failure to give notice is on an equal footing with the desire declared by giving one. One provision is as strong as the other. Construing them together, we think that the true interpretation of the covenant is that it furnished a timely means of information whether the parties were willing to execute another lease on the same terms. *There are no words indicating a right in the lessor to bind the lessee beyond the expiration of the term, or to obligate the lessor in like manner.* The covenant did not create an absolute and unqualified right in either." (Italics ours.)

Now compare the foregoing with *Burgener v. O'Halloran*, 111 Misc. Rep. 203, 181 N. Y. S. 235, where the court was construing the following clause in a lease:

"That the said tenant shall notify the said landlord one month before the expiration of the term, if he desires to renew the lease."

The court said:

"The appellants contend that, lacking, as it does, the words 'covenant,' 'grant,' 'option,' 'refusal,' or 'privilege,' the clause in question is a mere statement that the tenant shall notify the landlord 30 days in advance, if he wants to remain in the premises, and they claim that it is elementary law that 'a landlord is not bound to renew a lease without an express covenant to do so,' citing *McAdam on Landlord and Tenant* (2d Ed.) p. 254. This same authority, however, says that no particular form of words is necessary to constitute a covenant for renewal, and the general rule for the construction of leases is that they *must be construed most favorably to the lessee, and this especially when the clause to be construed is claimed to be one destroying or defeating the estate of the lessee.* * * * The lease in question is upon a printed form known as the 'Gilsey Form.' It is partly

printed and partly typewritten; it contains a number of mutual covenants, some 13 in all, and the words under construction by us appear to have been specially incorporated into the lease, in typewriting, in a blank space between the seventh and eighth paragraphs of the lease in question. The clause immediately follows the covenant on the part of the tenant, wherein he agrees to allow the landlords permission to show the premises to persons wishing to hire or purchase the same, and wherein the tenant further agrees that on or before the 1st of September, 1919, the landlords or their agent shall have the right to put up signs 'To Let' or 'For Sale' upon the property. Then follows the clause under discussion.

"As I look upon this proposition, the pertinent and cardinal questions to be asked here are: What is the meaning of the clause in question? and why was it thus put in the agreement under consideration? If it does not mean that this tenant was to have the option of the renewal of the lease for one year, upon his giving one month's notice, what does it mean, and why was such a clause put into the lease at all? If it is to be given the construction claimed for it by the appellants, then the phraseology is absolutely meaningless. And my deduction is that, taking into consideration the situation of the parties, their relationship to each other, and other outstanding features of this controversy, and applying the well-known canons of construction to contracts of this nature, it clearly can be held that the tenant is given the privilege of a renewal of this lease for one year upon his giving the landlords 30 days' notice. Any other construction would be repugnant to common sense. There are many cases in the books, but none that I can find with the precise phraseology of this case; the decisions of the court, however, as I read them, are to the effect that, whatever ambiguity there may be in the words of the covenant, the intention of the parties absolutely must prevail, and this, even though the intention of the parties is in opposition to the strict letter of the contract, when such intention is clearly ascertained. As courts have said in construing certain of these covenants, more apt language might have been used; but the intent is clear and must prevail. [Citing cases.] * * * The present lease was prepared by the landlords, and was tendered to the tenant, and hence, under all known principles of construction, it must be construed, if its meaning is doubtful, most strongly against the landlords. A clause capable of two different interpretations should be construed in a sense which will have some operation. *An instrument should be construed most strongly against the party who drew it, and should be given the meaning he ought reasonably have understood that the person to whom he delivered the instrument should put upon it.* [Citing cases.]" (Italics ours.)

We prefer to follow the reasoning of the Burgener Case, particularly with reference to the interpretation of the word "desire." We do not think the Gardella Case is controlling, not only because the language of its clause is so entirely different from that in the instant lease, but because the question of *intent* in the Gardella lease was clearly defined, as the court in that case said:

"Not only is provision made for the manifestation of this wish, but it is declared with equal definiteness that the failure to give notice shall be 'regarded as an intention' that the lease shall not be renewed. The negative intent manifested by failure to give notice is on an equal footing with the desire declared by giving one." ([242 Mass. 407] page 106.)

At this point it may also be well to consider the whole sentence in which clause 2 occurs. It is worded as follows:

"It is expressly agreed and understood that the said lease shall run at the option of the parties hereto for five years from the date hereof, the rental for the first two years and six months shall be \$45 per month, after which the rental shall be rated in accordance to the condition of the rents in that community, if rents are advanced in said community then rents on said building shall be advanced, if lower, then the rents on said building shall be diminished; all of which shall be decided between the parties hereto."

It might seem that the final phrase, "all of which shall be decided between the parties hereto," would tend to support the previous phrase, "it is expressly agreed and understood that said lease shall run at the option of the parties hereto for five years from date hereof," but we think not. On the contrary, we are of the opinion that said final phrase refers only to fixing the rental rate—that is to say, whether it was to be raised or lowered or remain the same. It may further be argued that, if the parties could not agree upon the rental rate for the last 2½ years, the lease would terminate. This is not true, and has been so decided in various cases where the fixing of the rental rates has been left to the parties or to arbitrators or to appraisers. It has been held that such an appraisal provision is neither indefinite nor uncertain. See *Nakdimen v. Atkinson, etc., Co.*, 149 Ark. 448, 450, 233 S. W. 694, 697, where the court was considering the following clause:

"It is mutually agreed that at the expiration of said period of ten years, the rental to be paid by the party of the first part to the party of the second part for the concession and privilege herein granted, as herein set out, shall be fixed by a board of arbitrators, three in number, one to be named by each of the parties hereto, and the third to be selected by the two so named by the parties hereto, and that the award of any two of said arbitrators shall be final and conclusive upon the parties hereto."

The court said:

"In the present case the essence of the contract was the renewal of the lease for another term of ten years, and the fixing of the rental for that period was merely ancillary to the main contract. Where the provision for an appraisal is incidental and subsidiary to the substantive part of the agreement, the party refusing to name an appraiser or arbitrator cannot be heard to complain where the court performs or provides for the performance of such service. The court in fixing the reasonable

rental value treats the method as a matter of form rather than substance. So it may be said in the present case that the clause of the contract providing for a board of arbitrators to fix the rental value of the premises does not render the contract void as being too indefinite to be enforceable."

In the case of *United Woolen Mills Co. v. Honaker*, 96 W. Va. 166, 122 S. E. 440, the court had before it the following clause:

"It is agreed between the parties hereto that at any time not less than six months nor more than nine months before the expiration of this lease, the parties hereto, if the above premises are then for lease, enter into an agreement for an extension or renewal of this lease for another five (5) years' term and the lessee shall have the privilege of extending or renewing the same provided it is willing to pay the same rental therefor as offered by any other responsible person, firm, or corporation in good faith."

In its opinion the court uses the following language:

"Volume 2, *Underhill, Landlord and Tenant*, § 805, treats the matter thus: 'The expression, "what responsible parties will agree to give," when applied to renting business property, means its highest rental value.' We find that the author of this text based the above language on the case of *Arnot v. Alexander*, 44 Mo. 25, 100 Am. Dec. 252, and, while that decision seems to be practically the sole support of the text-book expressions on the proposition (see 24 Cyc. p. 992), we are so favorably impressed by its logic and reasoning that we are perfectly willing to adopt its principles, so far as they are applicable. The renewal clause involved there read as follows: 'If this lease shall not be terminated by forfeiture, or any other cause, before the expiration of the five years, then said lessee or his legal assigns shall be entitled to a renewal of the same for five years longer, provided said parties can agree upon terms, or that said lessee is willing to give as much as any other responsible party will agree to give.'

"The suit was, as here, to compel specific performance of the renewal covenant. The chief defense was that the covenant was too uncertain and indefinite to constitute the basis of a specific performance decree, but the court held: 'Equity will hear evidence, fix amount of rent, and decree specific performance, or hold the covenantor liable in damages for the breach of his covenant to renew a lease, providing that the amount of rent for the renewal is to be ascertained by what responsible parties would agree to pay for the use of the premises, as that fixes the rent with as much certainty as though it were to be determined by appraisers, and only means the highest market value of the premises at the time of renewal or valuation.'

"* * * There is a principle of long standing that equity will not compel parties specifically to perform an agreement to submit to arbitration, but, in these renewal cases, *Jones, Landlord and Tenant*, § 346, says: 'However, there seems to be a doctrine, in the later cases, that equity will, to prevent a failure of justice, apply its own remedies, and thus, where the substantial terms of a contract are agreed upon, arrive approximately at the minor details and then specifically enforce the contract. In the

case of a covenant of this kind, it is obvious that it is not of the essence of the contract that the valuation should be made by appraisers rather than by a court of equity.' And so, in this case, it does not seem to us that it is material whether the rental value of the premises be fixed by the offers of third parties or by the court. See accord on this general proposition, 24 Cyc. p. 1006. The only phase of the renewal lease not made certain by the express terms of the original contract can thus be rendered certain in a manner not abhorrent to the agreement of the parties."

Many phases of this question have been passed upon by the courts. In the two cases cited, and in the following decisions, there was a failure to agree in some respect and the courts stepped in, took evidence and fixed the rental rates. We have classified the cases as follows:

Where one party refused to arbitrate. *Atkinson, etc.*, Co. v. *Nakdimen*, 157 Ark. 403, 248 S. W. 561; *Strohmaier v. Zeppenfeld*, 3 Mo. App. 429; *North Coast, etc.*, Co. v. *Kraft Co.*, 63 Wash. 250, 115 P. 97. Where the arbitrators failed to agree and also failed to appoint a third person. *Tobey Furniture Co. v. Rowe*, 18 Ill. App. 293; *Grosvenor v. Flint*, 20 R. I. 21, 37 A. 304; *Lehigh, etc.*, Co. v. *Andrus*, 91 N. J. Eq. 225, 109 A. 746. Where the parties failed to agree on arbitrators. 1 *Paige*, 412. Where the arbitrators failed to agree on the rental rate or value of the property upon which the rental rate was to be based. *Van Beuren v. Wotherspoon*, 12 App. Div. 421, 42 N. Y. S. 404; *Lehigh, etc.*, Co. v. *Andrus*, 92 N. J. Eq. 238, 112 A. 307; *Kaufmann v. Liggett*, 209 Pa. 87, 58 A. 129, 67 L. R. A. 353, 103 Am. St. Rep. 988. Where the appraisers disagreed and failed to appoint a third. *Springer v. Borden*, 210 Ill. 518, 71 N. E. 345. Where one appraiser died. *Weir v. Barker*, 104 App. Div. 112, 93 N. Y. S. 732. Where the appraisers failed to agree and one party refused to appoint new appraisers. *Lowe v. Brown*, 22 Ohio St. 463.

[3] Furthermore, if there be any doubt about the meaning of the two clauses in the instant case—if there be any ambiguity or uncertainty—that ambiguity or uncertainty must be resolved in favor of the lessee; the lessor being the scrivener. Section 1654, Civ. Code. This rule has long been enforced in grants and leases. One of the earliest pronouncements is contained in *Dann v. Spurrier*, 3 Bos. & Pull. 403, 127 Eng. Rep. 220:

"Much is to be found in the books relative to the construction of deeds which contain covenants in the alternative; from all of which the rule appears to be perfectly clear, that if a doubt arise as to the construction of a lease between lessor and lessee, the lease must be construed most beneficially for the latter." (Italics ours.)

This rule was followed by our appellate court, and concurred in by the Supreme

Court, in *Butt v. Maier, etc.*, Brewery, 6 Cal. App. 581, 92 P. 652. The court was there construing the following clause in a lease:

"At the expiration of this lease the said second party shall have the prior right to lease the same, said premises, for a further term of five years, for the rental sum of \$3,000 for the full term, payable at the rate of \$50 per month on the first of each and every month of said term. Provided, however, that if the said second party shall avail itself of that privilege, that then and in that event, the said first party shall not be required to pay for any improvements at the end of said second term of five years, but that then, at the option of said first party, the said premises shall be surrendered to her with all improvements thereon."

With reference thereto, the court said:

"The word 'prior,' as used in clause 2, does not qualify the right of renewal. The right given the lessee to lease for a further term of five years must necessarily be prior to the right of other parties to lease the property. As we construe the lease, it was optional with the lessee whether it made any improvements or erected any buildings upon the leased premises, or elected to renew the lease for a further term. If it erected buildings and the lessor exercised its option to demand the surrender of the leased property and offered to pay the value of such buildings, it was optional with the lessee to assent thereto, thus waiving its right to renewal, but there was no legal obligation so to do. Thus construed, there is no ambiguity in the provisions of the lease. If, however, it be conceded that the lease is conflicting in its terms, or uncertain in meaning, then under the provisions of section 1654, Civil Code, it 'should be interpreted most strongly against the party who caused the uncertainty to exist.' 'The promisor is presumed to be such party.' In this case, the lessor is the promisor. [Citing cases.]" (Italics ours.)

Hence, any "conflicting terms" in the instant lease should be construed most strongly against Glenn, the appellant. As the Supreme Court of Pennsylvania has well said, in *Kaufmann v. Liggett*, 209 Pa. 87, 97, 58 A. 129, 132 (67 L. R. A. 353, 103 Am. St. Rep. 988):

"As a general rule, in construing provisions of a lease relating to renewals, where there is any uncertainty, the tenant is favored, and not the landlord, because the latter having the power of stipulating in his own favor, has neglected to do so, and also upon the principle that every man's grant is to be taken most strongly against himself."

To the same effect, see *Fergen v. Lyons*, 162 Wis. 131, 155 N. W. 935, 937; *Gates v. Hutchinson, etc., Co.*, 88 Wash. 522, 153 P. 322, 324; *Burgener v. O'Halloran*, supra.

[4] Therefore, viewing the lease in the instant case from its four corners, and resolving all conflicting terms, ambiguities, and uncertainties in favor of the lessee, Bacon, we are of the opinion that said lease by its

terms was to run for "four years more," or "five years," as it has been differently phrased, at the option of either Bacon or Glenn; that is to say, either of them had the option to continue the lease in effect for four years after July 18, 1924. The lease does not, in any view of it, give to the appellant Glenn the right to terminate it in the face of Bacon's election to take the additional term.

This being so, it remains unnecessary to consider the rulings of the court in the admission of evidence.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

86 Cal. App. 206

SPERRY FLOUR CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.
(Civ. 5992.)

District Court of Appeal, First District, Division 1, California. Oct. 21, 1927.

Master and servant ~~Civ.~~ 417(9)—Award on evidence showing claimant was not dependent, may be set aside and matter remanded for adjudication of rights of other dependents (Workmen's Compensation Act, § 67c).

Where evidence showed that claimant was not dependent on deceased employee, award could be set aside and matter remanded to Industrial Accident Commission in order that testimony might be had showing dependency in other members of family, which was overlooked at time of hearing, under Workmen's Compensation Act (St. 1917, p. 876) § 67c, so that rights of all dependents could be adjudicated in one award.

Proceeding under the Workmen's Compensation Act by E. M. Joseph for the death of E. A. Joseph, his son, claimant, opposed by the Sperry Flour Company, employer. The Industrial Accident Commission awarded claimant compensation, and the employer brings certiorari. Award annulled.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

TYLER, P. J. Certiorari to review an award of the Industrial Accident Commission. It appears therefrom that one E. A. Joseph was on September 18, 1926, in the employ of petitioner, Sperry Flour Company, and on that date he came to his death by reason of an industrial injury due to his having been overcome with poisonous fumes while fumigating a warehouse. Thereafter E. M. Joseph, father of the employee, filed an application for adjustment of claim with the Industrial Accident Commission, and subsequently upon a hearing the applicant's testimony was taken, which is the only testimony in the case. It showed that, at the time of

the death of his son, applicant had his own home in Sacramento, while the son was living in Oakland and working for the Sperry Flour Company in that city. Residing with the father were the mother and two other children, a grown son, 23 years of age, a minor son aged 9, and a grandfather. The father was earning \$225 per month. He owned his own home and was fully able to support his wife and minor son. The oldest son was working and living with the father, and he contributed to the family about \$30 per month. The testimony of the applicant further showed that the deceased employee gave the father from \$40 to \$50 a month in cash; that this payment was made to the father partly in recompense for obligations that the father had assumed for the son; that the father used the money so obtained indiscriminately, at times depositing it in the bank and at other times settling bills with the same; that previously when the son was living at home he paid from \$30 to \$35 a month, which sum nearly equaled his board. It also appeared that at times the son paid a larger amount, which was applied on the debt to the father. Under these facts, the commission found that the applicant was partially dependent for support upon the deceased employee; that the annual amount devoted for such purpose was \$420, entitling the claimant to a death benefit of \$1,260, payable in weekly installments of \$17.81, based on a wage of \$125 a month; that claimant was also entitled to an award for \$150 burial expenses, payable to himself. Accordingly an award was made in favor of applicant in the total sum of \$1,410. Petitioners asked for a rehearing upon the ground that the evidence did not justify the findings of fact, and that the finding did not support the award. It was claimed, in support of the application before the commission, that the payments by the son to the father were not contributions for support, but were, on the contrary, payments for his own board over weekends and holidays, and upon an indebtedness under a special agreement with the father. The petition for a rehearing was denied. The same argument is here advanced in support of this petition. We are cited to cases to the effect that payment of money to repay an old obligation and for actual support are not contributions to a parent for his support. See *Federal Mutual Liability Ins. Co. v. Ind. Acc. Com.*, 186 Cal. 517, 199 P. 796; *Great Western Power Co. v. Ind. Acc. Com.*, 191 Cal. 724, 218 P. 1009; 27 Cal. Jur. 543.

Respondents contend that there is evidence in the record to show that at least a portion of the sums advanced by the son to the father were used by the latter in obtaining the necessities of life. Petitioners contend that, even assuming this to be true, nevertheless it was not such a contribution as was relied

upon by the father for necessities, as the evidence conclusively shows that he was not a dependent. Attorney for respondent commission concedes this to be true, and he asks that the award be annulled and that the matter be remanded for further proceedings before the commission under the provisions of section 67c of the Workmen's Compensation Act (St. 1917, p. 876), in order that testimony may be had showing dependency in other members of the family, a matter that was overlooked at the time of the hearing. The request is made in order that the rights of all dependents may be adjudicated in one award. We are inclined to grant the request.

The award is annulled, and the case is remanded for the purpose indicated.

We concur: KNIGHT, J.; CASHIN, J.

86 Cal. App. 226

In re STEIN. (Civ. 3110.)

District Court of Appeal, Third District, California. Oct. 21, 1927.

1. Infants $\S$ 19—Weight of testimony and credibility of witnesses in proceedings to adjudge minors wards of juvenile court is for juvenile court, not for appellate court.

In proceedings to adjudge minors wards of juvenile court, credibility of witnesses and weight of testimony indicating that home influence and example were inimical to welfare of children is for juvenile court and not for appellate court.

2. Evidence $\S$ 598(1)—Credibility of witnesses having limited opportunity for observing does not lend special weight to their testimony sufficient to overthrow testimony of witness testifying from investigation.

Where opportunities of witness for observing are limited, fact that witness is otherwise credible does not lend special weight to his testimony, so that number of highly credible witnesses testifying on matters of which they have little information cannot be said, by appellate court, to overthrow testimony of one witness who has investigated circumstances and testifies therefrom.

3. Infants $\S$ 19—Judgment of juvenile court, adjudging minors wards thereof and based on sufficient evidence, is conclusive on appeal.

In proceeding to adjudicate minors wards of juvenile court, where there is evidence which if believed by juvenile court is sufficient to sustain judgment, appellate court must accept findings and judgment of lower court as conclusive.

4. Infants $\S$ 19—Error committed by juvenile court in adjudging minors wards thereof is within province of juvenile court on proper application to correct at any time.

Under Juvenile Court Law, providing for application to modify or set aside order of juvenile court at any time before minors adjudged wards of court attain their majority and authorizing court to restore minors to custody

of mother if conditions warrant, or to make such other order as may seem just and proper, if error has been made by juvenile court in its estimate of testimony on which it adjudged minors wards of court, such error is within province of juvenile court, on proper application to correct at any time.

5. Infants — 19—Change of condition of mother of minors adjudged wards of juvenile court is matter for presentation to juvenile court.

Where minors were adjudged wards of juvenile court, change of condition of mother, who was operating dairy at time of decree, which kept her from home practically all day and prevented her giving minors attention to which they were entitled, is matter for presentation to juvenile court.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Application by Mattie M. Stein to have Lena Epp and others adjudged wards of the juvenile court, opposed by the mother of said minors. Decree for applicant, and the mother appeals. Affirmed.

Jacobs & Jacobs, of Stockton, for appellant.
Edward Van Vranken, Dist. Atty., of Stockton, for respondent.

PLUMMER, J. On the 17th day of November, 1925, a petition was filed by Mattie M. Stein, one of the juvenile court officers of the county of San Joaquin, in the superior court of the county of San Joaquin, praying that the above-named minors be adjudged wards of the juvenile court of said county. The petition shows that the oldest of said minors was of the age of 12 years and the youngest of said minors of the age of 5 years. It is further set forth in the petition that the whereabouts of the father of said minors was unknown; that said minors had no parents exercising proper parental care and control, and that said minors were in need of the same; that said minors have been kept and maintained in a bunkhouse unfit for such purposes; that the minors were residents within the county of San Joaquin; and that said minors should be dealt with according to the juvenile law of the state of California. A citation was thereupon issued, and in due time an answer to said petition was filed by the mother of said minors. The matter came on for hearing on the 30th day of November, 1925, and after the taking of the testimony, the further hearing of said matter was continued until the 7th day of December, 1925, upon which day the taking of testimony in said matter was concluded. At the conclusion of the taking of the testimony, the court found therefrom that Lena Epp was a minor of the age of 12 years; Verna Epp, a minor of the age of 10 years; Emma Epp, a minor of the age of 8 years; Alfred Epp, a minor of the age of 5 years, and Walter Epp, a minor of the age of 4 years; that it further

appeared to the satisfaction of the court that Alfred Epp was the father of said minors and Frances Epp the mother of said minors; that the whereabouts of the father of said minors was unknown, and that the mother of said minors was a resident of the county of San Joaquin; that it further appeared to the satisfaction of the court that said minors have no parent actually exercising proper parental control and care over them, and that such minors were in need of such control, and that the best interests of said minors would be subserved by their being adjudged wards of the juvenile court. Thereupon the court ordered and adjudged said minors to be the wards of the juvenile court and placed them under the general supervision and control of the probation officer of the county of San Joaquin. It was further ordered that Frances Epp, the mother of said minors, pay to the probation officer of the county of San Joaquin, until the further order of the court, the sum of \$15 per month for the maintenance of each of said wards.

Upon this appeal it is contended that the evidence introduced in this cause was insufficient to justify an order or decree adjudging said minors wards of the juvenile court of said county. Neither the sufficiency of the petition nor of the order of the court appears to be questioned upon this proceeding. Our attention is directed simply to matters of fact. While several cases have been cited to the effect that the custody of minors should not be taken from parents upon slight or trivial causes, and that it is a serious thing to interfere with a parent's control, care, custody, and education of his child, there is nothing in any of the cases cited which would lead to the conclusion that the court in this case proceeded without jurisdiction, or that its judgment went beyond the provisions of the Juvenile Court Law (St. 1915, p. 1225). When the record in this cause is sifted and analyzed, we are really presented with an argument that the testimony in this cause should have led the court to an opposite conclusion from that at which it arrived. The appellant has set out in an appendix to her brief all the testimony favorable to the appellant, and at the same time has omitted from her brief all the testimony which would indicate that the judgment of the juvenile court was well founded.

By turning to the testimony set forth in the reporter's transcript we find: That the minors in question were under the observation of the probation officers of the county of San Joaquin for some period of time prior to the actual filing of the petition herein on the 25th day of October, 1925. That the mother of the minors lived in the town of Lodi for a period of time. That she lived for a short period of time just north of the north line of the county of San Joaquin.

and then again moved to the place from which they were taken within the county of San Joaquin. That the minors were left, a good portion of the time, at a place where there was no one present but a man who is supposed to have been a milker. At this place the premises were found to be very filthy and in a dirty condition. That the beds were all in one room. That the children all slept in one room. That a part of the time the man supposed to be a milker slept in the same room. That the appellant herein was asked to better the conditions, and that the appellant wanted the probation officers to take care of the children, but was informed that what was wanted was for the mother to take care of them. That the persons of the children at this time in question were not unclean. After leaving the first residence mentioned Mrs. Epp moved to Lodi with her children and lived there a short period of time. The children were not kept in school regularly, and of this the mother was notified. Thereafter the mother moved with her children to a bunkhouse on what was known as the Noble ranch. This place was found to be in a filthy condition. It appears that it was at this place where the children slept in one room, and the room in which a man supposed to be a milker also slept—one of the little girls stating that she slept in the same bed with the milker. That when the children were taken from this home to the county hospital they were in a filthy and ragged condition and were affected with what is called "scabies." It thus appears that the minors were kept in three different places, all of which were other than fit places for the maintenance of children.

[1] The testimony also shows that the father of the minors was addicted to the excessive use of intoxicating liquor, had disappeared, and his whereabouts was unknown. The testimony further shows that for a number of days all of the minors were lodged in a hay barn at night. There is also testimony in the record indicating that the home influence and example were inimical to the welfare of the children. As it appears in the reporter's transcript, this testimony is not very strong, but its weight was for the juvenile court, and not for us.

[2,3] As against this testimony which we find in the record there is considerable testimony given by apparently responsible people, which testimony is set out in appellant's brief, indicating that the interposition of the juvenile court in behalf of said minors was unnecessary. The juvenile court had before it all of the witnesses. It was the duty of the juvenile court to give to the testimony of each witness the credibility and weight to which it might be considered entitled. The opportunity of the witness to ob-

serve and learn the conditions and all the circumstances under which the minors were being maintained were the really important facts or matters to be considered by the juvenile court, as well as the credibility of the witnesses, in coming to a conclusion. Where the opportunities of a witness for observing are limited, the fact that the witness is otherwise credible does not lend special weight to his testimony. In other words, the testimony of a number of highly respectable witnesses concerning matters of which they have but little information cannot be said by an appellate court to overthrow and destroy the testimony of only one witness who has investigated the circumstances and testifies therefrom. Judged by mere numbers of witnesses testifying, the order of the juvenile court should be reversed. But where there is sufficient evidence set forth in the transcript which, if believed by the juvenile court, is sufficient to sustain the judgment, this court, on appeal, must accept the findings and judgment of the lower court as conclusive.

[4] Under the provisions of the Juvenile Court Law application for a modification or setting aside of the orders of the juvenile court may be made at any time before the minors attain their majority, and under the provisions of the Juvenile Court Law the court below, upon application, should the conditions so warrant, might restore any and all of the minors herein referred to to the custody of the mother, or make such other or further order concerning their custody or the amount of money which should be contributed by the mother for their maintenance as may seem just and proper. This method of procedure being open to the appellant in this cause, if error has been made by the lower court in its estimate of the testimony upon which it acted, it is an error which is within the province of the juvenile court, upon proper application, to correct at any time.

[5] It may be here stated that the record in this cause shows that the mother was, at the time of the hearing hereof, engaged in conducting a dairy, which kept her away from the home practically all of the time every day, and doubtless tended in considerable measure to prevent her giving the minors in question the care and attention to which they were entitled, and it may be that these conditions are entirely changed at this time. This, again, is a matter for presentation to the juvenile court.

No legal reason appearing why this court should interfere therewith, the judgment of the juvenile court is affirmed.

We concur: FINCH, P. J.; WEYAND, Justice pro tem.

HALEY et ux. v. BLOMQUIST et ux.*
(Civ. 5519.)

District Court of Appeal, Second District, Division 2, California. Oct. 3, 1927.

Hearing Granted by Supreme Court Dec. 1, 1927.

1. Auctions and auctioneers ⇨7—Party to faked auction sale on sham bid will be given no relief.

Public policy forbids making of faked auction sale on sham bid, and the courts will give no relief to a party to such a sale.

2. Auctions and auctioneers ⇨7—Finding that chattel mortgagors were parties to agreement that auction sale to mortgagee should be faked held sustained by evidence.

In action for amount of bid made by mortgagee of chattels at auction sale thereof, evidence held to sustain finding that mortgagors were parties to agreement suggested by auctioneer that mortgagee make a sham bid and become party to a faked sale.

3. Auctions and auctioneers ⇨7—Finding that bid of chattel mortgagee at auction sale was sham held sustained by evidence.

In action for amount of bid made by chattel mortgagee at auction sale of mortgaged chattels, evidence held to sustain finding that bid was sham and made solely for the purpose of protecting the interest of the mortgagors and to prevent sale at inadequate price.

4. Auctions and auctioneers ⇨7—Finding that pretended purchase by chattel mortgagee at auction of chattels was without consideration held sustained by evidence.

In action for amount of bid made by chattel mortgagee at auction sale of chattels, evidence held to sustain finding that sales agreement was signed by mortgagee without consideration.

5. Auctions and auctioneers ⇨7—Buyer at sham auction sale held not estopped to assert fraud.

In action to recover amount of sham bid at faked auction sale, bidder might not be held to pretended sale on the ground that he was estopped to assert the fraud, on the ground that the written sales agreement could not be varied by parol, or on the ground that pretended sellers had not relied on fraudulent character of sale, but only buyer, and that he could not profit by his turpitude, since courts will not enforce a contract contrary to public policy.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action for money by I. M. Haley and wife against A. Blomquist and wife. From judgments in favor of defendants, plaintiffs appeal. Affirmed.

See, also, 260 P. 571, 260 P. 572.

Morris Abraham and Charles I. Rosin, both of Los Angeles, for appellants.

D. K. Gault and Schweitzer & Hutton, all of Los Angeles, for respondents.

CRAIG, Acting P. J. Pursuant to stipulation three appeals in suits between the same parties and involving interrelated matters have been herein briefed together. The one which will be the subject of this decision is designated in the complaint as an action for money, in which I. M. Haley and T. E. Haley, husband and wife, are plaintiffs, and A. Blomquist and his wife, Hattie Blomquist, are defendants.

The following statement of facts is intended to suffice in that regard for the decision of all three appeals: On January 31, 1923, A. Blomquist and Hattie Blomquist owned a certain hotel in the city of Los Angeles, known as the St. George. On that day they leased it to Jack Zeller for the period of 10 years, at a rental of \$1,150 per month. As a part of the transaction Zeller executed his promissory note for a total rental amounting to \$138,000, and as security therefor gave a chattel mortgage on the furniture and lease; he also purchased from the Blomquists the furniture and furnishings of the hotel and gave his promissory note for \$24,500, payable in installments of \$500 per month. This note was also secured by a chattel mortgage on the furniture and furnishings. Later, Zeller assigned both his interest in the furniture and in the lease to I. M. Haley, the appellant in these cases, who assumed the obligations of his assignor to make the payments above mentioned. Haley paid installments on the furniture only until January, and the rent until May, 1926. On February 11, 1926, appellant held a public auction to sell the furniture and furnishings and lease of the hotel.

At this point the parties disagree as to what took place. Appellants' contention is that Blomquist bid \$19,000 at the sale and became the purchaser. Respondent A. Blomquist insists that he permitted the auctioneer to announce him as bidder and purchaser merely to prevent the property being sold too cheaply, and that it was understood between the parties that he was not required to take the property, and was not in fact to be regarded as buying it, and claims that he had no intention of doing so. There is evidence that respondent A. Blomquist first authorized a bid of \$17,000; some one else bid \$18,000; the auctioneer then importuned Blomquist to bid \$19,000, which he refused to do; after that the auctioneer announced that Blomquist had offered \$19,000, at the same time stating privately that he need not take the property. However, Blomquist signed the customary certificate of sale. Thereafter, on a number of occasions, Haley demanded of Blomquist and of Hattie Blomquist the payment of the \$19,000, after deducting therefrom the amounts then due on the furniture. The Blomquists at all these times refused to comply with the demands. After May, 1926, Haley refused to pay further rent, but continued to occupy the premises. As before stated, the Blomquists did not pay as demanded, nor did they take possession of the

hotel. Haley then instituted suit for \$19,000, with interest thereon from February 11, 1926, less \$8,500, the amount still due on the \$24,500 note. This is the purpose of action Civil No. 5519. A judgment of nonsuit was entered as to Hattie Blomquist, and at the end of the trial judgment was rendered for the defendant A. Blomquist.

[1, 2] If the respondents' version of the conversation at the auction is taken to be true, there can be no doubt that fraud was perpetrated in the purported sale to Blomquist. According to the testimony of several witnesses, the auctioneer, Byrens, induced Blomquist to make a sham bid and to become a party to a fake sale. Such a transaction is against public policy, and courts will refuse to give relief to any party thereto. *Dealey v. East San Mateo Land Co.*, 21 Cal. App. 39, 130 P. 1066. But appellants insist that they were not parties to whatever may have been said and agreed between Byrens and Blomquist. Upon this question there is a direct conflict of the evidence. Certain witnesses stated that neither T. E. Haley nor I. M. Haley was present when the matter of Blomquist's bidding was discussed, but Blomquist testified that at the time "two feet away was standing Mr. Haley." In answer to a question by the court, Mrs. Blomquist testified that Haley was present when the conversation in question took place. Another witness, Mrs. Margaret Hutton, also corroborated the Blomquists both as to the arrangement between Byrens and Blomquist and the fact that T. E. Haley was present. Appellants point out that no witness testified that Haley took part in the conversation, and that certain of these witnesses gave other evidence contradictory to that to which reference has been made. These are considerations which might affect the credibility of witnesses and the weight to be given their testimony, but which, of course, the trial court alone had a right to take into account.

[3, 4] It is next contended that there is no evidence to support the finding that Blomquist had no intention of buying the property, no evidence to support the finding that Blomquist bid solely for the purpose of protecting the interest of Haley and preventing a sale at an inadequate price, and no evidence to uphold the finding that the agreement was signed by Blomquist without consideration. Blomquist himself testified that he had no intention of purchasing the property. The testimony of witnesses that Byrens, in the presence of Haley, urged Blomquist to bid because Haley "is your tenant; you ought to

help him out," to which Blomquist replied, "All right," and that later Byrens stated that Blomquist did not "have to take it; just bid it"; following which Byrens announced that Blomquist had bid \$19,000, and the latter finally signed the certificate of sale. This evidence, and more of a similar character, is amply sufficient to justify the second finding to which reference is above made. The same evidence warrants the finding that the agreement was signed by Blomquist without consideration, since the evidence permits the conclusion that the entire transaction was fraudulent.

[5] It is said by appellants that respondents (1) were estopped to assert facts constituting the fraud in this case; (2) that the oral agreement was superseded by the writing which cannot be varied by parol; (3) that appellants have not alleged the fraudulent part of the agreement, and it is only respondents who have sought to rely upon it, and, therefore, that the latter will not be permitted to profit by their own turpitude. Each of these considerations is a false quantity in a case of this character. We are here concerned with a fraud, not against any individual, but against the public. The rule is well stated in *Dealey v. East San Mateo Land Co.*, supra:

"It makes no difference how or when the fact was brought to the attention of the court that the contract sued upon is against public policy. Neither does it matter whether or not one of the parties raises the question of its illegality upon that account, but courts of law and of equity, as the true character of such a contract is disclosed, refuse to permit themselves to be used in settling a controversy arising out of such a contract."

This decision cites many authorities to the effect that the court must sua sponte refuse relief to either party to an agreement which contemplates a fraud upon the public, or which is void as against public policy.

Certain rulings of the trial court upon the introduction of evidence are mentioned by appellants, but no attempt is made to point out any prejudice which may have resulted therefrom. The rulings in question under this head, if considered to be error, become unimportant in view of our decision upon the principal legal issue presented. We find no other points requiring decision, and no error of a substantial character.

The judgment is affirmed.

We concur: THOMPSON, J.; COLLIER, Justice pro tem.

BLOMQUIST et ux. v. HALEY et ux.★
(Civ. 5518.)

District Court of Appeal, Second District, Division 2, California. Oct. 3, 1927.

Hearing Granted by Supreme Court Dec. 1, 1927.

1. Pleading $\S$ 129(2)—Answer admitted allegation of complaint as to assignment of lease by failing to deny it.

Answer admitted truth of allegation of complaint that lease was assigned to both of certain persons by failing to deny truth of allegation.

2. Pleading $\S$ 129(1)—Assertion in complaint, undenied in answer, and hence admitted, held sufficient to warrant finding of fact asserted.

Where complaint alleged that lease was assigned to both of certain persons and answer failed to deny it, and hence admitted allegation, there was sufficient basis for finding that the lease was so assigned.

3. Appeal and error $\S$ 1047(3)—Striking out testimony respecting auction sale, if error, held harmless, where sale was void.

Court's order striking out testimony concerning an auction sale of mortgaged chattels to the mortgagee, if error, held harmless, where the auction sale was void as sham.

4. Landlord and tenant $\S$ 291(17)—Judgment in unlawful detainer, based on failure to pay rent under unexpired lease, need not provide that execution shall not issue for 5 days (Code Civ. Proc. $\S$ 1174).

Judgment for plaintiffs in action of unlawful detainer, based on failure to pay rent under unexpired lease, held not erroneous because it contained no provision that execution should not issue for 5 days after entry of judgment, since Code Civ. Proc. $\S$ 1174, providing that execution shall not issue for 5 days in such a case, merely regulates time of issuance of execution and not contents of judgment.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action for unlawful detainer brought by I. Blomquist and wife against I. M. Haley and wife. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

See, also, 260 P. 572.

Morris Abraham and Charles I. Rosin, both of Los Angeles, for appellants.

D. K. Gault and Schweitzer & Hutton, all of Los Angeles, for respondents.

CRAIG, Acting P. J. This action is one of unlawful detainer. It concerns the property and one phase of the transaction mentioned in *Haley v. Blomquist* (Civil No. 5519) re-

ported in 260 P. 569. The opinion in that case states the principal facts involved in this appeal. The appellants make no denial of respondents' assertion that in the instant case the former failed to make certain payment required by the lease. The principal defense on the merits is that Blomquist purchased the lease, furniture, and furnishings of the hotel in question, and that not having paid Haley the purchase price the latter had a lien, under section 3046 of the Civil Code, for the sale price and had a right to hold the property until the purchase price was paid. In view of our decision in *Haley v. Blomquist*, supra, this defense is not available.

[1, 2] It is contended that there is no evidence to support the finding that Zeller assigned the lease to the appellants, and that they promised to carry out its terms. The point in this connection is that the written transfer between Zeller and Haley shows that the assignment was made to I. M. Haley, and that T. E. Haley does not appear as a party to it. An inspection of the instrument shows this to be true. However, the complaint contains the allegation that the assignment was made to I. M. Haley and T. E. Haley. The answer fails to deny this assertion, and therefore admits it to be true. This is sufficient basis for the finding that the transfer was so made. 24 Cal. Jur. 952. Any finding otherwise would be outside the issues and erroneous. *Welch v. Alcott*, 185 Cal. 731, 198 P. 626.

[3] Certain testimony concerning the auction sale was admitted and later was ordered stricken out. The making of this order is assigned as error, but in view of the holding in *Haley v. Blomquist*, supra, that the sale was void and against public policy, the ruling becomes immaterial.

[4] It appears that the judgment contained no provision that execution should not issue until 5 days after the entry thereof. It is contended that the failure of the court to include such a provision in the judgment was prejudicial error. In that behalf reliance is placed upon section 1174 of the Code of Civil Procedure, under the subdivision entitled "Execution." This provision does not affect the contents of the judgment. It merely regulates the time of issuance of execution after judgment, and the Code provision is sufficient to protect the appellants' rights, regardless of the judgment.

We find no other points requiring our consideration. The judgment is affirmed.

We concur: THOMPSON, J.; COLLIER, Justice pro tem.

BLOMQUIST et ux. v. HALEY et ux.*
(Civ. 5520.)

District Court of Appeal, Second District, Division 2, California. Oct. 3, 1927.

Hearing Granted by Supreme Court Dec. 1, 1927.

1. Chattel mortgages ⇨162—Mortgagees held to have right to possession of mortgaged chattels on default in payments, under express term of mortgage.

Chattel mortgagees held right to take possession of mortgaged chattels on failure of mortgagors to make stipulated payments, by the express terms of the mortgage.

2. Pleading ⇨129(1)—Answer admitted allegation of complaint by failing to deny it.

Answer admitted truth of allegation of complaint that lease was assigned to both of certain persons by failing to deny truth of allegation.

3. Pleading ⇨129(1)—Assertion in complaint, unadmitted in answer, and hence admitted, held sufficient to warrant finding of fact asserted.

Where complaint alleged that lease was assigned to both of certain persons and answer failed to deny it, and hence admitted allegation, there was sufficient basis for finding that lease was so assigned.

4. New trial ⇨165—Order attempting to vacate order granting new trial in general terms held void.

Where order granting new trial was general in terms, it exhausted court's jurisdiction, and subsequent order attempting to vacate order granting new trial was void.

5. Appeal and error ⇨1176(1)—Where order vacating order for new trial was void, but new trial could result only in one way, appellate court might itself direct entry of proper judgment (Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

Where trial court's order vacating order granting new trial and directing entry of judgment for lesser sum than original judgment was void, but a new trial could result only in entry of judgment to same effect, District Court of Appeals was not bound to send case back for new trial, but might itself direct entry of proper judgment in court below, under Code Civ. Proc. § 956a, as added by St. 1927, p. 583.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action in claim and delivery brought by A. Blomquist and wife against I. M. Haley and wife. From a judgment in favor of plaintiffs, defendants appeal. Reversed with directions.

Morris Abraham and Charles I. Rosin, both of Los Angeles, for appellants.

D. K. Gault and Schweitzer & Hutton, all of Los Angeles, for respondents.

CRAIG, Acting P. J. [1] This appeal is from a judgment against the appellant giving the respondents possession of certain person-

al property, which is the subject of the suit, and damages for the value of said property. The action is one in claim and delivery in the usual form. It is a companion case to Haley v. Blomquist (No. 5519) 260 P. 569, and Blomquist et al. v. Haley (No. 5518) 260 P. 571. The opinion in the first of the two companion cases just named relates the principal facts referred to in the instant appeal.

It appears that by the terms of the chattel mortgage mentioned in that opinion, on the 1st day of May, 1926, there became due the sum of \$500. The defendants and appellants as assignees of the personal property were obligated to make this payment, but refused to do so. The chattel mortgage expressly provides that, if the mortgagor shall fail to make any payment agreed to be made, the mortgagees have the right to take possession of the mortgaged property. Therefore appellants' default gave the respondents the right to claim possession.

Since the auction sale was void as against public policy (Haley v. Blomquist, supra), we need not consider appellants' contentions in reliance upon that transaction.

[2, 3] As in Blomquist v. Haley, supra, the failure of the answer to deny the allegations of the complaint that the lease was assigned to T. E. Haley, as well as I. M. Haley, was an admission of the truth of that statement. With the pleadings in this condition, the finding that Zeller assigned to both appellants was warranted.

[4] At the close of the trial judgment was rendered for plaintiffs and respondents for \$25,000, in the event that the property covered by the chattel mortgage should not be restorable to them. There was no justification or basis for a judgment naming this sum. Later, on September 17, 1926, the court granted appellants' motion herein for a new trial; then on September 20, 1926, the respondents having consented to a judgment for \$8,999.80, the order granting a new trial was vacated and set aside and the judgment modified in accordance with the stipulation. Respondents insist that the order made on September 17th was based upon an understanding that it should not take effect in the event that respondents consented to a modification of the amount of the judgment. The order is general in its terms and the record contains nothing in support of this assertion. Without doubt, the trial court exhausted its jurisdiction by granting the new trial, and the order made in attempting to vacate that order was void. Holtum v. Greif, 144 Cal. 521, 524, 78 P. 11, and cases there cited; Dorland v. Cunningham, 66 Cal. 484, 6 P. 135. No attempt was made to set the order aside upon a proper showing that it had been entered peremptorily or by inadvertence, as was done in Odd Fellows' Savings Bank v. Deuprey, 66 Cal. 168, 4 P. 1173, or to correct it, as in Garoutte v. Haley, 104 Cal. 497, 38 P. 194.

[5] None of the grounds set forth in appellants' motion for new trial have merit except that the judgment rendered was erroneous because for a wrong amount in case the personal property involved was not recoverable. Nevertheless, it clearly appears from the evidence and the pleadings herein that the sum of \$8,999.80 was, at the date of the trial, due to plaintiffs from the defendants. It further appears that on September 17, 1926, plaintiffs executed and on September 20, 1926, caused to be filed their written consent to the modification of the judgment in their favor reducing the amount from \$25,000 to said sum of \$8,999.80, and on September 20, 1926, the court, in the presence of counsel for both parties, set aside its previous judgment and its order granting the motion for a new trial, and modified said judgment in accordance with said consent that day filed. While the order vacating the order granting a new trial was void, still, as we have said, the true amount is that provided by the judgment as modified. We can see no benefit in sending the case back for a new trial which can only result in a judgment in favor of plaintiffs for \$8,999.80 as of September 20, 1926. Section 956a of the Code of Civil Procedure as added by St. 1927, p. 583 authorizes this court, under such circumstances, to make any order necessary in the interests of justice and to the end that final disposition of the case may be made upon a single appeal. The primary purpose of that section is as stated in its own language, that:

"Wherever possible causes may be finally disposed of by a single appeal and without further proceedings in the trial court."

The principal need for this reform in procedure was apparently regarded to be in cases where it might be necessary to take more evidence and make additional findings; but other instances of similar character occur. Such, we think, is the instant appeal. To care for these, as well as better to effectuate the general purposes of the law, it was enacted that the Supreme Court and District Courts of Appeals "may give and direct the entry of any judgment or order, and make such further or other order as the case may require."

The judgment appealed from is reversed. It is directed that the order of the trial court granting a new trial be vacated, that said court enter a new judgment for the plaintiffs that they have possession of all of the furniture, fixtures, and furnishings described in the complaint, and, in the event that said property cannot be restored to plaintiffs upon the return of the writ of the sheriff so stating, then that plaintiffs have judgment against the defendants in the sum of \$8,999.80, with interest from September 20, 1926, at the rate of 7 per cent. per annum, the amount

due and unpaid upon the note and chattel mortgage covering said property, and interest, and for their costs.

We concur: THOMPSON, J.; COLLIER, Justice pro tem.

88 Cal. App. 37

CORGIAT v. REALTY MORTGAGE CORPORATION OF CALIFORNIA. (Civ. 5878.)

District Court of Appeal, First District, Division 1, California. Oct. 13, 1927.

1. Appeal and error $\S$ 1008(3)—On appeal from order made on affidavits involving question of fact, conflict must be resolved in favor of prevailing party.

On appeal from order made on affidavits involving the decision of question of fact, court is bound by same rule which controls when oral testimony is presented for review, and, if there is any conflict in affidavits, those in favor of prevailing party must be taken as true, and facts stated therein considered established.

2. Appeal and error $\S$ 1024(4)—Order setting aside default on conflicting affidavits is conclusive on appeal.

Order setting aside default, made on conflicting affidavits, is conclusive on appeal.

3. Judgment $\S$ 136—Statute permitting setting aside default judgments is to be liberally construed (Code Civ. Proc. $\S$ 473).

Provisions of Code Civ. Proc. $\S$ 473, as to setting aside default judgments, are to be liberally construed so as to dispose of cases on their merits and to give party, claiming in good faith to have a substantial defense, opportunity to present it.

4. Appeal and error $\S$ 957(1)—Judgment $\S$ 139—Setting aside default judgment is largely within trial court's discretion, which will not be disturbed unless abused.

The question of setting aside default judgment rests almost entirely in trial court's discretion, and appellate court will not interfere unless it clearly appears there has been a plain abuse of discretion.

5. Judgment $\S$ 163—On application to set aside default, existing doubt will be resolved in favor of application.

On application to set aside default judgment, any doubt which may exist should be resolved in favor of application to end of securing trial upon its merits.

6. Judgment $\S$ 143(1)—Court held not to have abused its discretion in setting aside default judgment in setting aside default in view of evidence of defense on merits and prompt application for relief.

Court held not to have abused its discretion in setting aside default judgment, where it appears that defendant has defense on merits, application for relief was promptly made, and that default was due to inadvertence and excusable neglect and not through want of due diligence on part of defendant's attorney.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Helen Corgiat against the Realty Mortgage Corporation of California, wherein default judgment against defendant was rendered. From an order vacating and setting aside such judgment, plaintiff appeals. Affirmed.

Richard Liebman, of Oakland, for appellant.

Clifton R. Gordon, A. B. Dunne, and Dunne, Dunne & Cook, all of San Francisco, for respondent.

CASHIN, J. An appeal from an order vacating and setting aside a judgment. The action was brought by appellant against respondent corporation to recover damages for the alleged conversion of certain corporate stock. The summons was served on December 17, 1926, and thereafter a verified answer to the complaint was filed by respondent. A motion to set the cause for trial was regularly made by appellant, and the trial, by stipulation of counsel of record made in open court, was set for February 17, 1927, in department 2 of the superior court of the city and county of San Francisco, following which a notice of trial was served upon the attorneys of record for respondent. These attorneys failed to appear at the time the cause was heard, and the court entered its judgment in favor of appellant. Thereafter respondent served and filed a notice of motion for an order vacating the judgment upon the grounds that the same had been made and entered through the mistake, inadvertence, surprise, and excusable neglect of the respondent, and after a hearing the motion was granted on February 27, 1927.

The notice of motion, which was accompanied by a substitution of attorneys, referred to the verified answer and the files and records in the case, and was based upon certain affidavits, one being an affidavit of merits, which was served and filed.

Appellant contends that, in view of the facts, the order was an abuse of discretion.

On the date of the entry of judgment, Messrs. McGee and Mather were attorneys of record for respondent; no formal substitution of attorneys being had until the filing of the motion. It appears, however, from the affidavits filed that these attorneys had in fact terminated their connection with the case before the trial, and that Clifton R. Gordon, the attorney who was subsequently substituted as the attorney of record, was acting for respondent before and on the day of the trial. According to the affidavit of the latter, the attorney for appellant was notified on February 11, 1927, that affiant would be engaged on February 14, 1927, in the trial of another action in department 7 of

the same court; that at the hour of 10:30 a. m. on the latter date affiant left the courtroom of department 7, where he was engaged, and went to department 2 in order to ascertain the condition of the calendar in that department; that another action was then on trial in the latter department, and, from a conversation with counsel engaged therein, it appeared to affiant that the hearing would occupy the whole of that day; that he returned at 4:40 o'clock p. m., the hour at which the trial in which he was engaged in department 7 ended, and found that the action against respondent had been heard and the judgment entered.

It was shown by the affidavit of the attorney for appellant that the case was called at 10:30 o'clock a. m. on February 14, 1927, was continued until 2 p. m. of that day, and was not reached on the calendar until 3:05 p. m., at which hour the hearing was had and the judgment entered. It further appears from this affidavit that a conversation was had between the attorneys on February 11, 1927, and, according to affiant, Attorney Gordon then requested a continuance, and affiant was not advised that he would be engaged in another department on the day set for the trial of the cause.

[1-3] In the consideration of an appeal from an order made upon affidavits involving the decision of a question of fact, this court is bound by the same rule which controls when oral testimony is presented for review. If there is any conflict in the affidavits those in favor of the prevailing party must be taken as true and the facts stated therein must be considered as established (*Doak v. Bruson*, 152 Cal. 17, 91 P. 1001), and an order setting aside a default made upon conflicting affidavits is conclusive on appeal (*Patterson v. Keeney*, 165 Cal. 465, 132 P. 1043, Ann. Cas. 1914D, 232). The provisions of section 473 of the Code of Civil Procedure are to be liberally construed so as to dispose of cases upon their merits, and to give the party claiming in good faith to have a substantial defense an opportunity to present it. *Nicol v. Weldon*, 130 Cal. 667, 63 P. 63; *Waybright v. Anderson* (Cal. Sup.) 253 P. 148. As was said in *Mitchell v. California, etc.*, S. S. Co., 156 Cal. 576, 105 P. 590:

"It is for this reason that we more readily listen to an appeal from an order refusing to set aside a default, than where the motion has been granted, since in such a case a defendant may be deprived of a substantial right, whereas it may be assumed, if nothing to the contrary is shown, that the plaintiff will be able at any time to establish his cause of action. If for any reason he will be unable to do so, that fact should be made to appear; but, if he is merely subjected to delay or inconvenience by having the default set aside, he can be compensated therefor by the terms which the court would impose as a condition to granting the motion."

[4, 5] As the rule is stated in *O'Brien v. Leach*, 139 Cal. 220, 222, 72 P. 1004, 1005, 96 Am. St. Rep. 105:

"In matters of this sort the proper decision of the case rests almost entirely in the discretion of the court below, and this court will rarely interfere, and never unless it clearly appears that there has been a plain abuse of discretion."

Any doubt that may exist should be resolved in favor of the application to the end of securing a trial upon the merits. *Jergins v. Schenck*, 162 Cal. 747, 124 P. 426; *Savage v. Smith*, 170 Cal. 472, 475, 150 P. 353.

[6] In the present case it was not shown that appellant would be unable to establish her cause of action should the default be set aside; and, while it appears that the order subjected her to inconvenience and caused delay, compensation could, and no doubt would, have been allowed as a condition to granting the order had an application therefor been made to the trial court; and it sufficiently appears that respondent has a defense on the merits to the action which is urged in good faith. The application for relief was promptly made, and, from the circumstances shown, the trial court might reasonably have concluded that the attorney for respondent was not wanting in due diligence on the day of the trial, and that the default was due to inadvertence and excusable neglect. In view of the facts, we cannot say that this conclusion was not fairly supported, or that its action in granting the relief sought was an abuse of discretion. The order is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

86 Cal. App. 173

IN RE BRADLEY'S ESTATE.

GIRARD TRUST CO. et al. v. PACIFIC
SOUTHWEST TRUST & SAVINGS
BANK et al.

(Civ. 5687.)

District Court of Appeal, Second District, Division 1, California. Oct. 18, 1927.

1. Wills § 449—Will should be construed to effectuate intention to dispose of all property by will.

If, by any fair construction of language used by testator in drafting his will, it appears reasonably certain that he had in mind possibility that after disposition of specific legacies and devises portion of property would remain without testamentary disposition, and that he attempted to provide therefor, will should be construed to make operative such intention irrespective of expression employed by him to effectuate purpose.

2. Wills § 587(1)—Will disposing of "full one-third" of estate and "remaining full two-thirds of entire estate," containing no residuary clause, did not show intention to provide for distribution of residuum of estate.

Under will directing executors to use full one-third of entire estate for charitable devise and remaining full two-thirds of entire estate for children, containing no formal residuary clause, words "full one-third" and "remaining full two-thirds of entire estate" did not indicate any intention on part of testator to provide for distribution of residuum of estate, but simply indicated testator's intention to deal with different portions of the estate.

3. Wills § 448—Construction of will rendering it operative, rather than defeating it, will be adopted.

Court will adopt such construction which will render will operative, rather than one which would defeat testamentary disposition.

4. Wills § 849—Lapsed devise under will, showing no intention to provide for distribution of residuum, went to legal heirs rather than to devisees.

Under will disposing of "full one-third of entire estate" in specific devise, and "remaining full two-thirds of entire estate" to children, but containing no formal residuary clause, and showing no intention to provide for distribution of residuum, lapsed specific devise went to legal heirs of testator as distinguished from legatees and devisees expressly provided for by will.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Petition for the final distribution of the estate of Thomas Bradley, deceased, by the Girard Trust Company and others against the Pacific Southwest Trust & Savings Bank, administrator, and others. Decree for defendants, and petitioners appeal. Affirmed.

Cruickshank, Brooke & Evans, Lloyd W. Brooke, and L. L. Riccardi, all of Pasadena, for appellants.

John Perry Wood, of Los Angeles, and Frank C. Dunham and Raymond G. Thompson, both of Pasadena, for respondent Walter S. McEachern.

HOUSER, J. This is an appeal from a judgment or decree of final distribution in the matter of the estate of Thomas Bradley, deceased.

The controversy arises from the admitted fact that as to one-third of the estate of the deceased the direct provisions of the will with reference thereto became inoperative, and, as a consequence therefrom, that as to such portion of the estate the devise thereof was lapsed.

On the part of appellants, it is urged that such lapsed devise became a part of the residuum of the estate, and that the order of the trial court should have contained a direction for distribution of such lapsed devise to

the residuary legatee of the will of the deceased. On the other hand, it is the contention of respondents that the will contains no provision for the distribution of the residuum of the estate, and consequently that as to the property covered by the lapsed devise the legal heirs of the testator, as distinguished from the legatees and devisees expressly provided for by the will, were entitled to have distribution made to them as specified in the decree from which the appeal herein is taken. In such circumstances it becomes necessary to consider those portions only of the will of the testator which, as conceded by respective counsel, bear upon the several contentions of the appellants and the respondents.

After directing the payment of debts against the estate and certain specified legacies, the will provided, in substance, that the entire estate of the testator should be held in trust for the payment during the lifetime of the widow of the testator of one-third of the net income of the estate to her, and the remaining two-thirds of such net income to the children of the testator. As suggested by appellants, so far as is here material, the remainder of the will was as follows:

"Upon the decease of my said beloved wife, I order and direct my said executors and trustees to expend and use the full one-third of my entire estate, real, personal, and mixed, whatsoever and wheresoever situate, in the purchase of a sufficient quantity of real estate, conveniently located to the said city of Philadelphia, and in and for the erection thereon of cottages or dwelling houses for the benefit and use of retired and superannuated ministers of the Philadelphia Conference of the Methodist Episcopal Church. * * *

"The remaining full two-thirds of my entire estate, real, personal and mixed, shall be and remain under the control and supervision of my said executors and trustees and the full net income shall be paid to my above named children, or the survivors or survivor of them during the full term of their and each of their natural lives as aforesaid."

It may also be stated that immediately following the provisions of the will to which reference has just been had, the will contained such provisions that as a matter of law no final disposition was directly made of one-third of the estate.

It thus appears that, as such, the will contains no formal residuary clause. Appellants, however, point to the use of the words "the remaining full two-thirds of my entire estate," which, taken in connection with the former phrase, "full one-third of my entire estate," it is claimed indicated an intent on the part of the testator to provide for the disposition by his will of any property of which he was the owner at the time of his death, and of which no disposition had been made by the direct terms of his will. The argument of appellants primarily rests upon

the use of the words "remaining," "full," and "entire," and the suggestion is forcefully made that as nearly as possible, without express direction to that effect, the testator thereby indicated an intent to set up a general residuary clause in his will. Attention is also directed by the appellants to certain general rules of construction to the effect that in such matters no particular form of phraseology is required, but that, when from the language employed in the will it clearly appears that the intent of the testator was to provide for the disposition of any residuum in his estate, such intention should be effectuated by appropriate construction. Furthermore, that unless a contrary intent is clearly expressed by the terms of the will, an ineffectual devise will not pass to the heirs at law, but will become a part of the residuum of the estate. But, as frequently occurs, the solution of the question depends not so much on the principles of law which may be applicable in the premises, but rather upon the construction to be placed upon the facts, as disclosed by the language of the will itself.

[1] If by any fair construction of the language used by the testator in the drafting of his will it may appear reasonably certain that he had in mind the possibility that, after the disposition by him of specific legacies and devises, a portion of his property would remain without testamentary disposition, and that an attempt on his part was made by the terms of his will not only to recognize such situation, but as well to appropriately provide therefor, it is undoubtedly the law that such a construction should be placed upon the will as to make operative such intention on the part of the testator, irrespective of the expression employed by him to effectuate his purpose. Returning, therefore, to the determining words of the will, to which reference has been had, it is urged by appellants that the words "remaining," "full," and "entire" show that at the time the will was executed the testator had in mind all his estate remaining after the specific disposition made by him under prior provisions of his will, had been satisfied, and that the words "full" and "entire" signify an intent on the part of the testator to establish a general residuary provision in his will. From an examination of the entire will it is apparent that it was prepared by one skilled in, or at least accustomed to, such work. At any rate, if the testator had anticipated the possibility of the existence of a situation such as is here presented, judging from the facility in the use of words, as exhibited throughout the will, to have clearly and unmistakably expressed the wishes of the testator regarding the final disposition of any property not specifically provided for in the will would have been very easy of accomplishment. But considering the language which was employed by the testator, first, in

providing for the disposition of a "full one-third" of his estate; and, secondly, of the "remaining full two-thirds thereof," it is only by the greatest strain on the ordinary meaning of the words used by the testator that it may be discerned that the testator had in mind anything relating to a residuum.

Regarding the expression "full," as applied either to the one-third or to the two-thirds portion of the estate, it is clear that anything less than a one-third necessarily would not be a "full one-third"; just as anything more than a "full two-thirds" would represent a different fraction of the estate than would be indicated by the fraction as given. If more than a one-third interest was bequeathed or devised by the provision first mentioned, incontestably the remainder of the estate, instead of being represented by a two-thirds fraction, necessarily would be as much less than two-thirds, as the value of the estate over the "full one-third" thereof was expressed in a one-third thereof as increased by such added amount—from which it follows that the use of the word "full," as applied in the will to the said two fractions, neither adds to nor subtracts from either of such fractions. In other words, a direction simply that one-third of the estate should receive such and such a disposition, and that two-thirds thereof should be disposed of according to a separate disposition, would have carried the identical significance as though (as in the instant will) the word "full" had preceded each of such fractions. While under fitting conditions and circumstances the word "remainder" is considered as appropriate for designating an intention on the part of the testator to recognize the existence, or possible existence, of a residuum in his estate, it must appear that in a given case such word, or some cognate expression, was used by the testator intentionally or advisedly for the express purpose of conveying a thought, if not identical with a residuum, at least approaching such a condition.

[2] In the instant case, it will be noted that the testator, instead of using the word "remainder," as applied to his estate, coupled the word "*remaining*" with the other words "full two-thirds." It is, of course, obvious that if a "full one-third" of the estate has received testamentary disposition, a "*remaining two-thirds*," "full" or otherwise, ordinarily would require some sort of treatment at the hands of the testator. In other words, had one-third of the estate been devised or bequeathed, necessarily there would have been a "*remaining two-thirds*" thereof. As in the use of the word "full," the word "*remaining*" had no effect upon a designation of the fraction of the estate attempted to be acted upon by testamentary disposition. After providing for the disposition of one-third of the estate, two-thirds thereof would be "*remaining*," but the expression "*remaining*

full two-thirds" carried with it a meaning no different than would have been expressed by the omission of both the words "*remaining*" and "full." So far as thus may be perceived, the use of such words was a superfluity. Their omission from the will in the connection in which they were used therein would have produced no effect whatsoever upon the construction thereof. While it is a rule of law that in construing an instrument, so far as possible some meaning must be attached to each word thereof, it is manifest that even by the greatest latitude and by the utmost allowance for inaccuracy of expression, it is impossible to render the word "*remaining*," as used by the testator, into the word "*remainder*," so as to indicate an intention on his part to provide for the distribution of the residuum of his estate.

As hereinbefore stated, it is clear that the will was drawn by no novice in that line of work. As is well known, the ordinary language employed in the preparation of a residuary clause in a will usually contains such statement as "all the rest, residue, and remainder of my estate." Nowhere in the will in question is any language to be found which approximates in meaning any one of the three words "*rest*," "*residue*," or "*remainder*." While purely in sound, the word "*remaining*" is a near approach to the word "*remainder*," considering its use in the will as hereinbefore treated, it is entirely foreign to any legitimate expression indicative of a residuum. It would seem apparent that the intention of the testator was to deal, first, with one fraction of the estate, and latterly with that part thereof which was "*remaining*," rather than with any "*remainder*," considered in the sense of a residuum of the estate. In no part of the will is any direct reference made by the testator to any part of his estate which is left without specific testamentary disposition; nor by any reasonable deduction from the language of the will may it be inferred that the testator either believed that he had failed by his will to make disposition of his entire estate, or that he intended to provide for any possible contingency with reference to a failure in that regard. So far as may be ascertained, either from a consideration of the will as a whole, or from any part of it other than the single word "*remaining*," to which reference has been had, the will is absolutely silent on the subject of "*rest, residue, or remainder*" of his estate. It should also be remembered that the words to which particular attention has been directed were used, not in an attempt to distribute the fee of the real property, but only in connection with the distribution by trustees of the estate of two-thirds of the net income arising therefrom; and, consequently, that the word "*remaining*," if it ever could be considered in the sense of a technical "*remainder*," would have no application

to the residue of the estate here under consideration. Viewed from a standpoint of its effect as in any way modifying the word "remaining," the use of the word "entire" is deemed of no significance, nor are we able to perceive that the words "entire estate," as used in the will, had any bearing upon the question as to whether the testator intended to provide for the distribution of the lapsed devise to a residuary legatee.

[3, 4] While this court recognizes the principle that a construction which will render a will operative, rather than one which will defeat testamentary disposition, is favored in law, nevertheless it would appear clear that the word "remaining" as used by the testator, standing alone and substantially unaided by any other sentence, clause, or word in the will, is insufficient to overcome the evident purpose of the testator to refer, in the connection in which the word "remaining" was used, simply to that portion of the estate which was left immediately after one-third thereof had been the subject of his testamentary consideration.

It follows that the judgment should be affirmed; it is so ordered.

We concur: CONREY, P. J.; YORK, J.

86 Cal. App. 182

CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.
(Civ. 5845.)

District Court of Appeal, Second District, Division 1, California. Oct. 19, 1927.

Master and servant $\Rightarrow$ 387—Persons superintending construction, though controlled by architect, held "general superintendent," within statutory provision for increased compensation for injury by employer's misconduct (Workmen's Compensation Act 1917, § 6[b]).

Person having charge and control of men engaged in construction work, though he was subject to the advice and direction of the contractor and architect, held "general superintendent," within Workmen's Compensation Act (St. 1917, p. 834) § 6(b), providing for an increase in compensation in case injury is caused by serious and willful misconduct of the employer, or, if the employer is a corporation, on the part of an executive or managing officer or general superintendent.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, General Superintendent.]

Proceeding under the Workmen's Compensation Insurance and Safety Act by Thomas P. Barnes, claimant, opposed by the Church of Jesus Christ of Latter Day Saints, employer, and another. To annul an order of the Industrial Accident Commission, award-

ing additional compensation for injuries, the employer applies for certiorari. Writ denied.

F. Britton McConnell, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Commission.

CONREY, P. J. Petitioner was the employer of one Barnes, who claimed compensation for injuries received, arising out of and in the course of his employment. The principal award, which runs against the employer's insurance carrier, is not questioned here. But the claimant was awarded additional compensation against the employer, upon the ground that the injury was caused by reason of serious and willful misconduct of the employer. Petitioner contends that the commission exceeded its jurisdiction in the rendition of said award of additional compensation, and particularly, that the evidence did not justify or support the finding of fact that the employee was injured by reason of serious and willful misconduct of the employer, on the part of an executive, or managing officer, or general superintendent thereof.

Petitioner, as owner, entered into a contract with Nowell, as architect and contractor, for the construction of a church building. Nowell was to receive a fee of 3 per cent. on the cost of the building. He agreed to construct the house, and to supervise the entire work. In the transactions with Nowell, the church was represented by the bishop and by one Jensen, chairman of the finance committee of the church.

If the accident and resulting injury to Barnes were caused by misconduct of any one, the misconduct was that of one Taylor, who occupied a position in relation to the work of such description that, at least, he was foreman in charge of the work in which Barnes was occupied at the time of the accident. Barnes was hired by Taylor. It does not appear whether Taylor's contract of employment came to him through Nowell or through some officer of the church.

The evidence produced before the commission is not here, and is not set out in the petition. For the purpose of deciding upon the application for the writ, we assume that the evidence is as stated by counsel for petitioner, together with the supplemental statements of evidence as contained in the answer presented by counsel for respondent commission.

The provisions of law allowing an increase of compensation, in case of "serious and willful misconduct" of the employer, are directed against such misconduct on the part of "the employer, or his managing representative," etc., "or if a corporation, on the part of an executive or managing officer or general

superintendent thereof." Workmen's Compensation Insurance and Safety Act of 1917 (St. 1917, p. 834) § 6 (b).

There are, therefore, two propositions upon which petitioner must depend. First, that the evidence is not sufficient to warrant the commission in finding that Taylor was a "general superintendent" of the corporation, within the meaning of those words as found in the statute. Second, if Taylor was such general superintendent, that the evidence is likewise not sufficient to prove that he was guilty of willful and serious misconduct.

The accident was caused by the breaking of a floor board of a scaffold platform on which Barnes was standing. The scaffold was being put up within the building, and was to be used in further progress of the work. Jensen testified that Taylor was foreman in charge of the construction of the scaffold and the direction of the work of Barnes, at the time when the plank broke, and was in charge of the construction as well as the work that was carried on upon the platform. Barnes testified that he was hired by Taylor, under whom he was working at the time of the injury.

"Q. Do you know he was an officer of your employer? A. I don't know, but I don't think so.

"Q. Who was next over him, if you knew? A. The church itself, was the way I take it.

" * * * Q. Do you know whether there was a general superintendent over you? A. Nothing but the architect. * * *

"Q. Do you know from whom Mr. Taylor got instructions about the work? A. From the architect. That is what he told me, at least. That he followed nobody's instructions but the architect's."

It is further shown by the testimony of Jensen that Taylor hired men to work on the job and was actually present on the job and supervising it; that the contract of Nowell was to prepare the plans and supervise the entire construction; and that Nowell was actually superintending as the work progressed.

"Q. Why do you say he was actively superintending the construction of the church? A. As he was responsible to us for the bids and everything that went into the building and construction of it under his entire jurisdiction. * * *

"Q. And he was to represent your committee and the bishop in superintending it? A. Yes.

"Q. Or placing of the— A. Bids."

It is the contention of respondents that the nature of the supervision to be exercised by Nowell as architect was different from the supervision that was to be exercised by Taylor in charge of the actual work of construction and of directing men doing the work of construction.

The difficulty in determining the main issue here arose out of the fact that both Nowell and Taylor were described as persons

superintending the work of construction. We think, however, that from the testimony the commission was justified in drawing the inference that the superintendency by Taylor was general in its nature and covered the actual work of construction, and that the superintendency contracted for by Nowell was not of such nature that it excluded such superintendency as was exercised by Taylor or reduced Taylor to the status of a mere foreman bound to obey orders of Nowell. Although Taylor was subject to advice and direction from Nowell, nevertheless Taylor had charge and control of the men engaged in the work. This conclusion is in harmony with certain decisions of the Supreme Court. In *E. Clemens Horst Co. v. Industrial Acc. Com.*, 184 Cal. 180, 193 P. 105, 16 A. L. R. 611, the claimant for compensation was an employee of the company, of which Horst was president and general manager. Miller was general superintendent of petitioner's ranches. Conrad was superintendent of the particular plant where the claimant was injured. The misconduct which led to the injury was that of Conrad. The question to be determined was whether or not Conrad was "an executive or managing officer," within the meaning of that phrase as used in the statute. The court said at page 190 (193 P. 109):

"It seems clear, therefore, that the Legislature by this section did not use 'officer' in its technical, legal sense as one who has been elected, or whose office is provided for by the articles of incorporation, or the by-laws, but that by an 'executive or managing officer' was meant a person in the corporation's employ, either elected or appointed, who is invested with the general conduct and control at a particular place of the business of a corporation."

In *Blue Diamond Co. v. Industrial Acc. Com.*, 188 Cal. 403, 205 P. 678, wherein the question at issue related to a liability similar to that sought to be enforced in the present case, one Haines was superintendent of the plant and one Schreiner was manager of production of the company's rock-crushing plant. One Hay was general manager of the corporation. After reviewing the facts of the case, the Supreme Court said:

"In addition to this evidence of an opportunity on the part of the petitioner, through its general manager, to have gained actual knowledge of the unguarded and dangerous condition of its appliances, there is the evidence, ample in character, of the previous knowledge of both Haines and Schreiner, not only of the unguarded condition of the said belt and pulley, but also of the terms of the general safety orders of the commission and of its express and repeated directions given to them, and to each of them, as the executive and managing officers of the former owner with relation to the safeguarding of the belts and pulleys of the plant. It is urged by the petitioner that this knowledge on the part of these persons, so retained in their positions under the petitioner's ownership of the plant, cannot be imputed to the petitioner."

This contention apparently was based upon the fact that the knowledge of the persons named respecting said conditions of the plant and said orders was obtained prior to the transfer of the property from a former owner to the petitioner. However, the court declined to sustain this contention, and upon the assumption that these named persons represented the corporation petitioner in conducting the business of the plant, affirmed the award. No distinction appears to have been made by the court between Schreiner and Haines and Hay, but apparently it was considered that the misconduct of all or either of them was imputable to the corporation.

We are satisfied from the evidence as indicated in the petition and answer herein that the employee was injured by reason of the serious and willful misconduct of Taylor. It is not necessary to occupy space here with a review of that evidence. We are further of the opinion that Taylor was an executive or managing officer, or at least a general superintendent, of the corporation for the purposes of the construction work of which Taylor had charge; that is to say, that he was a "general superintendent," within the meaning of section 6 (b) of the Workmen's Compensation, etc., Act of 1917.

The petition for writ of review is denied.

We concur: HOUSER, J.; YORK, J.

86 Cal. App. 113

STATE FINANCE CO. v. ISAACSON.★
(Civ. 3233.)

District Court of Appeal, Third District, California. Oct. 14, 1927.

Hearing Denied by Supreme Court Dec. 12, 1927.

1. Estoppel ⇨75—Facts held to warrant conclusion that finance company authorized dealer to resell automobile, giving purchaser good title as against claims of finance company (Civ. Code, § 1142).

Where finance company, on default of purchaser of automobile, notified dealer who sold car to remove it to dealer's place of business, and demanded from dealer payment of amount due on contract, *held*, in view of Civ. Code, § 1142, conclusion that finance company conferred on dealer power to make resale of automobile, and that purchaser on such resale received title good as against claims of finance company, was justified.

2. Pleading ⇨409(4)—Defect in pleading in failing to allege estoppel held waived by reception of evidence without objection.

Any defect in defendant's pleading in failing to plead estoppel was waived by plaintiff permitting introduction of evidence without objection.

3. Estoppel ⇨72—Finance company held to bring itself within provision that one of two innocent persons whose negligence brought about act of third person must be sufferer (Civ. Code, § 3543).

Even though action of finance company in authorizing dealer to retake car on default of purchaser did not warrant inference that authority was given dealer to resell car, as against purchaser on resale, finance company brought itself within Civ. Code, § 3543, providing that, where one of two innocent persons must suffer by act of third, he by whose negligence it happened must be the sufferer.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by the State Finance Company against Peter Isaacson. Judgment for defendant, and plaintiff appeals. Affirmed.

Goldman & Altman and Edgar Sinton, all of San Francisco, for appellant.

W. H. Carlin and W. E. Davies, both of Marysville, for respondent.

PLUMMER, J. On the 25th day of July, 1925, one Ed L. Wissler, a dealer in new and secondhand automobiles, at Marysville, Cal., entered into a contract of conditional sale with one Emanuel Kanupes for a certain automobile known and called a "Jewett businessman's coupé." This contract set forth the purchase price of the automobile, the payment thereon of the sum of \$440 upon the signing of the contract, and the balance thereof to be paid in monthly installments ending on the 1st day of February, 1927. The contract specifies that the purchaser agreed to make such payments according to the terms of the contract; that, in the event of a failure to make such payments, the seller might repossess himself of said automobile and sell the same, and apply the proceeds thereof upon the contract, or might declare all of the unpaid installments immediately due upon the contract and bring suit therefor. The title to the property was reserved to the seller, and was to remain in him until the full completion of the contract. Immediately upon the execution of this contract the said Wissler sold and transferred all of his right, title, and interest in and to the property, and also to the conditional sales agreement, to the plaintiff in this action, and further guaranteed that the purchaser named in the conditional contract would comply with all the requirements thereof. The buyer of the automobile under the conditional agreement made one payment to the plaintiff herein, and then defaulted. After the default of the buyer, the plaintiff herein located the automobile in question in Fresno, took possession thereof, and placed the same in a garage in the city of Fresno. After doing this, the plaintiff, through its

agent and representative, C. J. Busby, sent the garage check for the car to the original seller, Wissler, at Marysville, with directions to him to get the car, and demanded that said Wissler pay to the State Finance Company the sum of \$1,276 balance due on the contract. Wissler, either by himself or through one of his employees, after receiving the garage check, as herein stated, went to Fresno, received the car in question, and took it to Marysville, where it was placed upon the premises where Wissler was conducting the business hereinbefore referred to, the testimony also showing that Wissler maintained a garage in connection with his other business, the testimony being that Wissler, at Marysville, had a garage, a showroom, and a used-car lot, and place out back for cars and a salesroom. The car was taken possession of by the State Finance Company and placed in a garage in Fresno, as above stated, late in November. Early in December, 1925, the agent of the plaintiff company saw the car at Wissler's place of business, but just where it is not stated. The testimony of some other witnesses is to the effect that the car was in the salesroom maintained by Wissler, and also that it stood for some days in the doorway or entrance thereto. Early in December, 1925, the automobile in question was sold to the defendant in this action, the defendant giving in exchange or purchase therefor to Wissler a car owned by him and the sum of \$250. The car, at the time, contained no registration certificate. The purchaser, being the defendant herein, requested new plates and a certificate, and was told the matter would be looked after. Upon cross-examination the agent Busby testified that he notified Wissler that his car was in Fresno, and to come down and take it up to Marysville. This witness further testified: "I supposed he would get the car in order to save storage charges on it in Fresno, and probably take it to his own place of business." After stating that he had demanded payment from Wissler of the sum of \$1,276, this witness testified that he made no other demand upon Wissler, and that he gave him no other instructions. The witness further testified that he did not, and did not know of any one giving instructions to Wissler to resell the car. The car was subsequently taken from the defendant's possession by the plaintiff and sold, and the proceeds thereof, in the sum of \$1,100, applied upon the Kanupes contract hereinbefore referred to. The action herein was tried before a jury, and the defendant was given judgment for the value of the car. From this judgment the plaintiff appeals.

Only one question is really tendered for decision herein. Do the facts which we have narrated in brief justify the conclusion that Wissler was given authority by the plaintiff

to resell the "Jewett" automobile? Section 1142, Civil Code, reads:

"Where the possession of personal property, together with a power to dispose thereof, is transferred by its owner to another person, an executed sale by the latter, while in possession, to a buyer in good faith and in the ordinary course of business, for value, transfers to such buyer the title of the former owner. * * *

The facts in this case differ from the circumstances upon which any of the cases cited to us by either appellant or respondent were decided. In the cases of *Kenny v. Christianson* (Cal. Sup.) 253 P. 715; *Carter v. Rowley*, 59 Cal. App. 486, 211 P. 267; *Chucovich v. San Francisco Securities Co.*, 60 Cal. App. 700, 214 P. 263; there was testimony to the effect that the automobile dealer was given authority, in so many words, to make sales. In the case of *Pacific Acceptance Corp. v. Bank of Italy*, 59 Cal. App. 76, 209 P. 1024, possession only (the truck involved) went into the hands of Peniston for a short period of time. In that case the court in its opinion said:

"Conceding that the bank transferred the possession of the truck to Peniston, there is no evidence that it gave him power to dispose of this truck, which is also a condition to make the statute above quoted applicable."

The statute referred to is the section of the Civil Code which we have cited. All that was done in that case was that the owner of the truck permitted it to be used in certain work, together with other trucks which were being used by purchasers on the same job. The compensation earned by the trucks being used on the particular job in question, over and above the expense of operating the trucks, was turned over to the bank to be applied on Peniston's indebtedness. Peniston had already sold several trucks upon conditional contracts, and assigned the contracts to the bank to secure a promissory note executed by him representing money borrowed from the bank. Nothing was done by the bank in that case indicating that the truck in question was turned back to Peniston; that the bank looked to him alone for payment, or had in any wise surrendered its security. In the case at bar, the plaintiff not only relinquished its security and turned back the possession of the truck to Wissler when it sent him the garage check, and notified him to retake the car, with the expectation and understanding that he would remove the car from Fresno to his place of business at Marysville, a distance of some 220 miles, but also demanded payment of Wissler of the balance due on the Kanupes contract which Wissler had guaranteed. What was the intent of the parties when this action was taken? Was it intended by any of the parties that the "Jewett" automobile should remain in the

salesroom or upon the premises operated by Wissler for an indefinite period of time? Was it intended that Wissler should be looked to for the balance of the money due by the plaintiff rather than to its security, the possession of which it had voluntarily relinquished and restored to the custody of the original seller? The testimony, we think, is sufficient to show that the agent of the plaintiff saw the car upon Wissler's premises in a position and place which would indicate to the general public that the car was there for sale. If the plaintiff did not, by its acts in surrendering the possession of the car to Wissler and demanding payment of him, intend that Wissler should make resale of the property, the conduct of the plaintiff in relinquishing its security is not reasonably susceptible of explanation. There is no intimation that the plaintiff desired to escape storage charged for the car, but, on the contrary, the intent is evident that the plaintiff expected Wissler to take steps to secure himself against further expenses. This case is more nearly analogous to that of *Carter v. Rowley*, 59 Cal. App. 486, 211 P. 267, where it is said that, if the owner of an automobile, knowing that a certain dealer is engaged in the business of selling second-hand cars, delivers his machine to said dealer for the purpose of finding a purchaser, he thereby clothes such dealer with such indicia of authority to sell the car as usually accompany such authority according to the custom of trade and general understanding of business men, etc. In the opinion in the case of *Carter v. Rowley*, supra, the court quotes with approval the language of Lord Ellenborough in *Pickering v. Busk*, 15 East (Eng.) 38, to wit:

"If the principal * * * send his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse sent it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe."

In the *Carter-Rowley* Case the distinction which we have made between this case and the case of the *Pacific Acceptance Corp. v. Bank of Italy* is likewise pointed out.

[1] We think the fact that the finance company sent the storage check for the car to Wissler at Marysville, notifying him to get the car which was stored at Fresno, with the understanding that he should remove the same to his place of business at Marysville, and at the same time demanded from Wissler payment of the amount due on the contract which he had guaranteed, justified

the jury in inferring therefrom that the plaintiff intended to, and did, confer upon Wissler the power to make resale of the car in question, and that upon resale thereof the purchaser from Wissler would receive a title good as against any of the claims of the plaintiff in this action.

[2] That the provisions of the Motor Vehicle Act (St. 1923, p. 522 et seq., as amended by St. 1925, p. 399) relative to registration of automobiles has no bearing upon the facts of this case appears from the cases of *Boles v. Stiles*, 188 Cal. 304, 204 P. 848; *Chucovich v. San Francisco Securities Co.*, 60 Cal. App. 700, 214 P. 263; *Kenny v. Christianson* (Cal. Sup.) 253 P. 715. The appellant makes the further contention that no question of estoppel was raised by the defendant in his answer to the plaintiff's complaint in this action. The evidence which we have referred to, however, all came into the case without objection, and, in fact, was introduced by the plaintiff itself, and, therefore, if necessary to be pleaded, any defect in pleading was waived.

[3] As hereinbefore stated, we think the acts of the plaintiff justified the inference on the part of the jury that authority was given to Wissler to resell the car, and, if it did not actually confer such authority, the plaintiff went so far as to bring itself within the terms of section 3543, Civil Code, to wit:

"Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

The judgment of the trial court is affirmed.

We concur: HART, Acting P. J.; WEY-AND, Justice pro tem.

86 Cal. App. 86

PEOPLE v. RICHARDS. (Cr. 1503.)★

District Court of Appeal, Second District, Division 1, California. Oct. 14, 1927.

Hearing Denied by Supreme Court Dec. 12, 1927.

1. Statutes §241(1) — Provisions of Penal Code are to be construed according to fair import of their terms to effect its objects and to promote justice (Pen. Code, § 4).

Common-law rule as to strict construction of penal statutes does not apply to the Penal Code, but, under Pen. Code, § 4, all its provisions are to be construed according to the fair import of their terms, with view to effect its objects and to promote justice.

2. False pretenses §18—Maxim, "Expressio unius est exclusio alterius," held not applicable to statute prohibiting presentation of false claims to state boards or officers (Pen. Code, § 72).

The maxim, "Expressio unius est exclusio alterius," held not applicable to Pen. Code, § 72, making presentation of false claims to state board or officer, or to county, town, etc., board

or officer, a felony; the enumeration of county, town, etc., boards and officers being made by way of example and not for purposes of exclusion, and statute does not limit the expression "state board or officer" to those whose powers and duties are state wide.

3. Statutes §211—Original section headings in Penal Code are integral parts of Code and must be consulted in ascertaining legislative will.

The original section headings of the Penal Code are not merely editor's notes, but are integral parts of the Code itself, and must be consulted in ascertaining and interpreting legislative will as expressed in the various sections.

4. False pretenses §18—Boards and officers of county flood control, irrigation, reclamation, and school districts held "state boards and officers," within statute as to presentation of false claims (Pen. Code, § 72).

The Los Angeles County flood control district, created by St. 1915, p. 1502, as well as irrigation, reclamation, and school districts, are state agencies for carrying out state purposes, and their boards and officers are "state boards and officers," within purview of Pen. Code, § 72, making presentation of false claims to any state board or officer a felony.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

C. H. Richards was indicted for alleged violation of Pen. Code, § 72. From a judgment dismissing the indictment, the People appeal. Reversed, with directions.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Asa Keyes, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

Hewitt, Ford, McCormick & Crump and J. F. Moroney, all of Los Angeles, for respondent.

SHAW, Justice pro tem. This is an appeal by the people from a judgment of dismissal given upon an order sustaining defendant's demurrer to an amended indictment. The amended indictment undertook to charge defendant with a violation of section 72 of the Penal Code, which, at the time of the offense alleged, read as follows:

"Every person who, with intent to defraud, presents for allowance or for payment to any state board or officer, or to any county, town, city, ward, or village board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is guilty of felony."

The indictment contained nine counts, each charging in language identical with the others, except as to the details of the claim, the presentation of a false and fraudulent claim to the board of supervisors of the Los Angeles County flood control district. The only argument made by respondent in support of the order sustaining the demurrer is that said

board of supervisors is not one of the boards described in section 72, and hence the presentation of a false claim to that board is not made a public offense by this section. Manifestly that board is not within the section unless it can be regarded as a "state board or officer."

The term "state officer" has been frequently considered by the courts, and various meanings have been given to it according to the context and the nature and purpose of the constitutional or statutory provision in which it is found. In some cases it has been limited to officers exercising a state-wide jurisdiction, and in others it is further limited to such officers as belong immediately to the three constituent branches of the state government, or to the officers provided for in the Constitution. In other decisions, the criterion has been whether the duties of the office directly concern the affairs of the state, and it has been said that an officer with such duties may be a state officer, although his duties are to be performed in a limited territory or district.

It has been held that a mine inspector is a state officer, although elected by a district, because the office directly concerns the affairs of the state. In *re Lamb*, 251 Pa. 102, 96 A. 255. Another case held that because the functions of a county game warden concerned the state at large or the general public, he was not a county officer, although his duties were to be performed within the territorial limits of a county, but he was either a state officer or a joint state and county officer. *State v. Shagren*, 91 Wash. 48, 157 P. 31. It has also been held that a local registrar of vital statistics who reports to a state registrar, although he may be a city or county officer acting ex officio as local registrar, is a state officer, because he is performing state functions. *Ft. Smith Dist. v. Eberle*, 125 Ark. 350, 188 S. W. 821; *Sacramento v. Simmons*, 66 Cal. App. 18, 25, 225 P. 36. In holding that a public administrator for a particular county is a state officer, the Supreme Court of Illinois said:

"All officers whose duties concern the state at large or the general public are state officers, although such duties are exercised within defined territorial limits."

In the same case that court declared that an officer might be both a state officer and a county or city officer. *Ramsay v. Van Meter*, 300 Ill. 193, 133 N. E. 193.

[1] Bearing in mind the evident purpose of section 72 to penalize the making of false and fraudulent claims against public funds, we see no reason for giving to the words "state board or officer," as used therein, any narrow or limited meaning. The common-law rule as to the strict construction of penal statutes does not apply to the Code, but all its provi-

sions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice. Pen. Code, § 4; *People v. Soto*, 49 Cal. 67; *People v. Fowler*, 88 Cal. 136, 25 P. 1110.

[2] Respondent's argument is that, under the rule embodied in the maxim, "*Expressio unius est exclusio alterius*," the mention in section 72 of county, town, and other boards and officers, all of whom, as he claims, might be regarded as state boards or officers, in the broadest sense, shows that the expression "state board or officer" must have been used in a more limited sense as referring only to boards and officers whose powers and duties are state wide. It is scarcely correct to say that all of the various boards and officers named in the section are state boards and officers, even in the broadest sense given to those terms by the authorities cited, for many of them do not perform services for or on behalf of the state. But aside from this, the rule of *expressio unius* is not of universal application. *Blevins v. Mullally*, 22 Cal. App. 519, 529, 135 P. 307. "The maxim does not apply to a statute the language of which may fairly comprehend many different cases, in which some only are expressly mentioned by way of example merely, and not as excluding others of a similar nature." 2 *Lewis' Sutherland on Statutory Construction*, § 495. In *McKendrick v. Western Zinc Min. Co.*, 165 Cal. 24, 28, 130 P. 865, 867, it was held that the maxim should not be applied to a statutory enumeration very similar in its framework to that here involved. We think the enumeration of county, town, and other boards and officers in section 72 is made by way of example, and not for purposes of exclusion, and does not limit the effect of the preceding language.

[3] Our conclusion is fortified by a consideration of the section heading prefixed to section 72. That section had never been amended up to the time when this case arose, and as originally enacted had the following section heading:

"Fraudulently Presenting Bills or Claims to Public Officers for Allowance or Payment."

These original section headings are not merely editor's notes, but are integral parts of the Code itself, and must be consulted in ascertaining and interpreting the legislative will as expressed in the various sections. *Bettencourt v. Sheehy*, 157 Cal. 698, 109 P. 89; *Matter of Application of Wilson*, 30 Cal. App. 567, 158 P. 1050, 23 Cal. Jur. 772. At the time this section was adopted there were in existence school districts, reclamation districts, swamp land districts, and levee districts, none of which are expressly mentioned in section 72, and upon the argument of respondent all of them would be excluded from its operation. No logical reason can be imagined for excluding them or any other public board or

officer from the operation of the section, and the section heading just quoted indicates that the Legislature had no such intention. As we shall see, all of these existing public corporations have been classed as state agencies, and their boards and officers, as well as those of the numerous other state agencies of similar character for which statutory provision has since been made, should be regarded as state boards and officers, within the meaning of section 72. We adopt the following language of the court in *Milliken v. Meyers*, 25 Cal. App. 510, 514, 144 P. 321, 323, as indicating the meaning of those terms as used in this section:

"If, on the other hand, the services rendered by petitioner were those required to be performed for and on behalf of the state, such fact would render the position a state office. And, notwithstanding the duties in performance are restricted to the city, they do not, merely by reason thereof, become municipal in character."

[4] Accepting that meaning, we next inquire as to the duties and functions of the officers of the Los Angeles County flood control district. That district was created in 1915 by a special act of the Legislature. Stats. 1915, p. 1502. The purposes for which it was formed as declared in this statute were:

"The objects and purposes of this act are to provide for the control of the flood and storm waters of said district, and to conserve such waters for beneficial and useful purposes by spreading, storing, retaining or causing to percolate into the soil within said district, or to save or conserve in any manner, all or any of such waters, and to protect from damage from such flood or storm waters, the harbors, water ways, public highways and property in said district."

To carry out these purposes, it was made a body politic and corporate, and given power to acquire and own property, to incur indebtedness, to issue bonds, to levy taxes, which are in reality special assessments, and to construct all necessary or proper works and improvements. The statute also provides:

"The board of supervisors of Los Angeles county shall be, and they are hereby designated as, and empowered to act as, ex officio the board of supervisors of said Los Angeles County flood control district, and said board of supervisors is hereby vested with the same powers, and shall perform the same duties for and on behalf of said district, and the government thereof, to carry out the objects and purposes of this act that the board of supervisors of Los Angeles county now have or may hereafter have by law for said Los Angeles county, and shall also have such other or additional powers for said district as may be necessary to carry out any of the objects or purposes of this act above mentioned, or to exercise any of the said powers of said district. * * *

This district is substantially similar in character, at least so far as the present matter is concerned, to irrigation districts and

reclamation districts. *Los Angeles County Flood Control District v. Hamilton*, 177 Cal. 119, 169 P. 1028. In the *Madera Irrigation District Case*, 92 Cal. 206, 322, 28 P. 272, 278 (14 L. R. A. 755, 27 Am. St. Rep. 106), the nature of an irrigation district was elaborately discussed, and this declaration was made:

"The district officers thus become public officers of the state. * * * Here are found the essential elements of a public corporation, none of which pertain to a private corporation. The property held by the corporation is in trust for the public, and subject to the control of the state. Its officers are public officers, chosen by the electors of the district, and invested with public duties."

Regarding reclamation districts, the Supreme Court has said:

"If these districts can be said to be corporations at all, I think they are properly called public corporations for municipal purposes. That phrase means no more than that they are state organizations for state purposes. They certainly are not municipal corporations in the strict sense. * * * They are public agencies, which would cease to exist when the policy of the state has changed so that they are no longer required, or when there is no further function for them to perform." *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 120, 48 P. 1016, 1017. "Such districts are, in strictness, not corporations at all, but rather governmental agencies to carry out a specific purpose—the agency ceasing with the accomplishment of the purpose." *People v. Sacramento Drainage Dist.*, 155 Cal. 373, 382, 103 P. 207, 212.

Declarations of a similar character have been made regarding school districts, levee districts, and other similar organizations in *Pass School Dist. v. Hollywood Dist.*, 156 Cal. 416, 419, 105 P. 122, 26 L. R. A. (N. S.) 485, 20 Ann. Cas. 87; *Reclamation Dist. v. Birks*, 159 Cal. 233, 238, 113 P. 170; *Webster v. Board of Regents*, 163 Cal. 705, 126 P. 974; *Reclamation Dist. v. Superior Court*, 171 Cal. 672, 676, 154 P. 845; and *Southern Pac. Co. v. Levee Dist. No. 1*, 172 Cal. 345, 156 P. 502.

In *Reclamation Dist. No. 551 v. County of Sacramento*, 134 Cal. 477, 479, 66 P. 668, 669, the court held that the property of a reclamation district is exempt from taxation, under section 1 of article 13 of the Constitution, which exempts from taxation property that "may belong to the United States, this state, or to any county, * * * or municipal corporation within this state." Referring to the property of reclamation districts, the court said:

"It is not necessary to hold this property, thus acquired, to be the property of a municipal corporation, in order to make it exempt from taxation. It would be sufficient to hold that it is public property of the state, within the meaning of the Constitution. The whole scheme of reclamation originates with the state, and is carried to a conclusion by agents of the state—the district, as we have already seen, being a public agency—in furtherance of public policy. The

property mentioned in section 3471 of the Political Code is public property, acquired by the agents of the state, for state purposes, and we think is exempt from taxation, as such."

In *Turlock Irr. Dist. v. White*, 186 Cal. 183, 189, 198 P. 1060, 1063 (17 A. L. R. 72), where it was contended that the property of irrigation districts had been exempted from taxation merely because of the inclusion in the exempting provisions of section 1, article 13, already quoted, of the words "municipal corporation," the court said:

"To the contrary, such exemption existed because of the express exemption of the property of 'the state,' contained in that section and because of the implications in favor of the exemption of public property."

The plain conclusion from these authorities is that the quasi corporations under consideration, including irrigation districts, reclamation districts, and school districts, are all merely state agencies for carrying out state purposes and their property is state property. It follows that their boards and officers are state boards and officers, within the purview of section 72 of the Penal Code. We see no reason for making any distinction in this respect between the Los Angeles County flood control district and the other quasi corporations above mentioned.

Respondent contends quite urgently that the case of *Rose v. Superior Court* (Cal. App.) 252 P. 765, is decisive of the point here involved, but we do not so regard it. In that case it was held that an irrigation district officer is subject to removal, under section 772 of the Penal Code, which provides for the removal by a superior court of "any officer within the jurisdiction of the court." In *Kilburn v. Law*, 111 Cal. 237, 43 P. 615, it was held that section 889 must be considered with section 772 and limits it to proceedings against district, county, municipal, or township officers, and hence bank commissioners, being state officers, are not subject to its operation. The argument made in the *Rose Case* was that *Rose*, who was a director of an irrigation district, was a state officer and hence not subject to removal under section 772, the argument being largely based on the declaration in the *Madera Irrigation District Case* that "the district officers thus become public officers of the state." As the court pointed out in the *Rose Case*, this does not mean that they are officers exercising a state-wide authority, and the word "district" as used in section 889 is descriptive merely of a geographical part of the state, having no reference to the nature of the officer's functions. To put the matter in another way, the court in order to reach its conclusion in the *Rose Case* was not required to hold and did not hold that irrigation district officers are not state officers, the latter term not being used in the statute under consideration. The decision is based merely on the proposition that

they are district officers within the jurisdiction of the superior court. They are, of course, district officers because elected in and for a district, but we see no reason why they may not by reason of the nature of their functions be also state officers, within the meaning of section 72.

For the foregoing reasons, the judgment appealed from is reversed and the court is directed to overrule the demurrer to the amended indictment.

We concur: CONREY, P. J.; HOUSER, J.

86 Cal. App. 125

In re GOLDMAN'S ESTATE. (Civ. 5689.)★

District Court of Appeal, Second District, Division 1, California. Oct. 15, 1927.

Hearing Denied by Supreme Court Dec. 12, 1927.

1. Wills §55(3)—Evidence that testator believed contestant of will desired his death supported finding that testator was under insane delusion.

In petition to probate will, evidence that testator stated he believed contestant of will would poison or kill him, and that testator would therefore have nothing to do with him, which was shown to be utterly without foundation on part of testator, supported finding that testator was subject to insane delusion which affected making of will.

2. Wills §300—Requirement that evidence must be sufficient to support verdict is same in will contest as in any other action.

Requirement regarding necessity of sufficiency of evidence to support verdict of jury is same in law as between a will contest and any other kind of action.

3. Wills §386—Jury's conclusion in will contest, based on conflicting evidence, is just as conclusive as in other actions.

Where substantial conflict exists in evidence, conclusion reached by jury is just as conclusive in will contest as in any other class of litigation.

4. Wills §324(2), 386—Whether evidence of insane delusion by testator preponderated for contestant or proponent of will was for jury, whose decision cannot be disturbed by appellate court, though evidence was conflicting.

In will contest question whether evidence to show testator was under insane delusion when making will preponderated in favor of contestant or proponent was solely within province of jury, and, though evidence was conflicting, appellate court would not be justified in disturbing judgment rendered on verdict.

5. Wills §384—Allowance of amendment to contestant's pleading to show testator was acting under insane delusion, in addition to general allegation of lack of testamentary capacity, made after reading depositions, held not prejudicial.

In will contest presenting issue of general testamentary capacity of testator, permission

to contestant to amend pleading to include issue whether testator was acting under insane delusion when making will, allowed after depositions taken in case were read, was not prejudicial to proponent of will, where no request was made by proponent for continuance and no claim was made that witnesses whose depositions were read could have furnished any evidence other than contained in depositions.

6. Pleading §229—Amendment to pleadings should be liberally allowed, especially where no new issue is presented.

Great liberality should be shown by trial court in permitting amendments to pleadings, especially where no new issue is presented.

7. Appeal and error §959(3)—Pleading §236(1)—Allowance of amendment to pleading is within trial court's discretion, whose ruling cannot be disturbed in absence of abuse.

Allowance of amendment to pleading during trial is within discretion of trial court, and trial court's ruling cannot be disturbed unless abuse of discretion is shown.

8. Wills §384—Amendment to pleadings of contestant of will alleging lack of testamentary capacity to allege insane delusion narrowed issue and was not prejudicial to proponent.

In will contest issue of insanity generally or utter lack of testamentary capacity is broader than issue of single insane delusion, and hence amendment to complaint alleging lack of testamentary capacity to allege insane delusion narrowed issue and could result in no prejudice to substantial rights of proponent of will.

9. Depositions §88—Admission of cross-examination in deposition, over objection, submitted by party taking deposition in chief, held not error.

Where deposition, taken at instance of contestant in which proponents conducted cross-examination, was taken under stipulation that it might be used by either party in will contest, it was not error to read in evidence cross-examination of witness, over proponent's objection.

10. Depositions §88—That party producing witness making depositions or party cross-examining witness is adversely affected by facts adduced is no ground for denying party benefit of facts brought out by opposite party.

Where deposition is taken to obtain testimony of witness unable to attend trial, witness "belongs" to neither side, and that facts may adversely affect contentions of party producing witness or party cross-examining witness is no ground for denying to either party benefit of facts adduced by opposite party.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge pro tem.

Petition by Harry W. Goldman and another to probate the will of Abe Goldman, deceased, contested by Ben F. Goldman. From a judgment denying probate, proponent and the Pacific Southwest Trust & Savings Bank appeal. Affirmed.

Hardy, Elliott & Aberle, of Los Angeles, for appellants.

Charles W. Ostrom and John Henderson Pelletier, both of Los Angeles, for respondent.

HOUSER, J. This is an appeal from a judgment rendered in pursuance of a verdict by a jury in a contest of the will of Abe Goldman, deceased. Contestant is the son of the testator.

The contest of the will as originally filed presented both the issue of undue influence in the making of the will and that of unsoundness of mind of the testator. On the hearing of the matter, by order of court, the former issue was withdrawn from the consideration of the jury, and by an amendment, contestant was permitted to modify the other issue from that of general incompetency to that of a fixed delusion on the part of the testator, which, at the time of the execution of the will, operated directly upon its provisions.

Special issues were submitted to the jury which included, first, the question as to whether, at the time or times when the testator made his will and the codicil thereto, he was suffering from a specific insane delusion which affected the making of such will and codicil, respectively, and except for which neither the will nor the codicil would have been made; and, secondly, whether at such time or times the testator was suffering from such a complete mental degeneration as to denote utter mental incapacity to know and understand the nature and extent of his act. As to the questions which signified a specific insane delusion on the part of the testator, the answers given by the jury were in the affirmative, but as to the questions relating to the testator's complete mental incapacity, the answers were in the negative. Judgment on the verdict having been rendered in favor of the contestant, the proponent of the will has appealed therefrom.

In effect, the principal point relied upon by appellant is that the evidence was insufficient to justify the verdict.

[1] Without attempting to set forth herein the testimony given by the several witnesses who testified at the hearing, it may suffice to state generally that at least six of such witnesses testified, in substance, that on many occasions, both precedent as well as subsequent to the making of both the will and the codicil thereto, the testator had made statements to the effect that he believed that the contestant would poison him or kill him; that the contestant desired the death of the testator in order that contestant might inherit the property of the testator; that it was for that reason that the testator would have nothing to do with the contestant; and that the testator, by his will, would leave the contestant very little, if any, of the testator's property. No evidence was produced which showed the slightest foundation for such be-

lief on the part of the testator. On the other hand, evidence was introduced from which the jury properly might have decided that the reason for the practical disinheritation of the son by the father was due to conditions and circumstances other than those which tended toward the establishing of an insane delusion of the testator which directly affected the provisions of the will and the codicil thereto, so far as the contestant was concerned.

[2,3] Many authorities are cited by appellant with reference to the law affecting testamentary incapacity, insane delusions, and the burden of proof. The evidence is reviewed, and it is argued with much earnestness that the law, as applied to what appellant insists were the facts as shown by the evidence, clearly indicates that a reversal of the judgment should be had. At the outset, it should be noted that so far as the requirement regarding the necessity of the sufficiency of the evidence to support the verdict of the jury is concerned, there is no essential difference in the law as between a will contest and any other kind of an action. Where the issue is clean-cut and any substantial conflict exists in the evidence relating thereto, the conclusion reached by the jury is just as conclusive in a will contest as it is in any other class of litigation. As is stated in the matter entitled *In re Presho's Estate*, 196 Cal. 639, 643, 238 P. 944, 945:

"As to the sufficiency of the evidence, if from all the evidence the verdict is based on material facts legally proved or on inferences which may be reasonably drawn from those facts, even though there be an honest difference of opinion as to the effect of the evidence, the verdict will be deemed supported."

[4] On a consideration of the evidence introduced on the trial, this court is convinced that the testimony of the several witnesses on behalf of the contestant brought the facts squarely within the definition as stated in numerous decisions by the courts of this state relating to what constitutes an insane delusion. The question of whether such evidence preponderated in favor of the contestant, or of the proponent of the will, was one which lay solely within the province of the jury to determine. As hereinbefore indicated, the finding by the jury on the issue of the insane delusion of the testator and its effect upon the execution of the will was amply supported by the evidence. It follows that because of the fact that the evidence may have been conflicting with relation to such issue, this court would not be justified in disturbing the judgment rendered by the lower court in pursuance of the verdict of the jury.

[5-7] Appellant contends, also, that the court erred in granting leave to the contestant to file an amended complaint. As hereinbefore stated, it appears that one of the issues, as originally drawn, presented the question of the general testamentary capacity of the

testator, and that in the course of the trial the contestant was permitted to so amend his pleading as to specifically include therein the issue of whether at the time of the execution of the will in question the testator was acting under the influence of an insane delusion which operated directly upon the provisions of the will. It is urged by appellant that the amendment was permitted at a time after a number of depositions taken in the case had been read in evidence, and that none of the witnesses whose depositions were taken by appellant were questioned on the issue relating to an insane delusion of the testator, and that no opportunity was afforded the proponent of the will to meet the allegations of the contest as amended other than by such witnesses as were in the court room. But so far as is disclosed by appellant's brief, no request was made by the proponent of the will for a continuance of the trial in order that he might procure the attendance of witnesses who would or might testify regarding the issue as amended. Nor is it now contended by appellant that either or any of the witnesses whose depositions were taken by him could have furnished any evidence other than such as is contained within the depositions which already had been taken which would have tended to offset the evidence produced by the contestant in that behalf. It is, therefore, difficult, if possible, to see in what manner injury resulted to the proponent by reason of the amendment to the pleading. But whatever may have been appellant's position in that regard, the rule is well established that great liberality should be shown by the trial court in permitting amendments to pleadings, especially where no new issue is presented thereby.

[8] Furthermore, the allowance of amendments to pleadings during the trial is a matter resting largely within the discretion of the trial court, and the ruling of which court cannot be disturbed unless an abuse of discretion be clearly shown. *Neher v. Kauffman*, 197 Cal. 674, 242 P. 713; *Milliken v. Valencia*, 47 Cal. App. 16, 189 P. 1049, and cases there cited. It is clear that the issue of insanity generally or utter lack of testamentary capacity is broader than the issue of a single insane delusion. It is therefore manifest that if the amendment had any effect it was that of narrowing the issue already before the court, rather than creating a new issue on the subject of insanity of the testator—to which situation the proponent could have no objection, and which course could result in no prejudice to his substantial rights in the premises.

[9] Appellant further complains of the action of the trial judge in permitting the contestant, over proponent's objection, to read in evidence the cross-examination of a witness as shown by a deposition. It appears that the

deposition of the witness was taken at the instance of the contestant, and that such cross-examination was produced by questions propounded to the witness by the proponent of the will. Before the taking of the deposition it was stipulated by respective counsel that the deposition might "be used by either party upon the trial of the contest." But aside from such stipulation, it is clear that no error was committed by the trial court. The presumed purpose in the taking of a deposition is to obtain the testimony of a witness who is unable to attend the trial of an action.

[10] The witness "belongs" to neither side. He is presumed to narrate certain facts within his knowledge which bear upon the issues in the case. That such facts may adversely affect the contentions or claims of the party producing such witness offers no just or substantial ground for denying to the other party the benefit of such facts; and the same rule should apply where the party cross-examining such witness is disappointed or displeased by the answers given by him to questions propounded to the witness by the cross-examiner.

This court can find no substantial error in the record.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

86 Cal. App. 136

BUTTRICK v. PACIFIC ELECTRIC RY. CO.
et al. (Civ. 5958.)

District Court of Appeal, First District, Division 2, California. Oct. 17, 1927.

1. Appeal and error $\S$ 867(2)—After granting of new trial for error in instructions only appellate court cannot consider sufficiency of evidence to support verdict (Code Civ. Proc. $\S$ 657).

Where motion for new trial was granted solely for error in giving instructions, the appellate court is precluded, under Code Civ. Proc. $\S$ 657, from considering sufficiency of evidence to support verdict.

2. Street railroads $\S$ 118(11)—Instruction that if plaintiff suddenly went on street car tracks from place of safety, she could not recover, held inapplicable to facts.

In personal injury action against a street railroad and its motorman, charge that, if plaintiff or her companion, being in place of safety, suddenly went on the tracks so as to be in danger of being struck by a passing car, then she could not recover, held error, as inapplicable to facts.

3. Appeal and error $\S$ 1066—Trial $\S$ 252(1)—Giving instruction finding no support in evidence is improper, and, if prejudicial, is ground for reversal.

Giving of an instruction which finds no support in evidence is improper, and, if prejudicial, is ground for reversal.

4. Negligence $\Leftrightarrow$ 141(11)—Instruction denying recovery if plaintiff or her companion suddenly went on tracks held error, where companion's negligence was not imputable to her.

Where companion of plaintiff, while they were walking near a street car track, was struck by approaching car and thrown against plaintiff, causing injury, instruction that, if plaintiff or her companion, being in place of safety, suddenly went on the tracks so as to be in danger of being struck by a passing car, plaintiff could not recover, was error, where negligence of her companion could be imputed to her.

5. Negligence $\Leftrightarrow$ 89(1)—To impute negligence, persons must be in such privity that doctrine of "qui facit per alium facit per se" applies (Civ. Code, § 1714).

In order that negligence of one person may be imputed to another, under Civ. Code, § 1714, the two must stand in such relation of privity that the doctrine of "qui facit per alium facit per se" directly applies.

6. Trial $\Leftrightarrow$ 253(4)—Instruction that, if plaintiff struck by street car left place of safety, she could not recover, held error, as omitting element as to what motorman was doing.

Where plaintiff's companion was struck by passing street car, thrown against, and injured her, in action against street railroad and motorman, instruction that, if plaintiff or her companion, being in place of safety, suddenly went on tracks so as to be in danger of being struck by passing car, she could not recover, held error, as omitting element as to what the motorman was doing, because, if injury was sustained by separate but concurring negligence of her companion and the motorman, she could recover from one or both.

7. Trial $\Leftrightarrow$ 194(17)—Instruction that, if plaintiff or her companion suddenly went on tracks, she could not recover, held error, as directing verdict.

Where plaintiff's companion, while walking along street car tracks, was struck by passing street car and thrown against plaintiff, causing injury, instruction that, if plaintiff or her companion, being in place of safety, suddenly went on tracks so as to be in danger of being struck by passing car, she could not recover, held error, as directing verdict for defendants, if jury found her companion suddenly went from place of safety and was struck by the car.

8. Trial $\Leftrightarrow$ 295(1)—In determining whether jury was properly instructed, instructions must be taken as a whole.

In determining whether the jury was properly instructed as to the law, instructions given must be taken as a whole.

9. New trial $\Leftrightarrow$ 39—New trial should be granted, where it cannot be told which of consistent or contradictory instructions jury followed.

If instructions are inconsistent or contradictory and it is impossible to tell which was adopted by jury, a new trial should be granted.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Gussie C. Buttrick against the Pacific Electric Railway Company and another. Judgment for defendants. From an order granting plaintiff's motion for new trial, defendants appeal. Affirmed.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for appellants.

E. B. Drake, of Los Angeles, for respondent.

PRESTON, Justice pro tem. This is an appeal by the defendants Pacific Electric Railway Company, a corporation, and R. H. Ludwigson from an order granting a new trial, after the jury had rendered a verdict in their favor.

The plaintiff, Gussie C. Buttrick, brought this action for damages for injuries which she alleges resulted to her from the negligence of defendants. The plaintiff made a motion for a new trial upon six grounds set forth in the notice, among them being:

"(5) That the court misinstructed the jury; (6) that the court failed to properly instruct the jury by refusing certain written instructions requested by the plaintiff."

[1] The trial court granted the motion for a new trial and in so doing used this language:

"Motion for a new trial is granted on the sole ground that the court was in error in giving instruction No. 17 on page 7 of the instructions."

Section 657 of the Code of Civil Procedure provides:

"When a new trial is granted upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order, it will be presumed that the order was not based upon that ground."

We are therefore precluded from considering the sufficiency of the evidence to support the verdict of the jury.

The evidence is conflicting, but the facts are substantially these: The accident occurred in the city of Los Angeles, on Sunday, December 23, 1923, at about 2:45 p. m., at a point where the railroad tracks of the defendant Pacific Electric Railway Company cross Sunset boulevard. Plaintiff, accompanied by one William Weeks, left a drug store at the northwest corner of the intersection of Sunset boulevard and Gardner street and walked southerly across a single track in the center of Sunset boulevard to a point about 5 feet or 6 feet north of the north side of the double track of said Pacific Electric Railway's railroad, which runs diagonally across Sunset boulevard. When they had reached this point Weeks and plaintiff both testified that they saw the car that afterwards struck Weeks, standing in a station up the double track on the north side of Sunset boulevard.

They turned and walked southwesterly parallel to the double track for about 25 feet, Weeks being on the left of plaintiff (the side next to the track), and Weeks being in about 4 or 5 feet to the right of the track, and plaintiff being immediately to his right, with their backs to the car. While walking in this position and just about the time they stepped upon the sidewalk to enter another drug store at the southwest corner of Sunset boulevard and Gardner street, Weeks was struck by the right end of the street car that they had seen standing up the track at the station, and knocked violently against plaintiff, and she was thrown against a power pole and severely injured. Both plaintiff and Weeks testified that no bell was rung until just at the time the car struck Weeks. Both Weeks and plaintiff also testified that Sunset boulevard was badly congested by automobile travel and they had difficulty in crossing Sunset boulevard and were positive that no warning was given by the car until just before Weeks was struck. The defendant Ludwigson, the motorman on the car, testified that, when he got about the center of Sunset boulevard with his electric car, an automobile turned east in front of him and he sounded the gong and applied the air to keep from hitting this automobile; that he was nearly across the Sunset boulevard before he saw the plaintiff and Mr. Weeks, who were about 8 feet from the curb and 5 or 6 feet from the track at that time; and that he was traveling about 6 or 8 miles an hour when he crossed the intersection. Ludwigson further testified:

"As they got to the curb, there seemed to be plenty of clear at the time they reached this curb, and at the time I started to go by, and, when the fender had gotten by, the gentleman stepped close to the car, catching him along by the step and door, the right front corner of the car. After I rung the gong for the automobile, I rung the gong again. Just as I got close to these people I rang the bell again; then I applied the brakes as soon as I saw they were getting too close. * * * I didn't see either one of these parties fall. I just saw the man throw up his hands; then I went by."

The specified acts of negligence alleged against defendants are: (a) "In negligently operating said electric car of defendant corporation" and (b) "in negligently failing to give timely or any warning or notice by bell, whistle, or otherwise of the approach of said car."

The defendants filed separate answers and each of said answers denies any negligence on behalf of each defendant. In each of said answers each defendant sets up contributory negligence of the plaintiff as a separate and distinct defense.

[2, 3] Said instruction No. 17 reads as follows:

"If you believe that the plaintiff, or Mr. Weeks, being in a place of safety, suddenly

went on the track, or so close thereto as to be in danger of being struck by a passing car, then plaintiff cannot recover."

[4-6] This instruction is erroneous for several reasons. In the first place, there is no testimony in the record that we can discover that shows that plaintiff was ever on the car track or close enough thereto as to be in danger of being hit by defendants' car; in fact, the testimony of all the witnesses seems to be to the effect that she was at all times at least 4 or 5 feet to the right of the car track and in a place of perfect safety, and never went into a place of danger. Therefore, for this reason alone, the instruction would be inapplicable to the facts of the case, and should not have been given. The giving of an instruction which finds no support in the evidence is improper, and, if prejudicial, is ground for a reversal. *Boone v. Oakland Transit Co.*, 139 Cal. 490, 73 P. 243; *Idemoto v. Scheidecker*, 193 Cal. 661, 226 P. 922; *Eppinger v. Kendrick*, 114 Cal. 620, 46 P. 613; *Bosqui v. Sufo R. Co.*, 131 Cal. 390, 63 P. 682; *Wallis v. S. P. Co.*, 184 Cal. 663, 195 P. 408, 15 A. L. R. 117; *Griffith v. Oak Ridge Oil Co.*, 190 Cal. 389, 212 P. 913; *Badostain v. Pacific Electric Co.* (Cal. App.) 256 P. 576. Secondly, it must be borne in mind that this is an action by Mrs. Buttrick against the railway company and its motorman alone. The appellants have not indicated, and we cannot see in the record any evidence, indicating that the relationship between Mrs. Buttrick and Weeks, at the time of the accident, was such that any negligence or contributory negligence on the part of Weeks would be imputed to Mrs. Buttrick. For this reason the instruction is erroneous. In order that the negligence of one person may be imputed to another, the two must stand in such relation of privity that the doctrine of *qui facit per alium facit per se* directly applies. Indeed, no other rule is consistent with section 1714 of the Civil Code, wherein it is declared that every one is responsible for any injury occasioned to another by his want of ordinary care, "except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." *Bryant v. Pacific Electric Ry. Co.*, 174 Cal. 737, 164 P. 385; 19 Cal. Jur. 659 et seq., and cases cited. Thirdly, the instruction also omits the very important element as to what the motorman was doing or not doing, because, if direct personal injury occasioned to plaintiff by the separate but concurring negligence of both Weeks and the motorman at one and the same time, plaintiff could recover from one or all of them, provided, of course, she was not guilty of contributory negligence. *Tompkins v. Clay Street R. Co.*, 66 Cal. 163, 4 P. 1165; *Lang v. Lilley & Thurston Co.*, 20 Cal. App. 223, 128 P. 1028; *Kimic v. San Jose-Los Gatos Ry. Co.*, 156 Cal. 386, 104 P. 986; *Cordiner v.*

Los Angeles Traction Co., 5 Cal. App. 407, 91 P. 436. In *Spear v. United Railroads*, 16 Cal. App. 660, 117 P. 966, the court said:

"All the authorities recognize the right of recovery against either or both of the defendants whose concurring acts of negligence united in producing the injury. 1 *Shearman & Redfield on Negligence*, 122; 1 *Thompson on Negligence*, p. 75; *Doeg v. Cook*, 126 Cal. 213, 58 P. 707, 77 Am. St. Rep. 171; *Thompkins v. Clay St. Ry. Co.* [supra], *Pastene v. Adams*, 49 Cal. 87."

[7] Said instruction omits other important elements and also tends to take the minds of the jury away from the two vital issues of the case, viz. (1) the conduct of defendants, and (2) the conduct of plaintiff, and focus their attention upon the conduct of Weeks alone. It amounted to a peremptory direction to the jury to bring in a verdict for defendants, provided they find as a fact that Weeks suddenly went from a place of safety and was struck by the car. Such is clearly not the law.

[8, 9] Appellants contend that, in determining whether the jury was properly instructed as to the law, the instructions given must be taken as a whole. This is, of course, the law. *Moore v. San Vicente Lumber Co.*, 175 Cal. 212, 165 P. 687; *Taylor v. Pacific Electric Ry. Co.*, 172 Cal. 638, 158 P. 119. We have followed this rule and we find that instruction No. 12 given by the trial court reads:

"You will notice in speaking of 'contributory negligence' I refer to the contributory negligence of the plaintiff. Neither the negligence, or contributory negligence, if any, of William M. Weeks, who was walking with the plaintiff at the time of the accident, can be imputed to, nor is it the negligence of the plaintiff in this case, and you cannot consider it at all, except that, if you should find that he was negligent, and that his negligence was the sole cause of the injury to plaintiff, and that she was not negligent, and the railroad company was not negligent, why, then the plaintiff could not recover."

In said instruction No. 12 the jury is told that:

"Neither the negligence or contributory negligence, if any, of William Weeks, * * * can be imputed to nor is it the negligence of the plaintiff."

This instruction is contradictory of said instruction No. 17, above quoted, in essential particulars, and the jury could not determine which of the two instructions correctly stated the law. They were bound to accept all the propositions that the court instructed them upon as a correct statement of the law by which they were to be guided, and, if the instructions are inconsistent or contradictory, it is impossible to tell which was adopted in reaching their verdict in this case, and for

that reason a new trial should be granted. *Brown v. McAllister*, 39 Cal. 573; *Chidester v. Consolidated People's Ditch Co.*, 53 Cal. 56; *Watts v. Murphy*, 9 Cal. App. 564, 99 P. 1104; *Hayden v. Consolidated Min., etc., Co.*, 3 Cal. App. 136, 84 P. 422.

It is not necessary to discuss the other contentions made by respondents that said instruction No. 17 is erroneous and prejudicial.

From what has been said, it follows that we are of the opinion that the order granting plaintiff a new trial was proper, and said order is therefore affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

86 Cal. App. 143

PEOPLE v. PAGE. (Cr. 987.)★

District Court of Appeal, Third District, California. Oct. 17, 1927.

Hearing Denied by Supreme Court Dec. 15, 1927.

1. Homicide ☞250, 268—Evidence in prosecution for murder held sufficient to take case to jury and support conviction.

In prosecution for murder, evidence of defendant's interest in getting rid of deceased, with whom he was operating hotel, quarrels between parties, and defendant's movements, was sufficient to make case for jury and supported conviction.

2. Criminal law ☞404(4)—Homicide ☞170—Inner sole fitting defendant's shoe, found at place of homicide, and similarity of soil at such place to that on defendant's socks, held material in prosecution for murder.

In prosecution for murder, presence of inner sole near place where body was found, alleged to have been worn in defendant's shoe, and character of soil adhering to defendant's socks, claimed to be similar to soil at place of murder, held material circumstances entitled to some weight in chain of circumstantial evidence.

3. Criminal law ☞1159(6)—Appellate court cannot substitute its judgment for decision of jury whether circumstances are equally consistent with guilt or innocence.

Appellate court cannot substitute its judgment for that of jury's in determining whether circumstances relied on to establish defendant's guilt are equally consistent with his innocence.

4. Criminal law ☞486—Expert witness' testimony that he examined soil at scene of homicide without microscope was sufficient foundation for opinion that it resembled soil on defendant's socks.

Testimony by expert witness that he examined soil around place of murder without aid of microscope was sufficient foundation for admission in evidence of witness' opinion that such soil was similar to that found on defendant's socks.

5. Criminal law §696(2)—Failure to renew motion to strike expert testimony after failure of prosecution to connect it up waived objection to testimony.

Objection to expert testimony as to similarity of soil taken from scene of homicide to that found on defendant's socks for failure to show soil was taken from scene of homicide held waived by failure to renew motion to strike out testimony after failure of prosecution to prove that samples of soil furnished witness were taken from scene of homicide.

6. Criminal law §1169(9)—Opinion of expert, based on facts which jury could draw for themselves if they believed facts, if erroneously admitted, was not prejudicial.

Opinion of expert witness that marks on inner sole might have been made by nails of defendant's shoe, based on accurate measurements of distance between imprints in inner sole while under pressure of 150 pounds and that between nails in shoe, was conclusion from facts which jurors could have reached themselves if they believed facts, and, if not proper subject of expert testimony, was not prejudicial.

7. Homicide §287—Refusal to instruct that absence of motive in murder prosecution favors innocence of defendant was not error.

In prosecution for murder, refusal by court to instruct jury that absence of motive is circumstance in favor of innocence of defendant was not error.

8. Homicide §156(1)—Evidence of defendant's relation with deceased was relevant to show malice and instruction limiting testimony to question of motive was properly refused.

In prosecution for murder, requested instruction that any evidence showing conduct or relation of defendant with deceased can only be considered in determining whether or not defendant might have had motive to commit crime was properly refused, since such evidence was relevant to show malice.

9. Criminal law §854(7)—Separation of juror during deliberations to receive dental treatment in immediate custody of sheriff at all times was not prejudicial to defendant.

Where one of jurors suffering from infected tooth was taken to dentist's office after case was submitted to jury and was at all times in immediate presence and custody of sheriff, and no reference was made to case except question by dentist as to when jury would be through and no vote was taken during such time, defendant was not prejudiced by separation of jury.

10. Criminal law §927(5)—Separation of jury under circumstances showing possibility of tampering is ground for new trial unless state shows no prejudice.

Where jury has been permitted to separate while deliberating on verdict under such circumstances as to make it appear that they might have been tampered with, new trial should be granted unless there is affirmative proof by state explaining separation and showing defendant was not prejudiced thereby, and

if such burden is met new trial should be denied.

11. Criminal law §995(7)—Judgment sentencing defendant to imprisonment in state prison at San Quentin held valid (Pen. Code, §1163).

Judgment sentencing defendant to "imprisonment in state prison of state of California at San Quentin" held valid under Pen. Code, §1168.

Appeal from Superior Court, Modoc County; Michael J. Roche, Judge.

Frank E. Page was convicted of murder, and he appeals. Affirmed.

See, also, 255 P. 887.

Hearing denied by Supreme Court; PRES-
TON, J., voting for a hearing.

D. B. Robnett and A. K. Wylie, both of Alturas, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of murder of the second degree. This appeal is from the judgment of conviction and the order denying a new trial.

For more than a year prior to the homicide the defendant and Mrs. Pearl Connell, who was of the age of about 40 years, jointly conducted a hotel at Cedarville, Modoc county. Apparently he was a widower and she a widow. Mrs. Connell disappeared during the evening of July 6, 1926, and two days later her body was found in an old cellar in the town. This cellar was a mere excavation, partly covered with a board roof and without any wall at one end thereof, that end being entirely open. An autopsy showed that she had been severely beaten about the head and face and that her death was caused by strangulation, her windpipe being crushed, evidently by the grip of some person's fingers on her throat and neck.

The evidence tending to connect the defendant with the commission of the crime is entirely circumstantial. There is substantial evidence: That he desired to purchase Mrs. Connell's interest in the business, but was unable to raise sufficient money to do so. That the parties engaged in frequent bitter quarrels. That in May or June, 1926, "he said they had just had a hell of a row, and he said that Francis (his adopted son, of the age of 15 or 16 years) had knocked her down with a cup, and he (defendant) laughed about it." That about two weeks before her death he said "she just gave me hell and I can't stand it any longer." That he frequently said "he was going to get rid of her because she was a detriment to the public and a nuisance around the hotel." That in June, 1926, he said: "Pearl and I just had it upstairs; I grabbed her by the nape of the neck and pushed her up against the wall, and I just took my fist and popped her one. * * * I showed

her where she belongs." That during that month he told her she was a "lowdown dirty cur," and applied other and viler terms to her. That in March or April of that year he "packed Mrs. Connell out the house and told her to stay out of there." That in February, 1926, he said: "I have got to get rid of her. * * * I don't know how I am going to do it, but * * * it is going to be done." That at that time one of the witnesses, to whom the defendant had related his troubles, said to him, "Pearl is jealous, you make her jealous," to which he replied, "Yes; and I will make her a damn sight more so, too."

About five years prior to the homicide, a young woman, who will be called May, her given name, resided in Cedarville for two or three months, and during that time she and the defendant became "pretty good friends," after which time they met but once prior to the day of the homicide, and then only for a few minutes. May was married to a man in a Sacramento valley town May 22, 1926, and thereafter resided in that town. With one of her brothers and another man she went by automobile from her home to Alturas, where they all attended a rodeo from the 2d to the 5th of July. Apparently their supply of money was running low, and they decided to go to Cedarville. The woman at whose place May stayed while in Alturas testified that May "was talking about going over there (to Cedarville), * * * and they thought they would go to the Frank Beebe house. May says, 'Well; if we go there and it don't suit us, we will go to the hotel. I might be in there in a couple of weeks. * * * I got his money once, and I can get it again.' * * * They got ready to go, * * * and I says, 'Well; are you coming back, or when will I look for you, or what are you going to do?' and May says, 'Well, you know what we are going for.'" May and her companions drove to Cedarville July 6th, arriving there about 4 o'clock in the afternoon, and went to the "old Beebe house," but, finding no water in the well there, they finally went to an unoccupied house, known as the Mabrier house, and "camped in that house," they having a light camping outfit with them. May and her brother went to the store to buy some provisions, and on the trip she met Nick Tisserand, whom she had known for many years. She testified:

"I asked him where Frank Page was. * * * He said he was in the hotel. * * * I told him if he saw him to tell him to come up to the Mabrier place, that I wanted to see him. * * * Between 7:30 and 8 o'clock * * * he (defendant) drove up and honked the horn, and I went out. * * * We went down on the Eagleville road and turned around near the Dyke place. * * * We pulled off the road and stopped for a few minutes, and then we came back to the Mabrier house. * * * We stayed there a little while and then drove to the mouth of the canyon and then came back to the Mabrier house."

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She further testified that, after the ride, the defendant left the Mabrier house about 9 o'clock; that she thought it was not later than 9 o'clock. May was interrogated by the district attorney on the 8th of July, after the body was found. Relative to the time at which she and the defendant returned to the Mabrier house, she then said:

"I judge it was right around 10 o'clock or maybe later when we got back. * * * We sat there for awhile, * * * maybe an hour or so; I don't know."

At the trial she testified that the statement last quoted is false and that she made it for the purpose of "trying to help Frank"; that "I just figured it this way, if Frank did it, he did it immediately after he left me, and I wanted to help him if I could, and I was not looking for any notoriety myself." The defendant testified that after leaving May at the Mabrier house, on their return from the ride mentioned, he drove directly to the hotel, arriving there after 10 o'clock. Other witnesses testified that he arrived there about 10 o'clock or later. It requires but a few minutes' time to drive from the one place to the other. May and the defendant are the only witnesses who testified as to the time at which the defendant left the Mabrier house.

Relative to the movements of Mrs. Connell during the evening of July 6th, a guest at the hotel testified:

"I saw her when she went out of the hotel. * * * I think it was about a quarter to 9 that evening; it was after half past 8. It was between half past 8 and 9 o'clock. * * * She asked me where Frank was. * * * I told her maybe he had went to see May. * * * I told her that Nick Tisserand had told me that he had brought Frank Page word from May that if he wanted to see her he would find her at the Mabrier house. * * * She (Mrs. Connell) seemed to act quite mad and got wild looking. * * * She went to the safe and looked around the safe and the shelf behind the counter. * * * She pulled out a drawer, and there was something knocking against the end of the drawer."

The next morning the defendant said that "the gun was missing that was in there"; that "it did not make much difference anyway, as there was no loads in the gun."

Several witnesses testified that they heard the screams of a woman during the evening of July 6th between 9 and 10 o'clock. The witnesses who gave the most plausible reasons for the accuracy of their statements fixed the time between 9:15 and 9:30. One woman testified that she heard "one big and two little screams." Another woman testified that she heard a man's voice say, "God damn you!" and "then a scream, and then another scream and then a kind of a— I don't know what kind of a noise." In the street, a short distance from where the body was found, "the weeds had been mashed down and it looked like the

appearance of a struggle having taken place there." Mrs. Connell's shoes were found at that place.

A woman employed in the hotel testified that the defendant was up at an unusually early hour in the morning of July 7th; that at that time he said that the door of Mrs. Connell's room was open and that she was not in the room; that he had gone to Eagleville the evening before to see a man who "wanted to go out and look at some mine," and that he reached the hotel on his return about 9 o'clock; that between 9 and 10 o'clock in the forenoon of the same day "he came into the kitchen and said, 'I did not get home last night until 11 o'clock, because I was out with that damned ———, May ———, and I did not want any one to know it'"; that shortly after the body was found the witness said to the defendant, "Frank Page, you killed that woman as sure as there is a God in Heaven," to which he made no reply, but "turned around and walked out." This witness identified a rubber inner sole of a shoe, hereinafter referred to, as one that she had seen during June, 1926, behind the hotel counter. A witness who heard the woman's screams testified that, between 7:30 and 8 o'clock in the morning of July 7th, the defendant called at the home of the witness and stated that Mrs. Connell left "yesterday afternoon," and that on leaving he said, "Don't say anything about Pearl being gone."

A pair of shoes and a pair of socks, both admittedly worn by defendant during the evening of July 6th, were introduced in evidence. Also, the rubber inner sole referred to was admitted in evidence. The defendant testified that he never saw the inner sole until it was produced at the trial. A witness, who was district attorney at the time of the homicide, testified that he picked up this inner sole at the time the body was found and about ten feet from the old cellar.

Edward Oscar Heinrich, a consulting criminologist employed by the district attorney, testified that, from "two abrasions of the composition of the rubber" inner sole "which correspond in their position with two nails in the heel" of the left shoe, it was his opinion that "the marks on the inner sole might have been made by the nails of that shoe." On cross-examination by counsel for defendant, the witness was asked, "Will you state to the jury as a fact, beyond all reasonable doubt, that those imprints in that inner sole were made by the tacks in that left shoe which is in evidence here?" The witness answered, "Yes, sir." The witness also testified that the soil on the defendant's socks is "very similar" to "the soil at and around" the old cellar.

Chauncey McGovern, a consulting criminologist employed by the defendant, testified with equal positiveness that Heinrich's opinions are entirely erroneous, saying, "It is my definite positive opinion that it (the inner sole) was never used in that shoe, and was

never made for that shoe, but was made for a shoe that was at least three sizes smaller."

Both criminologists produced powerful microscopes for the use of the jurors in their inspection of the exhibits. It is not improbable that the jurors were influenced more by their own examinations of such exhibits than by the opinions of the experts.

The defendant testified that the shoes in question were formerly owned by a guest at the hotel, who died in January or February, 1926; that "when his sister came, I offered her the shoes, and all his shoes, * * * but she said she did not want them. Then I picked out these shoes and commenced wearing them. * * * I saw they were a good pair of shoes, and I kept them and wore them; they was good for me when I did not have any."

The defendant was put to the necessity of squarely contradicting a large number of witnesses, and 13 citizens of Cedarville testified that his reputation for truth, honesty, and integrity was bad.

[1, 2] It cannot be held, as a matter of law, that the evidence is insufficient to warrant the verdict. There is substantial evidence to justify the inference that the defendant greatly desired to be rid of the deceased; that he was financially unable to purchase her interest in the business; that he had frequently quarreled with her and had, on at least two occasions resorted to physical violence; that she was jealous of him; that about 9 o'clock in the evening she took a gun and left the hotel when informed that the defendant had gone to see May; that about a half hour later, in a struggle with some man, she received violent blows upon her head and face and was then strangled; that the defendant's movements from 9 to 10 o'clock are accounted for only by his own testimony, which is squarely contradicted by that of May; that the defendant at first gave a false account of his whereabouts during the evening of the homicide; that he at first made a false statement as to the time of his return to the hotel that evening and, a few hours later, when he probably perceived that the truth would serve his purpose better, he correctly stated the time of such return; and that he remained silent when directly accused of the murder by a woman in his employ. Neither can it be said that the presence of the inner sole near the place where the body was found and the character of the soil adhering to defendant's socks are not material circumstances entitled to some weight in the chain of circumstantial evidence. Shoes often leave tell-tale tracks which could have been avoided by their removal.

Considering all the circumstances enumerated, including defendant's attitude towards the deceased and the latter's evident agitation at the time she left the hotel, the jury may have reasonably inferred that she left the hotel and the defendant the Mabrier house about

the same time; that they met in the street opposite the old cellar and there engaged in an altercation; that in the altercation the defendant violently assaulted the deceased with his fists; and that, for the purpose of stifling her screams, he then seized her by the throat and choked her, thereby causing her death. Whether or not the deceased met her death in the manner stated, the circumstances thereof are such that the defendant's guilt or innocence was a question of fact for the jury.

Appellant contends that such circumstances are equally consistent with the hypothesis of defendant's innocence as that of his guilt, and that, therefore, "there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court," citing *People v. Staples*, 149 Cal. 405, 425, 86 P. 886, 894, where it is said:

"The deduction to be drawn from these circumstances is ordinarily one for the jury, but where, * * * every circumstance relied on as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court."

[3] It is not to be presumed that it was intended, by the language quoted, to declare that an appellate court may substitute its judgment for that of the jury in determining whether the circumstances relied on to establish a defendant's guilt are equally consistent with his innocence. In the language of this court in *People v. Muhly*, 15 Cal. App. 416, 419, 114 P. 1017, 1018, "we do not understand that case to hold that where the circumstances are such as to reasonably justify the inference of guilt, the case will be taken from the jury because an inference of innocence might also reasonably have been drawn. Between these two inferences the jury must choose, and it is only where the evidence obviously does not warrant the inference of guilt that the court will interfere." This language was quoted with approval in *People v. Martinez*, 20 Cal. App. 343, 345, 128 P. 952, and *People v. Strauss*, 75 Cal. App. 447, 455, 243 P. 67. In the latter case a hearing in the Supreme Court was denied.

[4, 5] Heinrich testified that he had examined the soil in the vicinity of the old cellar and that it is similar to that found on defendant's sock. This examination, apparently, was made without the use of a microscope. He also testified that he made a microscopic examination of samples of soil furnished by the sheriff, presumably from the cellar, but that he did not know that they were taken from the cellar. Counsel for defendant then moved the court to strike out the testimony of the witness "in regard to the soil on the socks being similar to the soil in the cellar, on the ground that it is not shown that this soil that was brought to him came from the cellar." The court said: "I will allow it to stand subject to your motion in the event it is not con-

nected up." It is now contended that it was not connected up and that the court erred in not striking out the evidence. There are two answers to the contention. First, the witness had testified that he had examined the soil around the cellar without the aid of a microscope. This was a sufficient foundation for the admission in evidence of his opinion. Secondly, the defendant waived his objection by not renewing his motion after failure of the prosecution to prove that the samples of soil furnished by the sheriff came from the cellar. 24 Cal. Jur. 782; *Estate of Wempe*, 185 Cal. 557, 564, 197 P. 949.

[6] It is urged that the court erred in permitting Heinrich "to give his opinion and conclusion with regard to what made the holes in the rubber inner sole; and to testify as to his reasons for such opinion." The question to which objection was made at the trial was whether the marks on the inner sole "might have been made by the nails of that shoe." The witness had testified that he had made accurate measurements of the distance between the imprints in the rubber inner sole while under a pressure of 150 pounds and of that between the nails in the shoe and had found them the same, and his answer that the imprints might have been made by such nails was an obvious conclusion from the facts stated—a conclusion which the jurors themselves doubtless reached if they believed such facts. If, therefore, it be conceded that the matter was not a proper subject of expert testimony, the error complained of was not prejudicial.

[7, 8] The court refused to instruct the jury that the absence of motive "is a circumstance in favor of the innocence of the defendant." Such refusal was not error. *People v. Wilkins*, 158 Cal. 530, 536, 111 P. 612. The court properly refused to instruct "that any evidence that has been introduced in this case, showing the conduct or relation of the defendant with the said deceased, Pearl Connell, can only be considered by you in determining whether or not the defendant might or might not have had a motive to commit the crime charged against him." Obviously such evidence was relevant to show malice.

[9, 10] From affidavits presented on the hearing of defendant's motion for a new trial, it appears that the case was submitted to the jury about noon, May 12, 1927; that the jury returned a verdict about 4 o'clock in the afternoon of the following day; that one of the jurors was suffering from an infected tooth, which was being treated by a dentist; that it was necessary for the dentist to clean and repack the tooth after each meal; that after the evening meal of May 12th and the morning and noon meals of the next day the sheriff or his deputy took such juror to the dentist for treatment, remaining in the dentist's office with the juror about 15 minutes on each occasion; that during all of the times that he was absent from the jury room the juror was in

the immediate presence and custody of the officer, and that no reference was made to the case during any of said times, except that on one occasion the dentist asked the deputy sheriff in charge of the juror when the jury would be through, to which the deputy replied that he did not know; and that "no discussion was had upon any phase of said cause and no vote thereon was taken" at any time during which such juror was absent from the jury room. "Where the jury has been permitted to separate while deliberating upon a verdict, under such circumstances as to make it appear that they might have been tampered with, a new trial should be granted, unless there is affirmative proof upon behalf of the people explaining the separation and showing that the defendant was not prejudiced thereby. * * * If this burden is met by the people a new trial should be denied." *People v. Cord*, 157 Cal. 562, 571, 108 P. 511, 515. The proof in this case is ample to show that the defendant was not prejudiced by the separation of the jury.

[11] The defendant was sentenced to "imprisonment in the state prison of the state of California, at San Quentin." Appellant contends that the judgment is void. It is in the form approved in *People v. Ure*, 68 Cal. App. 545, 548, 229 P. 987, except that in that case the judgment contained the additional words, "as prescribed by law." Section 1168 of the Penal Code provides that "the court in imposing * * * sentence shall not fix the term or duration of the period of imprisonment." In *People v. Mendoza*, 178 Cal. 509, 510, 173 P. 998, it is said:

"Under this section the judgment of the court properly consists of a recital of the offense of which the defendant stands convicted, a designation of the state prison to which he is committed, and nothing more."

Measured by this rule, the judgment is valid.

The judgment and the order are affirmed.

We concur: BURROUGHS, Justice pro tem.; PLUMMER, J.

86 Cal. App. 216

MORGAN et al. v. GREEN. (Civ. 5922.)

District Court of Appeal, First District, Division 2, California. Oct. 21, 1927.

1. Evidence $\Leftrightarrow$ 448—Parol evidence was inadmissible to explain meaning of lease contract containing complete statement of obligations of parties without uncertainty (Code Civ. Proc. § 1856).

Where lease, providing that lessees should have use of pumping plant now being installed and pay all charges in connection with making a cotton crop, was complete statement of undertakings of parties, without uncertainty as to their respective legal obligations, parol evi-

dence was inadmissible to explain meaning thereof, in view of presumption under Code Civ. Proc. § 1856, that agreement embraced all terms agreed on.

2. Evidence $\Leftrightarrow$ 450(1)—Parol evidence is admissible, where terms of instruments are sufficiently uncertain to leave intention in doubt.

An exception to the parol evidence rule is that such evidence is admissible, where terms of the instruments are sufficiently uncertain to leave intention of parties in doubt.

3. Landlord and tenant $\Leftrightarrow$ 331(6)—Evidence held not to establish landlord's covenant to furnish water to irrigate land for cotton crop.

In tenant's action for breach of landlord's contract to furnish water, evidence held insufficient to establish landlord's covenant to furnish water to irrigate land for cotton crop to be grown by tenants.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by W. O. Morgan and another against Frank E. Green. From a judgment for plaintiffs, defendant appeals. Reversed.

Emmons & Aldrich, of Bakersfield, for appellant.

C. O. Bettys, of Los Angeles, and Brittan & Brittan, of Bakersfield, for respondents.

NOURSE, J. Plaintiffs sued for damages for breach of contract. The cause was tried before a jury, resulting in a verdict of \$7,000 in favor of the plaintiffs, and from the judgment following the verdict the defendant has appealed upon a typewritten record.

The complaint alleged that on April 22, 1924, the plaintiffs and defendant executed a written lease covering 120 acres of land owned by the defendant. It was recited in the lease that the lessees, having plowed and cultivated the land, agreed to plant the same to cotton and to irrigate, cultivate, chop, and care for said cotton to maturity, and to keep the said land free and clear of weeds and grass; that the lessees "shall have the use of the buildings, corrals, and pumping plant now being installed" throughout the season, and shall furnish all tools and implements and pay all expenses in connection with the planting and bringing to maturity of the cotton, and that "the lessor shall pay for the cotton seed to plant said land and shall pay all charges for power to operate said pumping plant"; that the cotton produced, together with the cotton seed, shall be divided equally between the lessor and the lessees, "which portion the lessees agree shall constitute in full their entire compensation for their undertaking herein." The complaint alleged that, as a part of the consideration for signing and executing the lease, the defendant at the time and concurrently with its execution agreed with the plaintiffs that he would furnish and supply the plaintiffs from

the pumping plant that was being installed on the property a sufficient and ample amount of water to irrigate all the land sufficient for raising to maturity the cotton that was to be planted on the land; that plaintiffs, in pursuance of said agreement, did immediately plow, cultivate, list, and plant the whole of said land to cotton; that they had faithfully and completely performed all acts to be performed by them, but that the defendant has failed and refused to furnish the water to irrigate the land; that by reason thereof the plaintiffs were unable to irrigate the land or to raise any cotton thereon to their damage. The answer admitted the execution of the written contract of April 22, 1924, and denied all allegations relating to any oral agreement covering the supply of water for irrigating the crop. It denied that pursuant to the terms of the written contract the plaintiffs plowed, cultivated, or performed any labor upon the land, but alleged that all labor performed by the plaintiffs on the land was done prior to the execution of the lease while they were operating as subtenants under a lease between the defendant and George and Griffin; that prior to April 22 all the planting of cotton upon said land had been performed from cotton seed furnished by the defendant to George and Griffin under the terms of their lease. It was denied that the defendant made any agreement to furnish any water to irrigate the land either before or after the execution of the lease of April 22d.

Upon the trial it developed that George and Griffin had leased the premises from the defendant under a written contract dated January 26, 1924, for the purpose of planting the land to cotton. In the month of February the plaintiffs agreed with George and Griffin to take over their lease and had a conversation with the defendant in which the latter agreed that this might be done if the original lessees would hold themselves responsible for the performance of the terms of the lease. Under this arrangement the plaintiffs prepared and planted the land to cotton, commencing work about February 27th, and finishing some time before April 22d. At the time they started work upon the premises a well had been drilled, but no pump installed. On or about March 2d, the defendant installed a pump in this well, but was able to develop only a small quantity of water. For a period of some two months thereafter he made every endeavor to develop water in the well, but was finally compelled to abandon operations because the well continually filled with sand. During the month of March the plaintiffs and the defendant had several conversations relating to defendant's efforts to develop water from the well, and on April 1st occurred the conversation upon which the plaintiffs rely as establishing a contemporaneous oral agreement to furnish

sufficient water for the irrigation of the crop. The plaintiff Morgan's version of this conversation is R. T. (page 12, line 23):

"I says to Mr. Green, I says, 'Mr. Green, I think the well is a failure, it has just about quit running, there don't seem to be any water.'

" 'Don't seem to be any water, what about it?' and he says, 'There is plenty of water there, all we need is to perforate the well.' * * * I said, 'Mr. Green, what if the water isn't there, what will we do about it?' and he says, 'You go ahead with your work, go right on, and if I fail to produce the water I will pay for your work.' Well, I went on back then, and told my partner what he said."

Another conversation occurred shortly after this as testified to by plaintiff Morgan, as follows (R. T. page 14, line 18):

"He says, 'There is an abundance of water there, I will guarantee the water, you go ahead and do the work; * * * I am going to send over and get an air compressor and blow that sand and water out and put that pump back, and we will have an abundance of water.'"

Plaintiffs continued to live upon the land and to do some work in connection with the cleaning out of the well under their arrangement with George and Griffin until April 21st, when they approached the defendant and asked that they be given a lease in their own names covering the premises. A lease was accordingly prepared and handed to the plaintiffs for their examination. They returned on the following day, having signed the lease which is in evidence. Asked as to conversations relating to the water supply at this time, the plaintiff Morgan testified (Tr. page 17, line 25):

"I don't remember anything said about the water at all at that time."

The plaintiff Townsend testified (Tr., page 78, line 12):

"Mr. Green, he said that the pump would be all right now, he thought, we would have plenty of water. He says, 'After it rains a while the well will get stronger.' * * *

"That was about all that was said about the water then."

On behalf of the defendant it was shown that he had made every effort to develop water from the particular well in which the pump was installed, but that the well continually filled with sand until finally abandoned some time in the month of May, 1924. It was also shown that when it appeared that the water could not be developed the defendant offered to procure for the plaintiffs another tract of land in the immediate neighborhood which he agreed to lease to the plaintiffs under the same terms of the contract of April 22d. Plaintiffs, however, refused to accept this offer, stating that they were wholly unable to finance themselves during the summer, and that they would have been unable to have continued their contract with

the defendant unless he had furnished them with funds to carry them over until the returns from the crop were received. It was also shown that the sanding of the well was not an unusual occurrence in that locality, but that it was known that many wells in the immediate vicinity had been abandoned on account of that condition, and that these facts were all known to the plaintiffs before the execution of the lease.

During the trial of the case the defendant objected to the admission of all the testimony relating to the conversations had covering the supply of water upon the grounds that it tended to contradict and vary the writing of April 22d. On this appeal respondent argues that the testimony was admissible under the exception to the general rule that when a portion only of the agreement between the parties had been reduced to writing it was proper to allow parol evidence covering the portion omitted, and that it was also admissible for the purpose of explaining the true meaning of the portion of the contract reading:

"The lessees shall have the use of * * * pumping plant now being installed throughout the season, and shall * * * pay all charges in connection with the planting and bringing to maturity of the cotton planted on said land."

[1] It will be noted that the theory upon which the complaint was drawn was that the contract to furnish sufficient water to mature the crop was a contemporaneous collateral agreement made at the time of the execution of the written agreement and as a part of the consideration for the latter. This theory, however, was abandoned during the course of the trial, and respondents insisted that the conversations were admissible for the purpose of explaining the true meaning of the written contract, and that as so explained that contract contained an express covenant on the part of the appellant to furnish water sufficient to irrigate the land and to bring the crop to maturity.

The two theories in support of the judgment are inconsistent. If the language of the lease relating to the pumping plant is to be interpreted as relating to the supply of water in the well, then a collateral covenant to furnish sufficient water to bring the entire crop to maturity could not be proved by parol. The rule is found in section 1856, Code of Civil Procedure, which declares that when the terms of an agreement have been reduced to writing it is presumed to embrace all the terms agreed upon. The decisions are all in harmony with the section of the Code running from *Harrison v. McCormick*, 89 Cal. 327, 330, 26 P. 830, 23 Am. St. Rep. 469, to *Thoroman v. David*, 199 Cal. 386, 390, 249 P. 513. We cannot improve upon the language of *Thompson v. Libby*, 34 Minn. 377, 26 N. W. 1, quoted in the *Harrison* Case, and approved in the later decisions:

"If it imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed."

Upon the theory first advanced by respondents that the evidence was admissible because the writing did not include all the terms agreed upon—the rule is uniform that evidence of such collateral agreements is admissible only when the circumstances attending the execution of the writing show that the parties did not intend it to be a complete and final statement of the whole transaction. 10 Cal. Juris. p. 927. The lease here does not come within this exception. It appears upon the face to be a complete statement of the undertakings of the respective parties without any uncertainty as to their respective legal obligations within the rule of *Harrison v. McCormick*, supra. *Gardiner v. McDonogh*, 147 Cal. 313, 319, 81 P. 964, and *Germain Fruit Co. v. Armsby Company*, 153 Cal. 585, 595, 96 P. 319.

Respondents cite *Henika v. Lange*, 55 Cal. App. 336, 203 P. 798. The case is not in point. The court was there considering the admissibility of parol evidence of the kind of crop which the parties contemplated was to be planted by the lessees under a written lease. By the terms of the lease the lessor contracted to furnish the lessees "a pumping plant of sufficient size to irrigate the above-described land properly," and the lessees agreed to run said pumping plant "continuously during the growing season of the crop." During the course of the trial parol evidence was admitted for the purpose of showing that the parties had agreed that the land should be planted in rice, that it was not suitable for raising any other crop, and that in the raising of rice a large supply of water was needed—greater than for any other crop. All of this evidence was admitted on the theory that it was necessary to show what the parties contemplated by the language of the lease reading: "A pumping plant of sufficient size to irrigate the above-described land properly." The difference between the *Henika* Case and the case at bar is apparent. In the first the lessor obligated himself to furnish and install a pumping plant of sufficient size to irrigate the land for the purpose of raising a particular crop. If one well or one pumping plant was insufficient for this purpose, the obligation was upon him to seek other wells or install other pumping plants. In the case at bar the lessor merely agreed to turn over to the lessees a particular pumping plant described in the lease as the one then being installed on the premises, and he further agreed to furnish power for

the use of the lessees in the operation of that particular pumping plant. He did not covenant to furnish or maintain a pumping plant of sufficient size to irrigate all or any portion of the land as was done in the Henika Case. Respondents also cite *Greathouse v. Daleno*, 57 Cal. App. 187, 206 P. 1019, where the court admitted parol evidence of an independent agreement upon the part of the owner of the land to remove trees from his land prior to the execution of an agreement for the leveling and grading of the land. The evidence was admitted under the well-known exception to the general rule that, where the subject-matter of the parol agreement is distinct from that to which the writing relates and the writing itself is silent on that matter, the agreement may be shown by parol particularly when it does not alter or vary the terms of the written contract.

A case more closely in point is *Ayers v. So. Pac. Co.*, 173 Cal. 74, 159 P. 144, L. R. A. 1917F, 949. The defendant had subdivided a tract of land to be sold in lots for a town site. The plaintiff purchased lots from the defendant under a deed containing a covenant that no intoxicating liquor should be sold or given away on the premises. After she had erected a hotel on the premises other lots were sold, all containing the same covenant, but the purchasers of these lots erected saloons on their lots and sold intoxicating liquors in violation of their covenants. The defendant refused to enforce the covenants, and the plaintiff sued for damages. The trial court admitted evidence of oral representations made to plaintiff, as an inducement to her purchase, tending to show that the defendant promised that no intoxicating liquor would ever be sold or given away upon any of the lots sold. In reversing the trial court the Supreme Court held that these representations did not amount to a contract of warranty, but were merely matter of opinion or prophecy, and, in the absence of an allegation of fraud or that they were false, they were not actionable. On the question of the admissibility of the parol evidence, the court said:

"The so-called agreement that sales of liquor should never take place in Moron was essentially a warranty regarding the permanent advantages of the property sold. Such a warranty, if made, would be a part of the contract of sale and not collateral thereto. To justify the admission of parol evidence of a contract between parties who have made an agreement in writing, on the ground that it is collateral, it must be upon a subject distinct from that to which the writing relates. *Germain Fruit Co. v. J. K. Armsby Co.*, 153 Cal. 594, 96 P. 319. Here the written agreement itself speaks on the subject of the sale of intoxicating liquors, and provides that none shall ever be sold on the premises described. To add to this provision the further stipulation that none should ever be sold in the entire town of Moron, and that the railroad company should see that none

was ever sold there, would be to add by parol to a written agreement which on its face purports to be complete upon that subject, and which, under section 1856, is presumed to embrace all the terms agreed on. Such evidence is inadmissible."

[2] One of the well-known exceptions to the parol evidence rule is that such evidence is admissible where the terms of the instrument are sufficiently uncertain to leave the intention of the parties in doubt. It is argued by the respondents that the parol evidence in this case was admissible under this theory. In support of the argument it is said that the term "pumping plant now being installed" is uncertain and unintelligible, and that to explain its meaning it is proper to show that the appellant covenanted to furnish water from this particular well upon which the pumping plant was being installed sufficient to irrigate the entire 120 acres and to bring the cotton crop planted thereon to full maturity. We are unable to perceive any uncertainty in the language of the lease. The lessor obligated himself to give the lessees the use of a particular pumping plant—the one which was then being installed upon the premises—and he also undertook to pay all charges for power to operate that particular pumping plant. There is nothing in this language which justifies an interpretation that by leasing the pumping plant the lessor undertook to guarantee any particular quantity of water. It might as well be said that in leasing the land he warranted it to be suitable for the raising of a particular quantity of cotton; that in agreeing to furnish the cotton seed he warranted its quality or the crop which it should produce; that in giving the lessees the use of the buildings and corrals he meant to furnish the buildings for living purposes or to fill the corrals with live stock.

[3] Aside from the question of the admissibility of the evidence, it wholly fails to establish the covenant upon which the respondents recovered. By the verdict they were given the full amount which it was estimated they would have received from the sale of one-half of the cotton crop if the land had produced at its maximum capacity. The evidence shows without conflict that all the conversations relating to the water occurred long prior to the execution of the lease and at a time when the respondents were operating under a lease given to George and Griffin. The evidence is also without conflict that the parties to the original lease made no engagements as to the amount of water to be supplied from the well, but on the contrary it was shown in the testimony of the witness George that this factor was intentionally omitted from their lease because it was not customary in that locality to require the lessor to guarantee any certain amount of water in a lease of that character. It also

appears that during all of this period when these conversations were had neither the appellant nor the respondents had in contemplation the execution of a lease between themselves. Thus if a covenant to furnish sufficient water to bring the cotton crop to maturity can be implied from any of these conversations, it was a covenant which would have inured to the benefit of the lessees, George and Griffin, and not to the respondents herein. But there is nothing in the evidence which warrants an inference that such a covenant was intended by either party. The most that this evidence does show is an independent contract wherein the appellant agreed that if sufficient water was not developed from the well he would pay the respondents for the work which they had expended upon the premises. If the extent of the agreement as shown in these conversations was that the lessor should pay the lessees for their labor if the water failed, then their measure of recovery is not that represented in the judgment, and the record fails to contain any competent evidence to support a judgment upon the obligation pleaded. We do not deem it necessary to consider the other errors assigned.

Judgment reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

86 Cal. App. 2¹

SNYDER v. REEG. (Civ. 3328.)

District Court of Appeal, Third District, California. Oct. 21, 1927.

1. Municipal corporations $\S$ 705(2)—“Throwing hand out” held not proper signal of automobile driver’s intention to turn (Motor Vehicle Act, $\S$ 130, subd. [a], par. 3, as amended by St. 1925, p. 412, $\S$ 15a).

In action for property damage from an automobile collision, defendant’s evidence, “I threw my ‘hand out’” to make a turn, held insufficient to meet requirement of Motor Vehicle Act, $\S$ 130, subd. (a), par. 3, as amended by St. 1925, p. 412, $\S$ 15a, requiring that the arm shall be extended during the last 50 feet preceding the turn about to be made.

2. Municipal corporations $\S$ 706(5)—Evidence held to sustain finding plaintiff’s speed was less than 15 miles per hour at time automobiles collided at street intersection.

In action for property damage from an automobile collision at street intersection when defendant’s automobile in making left-hand turn collided with plaintiff’s, evidence held to sustain trial court’s finding that at time of collision plaintiff was traveling at rate of speed less than 15 miles per hour.

3. New trial $\S$ 150(2)—Affidavits of plaintiff’s intoxication at time of automobile collision held insufficient to justify new trial.

Affidavits of witness, that at time of automobile collision plaintiff was intoxicated, and

of defendant, that he had made effort to secure evidence thereof and could not, with reasonable effort, secure testimony of witness at time of trial and requesting new trial for newly discovered evidence, held insufficient to authorize granting of new trial therefor.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Robert F. Snyder against Oscar Reeg. From a judgment for plaintiff, defendant appeals. Affirmed.

Abe Darlington and Henry S. Lyon, both of Placerville, for appellant.

E. Fitzgerald, of Placerville, for respondent.

PLUMMER, J. Plaintiff had judgment in an action to recover damages to an automobile owned by him, suffered by collision with an automobile owned and driven by the defendant. From this judgment the defendant appeals.

In support of his appeal the appellant alleges that the finding of fact that the plaintiff was traveling at a rate of speed less than 15 miles per hour is contrary to the evidence, and also that appellant’s motion for a new trial should have been granted. The particular findings of fact complained of are not set forth in the appellant’s brief. An examination of the record, however, shows findings, in substance, that the plaintiff was traveling at a speed not in excess of 15 miles per hour. At the time of the collision referred to the plaintiff was driving westerly on Main street, in the city of Placerville, and the defendant was driving in an easterly direction on the same street. At a point or place on said street where an intersecting street crosses Main street between two points known as Formi’s Corner and the Bell Tower, the defendant attempted a left-turn, and in so doing came in contact with the automobile then and there being driven by the plaintiff. No personal injuries appear to have been suffered by either of the parties, and the judgment awarded compensation for the damages inflicted upon the plaintiff’s automobile.

[1] Before referring to the testimony which to us seems to support the judgment of the trial court, we may dispose of the contention that the defendant gave a proper signal indicating his intention to make a left-hand turn. His testimony is as follows: “I threw my hand out.” There is nothing in the record showing that the signal required to be given by the third paragraph of subdivision (a) of section 130 of the Motor Vehicle Act (St. 1925, p. 412) was given by the defendant. The paragraph to which we have referred reads as follows:

“The signal herein required to be given before turning to the right or left, whether given by means of the hand and arm or by means of an

approved mechanical or electric device, shall be given continuously during the last 50 feet traveled by the vehicle before turning."

The record discloses nothing which would indicate that this provision of the Motor Vehicle Law was complied with by the defendant. The mere extending of one's hand prior to making a turn does not comply with the law. The requirement is that the arm shall be extended during the last 50 feet preceding the turn about to be made. The evident purpose of keeping the arm out is that drivers coming from an opposite direction may have a reasonable time within which to observe the signal being given by an approaching driver. And unless the arm, after being extended, is maintained in that position, the signal required by law is not given. So far as this case is concerned, there is nothing to show that the defendant did not attempt a left-hand turn and come in collision with plaintiff's car without having given the signal required by law.

[2] As to the rate of speed at which plaintiff was driving his car, the record shows the following testimony. Gertrude Springer, a witness called by the plaintiff, testified:

"I drive a car.

"Q. I will ask you if you can tell about how fast the plaintiff's car was going down the street? A. Not exactly, but about 15 miles."

On cross-examination:

"Q. About how fast would you say the car was going when it passed you? A. About 15 miles. That is my judgment; it was not going faster. In my estimation it was going exactly 15 miles."

The witness Boccocini, called by the plaintiff, testified:

"I was riding with the plaintiff. When we got in front of the courthouse, we were driving about 15 miles an hour. I looked at the speedometer at the courthouse. We did not seem to go any faster after that."

Markham Welsh, a witness called by the plaintiff, testified that in his opinion the defendant was under the influence of intoxicating liquor. The plaintiff testified that he was driving around about 15 miles an hour. Might have been a little more, might have been a little less. At the time of the collision the plaintiff testified that he was going about 15 miles an hour. There was also testimony in the record to the effect that the plaintiff was driving somewhat faster than 15 miles an hour across the intersection where the collision took place, but the foregoing testimony is sufficient to sustain the finding of the court. The finding of the court relative to the speed of the plaintiff was significant on account of the allegation of the appellant that the plaintiff was traveling at an unlawful rate of speed, and therefore was guilty of

contributory negligence, barring his right to recovery. The testimony to which we have referred, however, supports the judgment of the trial court and disposes of appellant's first alleged error.

[3] The second ground of alleged error is based upon the refusal of the trial court to grant a new trial. Plaintiff founded his motion upon two affidavits, one by George Besse, and one by himself. The setting forth of these affidavits shows their absolute insufficiency. George Besse deposed as follows:

"I am well acquainted with the plaintiff, Robert F. Snyder, and saw him at the Eagle's dance on the night of the collision between Snyder's automobile and the automobile of Oscar Reeg, and, in the opinion of affiant, Robert F. Snyder was under the influence of intoxicating liquor."

Oscar Reeg made affidavit as follows:

"That he is the defendant in the above-entitled action. That he made every diligent effort to secure evidence regarding the intoxication of the plaintiff at the time of the collision, and could not, with reasonable effort, secure the testimony of George Besse at the time of the trial of the issues in the above-entitled matter, and respectfully requests the court for a new trial upon the ground of newly discovered evidence."

Comment as to the insufficiency of the foregoing affidavits to justify the granting of a new trial is unnecessary.

Finding nothing in the record justifying any interference with the conclusions of the trial court, the judgment in this cause is affirmed.

We concur: HART, Acting P. J.; WEY-AND, Justice pro tem.

88 Cal. App. 209

FLEUTI v. APPLEDORN. (Civ. 6002.)

District Court of Appeal, First District, Division 1, California. Oct. 21, 1927.

1. Contracts $\S$ 309(1)—When parties agree on cause sufficient to excuse performance, possibility of performance will be tested by it.

When the parties to a contract agree on a cause sufficient to excuse it, possibility of performance will be tested by such cause.

2. Evidence $\S$ 455—Admitting evidence of surrounding circumstances to aid in determining meaning of "circumstances beyond control" excusing lessor's breach of contract held proper.

Under lease providing that, if "circumstances beyond control" should arise so that lessor would not be able to deliver premises, money deposited should be returned, it was proper to admit evidence of surrounding circumstances to aid in determination of meaning of term "circumstances beyond control," which has no definite or settled meaning.

3. Landlord and tenant $\S$ 128(1)—Delivery of premises held conditioned on option in prior lease and "circumstances beyond control" which might arise to prevent delivery referred thereto.

Purpose of parties under lease providing that lessor, if circumstances beyond his control should arise, making delivery of premises impossible, would return all money deposited, was, in view of evidence of surrounding circumstances, to condition delivery of demised premises on option in prior lease, and term "circumstances beyond control" was intended to refer exclusively thereto.

4. Landlord and tenant $\S$ 184(2)—Lessor obligated to return money in full, if circumstances beyond control prevented delivery of premises, must only return lessee's deposit on failure to perform.

Under lease providing, if delivery of premises was prevented by circumstances beyond lessor's control, then all money deposited should be returned in full to lessee, lessor, on failure to deliver premises because former lessee exercised option to renew lease, was required only to return deposit.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by A. J. Fleuti against C. A. Appledorn. From a judgment for defendant, plaintiff appeals. Affirmed.

Hayes, Oliphant & Dukette and David D. Oliphant, Jr., all of Oakland, for appellant.

McKee, Tasheira & Wahrhaftig, of Oakland, for respondent.

PARKER, Justice pro tem. Appeal by plaintiff from a judgment in favor of defendant in an action wherein plaintiff sought damages resulting to him by reason of defendant's failure to place said plaintiff in possession of certain premises.

There is little dispute regarding the facts of the case, and an outline thereof follows:

Defendant, Appledorn, on January 16, 1920, executed a three-year lease to certain parties named Lundquist and Chester (not parties to this action). By its terms this lease was to expire on January 15, 1923. The lease contained a provision giving Lundquist and Chester the right or option to extend it for an additional two years, and this option could be exercised at any time before the expiration of the term. On November 22, 1922, and while the Lundquist and Chester lease was still in force Appledorn executed to the plaintiff and appellant herein, Fleuti, a lease upon the same premises for a term of five years, commencing on January 16, 1923. The lessees under the first lease elected to exercise the option of extension, and in pursuance thereof remained in possession, and the plaintiff, Fleuti, lessee under the second lease, was refused possession and was never let into the premises to him demised.

At the trial of this action it was stipulated between the parties in open court that the reasonable rental value of the premises covered by the lease was \$50 per month in excess of the rental provided for in the lease, and that, if defendant were liable, the judgment should be for the sum of \$3,000. It may be noted in passing that this sum stipulated as damages represents the entire damage to plaintiff, and does not include any elements, save difference between amount of rent and actual value of the premises. There is no showing or claim of damages accruing by reason of loss of business, expense of moving, or damage to merchandise.

The lease to plaintiff, Fleuti, was in the general form and no point is made as to its sufficiency. This lease, however, contained a paragraph around which centers the present controversy, and that paragraph is as follows:

"It is further agreed by the party of the first part and the party of the second part, if circumstances beyond the control of party of the first part should arise that the party of the first part should not be able to deliver the hereinabove specified premises on the date agreed, all money deposited to the party of the first part should be returned in full to the party of the second part."

Perhaps, unnecessarily, it may be stated that party of the first part described the lessor, Appledorn, the defendant herein.

The plaintiff testified that he personally took no part in the negotiations preceding the execution of the lease to him, and that he had no conversation with the defendant prior to the signing of the lease. The plaintiff further testified that he did all of the business with his agent, a Mr. Poney. It was also in evidence on the part of plaintiff that on November 8, 1922, a few days prior to the execution of the lease, the plaintiff made a deposit of \$50 to bind the agreement and received from defendant a written acknowledgment of receipt thereof. In this acknowledgment appears the clause: "If circumstances beyond the control of the owner should arise, the money deposited should be returned."

The defendant, over the objection of plaintiff, was permitted to show, and did offer testimony showing, that at the time of and before the execution of the lease all of his negotiations were with one Mr. Poney, agent of plaintiff. The trial court permitted defendant to show that the premises were subject to the lease and option of Lundquist and Chester, and that at the time of the negotiations with plaintiff's agent Poney this fact was divulged and the said Poney well knew the situation then existing. Defendant, Appledorn, testified, over objection of plaintiff, that many times before November 8th the prior lessees, Lundquist and Chester, had ad-

vised him orally that they would not take advantage of their option, but would vacate on January 15, 1923. The first time he was so notified was in August, 1922, and the assurance was repeated on each succeeding month at the time of rent collection. On January 10, 1923, the said lessees, however, advised the owner of their intention to remain.

The trial court found upon sufficient evidence that the existence of the Lundquist and Chester lease and the option of renewal therein contained was known to plaintiff at the time of the execution of the lease to him, and that defendant notified plaintiff of the existence of said option and stated that he was willing to lease the premises to plaintiff subject to the exercise of said option, and that plaintiff was willing to accept a lease subject to the exercise of said option, and that, in order to make said lease subject to the option, the provision hereinabove set forth was inserted.

The court further found that it was the intent of said provision in the lease here involved, and so understood by plaintiff and defendant, that, in the event said Lundquist and Chester should exercise the option in the lease executed to them, the exercise of which option was a circumstance beyond the control of defendant herein, then and in that event said defendant should be released from all liability arising out of the execution of the lease to plaintiff, and said lease last referred to should be at an end, and both parties thereto should be released from any liability thereunder.

Appellant here contends that upon the facts as admitted and upon the stipulation as to damages the trial court erred in not entering judgment in his favor for the amount stipulated as damages, namely, \$3,000. Appellant strenuously urges that the provision in the lease as to failure to deliver possession is plain, clear, and unambiguous, and does not require the aid of extrinsic evidence to determine its meaning.

Without detailing separately each of appellant's points urged, it will suffice to state that it is his claim that, even if we find the court below properly admitted oral testimony to aid in construing the contract, nevertheless, the testimony adduced was insufficient to support the judgment rendered. It is urged that the facts here shown are not sufficient to be deemed "circumstances beyond the control" of the lessor to deliver possession, and then he further urges that, even if it be found that defendant was unable to deliver possession by circumstances beyond his control, yet he was not freed from further liability, but could still be called upon to respond to plaintiff for whatever damage followed his failure, even after the return of the deposit or other moneys received.

The old rule of restricting the admission of parol testimony to vary the terms of a writ-

ten contract is invoked. This rule, however, has its limitations. Conceding its force, nevertheless, it is correlated with many other rules of construction, and its force somewhat diminished in cases where manifest injustice would result from a too rigorous adherence thereto. However, accepting the rule of law prohibiting the admission of oral testimony to vary or alter the terms of a written contract, we have still the rule permitting, if not compelling, the admission of testimony that will explain and interpret the meaning of doubtful terms in a written contract, and also the rule which commands an examination into all of the facts and circumstances surrounding the parties and the subject-matter to illustrate the true intent and application of words or phrases of ordinarily common meaning.

[1] In the instant case all parties knew of the existence of the prior lease and that the exercise of the option given therein would leave the premises beyond the control of the lessor, Appledorn, and the evidence shows that at the time of negotiating for the lease under discussion here the defendant, Appledorn, informed plaintiff of this impediment to his contractual capacity with reference to the premises. Plaintiff himself prepared the writing and the language employed was his. At the instance of defendant and his demand that the contract cover the question of the option of the prior lessees and provide against the event of its exercise plaintiff inserted the paragraph here involved. We are not dealing with a case where it is claimed that performance became impossible after execution due to something extraneous. Here the situation was fully disclosed, and the purpose of the provision was to limit rights and liabilities of the parties in the event of the exercise of the option of the prior lessees. The term "circumstances beyond control" has no definite or settled meaning either in the law of contracts or elsewhere. True many authorities may be found to establish what facts or circumstances will or will not excuse performance; but none will be found to hold that, when the parties to a contract themselves agree upon a cause sufficient to excuse it, the possibility of performance will be tested by those authorities.

[2] In the brief of appellant herein we find him contending for this principle of law, viz.:

"If a certain intention was sought to be expressed, the contract should be so construed so long as the language used may fairly include it," citing *Balfour v. Fresno Canal & Irrigation Co.*, 109 Cal. 221, 41 P. 876.

We think it follows that under the circumstances shown to have existed the trial court was clearly right in admitting evidence of the surrounding circumstances to aid it in determining just what was sought to be expressed, and the admission of this evidence

was essential and necessary before it could be determined whether or not the language used might fairly include it.

It is quite unnecessary to go beyond the decisions of our own courts for ample light to guide us. In the early case of *Walsh v. Hill*, 38 Cal. 481, the court says:

"The only rule of much value—one which is frequently shadowed forth, but seldom, if ever, expressly stated in the books—is to place ourselves as near as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it."

Again, in *Eastman v. Piper*, 68 Cal. App. 554, 229 P. 1002, this language is found:

"A grant is to be interpreted in the same manner as any other contract, * * * so as to give effect to the intention of the parties if that intention can be ascertained. [Civ. Code, §§ 1066, 1636.] * * * The intention is to be gathered from the four corners of the instrument. But the rule that the intention * * * is to be ascertained from the writing alone, where the contract is reduced to writing, is subject to other rules of law for the interpretation of contracts. One of these is that 'a contract may be explained by reference to the circumstances under which it was made and the matter to which it relates.' [Section 1647, Civ. Code.] Another rule is that the contract should be read in the light of the general intent of the parties and the object sought to be attained by them."

[3, 4] From the language of the lease here involved and with particular reference to the surrounding circumstances under which it was executed, we think it clear that the underlying purpose of the parties and their main intention was to condition delivery of the demised premises upon the option in the prior lease, and that the term "circumstances beyond the control of the party of the first part" was intended to refer exclusively to this prior option. Therefore, with this construction, we come to the next clause, dealing with the liability of the lessor in the event of this happening. The language of the instrument is that, if delivery was thus prevented by circumstances beyond the control of the lessor, then all money deposited to the party of the first part should be returned in full to the party of the second part. Likewise, in the original receipt for deposit appears the clause: "If circumstances beyond the control of the owner should arise, the money deposited should be returned."

Appellant's position is that, if we find that

delivery was beyond the control of the owner, and even if we find that delivery is excused, nevertheless, the lessor is still bound to the lessee for all legal claims of damage in addition to his return of moneys paid. Appellant contends that the wording of the contract is clear and unambiguous to the effect that it sets forth but one thing, namely, the return of the money, but that in all other respects the rights and liabilities of the parties remain unaffected.

In the first place, applying such rules as have been hereinbefore referred to, we do not feel that the term "in full" is in itself so definite and certain as to foreclose all inquiry into its meaning or the use in which it was employed. It is obvious that a mere return of the money could have been assured without specifying "in full." The money deposited was everything of value that the lessor received; and, if the lessee demanded anything further from him upon his inability to perform, it was his duty to specify the same in his contract. Obviously the contract is subject to explanation and is indefinite and uncertain on its face as to what liabilities follow a failure of delivery of the premises, unless, forsooth, the return of the moneys as therein provided ended the matter. The trial court, therefore, had the alternative of accepting the provision for the return of the moneys in full as being the limit of the lessor's liability, or else receiving testimony to determine the intent of the parties on this point. The court did take testimony, and on sufficient evidence found that the return of the moneys in full satisfied all claims of the lessee and discharged the lessor from all further liability. We are content to accept this finding.

Appellant also complains that it was beyond the power of the court to order a judgment in his favor for the return of the moneys deposited, the pleadings being framed solely on the issue of damages. However, from the record before us we understand that plaintiff has since accepted this money on an agreement that this acceptance shall not affect the merits of his appeal. We have not considered this acceptance by plaintiff for any purpose at all save to preclude discussion of the question raised on the form of judgment.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

86 Cal. App. 193

INMAN v. SCHECHER et al. (Civ. 5535.)

District Court of Appeal, Second District, Division 2, California. Oct. 20, 1927.

1. Husband and wife ⇨265½—Defendant in action for forfeiture of lease could not claim premises to be community property, where lease provided that M. signed merely as husband of lessor.

Defendant in action for forfeiture of lease could not claim leased premises to be community property, where clause of lease to which he subscribed provided that it was admitted that husband of lessor had no interest in property.

2. Husband and wife ⇨196—Defendant in action for forfeiture of lease could not claim notice of forfeiture was insufficient because not signed by husband, where lease stated husband had no interest in property.

Defendant in action for forfeiture of lease could not claim that notice of forfeiture was insufficient because it was not signed by husband of lessor, where lease to which defendant subscribed admitted husband had no interest in property, and that he was signing lease as husband of lessor.

3. Trial ⇨139(1)—Defendant's motion for nonsuit held properly denied where plaintiff had introduced substantial evidence on all points raised by motion.

Defendant's motion for nonsuit held properly denied where plaintiff had introduced substantial evidence in her behalf on all points raised by motion.

4. Landlord and tenant ⇨112(2)—Lessor, by continuing to receive rent, waived breach of lessee's agreement to construct building within 30 days.

Lessor by accepting payment of rent for period of 2 years and 9 months waived breach of clause of lease providing that lessee should commence construction of building within 30 days from date of execution of lease.

5. Landlord and tenant ⇨112(2)—Where lessor waived breach of one clause but after breach of another clause in lease refused to accept rent, there was no waiver of second breach.

Where lessor waived lessee's breach of clause relating to constructing building and accepted rent, but, upon lessee's failure to pay assessment for street improvement, refused to accept any rent and gave notices of forfeiture of lease, as provided by Code Civ. Proc. § 1161, there was no waiver as to breach of clause regarding assessments.

6. Eminent domain ⇨155—Under lease providing for payment of proceeds of condemned land to lessee, lessee was not entitled to proceeds of judgment in proceeding condemning land excepted by terms of lease from premises demised.

Under lease providing that, in event any portion of property leased was condemned for state or other purposes, money received therefrom should be immediately paid to lessee, lessee was not entitled to proceeds of judgment

in proceedings condemning parcel which was by very terms of lease excepted from premises demised to lessee, and lessee could not claim that assessment, which he was under obligation to pay, had been paid by offsetting it against judgment.

7. Landlord and tenant ⇨290(3)—Lessor's breach of covenant relating to proceeds of condemned property could not be defense to unlawful detainer suit for violation of covenant to pay assessments.

Lessor's breach of covenant, providing that if any portion of property leased was condemned money received therefrom should be paid over to lessee, could not be defense to an unlawful detainer suit for violation of covenant to pay taxes and assessments.

8. Landlord and tenant ⇨290(5)—Lessee's defense, for money only, could not be interposed in unlawful detainer case.

Lessee's defense, that assessment for street improvement due under lease had been paid by being forfeited against judgment in condemnation proceedings, the proceeds of which lessee claimed under lease, being for money only, for which suit at law would lie, was not one of class of equitable defenses which could be interposed in unlawful detainer case.

9. Set-off and counterclaim ⇨15—Set-off or counterclaim is not permissible in unlawful detainer action.

Set-off or counterclaim is not permissible in an action for unlawful detainer.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Nana K. Inman against John L. Schecher and others for forfeiture of lease. From a judgment for plaintiff, defendant named appeals. Affirmed.

R. C. W. Friday, of Los Angeles, for appellant.

Harry L. Person and George D. Rodgers, both of Los Angeles, for respondent.

COLLIER, Justice pro tem. On December 15, 1922, respondent, in writing, demised to appellant two parcels of land situate in the city of Los Angeles, described therein as follows:

"Parcel 1. The west 147 feet of lot A, and the west 147 feet of the north 10 feet of lot B, of the Davis and Figueroa street tract, in the county of Los Angeles, state of California, as per map recorded in Book 5, page 102 of Maps, in the office of the county recorder of said county;

"Excepting therefrom an easement for street purposes over the west 20 feet condemned for the widening of Figueroa street by final decree of condemnation had in case No. 75183, superior court of Los Angeles county, a certified copy thereof being recorded in Book 5533, page 179 of Deeds; also the north 20 feet of the east 127 feet of lot A, as per case pending in the superior court in and for the county of Los Angeles to condemn the same for street purposes, being case No. B-92381.

"Parcel 2. The north 5 feet of the west 147 feet of lot C, and the south 40 feet of the west 147 feet of lot B, both in the Davis and Figueroa street tract, in the county of Los Angeles, state of California, as per map recorded in Book 5, page 102 of Maps, in the office of the county recorder of said county;

"Excepting therefrom an easement for street purposes over the west 20 feet thereof condemned for the widening of Figueroa street by final decree of condemnation had in case No. 75183, superior court of Los Angeles county, a certified copy thereof being recorded in Book 5533, page 179 of Deeds." (Italics ours.)

Attention is called to that portion of the paragraph in the description of parcel 1 commencing in italics, and particularly the italicized portion, commencing "also the north 20 feet," etc. This was the strip taken for the widening of Florence avenue, for which an assessment was levied and which is mentioned and discussed hereafter.

The tenancy commenced December 15, 1922.

Said lease contained several further provisions which are material here and for ready reference we will designate them as clauses 1, 2, 3, 4, and 5, respectively, and they are as follows:

Clause 1. "The lessee further agrees to pay all assessments of every kind and nature that may be levied against said property for improvements of any kind and all taxes levied during the entire term of this lease, including the last half of taxes for 1922, 1923."

Clause 2. "The lessee further agrees to commence the construction of a class A fireproof building within 30 days from the date of the execution of this lease, and all buildings erected upon said property during the term thereof shall be and remain thereon and become a part of the realty, and be and belong to the lessors at the expiration of this lease."

Clause 3. "It is further agreed that in the event any portion of the property hereby leased is condemned for street or other purposes, that the money received therefrom shall be immediately paid over to the lessee."

Clause 4. "In the event of the failure of the lessee to pay the rent herein specified at the times and in the amounts herein provided, the lessors may enter and retake possession of said premises, and if default shall be made after 30 days in the payment of the same, this lease may be determined at the option of the lessors."

Clause 5. "It is admitted that M. M. Inman, husband of Nana K. Inman, has no interest in said property, and is signing this lease as the husband of said Nana K. Inman, lessor." (Italics ours.)

By clause 2 appellant covenanted to construct on said premises a class A fireproof building within 30 days. This was never done, and in spite of his covenant appellant subleased a portion of said premises to the Shell Oil Company of California, who conducted a filling station thereon up to the commencement of this action. Respondent "protested" to appellant because of his failure to build said class A building, and his leasing to the Shell Oil Company.

In December, 1925, respondent served on appellant a notice declaring a forfeiture of said lease on account of said default.

On August 17, 1925, an assessment was levied on said premises by the city of Los Angeles for the opening and widening of Florence avenue. This assessment amounted to \$1,823.87, and became due August 1, 1925, and if not then paid became a lien on said premises and rendered the same subject to sale.

Appellant was notified of said assessment before it became delinquent, but failed to pay the same, and respondent paid it on October 3, 1925. Appellant has never reimbursed respondent therefor.

In December, 1925, respondent served a demand upon appellant to pay him, respondent, the amount of said assessment or deliver possession of the premises to respondent.

Respondent accepted rent from appellant from the commencement of the term, December 15, 1922, until September 15, 1925, but respondent has refused to accept any rent from appellant since that date, although appellant duly tendered same to him.

The case was tried before the court with a jury and judgment was rendered in favor of the plaintiff upon the first two counts.

[1] Appellant in his answer claims such premises to be the community property of M. M. and Nana K. Inman, but is foreclosed from that contention by clause 5 of the lease to which he subscribed; hence, that controversy ends there.

[2] For the same reason appellant's contention, that the notice of forfeiture is insufficient because it was not signed by M. M. Inman, is not tenable. By clause 4 it was "admitted" by both respondent and appellant that M. M. Inman had no interest in said property, and that he signed the lease merely as husband of Nana K. Inman; and our attention has not been called to any evidence to the contrary. In any event, there is abundant evidence in the record to show that the property was the separate property of Nana K. Inman.

As an alleged defense made to all of respondent's claims, and by way of "counterclaim and set-off" appellant sets forth the following:

"That, within 2 years last past, aforesaid plaintiff Nana K. Inman, and said Nana K. Inman jointly with her aforesaid husband, M. M. Inman, for a valuable consideration, jointly and severally became indebted to this defendant John L. Schecher, for and on account of detriment suffered by said John L. Schecher, and moneys paid by said John L. Schecher, at the special instance and request of said M. M. Inman and Nana K. Inman, husband and wife aforesaid, to and for the use and benefit of said M. M. Inman and Nana K. Inman, in the full sum of \$4,384.60, and which sum the said M. M. Inman and said Nana K. Inman jointly and severally promised and agreed to pay this defendant John L. Schecher.

"That demand has been made by this defendant for the payment to him of the last-named aforesaid sum, in and by virtue of further agreement in said Exhibit A further set out, to wit, in words and figures set out as follows:

"It is further agreed that, in event any portion of the property hereby leased is condemned for street or other purposes, the money received therefrom shall be immediately paid over to the lessee."

[3] Appellant's motion for nonsuit was properly denied as respondent had introduced substantial evidence in her behalf on all points raised by said motion. Estate of Caspar, 172 Cal. 147, 155 P. 631.

The demurrer of appellant to plaintiff's complaint was properly overruled.

We come now to the question of waiver, if any, presented by respondent's acceptance of rent from the inception of the lease to September 15, 1925—a period of 2 years and 9 months. Such acceptance would only effect a violation of clause 2, as that was the only breach complained of up to that time.

[4] We are of the opinion that such acceptance was a waiver of that breach. Respondent claims to have "protested" against said breach, but nevertheless continued to receive the rent. In other words, as was said in *Miller v. Reidy* (Cal. App.) 260 P. 358:

"This was a clear attempt to eat the cake and still keep it. His actions belie his words. Waiver is a question of intention [citing cases]. For the lessors month after month to accept rent specified in the lease, and at the same time declare that there was a forfeiture, results in an irreconcilable inconsistency."

Therefore, in that particular, the verdict of the jury and the judgment thereon are not supported, and are erroneous.

[5] This is immaterial, as we think the verdict on respondent's first cause of action must nevertheless be affirmed. The failure of appellant to pay the assessment for widening and improving Florence avenue was a special and independent breach of another and independent covenant of the lease. Since that breach respondent has steadily refused to accept any rent, and hence in that regard there has been no waiver. No other waiver is either alleged nor proved. Section 1161 of the Code of Civil Procedure provides for a forfeiture of a lease under such circumstances, and notices in proper form were served thereunder.

We will now take up appellant's second defense. Appellant's contention is based upon said clause 3:

"It is further agreed that, in event any portion of the property hereby leased is condemned for street or other purposes, the money received

therefrom shall be immediately paid over to the lessee."

From the evidence it appears that one Frase was the owner of the property in question next preceding Mrs. Inman. In said Florence avenue condemnation case Frase was awarded a judgment against the city of Los Angeles for \$7,980, which was subsequently assigned to respondent herein.

In the proceedings that followed an assessment was levied against the leased premises in the sum of \$1,823.87. Under the lease the assessment should have been paid by appellant. It was not so paid, because delinquent, and respondent paid the same by offsetting it against said judgment, and received the net balance of the award from the city of Los Angeles. This amounted to \$4,384.60. Appellant claims that in effect he has paid said assessment in that by clause 3 he was entitled to the proceeds of such judgment, from which the assessment was paid; that respondent having collected the same and paid therefrom said assessment, said payment should be treated as having been made by appellant and the said net balance belonged to appellant. The net balance of \$4,384.60 is the basis of appellant's second defense by way of counterclaim or set-off.

[6-9] There are four answers to appellant's contention. (1) None of the property leased to appellant has been condemned. The parcel condemned and which was the basis of the award was by the very terms of the lease excepted from the premises demised to appellant. This seems too plain for any argument. (2) Appellant's alleged demand arises out of the failure of respondent to turn over to appellant the proceeds of said judgment. Even assuming appellant was entitled thereto under the clause 3 (which we deny), clause 3 is entirely independent of the covenant to pay rent or to pay taxes or assessments; hence no breach by respondent of clause 3 would be a defense to an unlawful detainer suit for a violation of the covenant to pay taxes and assessments. *Arnold v. Krigbaum*, 169 Cal. 143, 146 P. 423, Ann. Cas. 1916D, 370. (3) The defense urged by appellant is not one of the class of equitable defenses which may be interposed in an unlawful detainer case, it being for money only, for which a suit at law will lie. (4) A set-off or counterclaim is not permissible in an action for unlawful detainer. *Arnold v. Krigbaum*, supra; *Schubert v. Lowe*, 193 Cal. 291, 223 P. 550.

The judgment of the trial court is affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

86 Cal. App. 179

TUPPER v. LITTLE et al. (Civ. 5751.)

District Court of Appeal, First District, Division 2, California. Oct. 19, 1927.

- 1. Appeal and error** $\S$ 882(9)—Defendants, eliciting testimony by cross-examination, might not complain on appeal that testimony was conclusion.

Where defendants elicited testimony that note was given in payment of debt by their cross-examination, and no objection was made to the testimony, they might not complain in the appellate court that testimony was mere conclusion of law.

- 2. Sales** $\S$ 39—Finding that note for interest under contract was separate transaction, not connected with modification of contract, held sustained by evidence.

In action on note, evidence held to sustain finding that note was given as absolute payment of balance of interest due under contract of sale, that it was an entire and separate transaction not connected with an agreement made at time of execution modifying the contract; and that it was not discharged by cancellation of contract.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action on a promissory note by W. C. Tupper against W. G. Little and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Shepard & Shepard, of Selma, for appellants.

Everts, Ewing, Wild & Everts, of Fresno, for respondent.

NOURSE, J. Plaintiff sued as assignee of a promissory note in the sum of \$775 executed by the defendants to W. H. Say on January 16, 1924. Plaintiff had judgment, and defendants have appealed on a typewritten record.

On January 16, 1923, the defendants had agreed in writing to buy certain land from Say, a portion of the agreed purchase price being paid at the time, and the remainder to be paid in fixed installments. At the close of the year the defendants, being unable to pay the interest and the installments then due, executed a modification of this agreement with Say whereby the time for payment of all installments on the principal under the contract was continued from the due dates fixed in the contract. At the same time the promis-

sory note in suit was executed covering the amount of interest then due. On June 19, 1924, the parties executed in writing a cancellation and abandonment of the contract of purchase and a release of "any other or further obligations or liabilities" under it. Thereafter the note in suit was assigned to the plaintiff, and this action was commenced on the theory that the note was given for a pre-existing debt—the interest due under the contract.

The trial court found that the note was given as an absolute payment of the balance of the interest due upon the contract of sale, and that it was an entire and separate transaction not connected with the modification agreement, and expressly exempted from the releases mentioned in the abandonment agreement of June, 1924. On this appeal the appellants state that there is but one question involved, and that is whether there is any support in the evidence for this finding of the trial court.

[1, 2] One of the appellants testified that it was at the express request of the appellants that no mention of interest was made in the modification agreement of January, 1924, but that at that time a portion of the interest due was paid in cash, and the note was given with the understanding that it should have no connection with the modification contract. The witness Say testified that the note was "given in payment of a debt, the interest." One of the appellants testified that the note was not given in payment of interest, but was merely further evidence of interest due. Appellants now insist that the testimony of the witness Say was merely an expression of a conclusion of law, but, even so, it was brought out by appellants on their cross-examination of the witness, and no objection was made to it.

In addition to the direct evidence, the fact that no mention was made of the note or the interest in the modification agreement of January, 1924, or in the release of June, 1924, would in itself support an inference that the note was a separate and complete transaction. The conceded fact that the note covered the amount of interest due, taken with this direct evidence of the intention of the parties, fully supports the findings of the trial court.

Judgment affirmed.

We concur: **KOFORD, P. J.; STURTEVANT, J.**

202 Cal. 299

GRIGSBY v. KING et al. (S. F. 11578.)

Supreme Court of California. Oct. 20, 1927.

1. Constitutional law ⚡205(5), 238(1)—Schools and school districts ⚡133—Statutes ⚡72, 96(1)—Act relative to teacher's tenure held not unconstitutional as discriminatory class legislation (Pol. Code, § 1609; Const. art. 1, §§ 11, 21; art. 4, § 25; Const. U. S. Amend. 14).

Pol. Code, § 1609, known as "Teacher's Tenure Act," was not, prior to amendment, violative of Const. art. 1, §§ 11, 21, article 4, § 25, and Const. U. S. Amend. 14, as legislation discriminating within a class.

2. Schools and school districts ⚡55—Board of school trustees, being neither natural nor artificial person, does not enjoy same constitutional rights as are accorded persons.

A board of school trustees, being neither a natural nor an artificial person, does not enjoy the same natural privileges and constitutional rights as do natural and artificial persons.

3. Constitutional law ⚡42—Where only powers possessed by board were statutory, it could not attack as unconstitutional the limitations thereon (Pol. Code, § 1609).

Where the only powers possessed by a board of school trustees were granted by Pol. Code, § 1609, such board could not attack, as being unconstitutional, limitations placed thereon by the Legislature.

4. Schools and school districts ⚡133—Power to employ teachers implies power to fix term and so end employment.

Power to employ teachers necessarily implies the power to fix the term and so end the employment.

5. Schools and school districts ⚡133—Power to employ teachers in classes implies power to classify.

Power to employ teachers in classes necessarily implies the power to classify.

6. Constitutional law 205(5), 238(1)—Schools and school districts 133—Statutes 72, 96(1)—That only teachers holding certain kind of certificates could be employed held to be limitation upon boards' power, and not unconstitutional extension of privilege to certain teachers (Pol. Code, § 1609; Const. art. 1, §§ 11, 21; art. 4, § 25; Const. U. S. Amend. 14).

Pol. Code, § 1609, authorizing employment as teachers of only persons holding a certain kind of a certificate, held a limitation upon the power of boards of trustees in the hiring of teachers, and not an extension of privilege to a certain class of teachers so as to render the act violative of Const. art. 1, §§ 11, 21, article 4, § 25, and Const. U. S. Amend. 14.

7. Constitutional law 205(7), 213—Schools and school districts 46—Statutes 73(2), 93(6)—Statutory classification of boards of school trustees according to size of districts held not unconstitutional as discriminatory class legislation (Pol. Code, § 1609; Const. art. 1, §§ 11, 21; art. 4, § 25; Const. U. S. Amend. 14).

The classification, under Pol. Code, § 1609, of boards of school trustees into two classes according to the size of their districts, held not unreasonable nor unconstitutional under Const. art. 1, §§ 11, 21, article 4, § 25, and Const. U. S. Amend. 14, as being discriminatory class legislation.

8. Schools and school districts 133—Statutes 96(1)—Unusual benefit or detriment enjoyed or suffered by individual teacher under Tenure Act does not invalidate statute (Pol. Code, § 1609).

Any unusual benefit or detriment enjoyed or suffered by an individual teacher, under the Teacher's Tenure Act (Pol. Code, § 1609), does not invalidate said statute, since such benefit or detriment is merely incidental to the main purpose of the statute.

9. Constitutional law 205(5), 238(1)—Schools and school districts 133—Statutes 72, 96(1)—Since statute restricting school trustees' power applies only to an impersonal administrative agency, constitutional guaranties of personal rights had no application on question of constitutionality (Pol. Code, § 1609; Const. art. 1, §§ 11, 21; art. 4, § 25; Const. U. S. Amend. 14).

Since statute (Pol. Code, § 1609) restricting school trustees' power relative to employment and tenure of teachers applies only to an impersonal administrative agency, the question of constitutional guaranties of personal rights, under Const. art. 1, §§ 11, 21, article 4, § 25, and Const. U. S. Amend. 14, had no application upon the matter of the constitutionality of such statute.

10. Schools and school districts 133—Under statute, board must classify teacher as permanent after 2 years' successful employment, regardless of contract (Pol. Code, § 1609).

Under Pol. Code, § 1609, relative to school trustees classifying teachers, the board is required to classify a teacher as permanent upon a showing by her of 2 years' successful work, regardless of a contract.

11. Injunction 78—Injunction held proper remedy for teacher, where board was wrongfully attempting to deprive her of position as permanent teacher (Pol. Code, § 1609).

Where a board of trustees was attempting, under Pol. Code, § 1609, wrongfully to deprive a teacher of her position as a permanent teacher in the schools, held proceeding for injunction was the proper form of relief as against claim that injunction would not lie for breach of contract for personal services.

In Bank.

Appeal from Superior Court, Napa County; R. L. Thompson, Judge.

Action by Isadore Grigsby against Mrs. P. S. King and others, as Trustees of the Napa School District. Judgment for defendants, and plaintiff appeals. Reversed.

E. L. Webber, of Napa, for appellant.

Leo A. Murasky, of San Francisco, for California Council of Education, Frank L. Fenton, of San Francisco, for San Francisco Teachers' Ass'n, William A. Alderson, of Los Angeles, and Henry F. Marshall, of Mill Valley, amici curiæ.

Thomas C. Anglim, Dist. Atty., and L. E. Johnston, Deputy Dist. Atty., both of Napa, for respondents.

Everett W. Mattoon, County Counsel, and J. H. O'Connor, Asst. County Counsel, both of Los Angeles, amici curiæ.

LANGDON, J. This is an appeal by the plaintiff from a judgment against her in an action brought to restrain the members of a board of school trustees "from attempting to deprive plaintiff of her position as a permanent teacher in the schools of the city of Napa."

The trial court denied relief upon three grounds: (1) Injunction will not lie for a breach of contract for the performance of personal services; (2) section 1609, article 7 of the Political Code, known as the "Teacher's Tenure Act," if interpreted to give plaintiff the standing of a permanent teacher under the facts of this case, is unconstitutional as denying the right to employer and employee of contracting for a definite, specific period of time; and (3) said section of the Political Code is unconstitutional because it is an unjust discrimination against a class of schools and of teachers.

It is to be observed that the last session of the Legislature amended this section so as to obviate all question of an objection thereto upon the last ground above stated. Prior to such amendment, the sections involved in our inquiry were as follows:

"Sec. 1609. Boards of school trustees * * * shall have power and it shall be their duty: * * *

"Second—To employ the teachers, as provided in part fifth * * * teachers may be elected on or after May second for the next ensuing

school year and each teacher so elected shall be deemed re-elected from year to year, except as hereinafter specified. * * *

"Fifth—To employ, as teachers, only persons who hold legal certificates for teaching * * * to serve as substitutes, probationary or permanent teachers. * * *

"(c) To classify as substitute teachers those persons employed as teachers from day to day for less than one school year. * * *

"(d) To classify as probationary teachers those persons employed as teachers for the school year, and who have not been classified as permanent teachers, * * * such classification to be made at the time of employment, and thereafter in the month of July of each school year.

"(e) To classify as permanent teachers all persons who shall have been successfully employed as teachers by the district for two consecutive school years at the time of classification; provided, also, that the two years of successful service shall have been performed in a district employing at least eight teachers under a principal who shall devote at least two hours per day to supervision in the school or schools under his control. Such classification shall be made at the end of the two years of such employment. * * *

"(h) To dismiss substitute teachers at any time. * * *

"(i) To dismiss probationary teachers during the school year for cause only, as in the case of permanent teachers, except that on or before the tenth day of June in any year the governing board may give notice in writing to a probationary teacher that his services will not be required for the ensuing school year. * * *

"(j) To dismiss permanent teachers, principals, or supervisors of special subjects, * * * only for one or more of the following causes, after a fair and impartial public hearing. Causes for dismissal are. * * *

"It is hereby provided, however, that whenever it becomes necessary to decrease the number of permanent teachers employed by a school district * * * on account of the discontinuance of a particular kind of teaching service * * * the governing board may dismiss such teacher or teachers at the close of the school year. * * * The teacher or teachers so dismissed shall be the teacher or teachers engaged in the type of teaching work so discontinued."

The defendants are trustees of a school district employing at least 8 teachers under a principal devoting more than 2 hours per day to supervision in the school or schools under his control. The plaintiff had been successfully employed as a regular teacher in said district for three consecutive years. Toward the end of the third year defendant board attempted to dismiss her by letter without holding any hearing or making any charges against her. The complaint set forth these facts and prayed for injunctive and general relief.

[1] In holding this section violative of state constitutional provisions contained in article 4, § 25, and article 1, § 11, and also in article 1, § 21, and the Fourteenth Amendment to the Constitution of the United States, the trial court proceeded upon the

theory that teachers as a class were the subjects of legislation, and that a discrimination within that class was apparent. We think that in the section of the Political Code under construction the Legislature was plainly dealing with boards of trustees as a class, investing them with powers not otherwise possessed, and providing the limitations and restrictions to be attached to the exercise of such powers.

[2, 3] Furthermore, a board of school trustees, being neither a natural nor an artificial person, does not enjoy the same natural privileges and constitutional rights as do such persons. Such a board is merely an administrative agency created by statute and invested only with the powers expressly conferred, subject to the limitations thereto attached by the Legislature. As aptly stated by counsel, it is anomalous that the board of trustees should claim powers granted to it by statute and only by statute and attack as unconstitutional the limitations imposed upon those powers by the same statute.

Title III of the Political Code is entitled "Education," and chapter III thereof bears the caption "Public Schools." This chapter is divided into 21 articles, each with its appropriate subtitle. Article 7 is entitled "Boards of Trustees of School Districts and City Boards of Education" and is divided into 23 sections. Section 1603 deals with boards of trustees with respect to membership; the following section deals with new districts, and the following section deals with vacancies. The succeeding sections prescribe the powers and duties of said boards with respect to various matters, section 1609, the subject of our particular examination, dealing with the power of said boards with reference to employees and with particular reference to teachers.

[4, 5] Part second of the section, above quoted, empowers the board to employ teachers as provided in part fifth. Part fifth empowers the board to employ persons to serve as substitutes, probationary, or permanent teachers. The power to employ imports the power to fix the term of and so end the employment. The power to employ in classes necessarily implies the power to determine who shall be employed in each class, i. e., to classify. If this were the entire content of the enactment, the board would then have plenary power in three particulars—to employ, to classify, and to dismiss teachers. But further provisions appear in the act which modify and limit the power conferred by imposing a duty with respect to its exercise.

[6] The otherwise plenary power of the board to employ teachers is limited by the provisions of subdivision (2) that they may employ as teachers "only persons holding legal teaching certificates then on file with the county superintendent." We think this

is to be construed as a limitation upon the power of the board to employ, and not the extension of a privilege to those having certificates on file.

Likewise, the plenary power of the board to dismiss is modified and limited by the provisions of subdivisions (h), (i), and (j). These subdivisions provide that, unless for cause, the board shall not have power to dismiss probationary teachers at all, except at the end of the school year; that, unless for cause, the board shall not have power to dismiss permanent teachers at all, except on discontinuance of special teaching service or diminution in number of pupils, and these limitations are expressly withdrawn in the case of substitutes who may be dismissed by the board at any time.

Similarly, the plenary power of the board to classify is modified and limited by the provisions of subdivisions (c), (d), and (e). It is therein provided that the board shall classify as substitutes only "persons employed for less than a school year to take the places of absent regular teachers"; that the board shall classify as probationary teachers only "those persons employed for the school year and who have not been classified as permanent." And subdivision (e), under attack here (read without the proviso), compels the board—all boards in all districts—to classify as permanent all successful, 2-year teachers, and to make its decision as to whether or not the teacher is a successful one at the end of a 2-year period. It limits the power of the board to act otherwise. But by the proviso, the Legislature exempts boards of trustees in small districts from this duty.

The distinction, then, is among boards of trustees—those in small districts having larger powers with reference to dismissal of teachers than those in larger districts, where the discretion in this matter is limited.

[7] In legal effect, the proviso divides the boards of trustees into two classes, according to the size of their districts. This seems a proper classification, based upon many reasons which are readily apparent. "There is no constitutional objection to the classification of school districts any more than of cities." In *re Sugar Notch Borough*, 192 Pa. 349, 43 A. 985. There would seem to be no reason why school districts may not be classified according to population for purposes of administration and government as well as municipalities. *People v. Lodi High School District*, 124 Cal. 699, 57 P. 660. The proviso prescribes the service which shall render operative the mandate of the section toward the trustees. It must be performed in a "district employing at least 8 teachers under a principal, etc." But smaller districts are exempted from the purview of the section. This results in the formation of two classes of school trustees—those of large districts and those of small districts, the one

subject to the mandate of the section, and the other exempt. And this classification, while apparently based upon the number of teachers employed, is, in the last analysis, based upon the population of the districts and within the scope of the decisions hereinbefore quoted, for under the law, the number of teachers employed depends upon the number of pupils, and that, of course, upon the population of the district.

There is no discrimination against the boards of trustees in small districts; the classification is based upon a substantial difference, pertinent to the distinction. In a large district, employing a supervising principal, the board, having the benefit of this expert service and counsel, may reasonably arrive at a decision as to the propriety of granting permanent tenure to a teacher within a definite period of time, while the board of a smaller district, with no special means of measuring the fitness of a teacher, is not in the same position as the board which has available the services and advice of its expert supervisor, who spends at least 2 hours each day directly observing, checking and supervising the work of the teachers under his charge.

Long prior to the enactment of the Teacher's Tenure Act, the Legislature had made a classification of school districts practically identical in character with the classification we are considering, for it had, in effect, said to school districts that those having 8 teachers or more might employ a nonteaching superintendent to supervise the work of such teachers.

[8] There is nothing in the law to prevent any teacher from serving in any school district which she may select. Any unusual benefit or detriment enjoyed or suffered by an individual teacher is merely incidental to the main purpose of the statute and does not invalidate it. "The restrictions of the Constitution upon legislation apply to direct legislation, not to the incidental operation of statutes constitutional in themselves upon other subjects than those with which they directly deal." In *re Sugar Notch Borough*, 192 Pa. 349, 43 A. 985; *Commonwealth v. Gilligan*, 195 Pa. 504, 46 A. 124.

[9] As to the other reason urged by respondents for holding the law in question unconstitutional, we think it is clear that constitutional guaranties of personal rights are inapplicable to an impersonal, administrative agency exercising special and limited powers. Boards of trustees have no existence, except by legislative enactment. They possess no natural rights; they exercise no functions except those specially granted to them. "A public office is a mere public agency created by the people for the purpose of the administration of the necessary functions of organized society." In *re Carter*, 141 Cal. 316, 74 P. 997.

[10, 11] It is also urged in support of the judgment that plaintiff failed to bring herself within the provisions of section 1609, because her contracts showed employment for a fixed, definite term. It was stipulated that there were written contracts for the first and second years' service, and that the third year's service was rendered pursuant to re-election by the board at the end of the second year. The law requires nothing more. The showing of two years' successful work brings plaintiff within the statute, and it was the duty of the board at that time to classify her as a permanent teacher, and any other action on its part was beyond its power and of no avail.

The view we have taken disposes of the objection to the form of relief asked, for the action becomes, in effect, not one to enforce a contract for personal services, but to restrain action by the board of trustees in excess of its power to the detriment and damage of plaintiff.

The judgment appealed from is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

I concur in the judgment: RICHARDS, J.

202 Cal. 319

McMAHON v. HAMILTON. (S. F. 12354.)

Supreme Court of California. Oct. 24, 1927.

1. Appeal and error ⇨648—Trial court cannot amend record to be used on appeal more than six months after it has been certified as correct (Code Civ. Proc. § 473).

In view of Code Civ. Proc. § 473, a trial court is without power to amend a record to be used on appeal more than six months after the same has been certified as a correct transcript of the proceedings had and taken in such court.

2. Appeal and error ⇨653(1)—Appellate court cannot change record authenticated by trial court.

A record authenticated by the trial court cannot be changed by an appellate court.

3. Appeal and error ⇨653(1)—Appellate court has inherent power to order corrections in record before it.

Appellate court has inherent power to order court to amend and correct record before it on appeal, so that the record shall speak the truth.

4. Courts ⇨78—Court rules are subservient to statutes.

Rules of court are subservient to statutory mandate.

5. Appeal and error ⇨653(1)—Appellate court may at any time pending determination of appeal have record corrected (Code Civ. Proc. §§ 473, 953; Supreme Court rule 14).

An appellate court may have a record amended, so that it will be correct, at any time pending determination of the appeal, without regard to Code Civ. Proc. § 473, in view of section 953, and Supreme Court rule 14, indicating no limitation on inherent appellate power to have record on appeal corrected.

6. Appeal and error ⇨653(1)—Record on appeal will be corrected when necessary, unless rights of adverse party would be injured thereby.

Technical objections to amending record on appeal are not favored, and a record will be corrected when necessary, unless a right of the adverse party would be injuriously affected thereby.

7. Appeal and error ⇨653(1)—Supreme Court favors amendment to record which will enable review of all facts before lower court.

Supreme Court favors an amendment to record on appeal, the effect of which is to enable review of all facts which trial court had before it when it made its decision.

8. Appeal and error ⇨657(1)—Supreme Court can permit withdrawal of transcript on appeal, more than six months after it has been certified as correct, for amendment and correction of bill of exceptions settled after appeal was taken (Code Civ. Proc. §§ 473, 953; Supreme Court rule 14).

Supreme Court held to have power to permit withdrawal of transcript on appeal, more than six months after it has been certified as correct, for amendment and correction of bill of exceptions settled after appeal was taken, and in view of court rule 14, and Code Civ. Proc. § 953; six months' limitation provisions of Code Civ. Proc. § 473, being inapplicable.

In Bank.

Action for damages for personal injuries by Joseph T. McMahon, by Rose Surryhne, his guardian ad litem, against Fred Hamilton. Judgment for defendant, and plaintiff appealed. Defendant's motion for an order authorizing withdrawal of transcript on appeal to permit its amendment was granted. Plaintiff moves to set aside the order authorizing withdrawal. Motion denied.

J. A. Tracy, of San Francisco, for appellant.

Louis V. Crowley and Joe Ryan, both of San Francisco, for respondent.

PER CURIAM. Plaintiff and appellant herein presents a motion that this court vacate and set aside an order heretofore made which said order authorized the withdrawal of the transcript in this cause from the files of this court for the purpose of correcting and amending the same. The action was instituted to recover damages for injuries suffered by the plaintiff as a result of the de-

fendant's alleged negligence. After trial, the jury returned a verdict for the defendant and judgment was accordingly entered. From the judgment so entered the plaintiff prosecuted this appeal. The transcript filed herein consists of the judgment roll, notice of appeal, and what purports to be a bill of exceptions certified to by the trial judge on October 25, 1926. Thereafter the respondent noticed a motion for the July calendar of this court, which motion suggested diminution of the record herein in order that the same might include the proposed and allowed amendments of respondent to the bill of exceptions submitted by appellant. In support of said motion for diminution the respondent filed, among others, an affidavit of the trial judge, wherein the affiant states that:

"On April 22, 1926, defendant filed herein his proposed amendments to plaintiff's proposed bill of exceptions. Thereafter, and on the 10th day of June, 1926, the matter of the settlement of plaintiff's proposed bill of exceptions and defendant's proposed amendments thereto came on regularly for hearing before affiant, and on said date affiant settled said bill of exceptions and allowed all of the proposed amendments of the defendant.

"At no time was said bill of exceptions engrossed and the plaintiff did not at any time incorporate the or any of the said amendments of the defendant, settled and allowed as aforesaid.

"Thereafter, and on the 25th day of October, 1926, the plaintiff, by his attorney, presented to affiant, as the judge of said court, an instrument in writing which affiant believed to be an engrossed bill of exceptions allowed as aforesaid, and so believing affiant as such judge, allowed, settled, and approved the same. Said instrument in writing so presented to and signed by affiant, as such judge, contains only the plaintiff's proposed bill of exceptions and does not contain the proposed and allowed amendments of the defendant, as affiant is informed and believes, and said instrument was and is not an engrossed bill of exceptions. Affiant, as such judge, would not have signed said instrument, if affiant knew the same was not an engrossed bill of exceptions, and if affiant knew that there was not contained therein the proposed and allowed amendments of the defendant."

It may be remarked in passing that the appellant filed his opposition to said motion for diminution accompanying the same with an affidavit of counsel which, in several material particulars, contradicts the affidavit of the trial judge. Upon the hearing of said motion this court made its order, now sought to be vacated, authorizing the withdrawal of the transcript to permit of its amendment so as to include in the bill of exceptions contained therein the proposed and allowed amendments offered by respondent. The appellant thereupon noticed the motion now under consideration for the October calendar of this court and seeks thereby to have this court vacate and annul the order just above referred to.

In the main, the appellant contends, in support of his motion to vacate, that both this court and the trial court are without jurisdiction and power to amend or cause to be amended what purports to be the bill of exceptions settled herein. The appellant in advancing this argument relies upon the provisions of section 473 of the Code of Civil Procedure and the case of *Merced Bank v. Price*, 152 Cal. 697, 700, 93 P. 866.

Before launching into a discussion of the issues so presented we pause to say that, in our opinion, the case of *Merced Bank v. Price*, supra, is without persuasive force and not in point for the reason that the trial court in that case had attempted to amend a bill of exceptions which had been prepared and settled prior to the taking of the appeal from an order denying a new trial. In the instant case the bill of exceptions was prepared and settled after appeal taken. That there is a clear line of demarcation between those cases in which the bill of exceptions is settled prior to the appeal and those in which settlement occurs subsequent to the prosecution of the appeal is now definitely settled. This distinction is considered in the case of *Baker v. Borello*, 131 Cal. 615, 617, 63 P. 914, where it is stated that:

"We have no doubt that a bill of exceptions, or statement which has been settled after appeal taken, may be corrected by a proper proceeding under section 473 of the Code of Civil Procedure, commenced, as this was, within six months after the settlement, for in such cases the superior court is empowered to settle the bill or statement—i. e., to complete the record—after and for the purposes of the appeal. * * * But a bill of exceptions, prepared and settled beforehand to be used in support of a motion for a new trial, after the denial of the motion and an appeal therefrom, presents a different question. We are of the opinion that in such case the record cannot be amended, and this for reasons which, though technical, are nevertheless conclusive. The appeal deprives the superior court of jurisdiction to set aside its order denying the new trial, and while that order is in force the record upon which it is based cannot be changed, and this court must review the order upon the same record upon which it was made. * * *"

The opinion in *Merced Bank v. Price*, supra, is based upon this very distinction and cites *Baker v. Borello*, supra, in support thereof. It would appear, therefore, that the second ground of decision in *Merced Bank v. Price*, supra, from which appellant seeks to derive comfort, while correctly stating the law, is purely dicta. Moreover, the case of *Merced Bank v. Price*, supra, would appear to be distinguishable from the instant case for the reason that this court was there called upon to determine whether the trial court had jurisdiction and power to amend the bill of exceptions as therein attempted. The issue here for solution is whether this court, or any appellate tribunal, may, under

the circumstances here presented, properly direct the lower court to amend a bill of exceptions or transcript even though the six months' period provided for in section 473, Code of Civil Procedure, has elapsed.

[1, 2] We have concluded that our order of July 11, 1927, authorizing the withdrawal and amendment of the transcript herein in the particulars above referred to, was a proper exercise of our appellate jurisdiction. In so concluding we are not unmindful of the numerous authorities, many of which are relied upon by the appellant and moving party, which declare, and correctly so, that a *trial court* is without power to and may not amend a record to be used upon appeal more than six months after the same has been certified as a correct transcript of the proceedings had and taken in such court. *Fountain Water Co. v. Superior Court*, 139 Cal. 648, 73 P. 590; *Baker v. Borello*, supra; *Sprigg v. Barber*, 118 Cal. 591, 50 P. 682. It is also well settled that a record authenticated by the trial court cannot be changed by an appellate court. *Mendocino County v. Peters*, 2 Cal. App. 24, 27, 82 P. 1122, and authorities there cited.

[3] Our research has failed to disclose, however, any authoritative expression which would preclude this or any appellate court having jurisdiction over a record regularly on file, from authorizing the temporary withdrawal thereof at any time during the pendency of the appeal, so that the same might be corrected and amended in conformity to the direction of the appellate court. In such a case we are not confronted with a want of power or jurisdiction in the trial court, assuming the six months' period to have expired, but rather with the inherent power of an appellate court to cause the amendment of a record before it so that the same might speak the truth. The trial court in such a case receives its power to act in the premises from the order of the appellate court. That an appellate court may have a record before it amended so as to speak the truth has long since been the subject of judicial decision. *Valentine v. Stewart*, 15 Cal. 387, 396. In that case this court adopted with approval the following declaration from *Johnson v. Whitlock*, 13 N. Y. 344, 349:

"If this statement has been imperfectly made, we have no doubt of the power of the Supreme Court to direct a resettlement, and to reform the proceedings in any manner not inconsistent with the actual finding of the judge or referee upon the facts. The facts, as found, cannot be changed and found differently, nor can leave be had to insert exceptions never in fact taken, but within these limitations it will always be proper to move in the Supreme Court, not to turn the case into a bill of exceptions—a proceeding which has no existence under the Code—nor into a special verdict, but so to amend the case itself as to fitly present the questions which are to be examined in this court."

[4, 5] We have failed in our examination of the authorities to uncover any statutory period of limitation upon this inherent appellate power. The absence of such limitation tends strongly to indicate that an appellate court may, in its discretion, permit of amendments to a record before it and should in this respect be liberal so as to secure a hearing on the merits. *Perri v. Beaumont*, 88 Cal. 108, 109, 25 P. 1109. Rule 14 of this court provides for the correction of a record upon a suggestion of diminution thereof. This rule is singularly free of any limitation of time within which a record may be corrected. It is true, of course, that rules of court are subservient to statutory mandate. *Brooks v. Union Trust Co.*, 146 Cal. 134, 138, 79 P. 843; *People v. Walker*, 76 Cal. App. 192, 244 P. 94. But, as indicated above, we have not succeeded in finding any statutory period of limitation upon this power of an appellate court to cause the correction of a record. Section 953 of the Code of Civil Procedure provides in part:

"If it appear that there is any paper or record in the custody of the clerk of the trial court which was before the trial court but which is not included in the record on appeal, and an examination of such paper or record will assist in a determination of the appeal on its merits, the court in which the appeal is pending may, on motion of either party, or on its own motion, require the production of a certified copy of such paper or record, and the same shall thereupon be deemed a part of the record on appeal."

This section likewise is without limitation and again is indicative of the conclusion we have announced herein, viz. that an appellate court may, at any time pending determination of the appeal, have a record amended so as to speak the truth, thus insuring disposition of causes upon their substantial merits.

[6, 7] It has repeatedly been held by this court that technical objections are not favored and that a record may and will, when necessary, be corrected unless a right of the adverse party is injuriously affected thereby. *Cal. Wine Assoc. v. Commercial, etc., Co.*, 159 Cal. 49, 53, 112 P. 858; *Perri v. Beaumont*, supra. Moreover, this court looks with favor upon an amendment the effect of which "is simply to enable this court to review the decision of the lower court, in view of all the facts which that court had before it when it made such decision." *In re Lamb*, 95 Cal. 397, 408, 30 P. 568, 571.

[8] As indicated at the commencement of this opinion, the trial judge authenticated what appears in the transcript on file herein to be a bill of exceptions under the erroneous impression and belief that it was an engrossed bill of exceptions presented by the appellant and containing the previously allowed amendments suggested by the respondent. The affidavits on file disclose that the bill, as certified by the judge, is not the bill

of exceptions theretofore settled by him. To hold under these circumstances that this court may not direct the correction of such misprision would result, in many instances, in the disposition of causes upon technical grounds and without regard to their substantial merits. In the absence of statutory mandate or authoritative expression to the contrary, we feel constrained to conclude, as already stated, that an appellate court in the exercise of its jurisdiction may direct and cause the correction of a record before it at any time during the pendency of the appeal; and, this without reference to the provisions of section 473 of the Code of Civil Procedure.

The appellant's motion to vacate the order heretofore made herein is denied.

AGNIFILI v. LAGNA et al. (Civ. 4598.)★

District Court of Appeal, Second District, Division 2, California. Oct. 14, 1927.

Hearing Granted by Supreme Court Dec. 12, 1927.

Judgment ¶717—Judgment in action for breach of contract to erect buildings held res judicata of action to foreclose mechanic's lien.

Judgment for defendant in action for breach of contract to erect bungalows and for depreciation of materials left on the ground by plaintiff held res judicata of plaintiff's suit to foreclose mechanics' liens, where every issue involved in the mechanic's lien suit was covered by findings for defendant in action for breach of contract.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by C. F. Agnifili against Antonio Lagna and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Culver & Nourse, of Los Angeles, for appellant.

Ernest M. Torchia and Charles Matthews both of Los Angeles, for respondents.

PEAIRS, Justice pro tem. This case, commenced for the purpose of foreclosing a mechanic's lien, arose over a contract entered into between one J. J. Rue and one A. Lagna, which contract was duly assigned with the consent of defendants herein to C. F. Agnifili, plaintiff herein, by which it was agreed that four bungalows should be erected on lots 4, 5, 6, and 7, block 5, Floristan Heights Addition, Eagle Rock City, Cal., and it is alleged by the plaintiff that he built one of the bungalows on lot 5 and commenced the erection of another on lot 6. The contract price was to be \$2,400 each, according to certain plans and specifications, on which payments were to be made as follows: \$300 when each bungalow was ready for plastering, and \$300 when outside was finished, and \$1,800 when

completed, credit of \$140 to be given for painting, tinting, and paperhanging by the owner on each of the bungalows. Plaintiff alleges that after completing the first bungalow and beginning the second defendants failed and refused to make payments due to the plaintiff under the terms of said contract, and that plaintiff was compelled to discontinue said work by reason thereof, and that plaintiff elected to treat the failure and refusal of defendants to make such payments as a breach of the contract on the part of the defendants; and plaintiff further alleges that about the 15th day of February, 1922, the defendants without just cause forbade plaintiff to proceed with the work under the terms of said contract, and in an action other than this, to which we shall refer hereafter as action No. 103798, on or about March 14, 1922, plaintiff sued defendants for damages to the amount of what would have been the profit of the plaintiff if he had been permitted to complete the contract and build the other two houses on lots 4 and 7, alleging that the amount of the profit on said two houses would have been \$650, and further sued for depreciation in the value of materials placed upon the ground for the second house to the extent of \$49.13.

Defendants, answering, denied that they forbade the plaintiff for any cause to finish the contract, and defendants further alleged that they had not sufficient information to determine what profit would have been made upon said houses, had they been built, nor to inform them as to whether the plaintiff had ordered or delivered upon the ground lumber or material for the purpose of constructing another house or houses on said tract, and denied further that the lumber or material, if so delivered, had depreciated in value in the sum of \$200 or any other sum or sums at all, and further denied that the plaintiff had always been ready, able, or willing to build said houses on said lots, and denied that defendant had without just cause or any cause refused to allow plaintiff to do so, and, after an amended complaint by plaintiff in which, among other things in paragraph 3 thereof, plaintiff alleged that on or about the 15th day of February, 1922, the defendants failed and refused to make payments due to plaintiff under the terms of said contract, that plaintiff by reason thereof was compelled to discontinue said work, a stipulation was entered into between the attorneys for plaintiff and defendants on the 19th day of September, 1922, that the amended complaint should be filed and deemed denied by the defendants.

This case (No. 103798) then came on for trial in October, 1922, in the superior court of Los Angeles county, in department 22 thereof. After the trial the court found that the contract as set out had been entered

into and duly assigned; that it was not true that on or about the 15th day of February, 1922, or any other time, that the defendants forbade plaintiff to proceed with the work under the contract, but that the plaintiff without sufficient notice to defendants abandoned said work and failed to comply with the terms thereof; that it was true that two of the houses called for by said contract had not been constructed; that it was not true that the plaintiff had always been ready, able, and willing to construct the two additional houses; that it was not true that the plaintiff had ordered or delivered on the ground lumber and material for the erection of houses on lots 6 and 7; that it was not true that said lumber and material had depreciated to the extent of \$49.13 or any other sum; that it was not true that the defendants had failed or refused to make payments due to plaintiff under the terms of said contract; that it was not true that defendants did on or about the 15th day of February, 1922, breach said contract.

As conclusions of law the court found that the plaintiff was not entitled to recover damages in the sum of \$699.13 or any other sum or sums whatsoever either by reason of the nonconstruction of the two houses or depreciation in value of materials; that plaintiff was not entitled to recover any money or moneys from the defendants; and that the defendants should have judgment against the plaintiff for their costs. Judgment was entered accordingly.

On or about the 20th day of March, 1922, the plaintiff filed a mechanic's lien against the defendants for the value of labor and materials used in the construction of house No. 1 on lot 5, less deductions, to the amount of \$2,260, and also for the value of labor and material on the house on lot 6, to the extent of \$1,493, or a total claim of \$3,753, less payment of \$801, leaving an unpaid balance of \$2,952; and on the 13th day of June, 1922, the plaintiff filed suit against the said defendants to foreclose said liens, in action No. 107330, which is the present one.

In this case the defendants answered that they had paid all of the sums due for the construction of the first house on lot 5 with the exception of \$10, and that they had paid \$300 toward the construction of house No. 2 on lot 6, and further answering alleged that the plaintiff had, without cause or excuse, failed to erect the house on lot 6, and upon information and belief denied that there had been any labor or material furnished for the construction of the house on lot 6. This action came on for trial, and the defendants were allowed to file, as a further defense in answer to said suit, a plea of former adjudication of the same matter, and the court, after considering the presentation to it of the pleadings, findings, and judgment in the case No. 103798, found that the contract

alleged to have been broken by defendants under action No. 103798 was the same contract which is set out in action No. 107330, and between the same parties as in action No. 103798. That the court in action No. 103798 had found that the plaintiff was not entitled to recover any money or moneys from defendants by reason of breach of said contract, and that no appeal had been taken by the plaintiff in said action, therefore the judgment in said action has become final; that as a conclusion of law the action before the court in this case is *res adjudicata*. In the case of *People v. Bailey*, 30 Cal. App. 581, 589, 158 P. 1036, 1039, it is said:

"In *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214, it is said: 'It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. * * *'"

And in the case of *Green v. Thornton*, 130 Cal. 482, 484, 62 P. 750, 751, the court says:

"In *Southern Pac. R. Co. v. United States*, 168 U. S. 1, 18 S. Ct. 18, 42 L. Ed. 355, it is said: 'The general principle announced in numerous cases in this court is that the right, question, or fact, definitely put in issue, and directly determined by the court of competent jurisdiction as a ground of recovery, cannot be contested in a subsequent dispute between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first remains unmodified. * * *'"

The contract sued on in this case is what is known as a severable contract (see *Pacific Wharf & Storage Co. v. Standard American Dredging Co.*, 184 Cal. 21, 25, 192 P. 847), and the plaintiff under certain conditions might have sued for damages or for loss of profits and sued separately for the actual cost of labor and material. The election, however, by plaintiff to declare the alleged failure to make payments a breach of the contract did not warrant a suit for profits, but might warrant a suit for labor and material such as was instituted under the mechanic's lien in case No. 107330. *Cox v. McLaughlin*, 52 Cal. 596; *Id.*, 54 Cal. 605, 610.

The plaintiff's manner of setting out his causes of action in the first suit (No. 103798) was such that, whether all of the matter set out in the second suit was in the same form or not, the allegations were so related that apparently all of the evidence necessary for the second action was presented in the first and ruled upon by the court and made a part of the record without objection from the plaintiff, and therefore the findings of the trial court in case No. 103798 would be necessary and in accordance with the pleadings and evidence therein.

Taking into consideration the findings of the court in case No. 103798, referred to by the court in this action, it would seem that every issue involved was covered by the findings in that case. It was alleged in plaintiff's complaint that defendants failed to make payment in accordance with the contract, and the court in case No. 103798 found that it was not true that the defendants failed or refused to make the payments due, and, in regard to the allegation of breach of contract, the court found that it was not true that the defendants did, on or about the 15th day of February, 1922, breach said contract. It further found that the defendants did not forbid or refuse to allow the plaintiff to erect said houses; it also found that the plaintiff did not deliver lumber or other materials for the purpose of erecting said houses, and it found that the houses, if constructed, would have cost more than the contract price called for. The court further found that plaintiff, without sufficient notice to defendants, abandoned the work and failed to comply with the terms of said contract.

We therefore feel that everything that could have been decided in case No. 107330 had already been decided in action No. 103798. Therefore the action before the court in case No. 107330 is *res adjudicata*. Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

86 Cal. App. 13

YOUNG v. CITY OF LOS ANGELES et al.*
CITY OF LOS ANGELES v. MORRIS et al.
 (Civ. 5525, 5526.)

District Court of Appeal, Second District, Division 2, California. Oct. 11, 1927.

Hearing Denied by Supreme Court Dec. 8, 1927.

1. Courts $\S$ 37(1, 3)—Lack of jurisdiction of particular case may be waived by failure to object, and submission to jurisdiction may raise estoppel to deny.

Though absolute want of jurisdiction or subject-matter or cause of action cannot be waived, nor can estoppel be invoked to confer jurisdiction on tribunal having no jurisdiction of subject-matter, where court has general jurisdiction of subject-matter, lack of jurisdiction of particular case may be waived by failure to object, or submission to jurisdiction may raise an estoppel to deny it.

2. Evidence $\S$ 10(3)—Court will judicially notice that corner of Fifth street and Grand avenue in city of Los Angeles is in business district and is congested with traffic at certain times during each day.

Court of Appeals will take judicial notice that a certain street intersection in the city of Los Angeles, known as the corner of Fifth street and Grand avenue, is in the business district; that Fifth street, east of Grand avenue, is a business thoroughfare; and that at certain

times during each day it is congested with pedestrians and vehicular traffic of all kinds.

3. Evidence $\S$ 10(3)—Court will judicially notice that Fifth street in city of Los Angeles proceeds westward from principal part of business district.

Court of Appeals will take judicial notice that Fifth street in city of Los Angeles proceeds westward from principal part of business district of city to its intersection with Grand avenue, and that intersection is but three or four blocks distant from such part of business district of city.

4. Courts $\S$ 37(2)—Method by which jurisdiction of particular case is obtained may be waived, unless seasonable objection is made.

Jurisdiction of subject-matter cannot be waived, but method by which jurisdiction of particular case within general class of cases is obtained may be waived, unless seasonable objection is made.

5. Courts $\S$ 37(2)—Landowner, after several years, held to have waived objection to jurisdiction of subject-matter in condemnation proceedings (Street Opening Act 1903, as variously amended [Deering's Gen. Laws 1923, Act. No. 8198]).

Where city of Los Angeles, pursuant to Street Opening Act (St. 1903, p. 376), as variously amended (Deering's Gen. Laws 1923, Act No. 8198), condemned property for extension of street and interlocutory decree of condemnation was entered, which was affirmed by appellate court, *held*, that landowner, after several years, acceptance of condemnation award and expenditure of large sums by city, and in view of congested traffic conditions which street extension sought to relieve, has waived and is estopped to deny court's jurisdiction of condemnation proceedings.

Appeals from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by the City of Los Angeles against Dan Morris and others, to condemn real property for street purposes. An interlocutory decree of condemnation was entered, and Annie F. Young moved to set aside and vacate such decree and the final decree and for an order dismissing the action. This motion was denied. After the decree in the condemnation action, Annie F. Young brought suit against the City of Los Angeles and others to quiet title. From judgment for defendant in the last-mentioned action, and from the order denying her motion in the condemnation action, Annie F. Young appeals. Judgment and order both affirmed.

Hyams & Himrod and Meserve, Mumper, Hughes & Robertson, all of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellants.

Jess E. Stephens, City Atty., and Herman Mohr and Donald M. Keith, Dep. City Attys., all of Los Angeles (John A. Rush, of Los Angeles, of counsel), for respondents.

WORKS, P. J. The second cause above, entitled *City of Los Angeles v. Morris*, No. 5526, in the files of this court, is an action for the condemnation of real property for street purposes. It was commenced pursuant to the provisions of an act of the Legislature commonly known as the act of 1903 (Stats. 1903, p. 376, and, as variously amended, Act 8198, Deering's Gen. Laws 1923), and such proceedings were had that an interlocutory decree of condemnation was entered in the action. From this decree the defendant Annie F. Young, appellant here, in due time prosecuted an appeal and the interlocutory decree was affirmed. *City of Los Angeles v. Morris*, 74 Cal. App. 473, 241 P. 409. Six months after the filing of the affirming opinion the Supreme Court rendered a decision, in which it is now contended that questions of law were settled which strike at the very foundation of the proceedings involved in *City of Los Angeles v. Morris*. This decision of the Supreme Court was pronounced in *O. T. Johnson Corporation v. City of Los Angeles*, 198 Cal. 308, 245 P. 164. Thereafter defendant Young made her motion in the trial court in *City of Los Angeles v. Morris*, pursuant to notice filed about May 18, 1926, for an order setting aside and vacating the interlocutory decree of condemnation, and also the final decree, which theretofore had been entered therein, and for an order dismissing the action. The motion was denied and the defendant Young now prosecutes her appeal from the order denying it. Mrs. Young also, after the decision in *O. T. Johnson Corporation v. City of Los Angeles*, and on May 4, 1926, commenced the action which is above, entitled *Young v. City of Los Angeles*, No. 5525, in the files of this court. The purpose of the action was to quiet her title to the property attempted to be taken under the decree in *City of Los Angeles v. Morris*. A demurrer was interposed to the complaint as amended in this new action, it was sustained without leave to amend, and judgment was accordingly rendered against the plaintiff. From this judgment Mrs. Young also appeals.

The two appeals are argued together in a single set of briefs, and it is conceded that the questions of law presented by them are identical. We may, then, look to the complaint as amended in the action to quiet title for the facts upon which a determination of the legal questions is to depend, for the pleading alleges specifically matters not to be found in an ordinary complaint in such an action. The allegations of the complaint as amended are, in part and in effect, as follows, taking them in the order in which they are presented in the pleading:

In *City of Los Angeles v. Morris*, which for convenience will hereafter be referred to as the first action, the "city of Los Angeles sought to condemn and have condemned, and now claims that it did condemn and have

condemned, for street purposes, the property" of appellant and of the other defendants in the action. The city now claims the right to use for street purposes the property which it so claims to have condemned, and makes such claim of right to use because of such condemnation. The complaint in the first action was filed June 29, 1921, and the answer of appellant therein was filed September 29, 1921. When the first action "was brought and tried, the Pacific Mutual Life Insurance Company of California held and was the owner of a mortgage indebtedness on" the property of appellant which was sought to be condemned in the suit "and because thereof was made a defendant in said action." This mortgage "indebtedness since the entry of the final judgment in said action was voluntarily paid by some person other than" appellant "and without her consent, authority, request, or confirmation." The first action was tried by jury as to appellant and the insurance company upon their demand in that behalf, and a verdict was rendered April 26, 1923. On April 27, 1923, "an interlocutory judgment or decree on said verdict of said jury was entered in said action as to the property of" appellant "and as to said mortgage in favor of" the insurance company. Appellant took her appeal from the interlocutory decree on July 11, 1923, and thereafter the decree was affirmed by the District Court of Appeal. At "the end of 60 days thereafter the remittitur in said action * * * was sent down and thereafter filed." After that event the trial court "purported and attempted to make, give, and enter a final decree or judgment in said action, wherein and whereby said court recited that it was adjudged and decreed that" appellant's "property was condemned to the city of Los Angeles" for the street purposes alleged in the complaint in the first action. Under the various ordinances leading up to the first action "and by virtue of said interlocutory judgment or decree and said final judgment or decree * * * the defendants now assert and claim that" appellant's property is part of "a public street of the city of Los Angeles" and "now claim and assert that said city is the owner, for street purposes, of the right to use" appellant's property "and for such purposes to pave and otherwise improve, and to maintain and use the same." After the affirmance of the interlocutory decree in the first action, after the sending down of the remittitur pursuant thereto, and after the entry of the final decree, "and believing and having good cause to believe that said judgment was valid and binding" and that the trial court had jurisdiction to render it, appellant "received from the county treasurer of the county of Los Angeles the sum of" \$38,205.44, "which said sum had been paid to said treasurer by the county clerk of said county, to whom the same had been paid with other money in satisfaction of

said judgment * * * and who therefor satisfied said judgment." At that time "there was an assessment against the remainder of" appellant's "property for the proposed improvement then amounting to the sum of" \$8,897.56 "and which amount plaintiff, on the day she received said money, * * * paid to the authorities of the city of Los Angeles in satisfaction and discharge of such assessment, leaving the sum of" \$29,307.88 "as the net amount which" appellant "thus received on said judgment and because thereof. * * * Whatever other moneys if any may have been paid on account of or in satisfaction of said judgment to any other person or corporation were paid without" appellant's "authority, knowledge, request, or confirmation."

It is of course obvious from this statement of facts that appellant, in her present situation, is remediless, unless the legal questions settled and declared in *O. T. Johnson Corporation v. City of Los Angeles*, supra, have an application under the facts of the first action. Notwithstanding this patent truth, we find it unnecessary to decide the question whether those points do apply here. It will be understood, therefore, that in nothing we say in this opinion do we intimate that the points determined in *O. T. Johnson Corporation v. City of Los Angeles* either would or would not have had an application to the first action if they had been presented upon the appeal from the interlocutory decree therein.

[1] Respondents contend that appellant has waived the points decided in the *Johnson Corporation Case*, and is estopped to urge them—is estopped, therefore, to contend for a dismissal of the first action or to maintain her action to quiet title. It is said in a standard encyclopædic publication:

"An absolute want of jurisdiction of the subject-matter or cause of action cannot be waived, nor can the doctrine of equitable estoppel be invoked to confer jurisdiction on a tribunal which has not jurisdiction of the subject-matter. But where the court has general jurisdiction of the subject-matter a lack of jurisdiction of the particular case may be waived by failure to take timely and specific objections, or an invocation of or submission to the jurisdiction may raise an estoppel to deny such jurisdiction." 15 C. J. 844.

It is pertinent now to remark that the point decided in *O. T. Johnson Corporation v. City of Los Angeles*, and upon which appellant relies, involved a question of jurisdiction of the subject-matter. The point did not, however, relate to the general jurisdiction of the trial court over suits for the condemnation of real property for street purposes, but only to jurisdiction over a particular case. That the general jurisdiction exists is true as a matter of course.

Before we cite other authority bearing upon the interesting and important question which is here presented, let us assemble brief-

ly the facts upon which the claims of waiver and of estoppel are based. Because of the decision in the *Johnson Corporation Case* appellant was spurred to a renewed activity in May, 1926, for it was then that the steps were initiated which resulted in the order and judgment from which the present appeals were taken. As the element of time is material to be considered in determining whether the claimed estoppel exists, it is of interest to note what period has elapsed since appellant first had the opportunity to present the point for which she now contends and what were the occurrences of the interim. We state a chronology of the events which have transpired in the first action. The cause was commenced a month less than 5 years before appellant took the first steps toward a realization of the hope inspired in her by the decision of the Supreme Court in the *Johnson Corporation Case*. The answer of appellant was filed 4 years and 8 months before she presented the new point. The interlocutory decree had been on file a little more than 4 years. The appeal from that decree was taken two months less than 4 years before the new steps were taken, and the decision affirming it was filed 8 months before that time. The remittitur went down, of course, 60 days after the decision. Thereafter, and before appellant made her motion in the first action and commenced her action to quiet title, but after the filing of the final decree in the first action, appellant accepted the money allowed her under the interlocutory decree and paid the assessment due on the property remaining to her. There is in her complaint to quiet title enough to show, also, that the mortgage on her property, held by the Pacific Mutual Life Insurance Company, was paid as a result of the condemnation decree and out of moneys provided by the decree for that purpose. During all these times appellant never suggested the point which she now contends is determinative of the first action.

[2, 3] We take judicial notice of the fact that a certain street intersection in the city of Los Angeles, known as the "corner" of Fifth street and Grand avenue, is in a business district (*Varcoe v. Lee*, 180 Cal. 338, 181 P. 223); that Fifth street, east of Grand avenue, is a business thoroughfare; and that at certain times during each day it is "congested with pedestrians and vehicular travel of all kinds" (*Reaugh v. Cudahy Packing Co.*, 189 Cal. 335, 208 P. 125). We think, upon the reasoning and authority of the two cases just cited, we also take judicial notice that Fifth street proceeds westward from a principal part of the business district of Los Angeles to its intersection with Grand avenue, and that the intersection is but three or four blocks distant from such part of the business district of the city. A copy of a map which is attached to the complaint in the first action, as well as the allegations of the

pleading itself, shows us that the project of which the first action was an outcome contemplates the extension of Fifth street in a westerly direction beyond Grand avenue. A copy of the same map is also made part of the complaint in the action to quiet title. This plat shows us that the easterly line of the lands of appellant which are purported to have been taken by the decree in the first action as a part of the proposed extension of Fifth street is but 829.04 feet from the westerly line of Grand avenue. From these facts we cannot but perceive that the proposed extension of Fifth street through appellant's lands, which are a full block in extent, is a most important improvement. If the question decided in *O. T. Johnson Corporation v. City of Los Angeles* were held to be applicable to the first action, and appellant were to be allowed to urge it therein and in the suit to quiet title, two possibilities would arise. This is the first: If the defendants in the first action other than appellant are satisfied with the results flowing from the decree therein and never present the point for which appellant now contends, then the extension of Fifth street is finally accomplished as far as Flower street, which the maps already mentioned show is an existing cross street upon which the property of appellant abuts at its easterly line. In the event above imagined the traffic which moves westward along Fifth street from the busy center of the city must of necessity turn either north or south at Flower street. This is the second possibility: If the point made by appellant is good as to her in the first action, it is also good as to the other defendants therein. If the latter shall elect to avail themselves of the question by steps similar to those which appellant has attempted to take, or by others, if others may be imagined, then the traffic conditions at the intersection of Fifth street and Grand avenue must remain as they now are and large portions of the heavy traffic westward along Fifth street must turn at Grand avenue, either to the north or to the south.

The bringing of either of these possibilities into being as an actual condition of affairs, as we are bound judicially to know, is fraught with danger to the future welfare of the city of Los Angeles. The proposed extension of Fifth street, under the scheme which brought the first action into existence, as we are informed by the pleadings and by the maps in the two records before us, was to run from a line 575 feet westerly from Grand avenue, to which line there was before the first action was commenced a cul-de-sac extension of Fifth street, to a point in another west-going street some four or five blocks to the westward, which point is outside the business district of the city. If the west-going traffic on Fifth street, or such portion of it as it is desirable to move to the westerly parts of the city, instead of pro-

ceeding the length of the proposed extension of Fifth street, is forced to turn either to the north or south, particularly toward the south, either at Grand avenue or Flower street, injurious consequences to the handling of the traffic of the city will result. A diversion of west-bound traffic along Fifth street for but one block south, either along Grand avenue or along Flower street, will bring it to Sixth street, an important thoroughfare which at those points and for some distance westward is in the business district of the city. Of this condition we take judicial notice under the cases already cited. Such a diversion of traffic not only will impede the progress of that traffic itself, but it, in turn, will impede the traffic into which it is diverted, either in Sixth street or to the southward of it, in which direction the business district extends. In connection with the length of time during which appellant has failed to present the point for which she now contends, these circumstances, we think, aid materially in determining whether she is estopped to urge the question. All the matters mentioned in this paragraph were within the knowledge of appellant, either actual or presumed.

A determination of the point for which appellant now contends, and in her favor, will compel the city of Los Angeles, if it shall adhere to its determination to extend Fifth street, a thing naturally to be expected under the circumstances to which we have adverted, to institute new proceedings for the effectuation of the plan, with the long delay necessarily incident to such a course.

We are bound to assume that the city has expended large sums of money in the prosecution of its plan for the extension of Fifth street, up to the point which has now been reached in its consummation. The consequence of an upholding of the point for which appellant now contends would be that the expenditure of these funds would result in a waste of the entire amount which has been expended in pursuit of the plan, whatever the amount may be, and whether the city should determine to put the plan into final effect or to desert it.

At the point at which we have now arrived in the preparation of this opinion it is not difficult to perceive the dire consequences to result from appellant's failure to present, in due time, the point for which she now so vigorously contends, if it were determined that it were applicable under the facts of the first case and if she were permitted to avail herself of it. The equities of the situation are plainly against appellant. The city has surely been misled to its grievous injury by the long-continued silence of appellant, and by her long submission to the jurisdiction of the courts, if she shall now be permitted to overturn the extension proceedings. Under such circumstances we are naturally diligent in an endeavor to ascertain such a state of the

law as will thwart her attempt at this late day to press the point. The public welfare demands that there should be an end to the litigation.

[4] One court has stated a general principle which may serve as an introduction to authorities dealing more specifically with the question here under examination, and the statement is quoted for that limited purpose, without a recital of the facts upon which the court based it:

"The general rule as applied to courts is that jurisdiction of the subject-matter—which means jurisdiction of the class of cases to which the particular case belongs and not jurisdiction of a case within such a class—cannot be waived. The method by which jurisdiction of a particular case within the general class of cases is obtained, and any defects or irregularities in respect thereto, may be waived, and are waived unless seasonable objection is made in accordance with the established practice." *Taylor Coal Co. v. Industrial Commission*, 301 Ill. 381, 134 N. E. 169.

See, also, *People v. Penn*, 302 Ill. 488, 135 N. E. 92.

Let us now proceed to a consideration of cases that seem, on the facts, to present situations which nearly approximate the condition evident in the present litigation, if, indeed, some of them do not exactly fit it. In a case in which a similar question to that here presented was considered the action, which was local in character, was commenced in a county other than that in which the property involved was situated. After decree it was attempted by certain of the parties to question the jurisdiction of the tribunal, but the court decided that:

"Having submitted to the adjudication without questioning the jurisdiction and having received the benefits of the decree, they cannot now claim that the Huerfano district court had no jurisdiction." *Field v. Kincaid*, 67 Colo. 20, 184 P. 832.

A somewhat similar condition of affairs is presented by several condemnation cases. In one of these the city of New York had condemned certain property for street purposes. Many years afterward an action in ejectment was commenced for the purpose of recovering the property. In ruling that the action could not be maintained, the court said on appeal:

"It is insisted by the counsel for the appellant that the laws under which this improvement was made, so far as they authorize the taking of private property for private purposes, are unconstitutional and void. This is undoubtedly true, when the power is exercised in opposition to the consent of the owner; but, when that consent is given, it is a waiver of the objection and removes the difficulty. A party may renounce a constitutional provision made for his benefit, and, when the law which provides for a transfer of property does not require the consent to be in writing, it may be manifested by parol acts and declarations, so as to effect a transfer of the title to real estate, notwith-

standing the statute of frauds. *Bassen v. Brennan*, 6 Hill, 47 [40 Am. Dec. 387]; *Embury v. Conner*, 3 Const. [3 N. Y.] 511 [53 Am. Dec. 325]. The receipt of the money operates as an estoppel, and the damages paid have the same effect as a conveyance, and vest the title in the corporation. The consent of the plaintiff is apparent from his conduct in the matter. He evidently appeared and interposed objections to the first report made by the commissioners, and probably induced them to make the award of \$1,500. He had a right to object to the confirmation of the report, upon the ground that the land was taken without his consent, and, had he done so, the report would have been set aside. Matter of *John v. Cherry St.* [In re *John & Cherry Sts.*] 19 Wend. 659. This he failed to do, and consented to receive the money without objection. The corporation was not bound to pay the money, except upon a waiver of all objections as to the title conferred, and his receipt of the money was a waiver of the objection, and a sufficient consideration for his affirmation of the title in the corporation. He received the money after he had inclosed the land; never offered to return it; remained quiet without asserting his claim, long after the possession was surrendered to the grantee of the corporation, who paid a valuable consideration for a conveyance; allowed him to improve it, without making any claim, and left it for the plaintiff, a purchaser upon an execution sale under an old judgment, 16 years after the land was appropriated under the corporation ordinance to bring an action for its recovery." *Sherman v. McKeon*, 38 N. Y. 266.

The opinion in another condemnation case is largely valuable because of the authorities which the court cites:

"A payment into the clerk's office, or a tender of the damages assessed, would not conclude a defendant; for, unless he accepted the same, there would be no acquiescence on his part, and he might properly appeal, or contest the right of the plaintiff in any other manner known to the law. *Hartshorn v. Potroff*, 89 Ill. 509. But the voluntary acceptance by the defendant of the damages assessed and awarded to him by the judgment, with a knowledge of all the facts, precludes him from afterwards controverting the rights of the plaintiff as established by the judgment. Nor is it material in such case that the judgment may have been erroneous, or even void. In *Kile v. Town of Yellowhead*, 80 Ill. 208, which was a prosecution for obstructing a highway, it was contended that the proceedings for establishing the highway were void, for the reason that they did not conform to the statute. The court said: 'After the road was ordered to be opened, appellant was paid and accepted \$75, as the amount of damages awarded him by the commissioner of highways for the location and opening of the highway. This estops him from alleging that the proceedings were void.' To the same effect are *Town v. Town of Blackberry*, 29 Ill. 137; *Rees v. City of Chicago*, 38 Ill. 322; *Hartshorn v. Potroff*, supra; *Karber v. Nellis*, 22 Wis. 215; *Felch v. Gilman*, 22 Vt. 38; *Hawley v. Harrell* [Harrall], 19 Conn. 142. In *Sherman v. McKeon*, 38 N. Y. 266, it was held that where real estate had been condemned and taken by the city of New York for the purpose of widening a street, and the owner accepted the damages awarded,

the receipt of the money by him was an expression of consent to the taking of the property by the city, and estopped him, and those claiming title under him, from alleging an unconstitutional taking of the property for private purposes. The same doctrine was laid down in *Embury v. Conner*, 3 N. Y. 511 [53 Am. Dec. 325]. In *Whittlesey v. Hartford*, etc., R. Co., 23 Conn. 421, and *Hitchcock v. Danbury*, etc., R. Co., 25 Conn. 516, it was held that where real property had been appropriated by a railroad company, and had been taken possession of and used for railroad purposes, the owner could not, after having received the damages assessed in his favor, question the regularity of the proceedings which resulted in the condemnation and assessment. In *Burns v. Milwaukee*, etc., R. Co., 9 Wis. 450, it was held that where condemnation proceedings had been had for the appropriation of two full lots belonging to the plaintiff, although more land was taken than the statutory right of way, the owner could not, after accepting the damages awarded for the entire property, question the legality of the proceedings or of the appropriation. The court said: "We think the respondent stands in no better position than as though he had conveyed the lots to the company by deed and received his pay, and then sought to reclaim them by this proceeding." *Test v. Larsh*, 76 Ind. 452.

In a later case the view expressed in the language just quoted was adhered to by the same court in a part of its opinion which is obiter, but in which additional authority is cited upon the subject. The action was in trespass for breaking down certain fences. The defendants answered that the act charged was committed by a town marshal because of rights claimed to have accrued to the town under a decree of condemnation of the property involved for street purposes. The court said:

"It is a general rule that, where benefits are awarded to the owner of land in proceedings to condemn, an acceptance of the sum awarded will preclude the owner from prosecuting an appeal. *Elliott*, App. Proc. § 150; *People v. Mills*, 109 N. Y. 69, 15 N. E. 886; *Felch v. Gilman*, 22 Vt. 38; *Hawley v. Harrall*, 19 Conn. 142; *Elliott, Roads & S.* 277. Judge Elliott says, in his Appellate Procedure (section 151): 'It will be observed that in the cases in which it has been held that an estoppel exists the act necessarily affirmed the validity of the judgment. Thus, where a party accepts money or property awarded him by a judgment, he concedes the validity of the judgment, since it is by virtue of the judgment that he obtains the money or property.' These principles have been applied by this court in proceedings similar to those involved in the present case. *Test v. Larsh*, 76 Ind. 452; *Railroad Co. v. Johnson*, 84 Ind. 420; *Newman v. Kiser*, 128 Ind. 258, 26 N. E. 1006. In *Byer v. Town of New Castle*, 124 Ind. 86, 24 N. E. 578, the doctrine that one may estop himself to deny the validity of condemnation proceedings was recognized. That he may estop himself, by the receipt of the money awarded in condemnation proceedings, to deny the validity of the proceedings, was held in a full and satisfactory opinion and

citation of authority in *Test v. Larsh*, supra. We can conceive no good reason why he should, in good conscience, be permitted to receive all the benefits of the proceeding, and, while holding them, deny that the proceeding is effectual to create the burdens corresponding to such benefits." *Holland v. Spell*, 144 Ind. 561, 42 N. E. 1014.

On appeal from a decree of condemnation the opinion of the court of last resort of another state reads, in full:

"Yell county was entitled to the condemnation of a portion of the lands of Brooks, Neely & Co., for a certain public highway over the same. The land was condemned for that purpose, and the damages caused thereby were assessed, and a county warrant was issued to them therefor, and was received and collected by them. They cannot now contest the right of the county to the land so condemned. The warrant was issued in payment of such damages, and they were not entitled to hold it to satisfy damages that might thereafter be assessed in another proceeding to condemn other lands of theirs for the same highway. Having received and collected it, they accepted it for the purpose for which it was issued, and are estopped from claiming the land appropriated for the highway, and cannot, without the consent of the county, restore their rights by the return of the money received on the warrant." *Brooks, Neely & Co. v. Yell County*, 76 Ark. 67, 88 S. W. 590.

A case decided in another state is in a few of its features somewhat like the one now before us. A bridge company, by proceedings under the law of eminent domain, procured a decree for the condemnation of certain lands upon payment into court of the sum of \$10,000. The defendant in the action thereupon appealed to the Supreme Court of the state and the decree was affirmed. An appeal was then taken to the Supreme Court of the United States and an affirmance again resulted. A successor in interest to the original defendant then, according to an opinion from which further quotation will be made below, "took and received from the clerk of the circuit court of Dunklin county the said \$10,000 in satisfaction of said judgment for and as compensation for said strip. In the meantime * * * the plaintiff in said condemnation proceeding, after depositing said \$10,000 with the clerk of the circuit court, proceeded to and did take possession of said strip of land and built and constructed its piers, approaches, and tracks to connect its * * * bridge with the Scott county terminus of said bridge, and graded and laid its terminal tracks on said strip, and has ever since and is now occupying and asserting its right to the possession thereof under and by virtue of its said condemnation proceedings. * * * Thereafter the successor to the defendant in the condemnation suit commenced an action in ejectment for a recovery of a part of the lands taken by the

decree, and judgment was therein entered in favor of the bridge company. Upon an appeal from this latter judgment the Supreme Court of the state said that the appellant contended for nothing that had not been settled in the condemnation litigation and that the court might well rest its decision upon what was determined in the earlier case, but that "it may be as well to add that two pertinent reasons suggest themselves in addition to what was said" in the earlier decision, as grounds for a ruling in favor of the bridge company. The court then said, in part:

"When the plaintiff in this cause, after the affirmance of the judgment of this court in 194 Mo. 175, 92 S. W. 475, by the Supreme Court of the United States in 206 U. S. 267, 27 S. Ct. 615, 51 L. Ed. 1057, accepted and took down the damages awarded to it by the judgment of the circuit court of Dunklin county as damages and compensation for this very strip of land, it foreclosed forever its claim to the possession of this strip. * * * If the plaintiff * * * had accepted the \$10,000 damages adjudged to it by the circuit court before its appeal had been determined, it is obvious, under the decisions of this court, said appeal would have been dismissed by this court upon the evidence of satisfaction being shown to this court. *Robards v. Lamb*, 76 Mo. 192. In that case Judge Norton, speaking for this court, said: 'Can a party appeal from a judgment in his favor after having accepted the fruit of the judgment and satisfaction of it?' The answer was in the negative. * * * So in this case, when plaintiff sought and obtained an order from the circuit court directing the clerk not to pay the damages, the \$10,000, to [the original defendants in the condemnation case], but to pay it to them, and afterwards received said money from the clerk, it became estopped by that action, irrespective of any error in the condemnation proceedings, from further claiming the land in suit, or questioning the validity thereof, and that estoppel is just as effective against assailing said condemnation proceeding collaterally as if the estoppel had been invoked in the direct proceeding to appropriate the land in suit." *Cape Girardeau & T. B. T. R. Co. v. Southern Illinois & M. Bridge Co.*, 215 Mo. 286, 114 S. W. 1084.

We note, of course, that no question of jurisdiction was involved in this action.

[5] It must be conceded that most of the cases above cited turned upon the fact that the parties who sought to reopen or overturn judgments and decrees had accepted the benefits arising from them. There is slight language in some of the opinions indicating that a lapse of time, with attendant circumstances, will aid to a determination that those are estopped who would attempt to nullify the solemn judgments and decrees of courts after they have become, in the ordinary sense, final. If, however, there were to be found no authority even remotely touching the particular subject, we should not hesitate to declare such a rule, under a state of facts like

that which is apparent in the present litigation. We think the general principles underlying the cases we have cited—which are no more nor no less than the principles of the law of estoppel itself—find a ready application to the situation in which appellant now finds herself and in which at this late day she seeks to embroil the city of Los Angeles. As we have already remarked, she by her silence—if the point she now seeks to present were good and if she were permitted to urge it—has enticed the municipality into a veritable pitfall. Valuable time, under such a state of affairs, will have been wasted, the public funds will have been expended without beneficial result, and troublesome traffic conditions which there was an attempt to cure will remain as before. As a consequence grave injury will have been entailed upon the inhabitants of the city. Under such circumstances we are not sure—although naturally we do not assume to decide the point—whether an estoppel would not have operated against appellant even if, after final decree against her in the first action, an occult prescience had prompted her to refrain from taking the money provided for her by the decree in the hope that some fortuitous circumstance, like the decision in *O. T. Johnson Corporation v. City of Los Angeles*, supra, might supervene to open a rift in the clouds which surrounded her. Her mere submission to the jurisdiction for so long a time, under the circumstances shown by the record, drags a salient principle of the law of estoppel into the case.

When we come to consider the nature of the point which it is claimed that appellant is estopped to assert—one relating to jurisdiction of the subject-matter—much comfort is to be found in the cases which we have cited. It is decided in one of them that a party may be estopped to question the jurisdiction of a court in a particular county to pronounce judgment in an action which in strictness could have been maintained only in another county. It has been determined, also, that one may waive or be estopped to assert constitutional questions against the validity of a judgment. Decisions to the effect that a right of appeal may be waived are most important, for such a waiver necessarily precludes the presentation of any kind of question which might be urged upon the appeal. It is remarked in several of the quoted opinions that one may be estopped to question a judgment which is void.

Under the provisions of the Code of Civil Procedure regulating the exercise of the right of eminent domain, a defendant who would collect the amount awarded to him by a judgment must execute a satisfaction of judgment before he can obtain it. Code Civ. Proc. § 1254. Appellant contends, granting that a waiver or an estoppel would result where the fruits of a judgment were taken

under such circumstances, that such a consequence does not follow from the collection of the amount of a judgment awarded in an action maintained under the provisions of the act of 1903, already mentioned. Under this act (section 31) no satisfaction of judgment is required to be filed before the amount awarded by a decree may be realized. If there is any difference between the two situations, as bearing upon the questions of waiver and estoppel, which we do not decide, it is not so material as to affect those questions. Certainly the satisfaction of judgment under section 1254 is executed under the compulsion of the statute. If a defendant in an action controlled by the section is not desirous of collecting his money, he may refrain from executing the satisfaction. If a defendant in an action maintained under the act of 1903 is in a similar mood, he simply refrains from collecting. In each instance the affair is in his own hands.

We have already seen that appellant's mortgage to the defendant Pacific Mutual Life Insurance Company was paid out of the money provided by the decree in the first action. She is accordingly discharged of liability upon the debt which the mortgage was given to secure. In her complaint in the action to quiet title she makes tender of the money she herself collected under the decree, although the tender is claimed by respondent to be insufficient, but she does not tender the amount paid to the insurance company. This circumstance, to our minds, has a material bearing upon the questions of waiver and estoppel which are here presented. It may be that appellant was not required, as a mere matter of pleading, to make tender of the amount paid to the company, for it was not received by her but by the corporation as a separate defendant. That question will therefore be laid aside. But if appellant should now be allowed to urge, against the sanctity of the judgment in the first action, the main point for which she contends, and should wage the battle over it successfully, how is the city to be reimbursed for the amount paid to the insurance company? Could the city succeed in an action to force the reimbursement? How could appellant, if reimbursement were possible, be restored to her position as a debtor of the insurance company? Surely this matter of the collection made by the company, of the amount of the judgment rendered in its favor, leads to most interesting ramifications.

On the whole, we are abundantly satisfied that the waiver and estoppel claimed by respondent are available to halt appellant's attempt against the judgment in the first action.

The judgment in Civil No. 5525 is affirmed. The order in Civil No. 5526 is affirmed.

We concur: CRAIG, J.; THOMPSON, J.

FRELIGH v. McGREW et al. (Civ. 5860.)

District Court of Appeal, Second District, Division 2, California. Oct. 20, 1927.

Appeal and error $\Rightarrow$ 64—Appellate court had jurisdiction of appeal from superior court judgment reversing judgment of municipal court in action to recover \$1,000 (Const. art. 6, § 4).

Since, under Const. art. 6, § 4, the District Court of Appeal has appellate jurisdiction over superior court's judgments, where demand amounts to more than \$300, and not to exceed \$2,000, the superior court did not have final jurisdiction on appeal from judgment of municipal court in action to recover \$1,000, and hence motion to dismiss appeal was properly denied.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Stella M. Freligh against Susan B. McGrew and others. Judgment for plaintiff in the municipal court was reversed on appeal to the superior court, and plaintiff appeals. Motion to dismiss appeal denied.

Arsen Yeretzian, of Los Angeles, for appellant.

Stephen Monteleone, of Los Angeles, for respondents.

CRAIG, J. The plaintiff brought this suit in the municipal court of Los Angeles city. The action was one for money had and received, to recover \$1,000 and costs.

After trial, judgment was rendered as prayed, the defendants appealed to the superior court, where a trial was had, and judgment rendered reversing that given in the municipal court. From the judgment so rendered by the superior court an appeal was taken by the plaintiff to this court, which appeal the defendant now moves to dismiss on the ground that the judgment of the superior court was final. In support of the motion we are cited to *Raisch v. Sausalito Land & Ferry Co.*, 131 Cal. 215, 63 P. 346. The plaintiff and appellant in resisting the motion relies upon *Scott v. Larson* (Cal. App.) 255 P. 248. These decisions construe separate and differently worded provisions of the Constitution. In the former appellate jurisdiction of the Supreme Court was involved. That jurisdiction is declared in section 4 of article 6 of the Constitution, from which it is apparent, as stated in the court's opinion, that "the appellate jurisdiction of this court over the judgments of the superior court is limited to the cases in which that court is entitled to exercise original jurisdiction, and does not extend to a review of its action in which it exercises only an appellate jurisdiction."

However, *Scott v. Larson* called for the construction of another part of the same section, to wit, that providing for jurisdiction

of the District Courts of Appeal, and the particular language in that behalf is:

"The District Courts of Appeal shall have appellate jurisdiction on appeal from the superior courts in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars, and does not amount to two thousand dollars. * * *

It was held that this provision conferred jurisdiction upon the District Court of Appeal to pass upon certain appeals from judgments rendered by the superior court in cases appealed from the municipal courts. We think this conclusion is inevitable, for in the provision under consideration in that case and in the instant one no exception is made, but jurisdiction is conferred upon the District Courts of Appeal "in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars, and does not amount to two thousand dollars." Here the judgment exceeds \$300, and is less than \$2,000.

The motion is denied.

We concur: WORKS, P. J.; THOMPSON, J.

86 Cal. App. 133

PEOPLE v. WASHINGTON. (Cr. 1478.)

District Court of Appeal, Second District, Division 1, California. Oct. 15, 1927.

Criminal law §1158(1)—Where conflicts in evidence are disclosed by record, reviewing court will not disturb order granting defendant new trial.

Where the record discloses conflicts in the evidence, the reviewing court will not disturb the order of the trial court granting the defendant a new trial.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Tena B. Washington was convicted of maintaining a public nuisance. From an order granting a new trial the people appeal. Order affirmed.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and George H. Johnson, Dist. Atty., and C. O. Thompson, Chief Deputy Dist. Atty., both of San Bernardino, for the People.

Trent Penland and Frank T. Bates, both of San Bernardino, for respondent.

YORK, J. The people are appealing, not from the judgment in this case, but only from the order of the court granting the defendant a new trial.

A careful perusal of the evidence shows, even from the cold record, several reasons why the order granting a new trial was made. Conflicts in the evidence appear, even conflicts in statements of a witness on direct and cross examination, and the evidence casts doubt as to the sobriety of a witness at the time of the happening of the incidents to which he was testifying. Where conflicts are disclosed by the record, we will not disturb the order of the trial court, as the trial court had before it at the time of the hearing the witnesses themselves, and was in better position to pass upon the questions involved on the motion for a new trial than this court could possibly be.

As to the difference between the rule laid down for the trial court in acting on a motion for a new trial and the rule on appeals from such orders, the question is very clearly discussed in the opinion and the citations therein contained in the case of *People v. White et al.* (Cal. App.) 259 P. 76.

In *People v. Canfield*, 173 Cal. 309, 159 P. 1046, cited in the foregoing case, the court states:

"The judge who presided at the trial of the cause, who heard the testimony, who observed the jurors and had an opportunity also of testing the truth of the defendant's statements by noticing his demeanor, was in a peculiarly favorable position for determining justly the question whether or not the defendant had been accorded a fair trial. * * * We can hardly manufacture in fancy a hypothetical situation in which a reviewing court would be justified in questioning the discretion of a trial court *who should grant a new trial in a case involving a criminal charge.*" (Italics ours.)

The case at bar was tried before two different judges, Hon. Charles L. Allison and Hon. Benjamin F. Warmer, both judges of the superior court of San Bernardino county. However, a considerable portion of the evidence was heard in the presence of Judge Warmer, and the motion for a new trial was granted by Judge Warmer. This fact is the principal difference between the case at bar and the case of *People v. Canfield*, supra.

We may assume that the acquittal of the defendant on the charge that she did willfully and unlawfully sell intoxicating liquor, etc., was not necessarily an acquittal on the second cause of action, that of maintaining a common nuisance. But an inspection of the record discloses the apparent fact that the jury, in order to have found defendant not guilty of the sale charge, must have disbelieved the principal witness for the state, even though he was strongly corroborated by other witnesses as to some facts. If they did so disbelieve, there remained no basis for a verdict of guilty on the second count.

The order granting a new trial is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

86 Cal. App. 189

REAL SILK HOSIERY MILLS, Inc., v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5853.)

District Court of Appeal, Second District, Division 1, California. Oct. 20, 1927.

Master and servant ☞375(1)—Injury to saleswoman, soliciting orders, before reporting for duty, held to arise "out of and in course of employment."

Where employer's manager expressly approved and assented to employee's habit of soliciting sales of merchandise before reporting for duty at 8 a. m., injury sustained by her while soliciting sales before reporting for work held to arise "out of and in course of employment."

Proceeding under the Workmen's Compensation Act by Claire Mueller, claimant, opposed by the Real Silk Hosiery Mills, Incorporated, the employer. To review and annul an order of the Industrial Accident Commission allowing compensation, the employer brings certiorari. Writ denied.

Rohe & Freston and Clyde F. Murphy, all of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

HOUSER, J. This is an application for a writ of review. It appears that a young woman was employed by the applicant herein as a saleswoman or solicitor for the sale of merchandise. She performed her duties on foot. Her regular hours of employment were from 8 o'clock a. m. to 5 o'clock p. m., and she was assigned to a restricted territory within which to perform her work. Instead of receiving a stated salary, her compensation was on a commission basis. At 8 o'clock each morning she was required to report to the manager of her employer for instructions, etc. At various times preceding the date of the injury sustained by the employee, and which was the basis for the present proceeding, the employee had visited prospective customers at an hour earlier than 8 o'clock a. m., which fact was well known to her employer, and for which act the manager of the employer had publicly commended the employee and held up her action in that regard as an example to be followed by other fellow saleswomen in the employ of the common employer. The employee lived in the general neighborhood of the district in which she worked and in which was located the office of the employer. On the morning of the day on which the employee was injured, she started from her home at an hour earlier than 8 o'clock a. m., and walked, not toward the office of her employer, but in an opposite direction, for the sole purpose of visiting a regular customer within her district, to whom she had previously sold mer-

chandise, and to whom she expected to make another sale of merchandise on that day. While she was walking on the opposite side of the street which formed the boundary line of one of the sides of the district in which she was assigned to work, an automobile ran up on the sidewalk on which the employee was walking and caused the injury of which the employee subsequently complained.

The applicant herein contends that the case falls within the rule that an employee cannot recover for injuries sustained by him while going to or from his work, and cites authorities which in general uphold such doctrine. But the facts in this case do not exactly fit with those authorities. At any rate, other authorities are to the effect that where the workman is acting about his master's business, the fact that he receives an injury while traversing the highway will not preclude a recovery; but, if it be shown that the injury arose out of and in the course of the employment, the employee is entitled to compensation for the injury received by him.

In the instant matter, it appearing that the manager of the employer having expressed his approval and assent to the habit of the employee in soliciting sales of merchandise before actually reporting for duty at 8 o'clock a. m., it would follow that at the time the injury was sustained the employee was engaged in attending to business of the employer, which arose out of and in the course of her employment.

The petition should be and it is denied.

We concur: CONREY, P. J.; YORK, J.

86 Cal. App. 200

FREEMAN v. SULLIVAN. (Civ. 3308.)

District Court of Appeal, Third District, California. Oct. 20, 1927.

1. Partnership ☞53—Evidence held to sustain finding that partnership was not created, but, under agreement, plaintiff was to bear losses (Civ. Code, § 2404).

Evidence held to sustain trial court's finding that relation of partnership was not created between parties, but, under agreement under which defendant bought and sold beans for joint account, plaintiff was to bear all losses, so that Civ. Code, § 2404, providing that agreement to divide profits implied agreement for division of losses, was inapplicable.

2. Partnership ☞9(1)—That defendant was to have one-half profits for buying and selling beans as compensation held insufficient to show partnership.

Fact that defendant was to have as compensation one-half of the profits, if any, for buying and selling beans for joint account of himself and plaintiff held, under evidence, insufficient to show a partnership.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by William Freeman against L. L. Sullivan. From a judgment for defendant. plaintiff appeals. Affirmed.

Charles A. Wetmore, Jr., of San Francisco, and Crofton & Wetmore, of Marysville, for appellant.

Sooy & Heywood, of San Francisco, for respondent.

PLUMMER, J. Action by the plaintiff for an accounting and to charge defendant with one-half of losses incurred. The defendant had judgment, and the plaintiff appeals.

The complaint filed herein sets forth two alleged causes of action, one based upon an allegation that the plaintiff and defendant formed a partnership and conducted a partnership for the purpose of buying and selling beans. The second cause of action sets forth that the plaintiff and defendant engaged in a joint adventure, the purpose of which was to buy and sell beans. The second cause of action set forth in the complaint was dismissed upon the trial. The answer of the defendant denies the partnership.

The transcript shows that the plaintiff and defendant, in the year 1917, entered into an oral agreement for the purpose of buying and selling beans. The plaintiff was to furnish the money; the defendant was to buy and sell the beans. The profits, if any, were to be divided. The testimony of the plaintiff was to the effect that the losses and gains were to be shared equally. The testimony of the defendant was to the effect that the plaintiff advanced all money; he, the defendant, was to do the buying and selling; that the plaintiff was to bear the losses, if any, and the profits, if any, were to be shared equally.

The court found that the relation of partnership was never created between the parties; that under the terms of the agreement entered into between the parties the plaintiff was to bear all the losses. The business carried on did result in a loss of several thousand dollars. The transcript further shows that the plaintiff was a man possessed of considerable means, having at his command a considerable sum of ready cash; that the defendant was a young man, 24 years of age, engaged as the driver of a creamery wagon, and had had some slight experience in buying and selling beans.

Upon this appeal the appellant sets forth five reasons why the judgment of the trial court should be reversed. First, that the court erred in failing to rule upon and grant plaintiff's motion to strike out a portion of defendant's answer. Second, that the court erred in granting defendant permission to file an amended answer. Third, that the court erred in overruling the plaintiff's objection to the introduction in evidence of defendant's exhibit number one, being copy of

a complaint. Fourth, that the court erred in denying plaintiff's motion for a new trial. And, fifth, insufficiency of evidence to justify the findings of fact. While the foregoing alleged errors have been assigned, only one, that is the fifth, has been seriously argued, and the only one to be considered in this opinion for the simple reason that it is the only one that touches the matter of substance affecting the merits of this action.

The agreement between the parties, as we have stated, was oral. The plaintiff testified to all the facts and circumstances necessary to show a partnership or joint adventure, and if the court, upon the testimony introduced by the plaintiff, had found the existence of a partnership, there would be no question as to the sufficiency of the evidence to sustain such finding of the court. On the other hand, the defendant testified to a diametrically opposite state of facts; and the question presented to us is not whether there is a preponderance of evidence one way or the other, but whether there is sufficient evidence to sustain the findings of the court. The defendant testified as follows:

"I had some transactions with Mr. Freeman in regard to buying and selling beans. The contract between us was an oral contract; nothing was in writing. The agreement was made in 1917. The conversation took place on Fifth street, at the corner of Fifth and D, in Marysville, at Rock & Young's Tire Shop. That was the only conversation I ever had with Mr. Freeman in regard to the contract. Mr. Freeman asked me what I was doing, and I told him I was buying beans, and he asked me who I was buying for, and I told him for Rosenberg Bros., and some for Walter Lewis of the J. R. Garrett Company. He asked me if I ever came across what you call 'snap buys,' and I told him a few. Freeman said, 'I have considerable money lying in bank. If you care to go in and buy and sell the beans we will make some money,' and I told him I was not in very good shape because I had no money. He said, 'You don't have to worry about money because you won't lose on this deal. I will advance the money, and you buy and sell the beans, and we'll split the profits.' At that time I spoke about who would name the buying price and who would name the selling price of the beans, and I said it was to be understood that I would buy and sell the beans, and he said, 'that's just what I want you to do. I don't want to have anything to do with the beans whatever and I will advance the money.' At the time I spoke to Mr. Freeman I said, 'Mr. Freeman, I have no money to lose at all. I have been working down at the creamery, and I can't take a chance on losing any money.' And Mr. Freeman said, 'I have got lots of money in the bank and I will speculate on these beans. I will put up the money and stand the loss.' I was twenty-four years old at that time."

Appellant, in his argument, refers to certain insurance policies said to have been taken out upon the beans. The transcript shows the following:

"The respective policies of insurance were then admitted in evidence by the court and marked Plaintiff's Exhibit A, B, C, and D, respectively. In said policies of insurance Freeman and Sullivan were insured."

The respective policies are not set out in the transcript, and nothing further appears in relation thereto save and except what we have just stated. The transcript also shows that a certain complaint was admitted in evidence in which Freeman and Sullivan were plaintiffs, in an action begun to collect damages alleged to have been suffered by the plaintiffs. The complaint is not set out in the transcript, and nothing therefore appears as to its contents. The same is true with reference to a contract with the United States government for the sale of certain beans, being beans handled under the oral agreement referred to. The only record evidence which appears in the transcript is a letter written by L. L. Sullivan to the Rideout Bank authorizing the sale of certain beans. The letter is as follows:

"Marysville, Cal., March 26, 1921. Rideout Bank, Marysville, Cal.—Gentlemen: Mr. William Freeman has authorized you to sell, without notice to him, any and all beans which you are holding as collateral security for his note to you for \$13,372.89, given August 16, 1919. As I am interested with Mr. Freeman in the beans pledged as collateral, I hereby consent to the said authorization and to any sale which may be made by you. Yours very truly, L. L. Sullivan."

[1] Even though the writings just referred to had been set out in the transcript, and assuming that their contents would tend to show the relation of partnership existing between the plaintiff and defendant in relation to the buying and selling of the beans, yet the trial court had before it the testimony of the defendant which we have just set forth, and if the trial court believed that to be a correct version of the transaction, then and in that case the record shows sufficient testimony to uphold the findings of the trial court.

We do not need to review the cases contained in the appellant's brief showing what constitutes a partnership and what constitutes a joint adventure, as the findings of fact in this case upon the testimony which we have set forth render all of them inapplicable. Accepting the testimony of the defendant as true, which the trial court had a right to accept, then the last clause found in section 2404, Civil Code, is applicable. That section reads:

"An agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated."

From this it follows that all of the cases having to do with an agreement where the parties enter into a relation involving a divi-

sion of the profits without any express stipulation as to the losses, are not in point. The court in this case has accepted the defendant's version that the plaintiff was to contribute the money; the defendant was to contribute his labor; the defendant was to have as his compensation one-half the profits, if any; that the plaintiff was the one who was speculating and taking the chances of losing by the venture. The plaintiff was putting up the principal with the hope of obtaining a profit thereon, and taking the chances of losing a portion of the principal. The defendant was giving his labor with the hope of obtaining a reward therefor, and a chance of receiving no compensation.

[2] The mere fact that the defendant was to have one-half of the profits, if any, as his compensation, is not sufficient to show a partnership. A somewhat similar question was passed upon in the case of *Fee v. McPhee Co.*, 31 Cal. App. 295, 160 P. 397. The court there, among other things, said:

"Plaintiff had no interest in the profits as property; he was simply employed under an arrangement by which he was to receive for his services a given sum out of, or a proportion of, the profits. *Berthold v. Goldsmith*, 24 How. 536 (16 L. Ed. 762): 'The general rule is,' as was stated in *Jernee v. Simonson*, 58 N. J. Eq. 282 (43 A. 370), 'if there is no community of interest in the property of a business, that there is no partnership inter sese by mere participation in the profits.'"

A somewhat similar case is that of *Jones v. Guaranty Co.*, 178 Cal. 375, 173 P. 586, where it was held that such a venture did not constitute a partnership. Likewise, in the case of *Vanderhurst v. De Witt*, 95 Cal. 57, 30 P. 94, 20 L. R. A. 595, where it is said:

"The fact that appellant was to receive one-half of the net profits of the farming and threshing business would not make him a partner therein, if the understanding and agreement between the parties was, that he was to receive the same only as a compensation for the use of certain personal property let by him to George De Witt, to be used by said George De Witt in the prosecution of that business," etc.

Many cases might be cited where one of the partners was to receive a certain proportion of the profits as his compensation and a partnership relation held not to be thereby created. See *Lyden v. Spohn-Patrick Co.*, 155 Cal. 177, 100 P. 236; *Martin v. Sharp & Fellows Co.*, 34 Cal. App. 584, 163 P. 373; *Hanna v. Flint*, 14 Cal. 73. See, also, *Whitcomb v. Converse*, 119 Mass. 38, 20 Am. Rep. 311; *Meadows v. Mocquot*, 110 Ky. 220, 61 S. W. 28. Other cases might be cited showing that where there is no community of interest in the property, there is no partnership, but, as this case comes squarely under the exception clause of section 2404 of the Civil Code, citation of authorities is unnecessary.

The evidence which we have set forth appearing to have been accepted by the trial court at its face value, the objection that the findings are not properly supported is untenable, and a discussion of the law relative to partnerships and joint adventures would seem to be wholly unnecessary.

The judgment of the trial court is affirmed. We concur: HART, Acting P. J.; WEY-AND, Justice pro tem.

ARMSTRONG v. LASSEN LUMBER & BOX CO. (Civ. 5795.)★

District Court of Appeal, First District, Division 2, California. Oct. 20, 1927.

Hearing Granted by Supreme Court Dec. 19, 1927.

1. Fraud ☞58(1) — Sales ☞441(3)—Evidence held to sustain findings of false representations and breach of warranty, in buyer's action against seller, based on defective condition of boiler sold.

In buyer's action against seller for damages resulting from defective condition of boiler which buyer resold, evidence held to sustain findings for plaintiff on counts for false representations and breach of warranty.

2. Sales ☞442(6, 7)—Measure of damages for sale of worthless boiler purchased to be resold held difference between actual value and resale price, plus expense of attempted repairs and loss incurred in buying substitute boiler (Civ. Code, § 3333).

Where boiler which seller warranted and sold buyer for purpose of resale proved worthless, buyer in action against seller for damages was entitled, under Civ. Code, § 3333, to recover difference between actual value and resale price, plus buyer's expenditures in attempt to put boiler in good condition, and in addition loss incurred by buyer in purchasing substitute boiler for person to whom resale was made, without regard to sections 3313, 3314.

3. Damages ☞62(4)—Buyer must so act as to minimize damages on seller's breach of warranty.

On seller's breach of warranty as to condition of thing sold, buyer is bound to so act as to minimize damages.

4. Sales ☞442(10)—Buyer recovering damages for defective boiler sold held not entitled to interest on purchase price paid.

Where boiler which buyer purchased for purpose of resale proved worthless, buyer in action against seller for damages, based on misrepresentation and breach of warranty, was not entitled to interest on purchase price originally paid.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by L. D. Armstrong, doing business under the name and style of the L. D. Arm-

strong Company, against the Lassen Lumber & Box Company. From a judgment for plaintiff, and an order made after trial and entry of judgment allowing plaintiff to amend the second amended complaint, defendant appeals. Modified and affirmed.

On rehearing. For former opinion, see 257 P. 214.

Cushing & Cushing and Walter Slack, all of San Francisco, for appellant.

Horace M. Street, of San Francisco, for respondent.

STURTEVANT, J. "Defendant appeals from a judgment against it for \$2,113.29 and interest on \$800 of this amount from March 24, 1922, and from an order allowing plaintiff to amend its second amended complaint made after trial of the action and entry of judgment.

"The action arises out of a sale of a used 80 horse power return tubular boiler and certain fittings thereof, claimed to have been made to plaintiff by defendant on March 24, 1922. The material facts in the case are: During the times involved in the action and prior thereto plaintiff was engaged in the business of buying and selling steam boilers at San Francisco, Cal., and defendant was operating a sawmill and box factory at Susanville, Cal. At the beginning of 1922 plaintiff ascertained that the Leal & Sons Lumber Company, who were conducting a sawmill business at Brownsville, Cal., desired to purchase an 80 horse power return tubular boiler good for 140 pounds per square inch pressure and in good condition, and requested an employee, one S. W. Smith, to find and secure such boiler. Smith at this time, having a memorandum in his office showing that defendant had some boilers for sale, visited Mr. R. D. Baker, president of defendant, and told him he was seeking an 80 horse power return tubular boiler good for 140 pounds pressure; that he wanted the boiler for resale purposes; that he would pay cash; and that his purchaser would buy on time. Baker showed Smith a list that had on it 2 boilers for sale described on the list thus: '2—60" x 16' boilers 140 pound pressure, including breeching, stack, front, water column, each \$900.' Baker told Smith other parties had an option for these boilers, and that if this was not exercised he would be glad to negotiate with Smith. After the option expired further verbal negotiations were had between Smith and Baker, resulting in an offer from Baker to sell one of the boilers for \$800 cash. In these conversations no mention was made by Smith that the boiler was being purchased for either the L. D. Armstrong Company or the Leal & Sons Lumber Company. This fact was first brought to defendant's notice in a letter left at defendant's office on March 22, 1922, addressed to defendant, which stated, 'Pursuant to your offer for the sale of one

boiler 60" x 16', good for 140 pounds working pressure, and including breeching, stack, front, grates and fittings, all in good order, f. o. b. cars Susanville, Cal., I have this day delivered at your office in the Monadnock Building, San Francisco, Cal., a check for the agreed price of \$800, signed by L. D. Armstrong Company, together with a bill of sale to be signed by your company in favor of the said L. D. Armstrong Company.

"To avoid any further delay I wish you would make immediate shipment of the above, as follows, viz.:

"From—L. D. Armstrong Co.

"To—Leal and Sons Lumber Co., Oroville, Cal.

"Via—Southern Pacific Co., as carload shipment.

"Please mail the B/L to me as soon as possible and oblige.

"Very truly yours, S. W. Smith."

"The descriptive part of the bill of sale referred to in this letter is as follows:

"One butt-strap boiler 60" in diameter by 16' long for 140 pounds working pressure complete with breechings, stack, front, grates, and full complement of fittings.

"Boiler now located at our plant at Susanville, Cal. Above consideration includes delivery of boiler on cars in good condition at Susanville."

"Inclosed with this letter was plaintiff's check made payable to defendant's order in the sum of \$800. To this defendant replied with a letter addressed to S. W. Smith stating, 'We have your letter 22d, and as arranged with you this morning, we have telegraphed our people at Susanville to make shipment of the boiler and parts quick as possible, shipping same as from L. D. Armstrong Company to Leal & Sons Lumber Company, Oroville, Cal., via Southern Pacific as a carload shipment, and on receipt of the bill of lading will forward same to you without delay.'

"As explained and arranged, this boiler includes breeching, stack, half arch front, water column, and safety valve, but no grate bars or other fittings, and we have issued a bill of sale accordingly to L. D. Armstrong Company, and we wish to acknowledge receipt also of their check for \$800 in payment of same f. o. b. cars Susanville."

"Inclosed with the same was a bill of sale reading as follows: 'For value received, we hereby sell, assign, and transfer to the L. D. Armstrong Co. the following described personal property, viz.:

"One butt-strap boiler 60" in diameter by 16' long for 140 pounds working pressure with breeching, stack, half arch front, and safety valve.

"This equipment is now located at our plant as Susanville, California. Above consideration includes delivery on car in good condition at Susanville.

"In witness whereof, we have hereunto set our hand this 24th day of March, A. D. 1922. Lassen Lumber & Box Co.,

"R. D. Baker, President.

"[Corporate Seal]

"Witness: L. Johnson."

"Defendant then loaded the boiler on a freight car at Susanville and caused the same to be shipped to Leal & Sons Lumber Company consigned to Oroville, Cal. There being no railroad from Oroville to Brownsville, Leal & Sons Lumber Company had the same diverted from Oroville to Honcut, and from there it was hauled to their plant at Brownsville with trucks, a distance of some 20 miles. There the Leal & Sons Lumber Company examined the boiler for the first time, and, finding a number of defects, notified plaintiff of the same and demanded another boiler from plaintiff. Plaintiff sent a boiler maker and helper, a boiler inspector of one of the companies that insure boilers, and one of the members of the State Industrial Accident Commission to inspect the boiler. The boiler workers were attempting to repair the boiler when the inspectors came and stopped the work because of the defects found, these being what is termed a bag in the boiler, a lamination in one of its plates, some burnt off rivets, and injured left-hand sheet. It is not claimed that the defect styled a "lamination" was known to the defendant prior to the sale of the boiler, but it is urged that the other defects, the bag in its bottom, twelve burnt off rivets at its rear seam, and supporting lugs driven into its left-hand sheet, were known to defendant prior to its making the sale, and justified the refusal of the Leal & Sons Lumber Company to accept the boiler shipped it by defendant. Plaintiff expended \$180.11 in attempting to repair the boiler sold by defendant. On discovering that further efforts in that line would be futile, it searched available markets for a suitable return tubular boiler to deliver under its contract, but without success. It then induced Leal & Sons Lumber Company to accept a boiler of different type, styled a water tube boiler. This necessitated the erection of the boiler by plaintiff, such work requiring experienced hands, which is not necessary for installing a return tubular boiler. The cost of the water tube boiler and its erection was \$1,933.18. The cheapest secondhand return tubular boiler plaintiff could discover with which to supply the Leal & Sons Lumber Company, after it declined that shipped them by defendant, was at a price at \$2,100. The evidence shows that a new return tubular boiler of the class sold by defendant would have cost at San Francisco in April, 1922, from \$2,300 to \$2,400. The price which Leal & Sons Lumber Company agreed to pay plaintiff for the boiler procured from defendant was \$1,575. The trial court found that the boiler furnished by defendant was of no

value, fixed the damages at \$2,113.29, being \$1,933.18 costs of the water tube boiler and its erection, and \$180.11 for plaintiff's expense in endeavoring to repair defendant's boiler at Brownsville. The judgment also awarded plaintiff interest at 7 per cent. per annum on \$800 from March 24, 1922, and costs, and ordered and adjudged that upon payment of the judgment defendant might retake his boiler.

"During the trial plaintiff asked leave to amend his second amended complaint to conform to the evidence and permission to so amend was granted, but through neglect and inadvertence the formal amendment was not engrossed and made part of the record in the case until after this appeal was taken. This was done under an order of the trial court on motion of plaintiff and after a hearing thereon, and defendant has appealed from this order, which appeal has been heard with the appeal from the judgment.

"The amendment allowed to plaintiff's second amended complaint, and filed after the judgment was appealed from, sets forth the facts concerning the installation of the used water tube boiler for the Leal & Sons Lumber Company in place of the defendant's return tubular boiler, the reasons for this action, the costs of doing the same, and is in conformity with the evidence admitted at the trial.

"Appellant does not question the right of amending pleadings to conform to the proofs in proper cases, but contends that the only time this can be done is prior to judgment. The precise point presented by this case does not appear to have been heretofore passed upon by the appellate courts of this state. A liberal allowance of amendments by trial courts in order that pleadings should conform to the proofs has been generally sustained on appeals from such orders. In *Koch v. Wilcoxon*, 30 Cal. App. 517, 158 P. 1048, it is said: 'An amendment to conform to the proof may always be made provided the cause of action is not thereby changed.' *Hancock v. Board of Education*, 140 Cal. 554, 74 P. 44; *Henry v. Phillips*, 163 Cal. 135, 124 P. 837, Ann. Cas. 1914A, 39; *Wardrobe v. Miller*, 53 Cal. App. 370, are to the same effect. The trial court in this case has done on motion an act similar to that which the Supreme Court directed the trial court to do in the case of *Alameda County v. Crocker*, 125 Cal. 101, 57 P. 766, where the court below was ordered to amend the complaint as of a date prior to the judgment, by inserting the true names of defendants sued under fictitious names. The decision of the United States Supreme Court in the case of *Norton v. Larney*, 266 U. S. 511, 45 S. Ct. 145, 69 L. Ed. 413, is an interesting one regarding allowing of necessary amendments in trial courts where it is said, 'Where the amendment must necessarily be allowed by the trial court, it would be mere ceremony

to reverse the decree and remit the purely formal making of the amendment to the lower court. We shall, therefore, consider the bill as amended to conform to the facts of record.'

"Under all the circumstances, if any error was committed by the trial court in allowing the filing of the amendment in question after appeal, so as to make the pleadings conform to the proof, it must be held an error that has not resulted in a miscarriage of justice after an examination of the entire case and the evidence.

"The second amended complaint, on which the action was tried, is in two counts, the first being based on deceit, and the second on breach of warranty. The trial court found that plaintiff bought the defendant's boiler in reliance on defendant's representation that the boiler was in good condition and good for 140 pounds pressure; that plaintiff entered into his contract with Leal & Sons Lumber Company in reliance on defendant's representations; that on the arrival of the boiler at Brownsville plaintiff in good faith made an effort to repair the boiler with competent workmen; that the boiler was not in good condition; that defendant knew this when it sold the boiler to plaintiff; and that the boiler was of no value either when placed on the cars at Susanville or at any time thereafter. These findings have ample support in the evidence introduced and the only substantial question to determine is whether or not the trial court has correctly determined the amount of damage recoverable by plaintiff. At the inception of the transaction defendant was informed that the boiler was being purchased for purposes of resale, and that the boiler required was one of 80 horse power in good condition and good for 140 pounds working pressure.

"The description in its bill of sale of March 24, 1922, describing the property sold as 'one butt-strap boiler 60" in diameter by 16' long for 140 pounds working pressure, with breeching, stock, half arch front, and safety valve,' and stating that this equipment was located at defendant's plant at Susanville, and that the consideration received included delivery on car in good condition at Susanville, cannot be construed as other than a warranty on defendant's part that the boiler sold was in good condition and capable of being used with safety under a steam pressure of 140 pounds.

"That the boiler was bagged and a number of its rivets burnt out when it was placed on the car at Susanville is shown by the evidence, and that because of these defects it was not at that time good for 140 pounds pressure, cannot be questioned. That the boiler was bagged and had a defective rear seam had been called to the attention of defendant in a report of the Hartford Steam Boiler In-

spection Company on an inspection made on the 16th and 17th of April, 1920.

"Defendant, when it represented the boiler to be in good condition, made a positive assertion not warranted by its information of that which was not true, even though it may have believed it to be true. Such statement if made by defendant with intent to induce plaintiff to enter into the contract of purchase would be an actual fraud on plaintiff and would justify a recovery of damages for such fraud. Subdivision 2, § 1572, Civ. Code."

The foregoing opinion is a copy of the opinion rendered by Judge Bartlett sitting as a justice pro tempore in this court. Thereafter a petition for rehearing was filed, and therein the appellant contended that this court had erred in the rule of damage. That the contention might receive further consideration, the court granted a rehearing, heard counsel reargue the question, and has examined many additional authorities. After having done so, the court is of the opinion that the conclusion reached in the former opinion is correct.

[1] As state above, the plaintiff pleaded his claim in two counts. He pleaded a cause of action (1) as for false representations, and (2) he pleaded a cause of action as for the breach of the warranty. The trial court made findings in favor of the plaintiff on both counts. The defendant earnestly challenges both findings. The challenge cannot be sustained. There is evidence in the record which sustains each finding.

[2, 3] The defendants also challenge the measure of damage adopted by the trial court. They argue that the facts are such that the rule stated in section 3314 of the Civil Code does not apply, and that the damages allowed exceeded the rule stated in Civil Code, section 3313. But, in the presence of the finding on the issue of fraud, these matters become academic discussions. The trial court found in favor of the plaintiff on the issue of fraud. In this same connection it found that the boiler as delivered had no value. The plaintiff pleaded and proved, and the trial court found, that the plaintiff paid the defendant \$800 for the worthless boiler; that the plaintiff had contracted a bona fide sale thereof to Leal & Sons Lumber Company for \$1,575; that is, at a profit of \$775; that the plaintiff expended \$180.11 in good faith in an attempt to use the boiler; and that he expended \$1,933.18 to purchase a boiler to make good his contract to Leal & Sons Lumber Company. The detriment suffered by the plaintiff included: (1) The difference between \$1,575, the value of the boiler if it had been what it was represented to be, and zero, which was the actual value as found by the court (*Spreckels v. Gorrill*, 152 Cal. 383, 390, 92 P. 1011), that one item included his outlay, \$800, and "the benefit of the bargain," \$775, but both were elements of his detriment

as decided in the case cited; (2) his expenditures made in good faith in an attempt to use the boiler, that is \$180.11; and, (3) the sum of \$358.18, that is the loss incurred by the plaintiff in buying the substitute boiler. Each of these items was a direct consequence and therefore a proximate result of the wrong of the defendant. 1 *Sedgwick on Damages*, § 121b. Each item mentioned was an element of the detriment suffered by the plaintiff and therefore recoverable. Civ. Code, § 3333. *Merguire v. O'Donnell*, 103 Cal. 50, 36 P. 1033, is authority sustaining the recovery of the first and third items. *Hines v. Brode*, 168 Cal. 507, 510, 143 P. 729, is authority sustaining the first, second, and third items. And under well-settled rules, the plaintiff was bound to so act as to minimize the damages. In doing so, he incurred a loss of \$358.18 in purchasing the substitute boiler. Therefore he was entitled to recover that item. These conclusions are supported by numerous authorities. 4 *Sutherland, Damages*, §§ 1171-1174, and cases cited.

[4] The plaintiff did not rescind. He affirmed the contract and sued for damages. At the time the defendant received the \$800 in payment it was entitled to receive it and thereafter to retain it. The defendant was not therefore liable for interest on the \$800 so received and retained.

That portion of the judgment which awarded interest on the \$800 is stricken out. As so modified, the judgment is affirmed. The plaintiff will recover his costs on appeal.

We concur: KOFORD, P. J.; NOURSE, J.

86 Cal. App. 409

**VEGETABLE OIL CORPORATION v.
TWOHY. (Civ. 6039.) ***

District Court of Appeal, First District, Division 1, California. Oct. 28, 1927.

Hearing Denied by Supreme Court Dec. 27, 1927.

1. Evidence $\S$ 80(1)—Law of state in which plaintiff corporation was organized and existing is presumed to be same as law of California, where foreign laws were not alleged.

Where complaint by corporation, organized and existing under laws of Delaware, to recover stock subscription contained no allegation as to effect of laws of Delaware, laws of such state, in absence of allegation to contrary, must be presumed to be same as law of California.

2. Corporations $\S$ 89(1)—Code provisions for making calls and assessments become part of contract for stock subscription, where contract is silent thereon (Civ. Code, § 331 et seq.).

Where subscription contract to stock of corporation is silent as to time of payment, provisions of Civ. Code, § 331 et seq., with respect to manner of making calls and assessments, enter into and become part of contract.

★Hearing denied by Supreme Court.

3. Corporations ~~§~~90(1)—Corporation cannot maintain suit to collect unpaid assessments without first exhausting statutory procedure (Civ. Code, § 331 et seq.).

Suits for collection of unpaid calls or assessments cannot be maintained until corporation has followed and exhausted procedure laid down in Civ. Code, § 331 et seq.

4. Corporations ~~§~~90(5)—Allegation that corporation, suing for stock subscription, duly performed all terms on its part failed to allege that statutory procedure for collecting unpaid assessments had been exhausted (Civ. Code, § 331 et seq.).

In suit by corporation to recover stock subscription under contract fixing no time of payments, allegation that corporation has duly performed all terms and conditions on its part was not sufficient to allege that procedure required by Civ. Code, § 331 et seq., for collection of unpaid calls or assessments had been exhausted.

5. Corporations ~~§~~90(5)—Facts creating personal liability under statute for assessment by corporation must be alleged to maintain action for assessment (Civ. Code, § 331 et seq.).

In order to maintain an action to collect a call or assessment by corporation, facts which create personal liability therefor, under Civ. Code, § 331 et seq., must be alleged.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Vegetable Oil Corporation against John Twohy. Judgment for defendant, and plaintiff appeals. Affirmed.

R. S. Gray, of San Francisco, for appellant.

Sanborn & Roehl and De Lancey C. Smith, all of San Francisco, for respondent.

CASHIN, J. The plaintiff is a corporation organized and existing under the laws of the state of Delaware, and the action was brought, to recover an amount subscribed by the defendant for certain shares of the capital stock of the corporation. A general demurrer to an amended complaint was sustained, and, the plaintiff having declined to further amend, a judgment—from which the appeal was taken—was entered for the defendant.

The subscription alleged was for preferred stock, the averments of the complaint with respect to the terms of the contract being as follows:

"That on or about the 28th day of January, 1918, plaintiff's directors at a regular meeting thereof duly opened books of subscription to fill up the plaintiff's capital stock; that on or about the 20th day of March, 1920, the defendant duly subscribed in writing and agreed to take 300 fully paid and nonassessable shares of the said preferred stock of the plaintiff at the price of \$110 a share, or a total price amounting to \$33,000; that no definite date of payment of said subscription was stated therein, and the reasonable time for performance

(without demand) by defendant in the premises expired long before but within 4 years preceding the commencement of this action."

It was further alleged that pursuant to an agreement of the parties that the defendant might solicit subscriptions from others, and that such subscriptions should be applied to the subscription by him, he procured from one Frank Marten a subscription for 50 shares of the stock of the corporation at \$110 per share, amounting to \$5,500, which sum was paid and credited to the account of the defendant; that no further payments were made thereon and "the plaintiff has fully performed all the terms and conditions on its part, and has always been ready, able, and willing to issue and deliver to defendant upon payment therefor by him stock certificates representing the shares of its preferred stock in accordance with said subscription."

[1-3] The complaint contained no allegation as to the effect of the laws of Delaware, and, in the absence of allegations to the contrary, the laws of that state must be presumed to be the same as our own. *Norris v. Harris*, 15 Cal. 226; *Peck v. Noee*, 154 Cal. 351, 97 P. 865. It is the rule in California that where a subscription contract is silent as to the time of payment the provisions of the Code with respect to the manner of making calls and assessments enter into and become a part of the contract, *Los Angeles Athletic Club v. Spires*, 166 Cal. 173, 135 P. 298; and that suits for the collection of unpaid calls or assessments cannot be maintained until the corporation has followed and exhausted the procedure laid down in sections 331 et seq. of the Civil Code. *Bell Development Co. v. Marshall*, 35 Cal. App. 324, 169 P. 717.

[4, 5] In the present case the contract fixed no time of payment; and, other than the averment "that the plaintiff has duly performed all the terms and conditions on its part, * * *" it was not alleged that the prescribed procedure had been followed. It is contended by plaintiff that this allegation sufficiently shows that the statutory provisions in this respect were complied with, but, as held in the following cases, it is essential in order to maintain an action to collect a call or assessment that the facts which create a personal liability therefor under the provisions of the statute be alleged. *Shively v. Eureka, etc., Co.*, 129 Cal. 293, 61 P. 939; *Los Angeles Athletic Club v. Spires*, supra; *Bell Development Co. v. Marshall*, supra; *Bottle Mining & Milling Co. v. Kern*, 9 Cal. App. 527, 532, 99 P. 994.

In view of the above rule, the complaint was insufficient and the demurrer was properly sustained.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

88 Cal. App. 284

RICKS v. ADORNI. (Civ. 3320.)

District Court of Appeal, Third District, California. Oct. 24, 1927.

1. Landlord and tenant ⇨230(1)—Complaint alleging indebtedness, tenant's agreement to pay, and named amount was due and unpaid held to state cause of action for rent.

Complaint alleging tenant became indebted to landlord in named sum for rent of premises at named monthly rental, that he agreed to pay rental at named rate, that he had not paid rental or any part thereof, and that named sum was due and unpaid held sufficient to state cause of action for rent.

2. Appeal and error ⇨989—Question on appeal is whether evidence substantially supports judgment.

Question on appeal is not whether there is sufficient evidence to warrant judgment for appellant, but whether judgment rendered is substantially supported by evidence.

3. Landlord and tenant ⇨231(8)—Evidence held to sustain finding that defendant conducted business in rented premises on his own account and for his individual benefit.

In action for rent of restaurant, evidence that defendant as creditor of former tenant took over restaurant business held sufficient to sustain finding that he conducted restaurant on his own account and for his individual benefit.

4. Landlord and tenant ⇨110(1)—Tenant abandoning premises would be estopped from asserting any right of possession under lease.

Where written lease under which restaurant proprietor held premises was not canceled in writing or terminated formally, but tenant abandoned premises and landlord took possession thereof through creditor of tenant as her tenant, the original tenant would be estopped from asserting any right of possession.

5. Landlord and tenant ⇨110(1)—Landlord, taking possession of premises on abandonment thereof by tenant, could lease them to defendant, who was creditor of tenant.

Where former tenant abandoned leased premises, and landlord took possession thereof through defendant, as creditor of tenant, as her tenant, former tenant being estopped from asserting any right of possession, landlord could lease premises to defendant.

6. Appeal and error ⇨692(1)—No part of account books appearing in record, reviewing court cannot determine whether sustaining objection to their introduction was erroneous.

Where court sustained objection to introduction of account books in evidence, reviewing court cannot determine whether ruling thereon was erroneous or prejudicial, where no part of account books appears in record.

7. Landlord and tenant ⇨200(1)—Whether tenant paid at rate provided or reasonable rental value was immaterial, where reasonable value was same as rate provided.

Where first tenant abandoned premises and landlord took possession thereof through ten-

ant's creditor as her tenant, in action for rent it was immaterial whether defendant was liable for rent at rate named in the lease or for reasonable value, where testimony showed reasonable rental value was at same rate as rate named.

Appeal from Superior Court, Humboldt County; Warren V. Tryon, Judge.

Action by Eva L. Ricks against Joseph Adorni. From a judgment for plaintiff, defendant appeals. Affirmed.

Metzler & Mitchell, of Eureka, for appellant.

P. H. Ryan, of Eureka, for respondent.

FINCH, P. J. [1] Judgment was entered in favor of the plaintiff for the amount demanded in the complaint, and the defendant has appealed therefrom. The complaint alleges:

"That defendant became indebted to plaintiff in the sum of \$1,000 as and for the rent of those certain premises Nos. 211 Fourth street and 514 Second street, in the city of Eureka, county of Humboldt, state of California, for the period of 8 months commencing on the 1st day of June, 1925, at the monthly rental of \$125.00, payable monthly in advance on the first day of each and every month, and that defendant promised and agreed to pay said rental at said rate; that defendant has not paid said indebtedness nor any part thereof, and that said sum of \$1,000 is now due, owing, and unpaid from defendant to plaintiff."

Appellant contends that the complaint does not state a cause of action. Complaints in substantially the same form have been so often held sufficient in this state that discussion of the question is deemed unnecessary.

[2] In appellant's brief it is said:

"We hesitate to set forth all of the evidence given in the case, but will set forth that testimony which we believe establishes the facts of the case by the great preponderance."

The evidence which is most favorable to the appellant is then quoted. This method of presenting an appellant's case is ordinarily futile. The question on appeal is not whether there is sufficient evidence to warrant a judgment for the appellant, but whether the judgment rendered is substantially supported by the evidence.

[3] It substantially appears from the evidence that Ted Regos held, under a lease from the plaintiff, certain rooms in a building on the premises described in the complaint, in which he conducted a restaurant known as the Liberty Café; that he became heavily indebted to various persons, of whom the defendant was the largest creditor; and that in the spring of 1925 Regos, the defendant, and the agent of the plaintiff held a consultation relative to such restaurant business.

Plaintiff's agent, P. H. Ryan, who is her attorney in this action, testified:

"By appointment, Mr. Adorni and Mr. Ted Regos met with me in my office and it was explained to me in the presence of all three of us that Mr. Regos was financially upon the rocks and he was leaving here, * * * and that he desired and was going to turn the whole business over to Mr. Adorni, who had a large mortgage * * * upon the fixtures and equipment of the Liberty Café. And he stated in substance and effect that he was abandoning the place to Adorni; * * * and he wanted to know, and Mr. Adorni wanted to know from me as Mrs. Rick's attorney and agent, if it would be satisfactory to her and to me for him, Adorni, to take over the place, and I asked Adorni if he would accept an assignment of the lease so as to obligate himself for all the rents under the lease, and he refused to do it, said in substance, or the idea he gave me was he was not willing to bind himself for all the rent that might accrue under the lease until it expired. Then I told him that that was all right with me to go in there, and he could take the place provided he paid the rent, and he answered that he would pay the rent. He stated that he thought he could operate the place and build the business up and sell it or dispose of it, and thus get enough money out of it to pay his own claim, and possibly enough out of it to settle the debts of the other creditors. * * * Regos left. * * * He abandoned the leased premises, stated in effect and in substance that he was turning them over to Joe Adorni, and in his presence and the presence of Adorni, I gave Adorni to understand that he must pay the rent if he kept the place. * * * He stated in substance and effect that he would pay the rent as long as he occupied it. * * * Several times I telephoned and dunned him for the rent * * * and he repeatedly asked me for a reduction of the rent."

The plaintiff testified that the defendant stated to her that he would pay the rent; that in July, 1925, he paid her back rent due from Regos in the sum of \$300 and said that "he would pay the future rent"; that he said, "I will pay it while I am there and have full charge;" that "he had taken over the business and was going to handle it, try to pull it out;" that "he owned the fixtures and that he was going to manage it;" that "he owned everything in there, and he was going to fix it up and sell it;" that "Regos was out of it entirely." Admittedly the defendant was in possession of the premises and conducting the business in question in some capacity during the whole period for which the plaintiff claims rent. In his answer the defendant alleges:

"That said defendant had nothing whatsoever to do with said premises except to act in the capacity of a trustee for the creditors of said Ted Regos, among said creditors of whom was said plaintiff."

Some testimony was introduced in support of this allegation, but the evidence quoted

herein is amply sufficient to support a finding to the contrary and to the effect that the defendant conducted the business on his own account and for his individual benefit alone.

[4, 5] The written lease under which Regos held the premises was not canceled by an instrument in writing or terminated in any other formal manner, but Regos abandoned the premises, and the plaintiff took possession thereof through the defendant as her tenant. Under the circumstances shown by the evidence, Regos would be estopped from asserting any right of possession under the lease. "On a tenant's abandonment of the premises, the landlord may re-enter, and take unqualified possession, for his own benefit, in which case the tenancy is at an end." 15 Cal. Jur. 797. The lease being so terminated, the plaintiff had the right to lease the premises to the defendant.

[6] The defendant offered in evidence the account books of the Liberty Café kept under his direction during the time he had charge of the business. The court sustained the plaintiff's objection to the introduction of such evidence. No part of such account books appears in the record, and therefore it cannot be determined whether or not the ruling was erroneous or prejudicial. 2 Cal. Jur. 275.

[7] The lease under which Regos held the premises provided for payment of rent at the rate of \$125 a month. The plaintiff testified that the reasonable rental value of the premises was \$125 a month. Whether the defendant was bound to pay at the rate provided in the lease, therefore, or the reasonable rental value, the result is the same.

The judgment is affirmed.

We concur: HART, J.; WEYAND, Justice pro tem.

McNEECE v. WOOD et al. (Civ. 5514.)★

District Court of Appeal, Second District, Division 2, California. Oct. 21, 1927.

Hearing Granted by Supreme Court Dec. 19, 1927.

1. Landlord and tenant §134(2)—Use of room for registering bets on horse races held unlawful use within lease prohibiting any improper or unlawful use (Pen. Code, § 337a).

Use of room in rented premises for registering bets on horse races in violation of Pen. Code, § 337a, held unlawful use within terms of lease prohibiting lessee from using premises for any improper or unlawful purpose.

2. Appeal and error §931(5)—Appellate court presumes that trial court followed testimony of witness sought to be impeached which was favorable to respondent.

Under rule that decision of trial court is final on questions of fact, where there is conflicting testimony, appellate court must presume that trial court followed witness' testimony

which was favorable to respondent, though appellant sought to impeach witness' testimony.

3. Landlord and tenant ⇨37—Lease should be strictly construed when sought to be forfeited.

Where forfeiture of lease is in issue, lease should be strictly construed.

4. Landlord and tenant ⇨105—Lease prohibiting "any" improper use, and providing that "any" such improper use shall forfeit lease, requires only single improper use for forfeiture (Code Civ. Proc. §§ 16, 1875; Civ. Code, § 1644).

Under Code Civ. Proc. §§ 16, 1875, and Civ. Code, § 1644, providing for construction of words in ordinary sense and that courts take judicial notice of true significance of words, lease prohibiting lessee from using premises for "any" improper purpose and "any" such improper use shall forfeit lease, may be construed to mean prohibition of single improper purpose, and that one violation would forfeit lease.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Any.]

5. Landlord and tenant ⇨105—Violation by subtenant forfeiting lease was violation by lessee, whether he knew it or not.

Under lease providing that any improper use shall work forfeiture of lease, violation of such provision by subtenant forfeiting lease was violation by lessee, whether lessee knew it or not, since lessee is responsible for acts of sublessees, whether known to him or not.

6. Landlord and tenant ⇨105—National Prohibition Act, forfeiting lease for violation of act by lessee, is written into lease executed subsequent to its enactment and gives landlord cumulative remedy (Wright Act; National Prohibition Act, tit. 2, § 23, subd. 4 [27 USCA § 37]).

Where lease providing for forfeiture on lessee's using premises for any unlawful use was executed after National Prohibition Act (27 USCA) and Wright Act (St. 1921, p. 79) went into effect, National Prohibition Act, tit. 2, § 23, subd. 4 (27 USCA § 37) providing that violation of act shall at option of lessor work forfeiture of lease, gave landlord cumulative remedy and was written into lease.

7. Landlord and tenant ⇨105—Clause forfeiting lease on single unlawful use of premises held not dependent on subsequent clause giving landlord option to forfeit on lessee's failure to comply with covenants for 30 days.

Clause in lease providing for forfeiture on lessee's committing single improper use of premises, violation of which eo instante worked forfeiture, held not dependent on subsequent clause giving lessor option to forfeit lease on lessee's failure to keep covenants for period of 30 days; such clauses being independent of each other.

8. Landlord and tenant ⇨44(2)—Covenant in lease against unlawful use of premises runs with land and is binding on assignees and subtenants of original lessee.

Covenant in lease prohibiting lessee from using premises in any improper or unlawful

manner is a covenant running with the land, binding on all assignees and subtenants of original lessee.

9. Landlord and tenant ⇨105—Use of premises for registering bets on horse races and in violation of Prohibition Act held substantial breach, justifying forfeiture of lease prohibiting any unlawful use of premises (Pen. Code, § 337a).

Under lease prohibiting any unlawful or improper use of premises, use of premises for registering bets on horses, in violation of Pen. Code, § 337a, and for sale of liquor, in violation of Wright Act (St. 1921, p. 79) and National Prohibition Act (27 USCA), was substantial breach justifying forfeiture of lease.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by James R. McNeece against George W. Wood and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

Luce & Swing, of San Diego, for appellant.

A. Haines and John H. McCorkle, both of San Diego, for respondent.

COLLIER, Justice pro tem. Facts: McNeece, in writing, leased to Wood certain real property in the city of San Diego. The lease contained only two clauses which are material here. They are as follows:

Clause 1. "It is further agreed and understood that said lessee shall not use or permit to be used said premises for *any* improper or unlawful purpose, and *any* such improper or unlawful use *shall work a forfeiture of this lease.*" (Italics ours.) Clause 2. "It is further hereby agreed that if the lessee shall at any time refuse or fail to pay the rent as herein provided to be paid by him, or shall refuse or fail to keep any of the covenants and agreements herein contained and such conditions shall continue for a period of 30 days, then, and in that event, the lessor may, at his option, declare this lease forfeited and may retake possession of said premises without process of law."

[1] Wood sublet the upper floors of said premises to Jennie H. Hipwell, one of the defendants (not appearing in this appeal), who operated the same through her agent, Mrs. Geohegan. On or about November 20, 1925, Mrs. Geohegan leased room 438 in said premises to Bradley and O'Brien, alias O'Hara, who immediately commenced to operate therein a "bookmaking" joint. Mrs. Geohegan testified at the trial that said room was rented for the purpose of bookmaking. This was noticed by a Mr. Logan, who occupied the dual position of elevator man and janitor for Mrs. Hipwell and Mrs. Geohegan, and watchman for Wood. Logan notified Mrs. Geohegan of his suspicions and tried twice to notify Wood, but without avail. Logan then notified the police department. Room 438 was raided by the police on

December 1, 1925. It was stipulated by all parties during the trial that the room was being used by Bradley and O'Brien for "registering bets on horse races and they had with them the paraphernalia for that purpose." This was clearly a violation of section 337a of the Penal Code, and an "unlawful" use within the terms of the lease. Thereupon McNeece served notices declaring said lease forfeited, whereupon this action was commenced.

On June 19, 1926, one England was operating a lunch counter on the ground floor of the building under a sublease from Wood. On that date one Shepherd, England's employee, *who was in charge of the lunch counter during the night shift*, was arrested for violation of the Wright Act (St. 1921, p. 79). The evidence disclosed that the arresting officers found two pints of moonshine whisky behind the counter, one pint in Shepherd's coat and one pint in each of a pair of the latter's shoes. The coat and shoes were in a locker in the rear of the restaurant, the door of the locker being open. McNeece again served notices upon Wood, charging the above as an additional violation of the lease. Plaintiff's complaint was amended to cover the same. Thereafter a trial was had, and the court found that both of said matters were violations of the "unlawful purpose" clause, forfeited the lease, and awarded damages to plaintiff.

[2] There was no evidence showing that Wood had any actual knowledge of either of said matters until after they had happened. But in addition to the testimony of Logan, epitomized above, Mrs. Geohagan, the agent of the sublessee, Mrs. Hipwell, testified, in substance, that she alone managed the upper floors of said premises, and that on November 20, 1925, she rented room 438 to Bradley and O'Brien *for the purpose of "bookmaking."* Appellant sought to impeach this evidence, but, in view of the familiar rule that the decision of the trial court is final on questions of fact where there is conflicting testimony, we must presume that the court followed her testimony, which was favorable to the respondent.

The case largely turns upon the interpretation to be placed upon the words in the lease, "said lessee shall not use or permit to be used said premises for any improper or unlawful purpose"—in view of the fact that the evidence shows that Wood did not at any time have actual notice or knowledge of either or any of said unlawful acts, except as he may have received the same, as a matter of law, by reason of the notice or knowledge of his watchman, Logan.

Appellant contends that Wood did not "permit" said violations, therefore the lease could not be forfeited. He also contends that clause 2 modifies clause 1, so that granting, for the sake of argument only, that clause

1 was violated, still such violations must continue for 30 days before the lease could be forfeited, and that there was no showing of any violation continuing for that period of time. The other contentions of appellant which we deem material will be noticed in due course. If, within the decisions, Wood did not "permit" the said violations, then the judgment of the trial court must be reversed. Hence we shall first consider that point.

[3] Respondent seeks to forfeit appellant's lease. At the outset we are confronted with the rule of strict construction where such a forfeiture is the issue. This rule is clearly epitomized by Justice Works in *Stratford v. Continental, etc., Co.*, 74 Cal. App. 551, 555, 241 P. 429, 430, as follows:

"The courts tenaciously cling 'to the rule that forfeiture of estates and restraints upon alienation should not be enforced except when the terms of the conditions are so plain as to be beyond the province of construction' [citing cases]."

[4] Attention is first called to clause 1, and particularly to the words italicized, as follows:

"* * * said lessee shall not use or permit to be used said premises for *any* improper or unlawful purpose, and *any* such improper or unlawful use shall work a forfeiture of this lease." (Italics ours.)

It seems to us that the "terms and conditions are so plain as to be beyond the province of construction." The Standard Dictionary defines "any" as "a, an, *one*; said of a *single* person, thing or part of whatever kind, degree or quantity from among a number, class or total." Webster defines "any" as "*one*," indefinitely out of a number; *one* indiscriminately of whatever kind or quantity." "Words and phrases are construed according to the context and the approved usage of the language. * * *" Section 16, Code Civ. Proc. "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." Section 1614, Civ. Code. "Courts take judicial notice of the following facts: 1. The true signification of all English words and phrases, and of all legal expressions." Section 1875, Code Civ. Proc.

In the light of the foregoing, clause 1 may be paraphrased as follows:

"* * * The lessee shall not use or permit to be used said premises for a *single* improper or unlawful purpose, and *one* such improper or unlawful use shall work a forfeiture of the lease."

Therefore, leaving out of the discussion for the time being the knowledge or lack of knowledge of the appellant, "any," or a "single," violation of clause 1 would be sufficient

to work a forfeiture of the lease. This position is sustained by *Burke v. Bryant*, 283 Pa. 117, 128 A. 822, where it is said:

"The owners of a building and land in Wilkes-Barre leased the premises to Bryant and Bell 'for the purpose of garage and storage' for a term of 10 years. The lease provides, the 'premises shall not be used for any purposes contrary to this agreement, and in case of violating this agreement the lessors may, at their option, declare the term of this lease at an end.' The lessees sublet the premises, as they were privileged to do, to Harry Bloom. *The clauses governing subletting give to the lessors or their assignees the same rights and powers against subtenants as against original lessees.* The lessor owners assigned the lease, with all its terms and conditions, to Berry and Cohen, who subsequently assigned to the present use plaintiffs.

"As the result of a police raid on May 28, 1923, a large still, with the necessary equipment for distillation of medicated alcohol, was discovered thereon in full operation, and was confiscated. The plaintiffs, on learning of this use of the property, proceeded to regain possession by confession of judgment in ejectment against the original lessees by virtue of a warrant of attorney contained in the lease, *declaring a forfeiture, in their affidavit of default, because of a violation of the terms of the lease, and because of the provisions of the Volstead Act.* U. S. Comp. St. Ann. Supp. 1923, § 10138½ et seq. (27 USCA). Bloom denied any connection with the still, charging another who had the privilege of occupying for a short time a small boarded off portion of the building as responsible. The court below, on petition, opened the judgment thus entered, and, at the trial subsequently held, the jury found the premises were used for purposes contrary to the lease and the law, with Bloom's knowledge and connivance. Judgment was entered on the verdict.

"This appeal raises some very interesting and important questions which we must consider: First, whether the doing of things which constitute a violation of the Volstead Act may, under section 23 of title 2 of that act (section 10138½) [27 USCA §§ 35-37] work, at the lessor's option, a forfeiture of the lease, and if so, whether the impairment of the obligation of a contract or the taking of property without due process of law would result. * * *

"The last clause of section 23 of title 2 of the Volstead Act reads: 'Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease.' Act October 28, 1919, c. 85, 41 Stat. 305, 314.

* * * The forfeiture of leases, where the premises have been used in violation of the liquor laws, is a valid exercise of the police power as being an aid to prohibition. It has a direct effect on the enforcement of the law.

If violators of the law were permitted to remain in possession, enforcement would be rendered increasingly difficult, whereas if the premises are returned the maintenance of public morality is secured. It is very important that a lawless occupant should be completely ejected by a law-abiding lessor. Forfeitures under this section of the Volstead Act have been upheld. *Grossman v. U. S. (C. C. A.)* 280 F. 683; *U. S. v. Boynton (D. C.)* 297 F. 261; *Farrelly v. Wells*, 115 Misc. Rep. 632, 189 N. Y. S. 34.

There is no denial of due process because the forfeiture was to be effected as in other cases.

* * * The language of the act is:

"Any violation of this title upon any leased premises by the lessee or occupant thereof shall at the option of the lessor work a forfeiture."

*"The cause of forfeiture arises when the unlawful relation is shown to exist. * * * The consequences of the act, so far as the public is concerned, may result in fine and imprisonment, but, as it relates to the owner of the premises, his protection lies in forfeiture. It is a separate, distinct, and independent redress, different from the government's right to convict or resort to padlock proceedings. See Commonwealth v. Allen, 70 Pa. 465, 471. A decree abating a nuisance and canceling a lease for violation of section 23 of the Volstead Act was sustained in Grossman v. U. S. (C. C. A.) 280 F. 683. * * **

*"It is urged that a single violation of the Volstead Act would not be sufficient to declare a forfeiture. The acts do not so state. * * * The tenant was responsible for any violation of the covenants of the lease by the subtenant, and it is not material whether he knew of such violation or not. Goenner v. Glumicich, 81 Pa. Super. Ct. 521. Where a subtenant offends against a provision prohibiting the occupation of the premises for dwelling houses or any unlawful purpose, the restriction on the manner of use runs with the land, and is binding on the estate in the hands of subtenants. Wheeler v. Earle, 5 Cush. (Mass.) 31, 51 Am. Dec. 41." (Italics ours.)*

See, also, *Poulos v. Toledo, etc., Co.*, 22 Ohio App. 426, 154 N. E. 57, where a sale of cocaine brought about the forfeiture.

[5] Appellant claims that the lease was not forfeited because he had no knowledge of the violations until afterwards, and hence did not "permit" them. With this contention we cannot agree. We hold that a violation of clause 1 by a subtenant was a violation by the lessee whether the lessee knew it or not. The following language of the court in *People ex rel. Jay v. Bennett*, 14 Hun (N. Y.) 63, 65, is illuminating on this question. Here the court was considering this clause in a lease:

"It being clearly and distinctly understood, however, that at no time shall it be allowed to sell intoxicating liquor on the premises."

The court said:

"The covenant between the relator and the lessees was broken when liquor was sold. *It extended to all successors of her lessees. It related to the premises and subjected all occupants to its control, no matter from what source they derived their right of possession under it. [Italics ours.]* The covenant indeed, construed in the light of the existing laws, was that if liquor was sold upon the premises without license, and therefore in violation of the statute of 1857 (Laws of 1857, c. 628), regulating the sale of intoxicating drinks, the lease should become ipso facto void at the option of the relator, and she could employ the same process to enforce that result which she could resort to if the tenants or lessees had held over after the expiration of their lease. * * * [Italics ours.]

"It then seems to be beyond all dispute that if the premises or any part of them was used or occupied for any illegal trade, the relator was eo instante invested with the right to declare that the lease was void, and to insist upon her right to possession. The sale of intoxicating liquors without a license, whether as an entire business or as an incident to one, is an illegal trade under the statute of 1857, supra. The sale is a criminal offense and punishable as such. It is a misdemeanor, and prohibited as a crime. * * * The relator proved the use of a part of the demised premises for the sale of liquors without a license, as an incident of the business carried on by the seller. Having done this, she established the facts required by law to authorize the remedy she sought."

Perhaps the leading case on this branch of the question is *Wheeler v. Earle*, 5 Cush. (Mass.) 31, 51 Am. Dec. 41. In this case evidence was introduced tending to show that a subtenant of a part of the premises, under the tenant, had occupied the same for the unlawful purpose of selling liquor without a license. The court ruled that the evidence established such a use as constituted a breach of the lessee's covenant, that a breach thereof gave a right of re-entry, and that the tenant must be presumed to have known of the unlawful use by his subtenant. The court in its opinion said:

"Does the clause in this lease, authorizing a re-entry by the lessor, to repossess himself of the premises, apply to the breach of the covenant, 'that the lessee will not occupy, or in any manner suffer the buildings now on the premises, or which may hereafter be erected thereon, to be occupied, for dwelling houses, or for any unlawful purposes whatever'?"

"This, of course, depends upon the construction to be given to the indenture. The language is very broad; the lessee stipulates, 'if he shall neglect or fail to perform and observe any or either of the covenants herein contained, which on his part are to be performed,' then the lessor may lawfully enter, etc. *Although the conditions upon which the lessee took his lease may be such as materially to affect the value of his leasehold interest, and subject it to the contingency of an early termination, yet if such are its plain and obvious terms, the lessee must abide by the stipulations of the lease.* * * *

"This restriction upon the manner of using the premises runs with the land, and is binding upon the estate in the hands of subtenants. They take only the title of the lessee, and with the like limitations and restrictions. Such use by a subtenant holding under the original lessee, for an unlawful purpose, would equally forfeit the estate. This principle seems very clear, and hence, in the treatises upon the relation of landlord and tenant, it is said that when an estate is held subject to forfeiture, for breaches of numerous covenants or stipulations, some of which may be likely to be violated, it is expedient always to take from the sublessee good security against all such violations of the various stipulations in the original lease, as may subject the original lessee to lose his whole estate. *By creating subtenants, the original lessee puts them in possession of the premises, and being*

thus in under him, their acts, if in violation of the conditions of the lease, will cause a forfeiture."

"In the view we have taken of this case, it is unnecessary to consider particularly, whether the ruling that the defendant was presumed in law to know that the buildings were used for unlawful purposes, if the fact was so, was entirely correct in the form stated. *The legal consequence will be much the same under the different forms in which I have stated the consequences of a violation of the lease by a subtenant of the lessee.*" (Italics ours.)

In *Miller v. Prescott*, 163 Mass. 12, 39 N. E. 409, 47 Am. St. Rep. 434, the court said:

"The plaintiff's testator, who was the lessee of the real estate described in the writ, entered into a covenant not to 'make or suffer any waste, or any unlawful, improper, or offensive use of said premises.' By the terms of the report the verdict is to stand, unless there was error in one of the two following rulings: First, 'that unlawful use of the premises by a subtenant was a breach of the covenants and conditions of the lease, whether known by the plaintiff, or her testator or not.' * * * The covenant referred to is a covenant concerning land, and affecting the mode of enjoyment of it. * * * It is intended for the protection of the lessor, and he may enforce it directly against the original lessee, or against an assignee of the lease. If there is no assignment of the lease, but a subletting of the whole or a part of the premises for a time less than the remainder of the term, so that no privity of estate is created between the lessor and the subtenant, the covenant would be ineffectual for the lessor's protection, if he could not proceed on the ground that it applies as well to an unlawful use by a subtenant as by the original lessee. *We are of opinion that the agreement not 'to make or suffer' an unlawful use of the premises must be interpreted as a stipulation that there shall be no unlawful use by the original lessee, or by any person who is occupying under him.* It is easy for the lessee to control the use of the property, and to protect the interests of the lessor and of himself in this particular. With this interpretation, effect is given to the word 'suffer.' It may not be reasonable to hold that the covenant makes the lessee liable for an unlawful use of the property by trespassers, but *he may well be held to 'suffer' unlawful use of the property if he does not take effectual measures to prevent such a use by those who occupy by his authority.*" (Italics ours.)

To the same effect are *Haymarket Realty Co. v. Sullivan*, 249 Mass. 262, 143 N. E. 907; *Sullivan v. Vorenberg*, 241 Mass. 319, 135 N. E. 165; *Arado v. Maharis*, 232 Ill. App. 282; *United States v. Gaffney* (C. C. A.) 10 F.(2d) 694; *Crowe v. Riley*, 63 Ohio St. 1, 57 N. E. 956; *Shepard v. Dye*, 137 Wash. 180, 242 P. 381, 49 A. L. R. 824; and *Burke v. Bryant*, supra.

[6] Appellant claims that section 10138½ of the National Prohibition Act, "Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease," does not apply in this case. We think

this position untenable. The instant lease was executed after the National Prohibition Act and the Wright Act went into effect, *and the National Prohibition Law was written into the lease*. See *United States v. Gaffney*, supra, where the United States Circuit Court of Appeals for the Second Circuit says:

"Entirely apart from the specific covenants of both Mantell's and Gaffney's leases, *each of them impliedly contained a covenant to obey the National Prohibition Law*. When that covenant was broken by the tenant, all right to maintain the lease as against the landlord was gone; and it was assuredly within the power of the nation to aid the landlord to recover his premises, by a method well known to the law, and not created by the amendment."

To the same effect see *Burke v. Bryant*, supra. Furthermore, the National Prohibition Act and similar enactments give the landlord a cumulative remedy. *Haymarket Realty Co. v. Sullivan*, supra; *Burke v. Bryant*, supra.

[7] We now come to the question, Does clause 2 control clause 1? Appellant contends that:

"Considering the two clauses of the lease which provide for a forfeiture and applying the proper rules of construction to those two clauses, a breach of the condition not to use or permit the use of the premises for unlawful purposes must continue 30 days before a forfeiture may be exacted."

This we cannot accept. As we have seen, clause 1 provides that:

"Any [one, a single] improper or unlawful use shall work a forfeiture of this lease."

Furthermore, it seems clear to us that the two clauses are not dependent the one on the other. Clause 1 refers solely to the use of said premises. Clause 2 refers only to the covenants given as consideration for the use. Clause 1 refers to the positive mandate of the law; clause 2 refers to the contract of the parties. A violation of clause 1 ipso facto and eo instante works a forfeiture of the lease, whereas a violation of clause 2 merely gives the landlord an option to terminate the lease. Finally, it seems to us that to say that clause 2 modifies clause 1, to the effect that a violation of clause 1 must continue 30 days, would be to hold that there was a contractual obligation on the part of the lessee to permit any illegal use of the premises for 30 days, which would be clearly against public policy and void. Therefore we hold that clause 2 does not modify clause 1—that the two clauses are independent of each other.

Appellant as his next contention quotes the following from 36 C. J. 92, § 726:

"A covenant restricting particular acts upon the premises may be such as to hold the tenant responsible for the acts of third persons. Upon a positive covenant by the lessee not to use or permit the use of the premises in a particular

manner, the lessee may be liable for acts of a sublessee. Where there is a covenant not to do or permit to be done a particular thing, a lessee who grants an underlease and authorizes that particular thing to be done commits a breach of the covenant. *But where the sublease contains the same restriction as the original lease*, which is violated by the sublessee, it is held that the lessee is not liable on his covenant not to do or suffer the acts in question, and it is held that a covenant on the part of the tenant for himself and his assigns does not render him liable for acts of a sublessee." (Italics ours.)

[8] That portion of the text commencing with the italicized words is claimed to be supported by two English cases, and no others; but these cases support the text only in part and they are contrary to the great weight of American authority, as shown by the cases already cited. The American cases, almost without exception, treat such a covenant as one running with the land and binding upon all assignees and subtenants of the original lessee. See *Wheeler v. Earle*, *Burke v. Bryant*, and other cases, supra.

[9] Appellant next urges that a breach of the lease must be substantial before a forfeiture is justified, and claims that the violations in question are insubstantial, if not trivial. We cannot sustain him. The penalties to which the lessor may be liable under both the National Prohibition Act and section 337a of our Penal Code are neither of them to be desired or lightly suffered. The Supreme Court of Minnesota has well said, in *Zotalis v. Canelos*, 138 Minn. 179, 164 N. W. 807, L. R. A. 1918A, 1066, where shaking dice for cigars was a violation of a covenant against gambling which was under consideration:

"The violation of a condition in the lease cannot be said to be trivial when the violation is of such a character that the lessor may be subjected to a criminal prosecution on account thereof."

Furthermore, the action of the lessor, when a violation of the National Prohibition Act occurs, may well have a distinct bearing on the attitude toward him of those in charge of enforcing that legislation, including the courts. In *Grossman v. United States*, 280 F. 683, 685, Justice Evans, speaking for the Circuit Court of Appeals, very aptly said:

"The court might not conclude to dispossess the landlord, if it appeared that he was innocent of the uses to which his property was being put by the tenant and manifested a desire to co-operate in abating the nuisance. Of course, the landlord cannot close his eyes to the obvious and still plead innocence. He may be chargeable with knowledge concerning the character of, and the uses to which, the premises are put, if the facts reasonably warrant such a conclusion, notwithstanding he professes his ignorance of such uses. *His attitude toward the tenant, after being informed of the latter's misconduct, might, and probably would, be determinative of the state of his mind and his knowledge of the*

tenant's wrongdoing; for it is hardly conceivable that a law-respecting landlord would not avail himself of the above-quoted provision of the National Prohibition Act and seek to oust the tenant, upon discovering that his premises were being maintained as a nuisance by such tenant. On the other hand, the landlord who repudiates the tenant's action immediately upon learning of the facts, and who at the first opportunity avails himself of a remedy open to him to oust the tenant from the premises, necessarily places himself in a position of vantage when it comes to the terms of the decree finally entered." (Italics ours.)

Enough has already been quoted to show that the courts have readily forfeited leases of the character we are considering, where violations have occurred. Only decisions dealing with violations similar to the case at bar have been cited, and they have been numerous. Therefore, construing the forfeiture clause most strictly against the landlord, for whose benefit it was created, we find the intention of the parties to be clearly set forth in the very terms of the instrument; that the breach was a substantial one, which equity will not relieve against; that the covenant in question runs with the land and was and is binding on all lessees and subtenants; that the original lessee is responsible for the acts of his sublessees, whether known to him or not; that clause 2 does not impair or modify clause 1 each of them being independent covenants; and that the lease has been breached by appellant through those for whom he was responsible, and has therefore been forfeited.

The judgment of the trial court is affirmed.

We concur: CRAIG, Presiding Justice pro tem.; THOMPSON, J.

36 Cal. App. 235

PEOPLE v. FLORES. (Cr. 1401.)

District Court of Appeal, First District, Division 1, California. Oct. 22, 1927.

1. Criminal law §24—Specific intent as element of offense is not presumed from unlawful act, but must be proved as fact, except in murder cases.

Except in cases of murder, whenever specific intent is an element of offense, existence of intent must be proved as a fact and is not presumed from commission of an unlawful act.

2. Burglary §46(2)—Instructions in burglary prosecution held sufficient to require proof beyond reasonable doubt that defendant entered dwelling with intent to commit larceny, to convict.

In prosecution for burglary of dwelling house, instructions that every one is presumed to intend that which he does and all natural and probable consequences of own acts, that in-

tent and act must exist to constitute offense, that all presumptions are in favor of innocence, and that conviction requires showing that defendant entered dwelling house with intent to commit larceny, to be proved beyond reasonable doubt, held sufficient to require proof of entry and intent to commit larceny beyond reasonable doubt, to convict.

3. Criminal law §829(6)—Instruction that intoxication does not lessen criminal act, but may be considered in determining intent, covered requested instruction and was proper.

In prosecution for burglary, instruction that no act committed by person while intoxicated is less criminal by reason thereof, but may be considered in determining intent which is necessary element of crime, fully covered requested instruction on question of effect of intoxication on intent and was proper.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Joe Flores was convicted of burglary, and he appeals. Affirmed.

Gallagher & Jertberg, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

CASHIN, J. The defendant was charged by an information filed in the superior court of the county of Fresno with the offense of burglary and was convicted. An appeal was taken from the judgment and from an order denying a motion for a new trial.

It is contended that the court misdirected the jury on matters of law, erred in its refusal to give an instruction requested by the defendant, and that a statement of the law by the prosecuting attorney in the course of his argument to the jury was prejudicially erroneous.

The evidence adduced shows that the dwelling house of P. Bandoni, situated in the town of Firebaugh, in Fresno county, was on the night of December 5, 1926, between the hours of 7:30 and 10 o'clock p. m., entered and a watch and a sum of money consisting of silver and copper coins taken therefrom. The crime was committed during the absence of Bandoni and his family, and it appears that an entrance was effected through one of the windows in a bedroom of the dwelling. Upon the return of the owner and his family, the screen over the window was found to have been cut and removed, and one of the panes of glass nearest to the window lock was broken. Bloodstains were discovered near the window and also upon a bed in the bedroom and in other parts of the house.

At about 10:30 o'clock on the same night defendant was arrested in a hotel near the scene of the crime. At the time of his arrest he was wearing a bandage on his right hand, and there was found upon his person the stolen watch and a small sum of money

in silver and copper coins. The defendant denied all knowledge of the crime, and the witnesses agree that at the time of his arrest he appeared to be intoxicated. It was further shown that the thumb of defendant's right hand and his forefinger had been recently cut. The cuts, according to his testimony and that of others—who testified that they were in his company during the day and evening of the crime—were received in a scuffle at the hotel. The defendant was unable to account for his possession of the watch, and denied any recollection of his movements during the evening preceding the crime.

The instruction of which the defendant complains was as follows:

"Every one is presumed to intend to do that which he in fact does, and also is presumed to intend all the natural and probable consequences of his own acts."

The jury was also instructed that in every crime or public offense there must exist a union or joint operation of act and intent; that all presumptions of law independent of evidence are in favor of innocence; that before they might convict they must believe from the evidence beyond a reasonable doubt that the defendant entered the dwelling house with the intent to commit larceny; that the burden was upon the prosecution to show such intent beyond a reasonable doubt; and that this burden never shifted, but remained upon the prosecution throughout the whole case.

[1] It is the rule except in cases of murder, in which a contrary rule is established by statute, that whenever a specific intent is an element of an offense the existence of the intent must be proved as a fact, and is not presumed from the commission of an unlawful act. *People v. Landman*, 103 Cal. 577, 37 P. 518; *People v. Johnson*, 106 Cal. 289, 39 P. 622; *People v. Maciel*, 71 Cal. App. 213, 234 P. 877. In *People v. Richardson*, 161 Cal. 552, 120 P. 20, the defendant was charged with having procured a pregnant woman to take a certain drug with intent thereby to cause a miscarriage, intent being the gist of the offense. It was held with respect to an instruction similar to the one in question that, although it was a correct statement of the law in ordinary cases, the instruction was not applicable to a case where intent was the gist of the offense, but, the jury having been fully instructed that the specific intent with which the act was done was the gist of the offense, and that unless they were satisfied from the evidence beyond a reasonable doubt that the act was done with the intent to procure a miscarriage they must acquit, it was clear from the charge as a whole that the instruction complained

of was not meant, nor could have been understood by the jury, as requiring or authorizing them to find such intent in the absence of evidence establishing it beyond a reasonable doubt.

[2] In the present case the clear purport of the two instructions given was that, in order to convict, it must be proved as a fact beyond a reasonable doubt that the defendant entered the dwelling house with the intent to commit larceny, and we are satisfied that the charge was so understood by the jury.

[3] The defendant offered and the court refused the following instruction:

"You are instructed that in the crime of burglary one essential element constituting such crime is that the defendant must have entered the house, room, apartment, with the intent to commit larceny or any felony. Therefore you are instructed that if you believe the defendant was intoxicated at the time of the alleged burglary you must take into consideration such facts in determining whether or not defendant was capable of entertaining the intent to commit grand or petit larceny or any felony at the time it was alleged in the information he entered the building alleged in the information."

In other parts of its charge the court instructed that intent was an essential element of the offense of burglary and must be proved beyond a reasonable doubt, and, with respect to the purpose for which evidence of intoxication might be considered, instructed as follows:

"You are instructed that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition; but whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime the jury may take into consideration the fact that the defendant was intoxicated at the time in determining the purpose, motive, or intent with which he committed the act."

The foregoing instruction stated the law and fully covered all that was contained in the offered instruction, and the refusal of the latter was not error.

We find no merit in the further contention that the statements of the district attorney of which appellant complains were erroneous or prejudicial; and after an examination of the entire record, including the evidence, we are satisfied that the verdict is fully supported, and that no error is shown which may reasonably be said to have been prejudicial or to have resulted in a miscarriage of justice.

The judgment and order are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

86 Cal. App. 343

GORDON et al. v. BEASORE et al.
(Civ. 3301.)

District Court of Appeal, Third District, California. Oct. 25, 1927.

1. Appeal and error ⚡612(2)—Where record is made up under alternative method, clerk may certify only judgment roll and notice of appeal (Code Civ. Proc. § 953a).

Under Code Civ. Proc. § 953a, where record on appeal is made up under alternative method, the only portion of the transcript on appeal to which the clerk may certify is the judgment roll and notice of appeal.

2. Appeal and error ⚡612(2)—Where applications for orders, orders made, minutes, and affidavit were certified to by clerk, but not by judge, record made up under alternative method held insufficient for review (Code Civ. Proc. § 953a).

Under Code Civ. Proc. § 953a, record made up under alternative method held insufficient for purposes of review, where applications for orders, orders made, court minutes, and affidavit which were necessary to a determination of questions presented by appeal were certified to by the clerk, but not by the judge.

3. Appeal and error ⚡641—Where record is insufficient for review because not properly authenticated, proper procedure is to affirm judgment (Code Civ. Proc. § 953a).

Where record made up under alternative method is insufficient for review under Code Civ. Proc. § 953a, because certain essential portions are certified to by clerk, but not by judge, but appellate court acquired jurisdiction by filing proper notice of appeal, proper procedure is to affirm judgment rather than to dismiss appeal.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Virgel L. Gordon and others against Tom Beasore, Thomas Jones, and another. From orders granting and refusing to vacate injunction pendente lite, defendants named appeal. Affirmed.

Peckinpah & Carter, of Fresno, and William H. Metson, of San Francisco, for appellants.

Barcroft & Barcroft, and John J. Coghlan, all of Madera, for respondents.

BURROUGHS, Justice pro tem. The defendants Beasore and Jones have appealed from three orders of the superior court of Madera county and they are all presented upon the same record. One of said orders granted the plaintiffs an injunction pendente lite, and the other two are orders refusing to vacate and set aside the above order for injunction.

The plaintiffs have made a motion in this court to dismiss all of the appeals because the record is not certified by the judge as required by section 953a of the Code of Civil

Procedure; the appeals having been taken under the so-called alternative method. The transcript on appeal contains a copy of what purports to be the pleadings, the orders appealed from, the minutes of the court on the hearing of the application for said orders, and certain other documents, together with the notice of appeal from the orders. These are all certified by the clerk of the court as constituting the transcript on appeal and being true and correct. There is also included in the record the reporter's transcript of the testimony taken on the original hearing of the application for the said injunction. Attached to this reporter's transcript is the certificate of the judge as required by section 953a, supra. Section 953a provides that:

"Any person desiring to appeal from any judgment, order or decree of the superior court to the Supreme Court or any of the District Courts of Appeal, may, in lieu of preparing and settling a bill of exceptions pursuant to the provisions of section 650 of this Code, or for the purpose of presenting a record on appeal from any appealable judgment or order, or for the purpose of having reviewed any matter or order reviewable on appeal from final judgment, file with the clerk of the court from whose judgment, order or decree said appeal is taken, or to be taken, a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate, be made up and prepared."

It is further provided in said section that:

"If the judgment, order or decree appealed from be not included in a judgment roll, the party desiring to appeal shall on the filing of said notice, specify therein such of the pleadings, papers, records and files in said cause as he desires to have incorporated in said transcript in addition to the matters hereinbefore required and the same shall be included."

[1] Provision is then made in said section for the preparation of the transcript, the filing of the same with the clerk, and giving of notice to counsel of the time when the court would settle said transcript, and upon the settlement of the same by the judge he shall attach thereto his certificate certifying to the truth and correctness of the same, and it then becomes a portion of the judgment roll, and may be considered on appeal.

The foregoing portions of said section have been construed by the court many times, and the rule of procedure plainly pointed out that the only portion of the transcript on appeal to which the clerk may certify is the judgment roll and notice of appeal.

In *Richmond v. Julian Consolidated Mining Co.*, 176 Cal. 600, 169 P. 356, it is said:

"The transcript contains copies of certain notices of motion, affidavits, and orders bear-

ing on this matter. But it is settled by our decisions that, where a record is made up under the alternative method, all that may be authenticated by the clerk is the judgment roll, together with the notice of appeal. In the absence of a certificate of the trial judge, other papers are not a part of the record on appeal, and they cannot be considered."

In *Bell v. Brigrance*, 194 Cal. 445, 229 P. 27, it is held that, upon the certification by the trial judge of the truth and correctness of a reporter's transcript being made, the transcript becomes a part of the record on appeal, and in no other way can it become such.

Knox v. Schrag, 18 Cal. App. 220, 122 P. 969, was an appeal from an order granting a change of the place of trial. The transcript filed was authenticated by the clerk of the court, who certified that it "contains full and true copies of the bill of exceptions and notice of appeal from order, and all papers used in motion for change of venue, now on file in said court and cause." No bill of exceptions was ever certified by the judge. The court held:

"A record so authenticated is wholly insufficient as a basis for this court to review the order appealed from."

In *Barnabee v. Hunstock*, 42 Cal. App. 659, 183 P. 951, it is held that where the order appealed from arises on a record outside the judgment roll, it is not for the clerk, but for the judge who determined the motion, to certify the papers and proceedings on which the order appealed from was made.

In *Martin v. Pacific Gas & Electric Company*, 195 Cal. 544, 234 P. 321, it was held that, under section 953a, Code of Civil Procedure, the only record the clerk of the court may certify for use on appeal is the judgment roll and notice of appeal, and that all other matters or documents must be inserted in the reporter's transcript and settled by the judge.

[2] In the case at bar the only matter certified to by the judge is the evidence taken on the hearing for the injunction pendente lite. The applications for the orders, the orders made, the minutes of the court, and the affidavit filed, are all necessary to a determination of the questions presented by this appeal, but, being certified to by the clerk and not by the judge, the record is wholly insufficient for us to review the action of the trial court.

[3] Counsel for respondents has made a motion to dismiss the appeals, but it is held in *Knox v. Schrag*, supra, *Barnabee v. Hunstock*, supra, and *Hibernia Savings & Loan Society v. Doran*, 161 Cal. 118, 118 P. 526, that the proper order to be made in this character of cases is to affirm the judgment. In the case last cited it is said:

"Jurisdiction over the appeal having been vested * * * by the notice of appeal given

by appellant * * *, the proper order would be one of affirmance of the order upon appeal for lack of record showing error."

In this case, this court having acquired jurisdiction by the filing of the notice of appeal and its proper certification by the clerk to this court, but there being no proper record before the court upon which it may examine into the merits of the orders appealed from, they, and each one of them, must be affirmed, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

86 Cal. App. 329

PEOPLE v. WYSONG. (Cr. 1523.)★

District Court of Appeal, Second District, Division 2, California. Oct. 25, 1927.

Rehearing Denied Nov. 25, 1927. Hearing Denied by Supreme Court Dec. 22, 1927.

1. Robbery $\Leftrightarrow$ 20—Conviction for robbery in first degree under indictment for robbery by force from person held not objectionable, because statute does not define first degree robbery (Pen. Code, §§ 211, 211a).

Where indictment for robbery alleged that defendant willfully and feloniously took from person of another certain money without consent and against the will of such person by means of force, and putting in fear without specifying degree of robbery, conviction of first degree robbery was not objectionable on ground that Pen. Code, § 211a, declares robbery as defined by section 211 to be that of second degree, but does not embrace elements necessary to constitute first degree robbery.

2. Robbery $\Leftrightarrow$ 24(1)—Evidence showing robbery at point of revolver supported conviction for first degree robbery.

In prosecution for robbery, evidence showing offense was committed at point of revolver supported conviction for first degree robbery.

3. Criminal law $\Leftrightarrow$ 763, 764(13)—Instruction that law does not distinguish between circumstantial and direct evidence required for conviction held not objectionable as comment on evidence.

In prosecution for robbery, instruction that law makes no distinction between circumstantial and direct evidence in degree of proof required for conviction was not objectionable as invasion of province of jury by comment on evidence or weight of testimony.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Joe Wyson was convicted of robbery, and he appeals. Affirmed.

James E. Fenton, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant and three other men were charged by indictment with robbery. In one count it was alleged that on

or about the 11th day of April, 1927, at and in the county of Los Angeles, state of California, the defendants did willfully, unlawfully, and feloniously take from the person, possession, and immediate presence of one Clifford Shaw \$3,090, the personal property of the Citizens' Trust & Savings Bank, without the consent and against the will of Shaw, and which said taking was accomplished by means of force, and by then and there putting the said Clifford Shaw in fear. Appellant was tried alone, and was convicted of robbery in the first degree. A motion for new trial was presented, which was denied, and he appealed from the judgment and from the ruling upon said motion. The indictment contained a second count, but it was dismissed.

[1] The principal ground of appeal consists in the assertion that section 211a of the Penal Code declares robbery as defined by section 211 of the Penal Code to be that of the second degree, but does not embrace the elements necessary to constitute robbery in the first degree, and that, since the indictment in this case merely charged appellant with the crime of robbery, without specifying the degree, he was convicted of a crime with which he was not charged.

Appellant refers to *In re Colford*, 68 Cal. App. 308, 229 P. 63, and *People v. Howard*, 3 Cal. App. 36, 84 P. 462, holding to the contrary, but argues that the reasoning therein is "specious, but unsound." These decisions have been followed by *People v. North* (Cal. App.) 252 P. 1063, and *People v. Tognola* (Cal. App.) 256 P. 455, the two last-named cases also holding that robbery is sufficiently charged, if the information or indictment follows the language of section 211 of the Penal Code.

[2] In the instant case the offense was shown to have been committed at the point of revolver, and the evidence amply supports the jury's verdict, placing the offense clearly within the definition of robbery of the first degree.

With one exception, other points presented are based upon the contention just mentioned, and are therefore governed by the cases above cited.

[3] The court instructed the jury that "the law makes no distinction between circumstantial and direct evidence in the degree of proof required for a conviction." It is said that by this instruction the court invaded the province of the jury and commented upon the evidence. It seems quite obvious that this criticism is without merit. The language used is plain, and clearly means that as a matter of law the jurors are not required to regard either class of evidence, circumstantial or direct, as being of greater weight than the other. There is no semblance of a suggestion of the court's idea as to the weight of the testimony of any witness or of any evi-

dence that was before the jury for consideration.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

86 Cal. App. 374

PEOPLE v. FREEMAN et al. (Cr. 1524.)

District Court of Appeal, Second District, Division 1, California. Oct. 26, 1927.

1. Robbery ☞11—Whether instrument is dangerous or deadly weapon within definition of first degree robbery depends on circumstances (Pen. Code, § 211a).

Whether given instrument is dangerous or deadly weapon within definition of first degree robbery in Pen. Code, § 211a, depends primarily on attendant circumstances as well as use which has been made, or is proposed to be made, of the particular instrument.

2. Criminal law ☞304(2)—It is common knowledge that in committing robbery pistols are frequently used as bludgeons.

It is matter of common knowledge that in committing robbery pistols are frequently used as bludgeons rather than as firearms.

3. Robbery ☞11—Unloaded pistol carried by person committing robbery held "dangerous weapon" within statute defining first degree robbery (Pen. Code, § 211a).

That person perpetrating crime of robbery is armed with pistol is enough to justify conclusion that it is "dangerous weapon" within Pen. Code, § 211a, defining first degree robbery, even though it be not loaded, since it is common knowledge that in committing robbery pistols are frequently used as bludgeons.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dangerous Weapon.]

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Owen Freeman and others were convicted of robbery, and they appeal. Affirmed.

Wm. T. Aggeler, Public Defender, and Carl A. Davis, Deputy Public Defender, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, for the People.

HOUSER, J. Defendants pleaded guilty to a charge of robbery. On a hearing had for the purpose of fixing the degree of the crime, the evidence showed that in the commission of the offense one of the defendants used a large unloaded revolver, although no oral threats were made by either of the defendants, nor was any attempt made by either of them to shoot with such weapon or to strike the victim of the robbery with it. At the time the robbery occurred another of the defendants had a matchbox made of metal in

the shape of a pistol, which he flourished about, and the third defendant had nothing whatsoever in his possession which represented a weapon of any sort. In such circumstances, and in accordance with the provisions of section 1192 of the Penal Code, the trial court determined that the degree of the crime committed by the defendants constituted robbery in the first degree. From the judgment of the court pronounced in pursuance of such determination the defendants appeal to this court.

Section 211a of the Penal Code provides that:

"All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree. All other kinds of robbery are of the second degree."

It is the contention of appellants that, because the record herein fails to show that any attempt was made by the defendants, or by either of them, to use the unloaded pistol in the possession of one of them in an aggressive or offensive manner, thereby indicating an attempt to injure the victim of the robbery, it cannot be said that the unloaded pistol was either a dangerous or a deadly weapon, and consequently, that the determination by the trial court to the effect that the defendants were guilty of robbery in the first degree was prejudicial to the substantial rights of the defendants, for which error a reversal of the judgment should result.

[1] The question as to whether a given instrument is a dangerous or a deadly weapon depends for its solution primarily upon the attendant circumstances, as well as upon the use which has been made, or is proposed to be made, of the particular instrument. Notwithstanding the general prevailing opinion, at least among those unfamiliar with, or unaccustomed to, the use of firearms, that a gun "without lock, stock, or barrel" is dangerous, it is patent that ordinarily, and without the aid of some animate agency, a gun in itself, either loaded or unloaded, possesses no qualities either dangerous or deadly. In other words, it is only by its use, whether arising from human or other manipulation, that it assumes a deadly character, or one dangerous to life or limb; and just so, only in a lesser degree, is any other invention, device, or instrument. According to the authorities, an ax (*People v. Guidice*, 73 Cal. 226, 15 P. 44), a hatchet (*Stanton v. State*, 68 Tex. Cr. R. 602, 151 S. W. 808), a chisel (*Commonwealth v. Branham*, 8 Bush. [71 Ky.] 387), a pick handle (*People v. Fuqua*, 58 Cal. 245), a rock (*Cosby v. Commonwealth*, 115 Ky. 221, 72 S. W. 1089), a stone (*Acers v. United States*, 164 U. S. 388, 17 S. Ct. 91, 41 L. Ed. 481), a brickbat (*People v. Fahey*, 64 Cal. 342, 30 P. 1030), a stocking filled with salt and plaster (*People v. Valliere*, 123 Cal.

576, 56 P. 433), or even a pin (*State v. Norwood*, 115 N. C. 789, 20 S. E. 712, 44 Am. St. Rep. 498), may, in appropriate circumstances become a deadly weapon. As is said in *State v. Huntley*, 91 N. C. 617, 620:

"* * * A small pocket knife, a walking cane, a switch of the size of a woman's finger, if strong and tough, may be made a deadly weapon if the aggressor shall use such instrument with great or furious violence, and especially, if the party assailed should have comparatively less power than the assailant, or be helpless and feeble. * * * It is the use of such instrument that gives consequence to the offense."

It is manifest that a heavy club or a piece of gas pipe in the hands of a child of tender years, and proposed by it to be used as against a large and powerful man of mature years, could scarcely be considered either as a deadly or a dangerous weapon; but, reversing the situation as to parties, it is clear that the weapon might be not only dangerous, but deadly. Notwithstanding the fact that ordinarily and in and of itself the instrumentality may be in fact comparatively harmless, if, considering the attendant circumstances, together with the present ability of its possessor, the instrument is capable of being used in a deadly or dangerous manner, for the purpose of the particular occasion only, the character of the instrument may be established.

[2, 3] In the instant case it is apparent that, although the defendant who had possession of the unloaded pistol at the time the robbery occurred was 10 or 12 feet distant from the victim, it was possible for such defendant within a very short space of time to have used the pistol as a bludgeon or club; thus rendering it a most "dangerous" weapon within the meaning of the statute. So far as this state is concerned, the point seems to be settled in each of the cases of *People v. Egan* (Cal. App.) 246 P. 337, and *People v. Shaffer*, (Cal. App.) 254 P. 666. In the first of such cases, in considering the point urged by appellant, the court said in part:

"* * * It is a matter of common knowledge that in committing robbery pistols are frequently used as bludgeons rather than as firearms. The fact, therefore, that a person perpetrating such crime is armed with a pistol is enough to justify the conclusion that the pistol used by him is a 'dangerous' weapon within the meaning of said section 211a of the Penal Code, even though it be not loaded."

And in the *Shaffer* Case it was directly held that an unloaded revolver is a "dangerous" weapon, within the meaning of section 211a of the Penal Code.

It must therefore be concluded that in the premises no error was committed by the trial court.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

86 Cal. App. 294

ATKINS v. BOUCHET et al. (Civ. 5825.)★

District Court of Appeal, First District, Division 2, California. Oct. 25, 1927.

Hearing Denied by Supreme Court Dec. 22, 1927.

Municipal corporations  **705(10)**—Where driver could have stopped automobile after seeing pedestrian's danger, last clear chance doctrine was applicable.Evidence that defendant automobile driver could have stopped his automobile after observing plaintiff's dangerous position, and could have avoided striking her, *held* to justify application of doctrine of last clear chance.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action for damages for personal injuries by Anna D. Atkins against J. B. Bouchet and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Hearing Denied by Supreme Court; LANGDON, J., voting for a hearing.

Wm. M. Abbott, K. W. Cannon and J. E. Reardon, all of San Francisco, for appellants.

Ostrander & Carey, of Oakland, for respondent.

STURTEVANT, J. The plaintiff brought an action to recover damages for personal injuries. The defendants answered, and a trial was had in the trial court. The jury returned a verdict in favor of the plaintiff. From a judgment based thereon the defendants have appealed under section 953a of the Code of Civil Procedure.This is the second appeal. 65 Cal. App. 94, 223 P. 87. The facts are so fully stated in the reported case that we need not restate them. On the second trial the plaintiff testified, and also demonstrated, that she did not pause at the corner "one or two minutes" of 60 seconds each. She showed that she barely paused. The defendants claim the new record is substantially the same as the first, and that the decision on the first appeal has become the law of the case, and that the plaintiff was guilty of contributory negligence, and cannot recover. *McClenahan v. Keyes*, 65 Cal. App. 467, 224 P. 241.

If we assume, as the defendants contend, that, in view of the facts which we have recited, and the decision on the former appeal, the plaintiff was guilty of contributory negligence, the case is not yet determined, because the plaintiff did, on the second trial, rely on the doctrine of the last clear chance, and now vigorously presents the point. She introduced evidence to support that theory, and she presented an instruction on the subject which was given by the trial court. The defendants' answer is that the "plaintiff was guilty of contributory negligence which continued clear down to the moment of the impact, and was a concurring, contemporaneous, and proximate cause of the injuries and dam-

ages complained of." The defendants rely on *Sego v. Southern Pacific Co.*, 137 Cal. 405, 70 P. 279; *Everett v. Los Angeles, etc., Ry. Co.*, 115 Cal. 105, 43 P. 207, 46 P. 889, 34 L. R. A. 350; and *Mayer v. Anderson*, 36 Cal. App. 740, 173 P. 174. The plaintiff replies that the rule contended for does not apply when the injured party was at the time wholly unaware that she was in a situation of danger. In this connection she cites *Palmer v. Tschudy*, 191 Cal. 696, 700, 218 P. 36, and 19 Cal. Jur. p. 651. Those authorities are further supported by what is said in *Arnold v. San Francisco-Oakland T. Rys.*, 175 Cal. 1, at page 4, 164 P. 798, 800:

"This doctrine applies where the injured party by his own negligence has placed himself in a position of danger from which he cannot extricate himself, or of which he is obviously unconscious, and the defendant, seeing or knowing his peril or seeing or knowing facts from which a reasonable man would believe him to be in peril, and being able by the use of ordinary care to avoid injuring the plaintiff in his perilous position, fails to use such care and thereby causes the injury."

And *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, at page 526, 74 P. 15, 19 (63 L. R. A. 238, 98 Am. St. Rep. 85), speaking on the point now before us, the court placed its remarks in italics, and said:

"In such a case he *who knows of the danger and can avoid it, as against one who does not in fact know thereof*, has the last clear opportunity to avoid the accident. If a motorman should discover a man asleep on the track in front, and knowing him to be asleep, should proceed, regardless of his position and condition, and run over him with his car while still asleep, there would be very little question that the motorman had the last clear opportunity, and that his negligence was the proximate cause of the injury."

The plaintiff called as a witness J. H. Meiss, the driver of the automobile, and examined him in detail regarding the facts pertinent to the application to this case of the doctrine of the last clear chance. She also took the stand and testified in her own behalf on the same subject. She testified to the same facts as on the first trial, except as noted above. Meiss testified that, as he approached from the east, driving westerly, he saw the plaintiff when he was a half block away, and continued to watch her; that he saw her standing at the corner of the sidewalk facing south; that from appearances she was about to cross East Fourteenth street; that she had an umbrella down over her head; and that it was inclined over her left shoulder, pointing toward the east, and thus obscured her head and face from him; that he did not see her look toward him at any time; that the street was not occupied by passing vehicles which obstructed his view of the plaintiff; that he nevertheless proceeded to cross Eighth avenue at a speed of 10 or 12 miles an hour until he was about 15

feet from the corner where the plaintiff stood, and at the time that he saw her start across the street. He also testified that he could stop his machine within 10 feet. An expert testified that the machine could have been stopped in 10 feet if it was being driven at 15 miles an hour, and, if it was being driven at 10 or 12 miles an hour, it could have been stopped in 6 or 8 feet; that there was no cause for the car to skid at the time and place; and that stopping the car under the existing circumstances would not cause skidding. We think it may not be held that the doctrine of the last clear chance is not applicable to the facts of this case. See, also, *Kramm v. Stockton Electric R. R. Co.*, 3 Cal. App. 606, 86 P. 738, 903.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

86 Cal. App. 406

JAMES L. McLAUGHLIN CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. No. 5903.)★

District Court of Appeal, First District, Division 1, California. Oct. 28, 1927.

Hearing Denied by Supreme Court Dec. 27, 1927.

1. Master and servant ⇨398—Corporation, represented by attorney at hearing in compensation proceeding brought against officer, held to have waived formal notice of application.

Where compensation case was, by mistake, brought against corporation's president and the insurance carrier, who appeared as defendants, and the corporation which was the real employer was made a party on rehearing, and had been represented by an attorney throughout the proceedings, and both president and attorney had full knowledge of the actual facts of the case, which they failed to disclose to the commission, corporation held to have waived formal notice of application for compensation.

2. Master and servant ⇨398—Award against corporation made party to compensation proceeding, brought against officer, held valid without formal notice.

Where compensation proceedings were, by mistake, brought against the president of the corporation which employed claimant, and against the insurance carrier, and they appeared as defendants, when corporation was made party to the proceeding on rehearing after having been afforded full opportunity to be heard at every stage of the proceedings, Industrial Accident Commission held to have jurisdiction to make an award against the corporation, although it had not been given formal notice.

3. Master and servant ⇨398—Compensation proceedings, brought against corporate officer, held not barred as to corporation (Workmen's Compensation Act, § 11).

Compensation proceedings, brought by mistake against president of corporation employing

claimant and against the insurance carrier, who appeared as defendants, held not barred as to corporation by Workmen's Compensation Act, § 11 (St. 1917, p. 841), limiting time for bringing compensation proceedings, where corporation, while not a formal party to proceedings, was such in effect.

4. Master and servant ⇨398—Where employer was made party to compensation proceedings within six months after last compensation payment, employee's recovery held not barred by limitations (Workmen's Compensation Act, § 11).

Where compensation proceedings were, by mistake, brought against the president of the corporation, which employed claimant, and against the insurance carrier, and they appeared as defendants, but the corporate employer was made a party to the proceedings within six months after the last compensation payment, Workmen's Compensation Act, § 11 (St. 1917, p. 841), limiting time for bringing compensation proceedings, did not bar claimant's recovery.

Proceeding under the Workmen's Compensation Act by George Heine, claimant, opposed by James H. McLaughlin (James L. McLaughlin), employer, and the New Amsterdam Casualty Company, insurance carrier, in which the James L. McLaughlin Company, employer, was made a party. To review an order of the Industrial Accident Commission awarding compensation, the employer applies for certiorari. Award affirmed.

Barry J. Colding, Theodore Hale, and Thacher & Wright, all of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CASHIN, J. A proceeding in certiorari to review an award made by the Industrial Accident Commission.

On December 7, 1926, George Heine filed an application with the commission for the adjustment of a claim for compensation, the defendants named in the application being James H. McLaughlin (whose true name was James L. McLaughlin), who was alleged therein to be the employer of the applicant, and the New Amsterdam Casualty Company, the alleged insurance carrier. The defendants named appeared in the proceeding, and McLaughlin testified at the hearing. The commission, on January 29, 1927, made an award for normal compensation against McLaughlin, who, according to the findings, was the employer, and the New Amsterdam Casualty Company, found to be the insurance carrier, and awarded the applicant a further sum based upon the serious and willful misconduct of the employer in failing to comply with the safety orders of the commission.

After the award was made, defendant McLaughlin filed a petition for a rehearing, al-

leging that the applicant, at the time of the injury, was employed by the James L. McLaughlin Company, a corporation, of which the defendant was president. A rehearing was granted, and on April 6, 1927, the time fixed therefor, the corporation was formally made a party to the proceeding; the order providing that the case should be open for an answer to be filed within three weeks.

At this hearing it appeared from the testimony of McLaughlin and the statement made by the counsel representing the Casualty Company that both understood and believed that the original proceeding was against the James L. McLaughlin Company, and that they were not apprised that this corporation was not named in the application as the employer until after the award was entered. It further appears from the attorney's statement that at the hearings preceding the award he was representing the James L. McLaughlin Company as well as the insurance carrier, and that the latter carried insurance only for the corporation. At the time of the rehearing the attorney mentioned entered, on behalf of the James L. McLaughlin Company, an oral plea, alleging that more than six months had elapsed between the date of the injury and the date when the corporation was made a party to the proceeding, and that the claim for compensation based upon the alleged misconduct of the employer was barred by the provisions of section 11 of the Compensation Act (St. 1917, p. 841).

Further evidence was taken, and, on May 28, 1927, the decision on rehearing was filed in which the commission found that, at the time the injury occurred, the applicant was employed by James L. McLaughlin Company, and an award was made against the latter and the insurance carrier for the same amounts previously awarded against the insurance carrier and James L. McLaughlin.

In the present proceeding the petitioner, James L. McLaughlin Company, contends that the second award should be annulled, for the reason that the corporation was not served with notice of the filing of the application for compensation; that it was not afforded an opportunity to adduce evidence in defense of the claim; and that the portion of the claim for compensation based upon misconduct by the employer was barred by the provisions of the statute.

As stated, petitioner, through its attorney, orally interposed the plea of the statute of limitations to the application, and, as appears from the record, filed a written answer thereto. The attorney also represented petitioner at each of the hearings, and cross-examined the witnesses, including the applicant, and both its president and attorney had full knowledge of the actual facts of the case which through inadvertence they failed to disclose to the applicant or to the commission. Furthermore, at the close of the last

hearing, the attorney was asked by the referee whether he wished further notice or a further hearing on behalf of petitioner, to which inquiry, as may be reasonably inferred from his statements, he replied in the negative.

[1, 2] It is clear from the foregoing that formal notice was waived by petitioner; that it was afforded a full opportunity to be heard at every stage of the proceeding, and, as held under similar circumstances in *Pruitt v. Industrial Accident Commission*, 189 Cal. 459, 209 P. 31, the commission was not without jurisdiction to make the award.

[3, 4] With respect to the bar of the statute, while petitioner was not a formal party to the proceeding previous to April 6, 1927, it was such in effect. Moreover, the evidence shows that, after the injury, the applicant was paid compensation; the last payment, as may reasonably be inferred from the testimony of the applicant, having been made on October 7, 1926. As provided by section 11 of the act the above payment had the effect of extending for six months the time within which proceedings for the collection of compensation might be commenced, and this period expired on April 7, 1927.

We find no ground for the contention that the commission was without jurisdiction, and its award, being fully supported by the evidence, is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

86 Cal. App. 339

CAMPODONICO v. SANTA MARIA BEAN & GRAIN CO. (Civ. 4436.) ★

District Court of Appeal, Second District, Division 2, California. Oct. 25, 1927.

Hearing Denied by Supreme Court Dec. 22, 1927.

1. Chattel mortgages ☞ §36—Generally, lien of mortgage on growing crop is lost by removal of crop from land.

Generally, lien of mortgage on growing crop is lost by removal of crop from land to which it was attached.

2. Chattel mortgages ☞ §36—Lien of mortgage on growing crop is not lost by tortious removal.

Exception to general rule that lien of mortgage on growing crop is lost by removal of crop from land to which it was attached is when crop is tortiously removed.

3. Chattel mortgages ☞ §36—Mortgagee of growing oats held not to have lost lien, where mortgagor breached agreement to store in warehouse in mortgagee's name.

Mortgagee of growing crop of oats did not lose lien thereon by removal of oats from land, where mortgagor agreed to convey threshed grain to named warehouse, and store it there in mortgagee's name, and instead tortiously stored it in his own name, took warehouse receipts,

and absconded, and warehouse, having notice of existence of mortgagee's lien, took the crop subject to it.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by E. M. Campodonico against the Santa Maria Bean & Grain Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Preisker, Preisker & Goble, of Santa Maria, for appellant.

Fred A. Shaeffer, of Santa Maria, for respondent.

WORKS, P. J. The plaintiff in this action was the holder of a mortgage on a growing crop of oats which was the property of the mortgagor, one Sutton. While the latter was engaged in threshing the oats, on his own land, it was agreed between him and plaintiff that he (Sutton) would convey the threshed grain to a certain warehouse, and would there store it in plaintiff's name. Sutton hauled the grain to the warehouse, but stored it in his own name; that is, he took warehouse receipts showing a storage by himself instead of by plaintiff. Later he sold and conveyed the oats to defendant by indorsing to it the warehouse receipts. Sutton failed to pay the mortgage debt, and decamped with the proceeds of the sale of the grain. Defendant had both actual and constructive notice of the fact that Sutton's crop was under mortgage to plaintiff. This action was commenced for the purpose of procuring judgment for the amount due on the promissory note for the payment of which the mortgage was security. Judgment was rendered accordingly, and defendant appeals.

Appellant contends that the complaint failed to state a cause of action; that certain findings of the trial court were not sustained by the evidence; and that the evidence failed to support the judgment. All of these points depend for solution upon the single general question whether defendant was liable to plaintiff upon the facts above stated.

[1, 2] It is undoubtedly the general rule that the lien of a mortgage on a growing crop is lost by a removal of the crop from the land to which it was attached (*Horgan v. Zanetta*, 107 Cal. 27, 40 P. 22), but the rule has its notable exceptions. One of these exceptions, for instance, operates in those cases in which the removal of the crop is tortious (*Chittenden v. Pratt*, 89 Cal. 178, 26 P. 626; *Bank of Woodland v. Duncan*, 117 Cal. 412, 49 P. 414), when, under certain circumstances, the lien of the mortgage is superior to asserted rights of third persons. Closely akin to such cases are those in which the removal, although not actually tortious, is fol-

lowed by such acts as those committed by Sutton in the present instance.

In the first case in which the exact question here presented was mentioned, the mortgagor, indeed, was guilty of no wrongful act. He (one Pullen) had mortgaged a crop of hay to one McDermott. The latter, when the hay was grown, directed Pullen to convey it to a warehouse not on Pullen's land. This the latter did, and he thereafter executed a bill of sale of the hay to McDermott. The property was then attached by a creditor of Pullen, and was taken into custody of the sheriff. McDermott thereafter sold the hay to one Byrnes, who then brought suit against the sheriff to recover possession of it. The plaintiff's title was upheld because of the bill of sale from Pullen to McDermott, but in its opinion on appeal the court employed this language:

"The testimony tended to show that the hay was hauled to the warehouse by Pullen, at the request of and as the agent for McDermott, and this being so, we are not prepared to say that McDermott did not have a lien on the hay after it was placed in the warehouse for the full amount of money represented by his note and mortgage." *Byrnes v. Hatch*, 77 Cal. 241, 19 P. 482.

If these expressions, obiter as they are, indicate the true state of the law, then the plaintiff here preserved the lien of the crop mortgage, or created a new lien equivalent to it, through her agreement with Sutton for a removal of the oats to a warehouse and for a storage there in plaintiff's name. Under the agreement, then, Sutton was a mere agent for the purpose of warehousing the oats for plaintiff.

In a later case the Supreme Court determined the law to be as hinted in *Byrnes v. Hatch*, although, again, there was no wrongful act upon the part of the mortgagor. One Dodge had mortgaged a growing crop to one Campodonico. When the crop was grown, the latter requested Dodge to store it in a warehouse as the property of Campodonico. The crop was taken to the warehouse accordingly, and the warehouseman was asked to issue a receipt in the name of Campodonico. This he did not do, but issued it in the name of Dodge, over the protest of the latter. These facts were later reported by Dodge to Campodonico, but in the meanwhile the crop had been attached by a creditor of Dodge. After the attachment, the property, without the knowledge or consent of Campodonico, was transported outside the county and to a distant part of the state. Campodonico then brought suit against the warehouseman for damages as upon a conversion of the crop. In affirming a judgment for the plaintiff the Supreme Court said:

"The lien of respondent's mortgage was not lost by his permitting the mortgagor, Dodge, to haul the mortgaged property from the land on

which it was grown, and its storage in defendant's warehouse, under the circumstances disclosed in the findings. *Byrnes v. Hatch*, 77 Cal. 244 [19 P. 482]. The neglect or refusal of defendant's agent to issue a receipt showing that the property was stored in the warehouse for the plaintiff did not change the effect of the agreement, made between plaintiff and his mortgagor, Dodge, as to the way in which it should be stored, so as to destroy the mortgage lien. * * * *Campodonico v. Oregon Improvement Co.*, 87 Cal. 566, 25 P. 763.

[3] We think the present case is stronger than the two which we have cited, for the reason that Sutton violated his agreement with respondent, and endeavored wrongfully to vest in himself a paper title to the oats. The case is therefore, as between Sutton and respondent, at least somewhat like those in which mortgaged crops are tortiously removed from the land to which they are attached. Sutton surely held the warehouse receipt for respondent, and he could not profit by his wrong to the exclusion of the rights of respondent in the crop of oats. We think that respondent's lien was preserved under these circumstances, and that appellant, having had actual and constructive notice of the existence of the lien, although the latter kind of notice would be enough, took the crop subject to it. In addition to the cases already cited, we think this conclusion finds support in *Crosby v. Fresno Fruit Growers' Co.*, 30 Cal. App. 308, 158 P. 1070.

Judgment affirmed.

We concur: CRAIG, J.; THOMPSON, J.

86 Cal. App. 412

EVANS v. BAXTER. (Civ. 5948.)

District Court of Appeal, First District, Division 2, California. Oct. 28, 1927.

1. Judgment ¶17—Where no issue of damages was raised in pleadings, court erred, on plaintiff's default, in awarding defendant damages.

Where, in an action to recover the purchase price of real property, plaintiff was in default for nonappearance for trial, and court awarded damages to the defendant, court thereby committed error, where the issue of damages was not raised in the pleadings.

2. Appeal and error ¶858—Judgment awarding defendant more relief than prayed for held reviewable on appeal, such being direct attack.

Judgment awarding defendant damages on plaintiff's default by nonappearance at trial, although the pleadings raised no issue of damages, held reviewable on appeal, such attack by appeal being by direct, and not by collateral, proceedings.

3. Process ¶166—That codefendant was not properly served with process did not, in absence of objection, prevent trial as to parties served.

Where, in an action against three persons for the purchase price of land, one of the codefendants was not properly served with process, such fact did not, in the absence of an objection, prevent a trial as to the parties served.

Appeal from Superior Court, Los Angeles County; T. I. Fitzpatrick, Judge.

Action by Esther L. Evans against A. H. Baxter and others. Judgment was entered in favor of named defendant, and plaintiff appeals. Judgment modified, and, as modified, affirmed.

Goode & McCreery, of Los Angeles, for appellant.

Edgar I. Thompson, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued the three defendants jointly for money claimed to be due upon the purchase price of certain real property. The defendant Baxter alone answered. The cause was regularly set for trial, and, the appellant failing to appear at the time set, her default was taken, and judgment was entered against her and in favor of defendant Baxter alone. In due time she moved to set aside the judgment, which motion was denied. The appeal is from the judgment and from the order refusing to set it aside.

The complaint was in the ordinary form for money. The answer denied that the property described in the complaint was purchased from plaintiff, and alleged in detail the transaction between Baxter and his codefendant Seddon whereby the property came to Baxter in exchange for other properties transferred to Seddon, who, it was alleged, was at all times acting in co-operation with plaintiff. The answer closed with a prayer that plaintiff take nothing from Baxter, and that he have judgment for his costs.

The trial court entered judgment in favor of Baxter and against the plaintiff in the sum of \$500 "for his damages in said action." In moving to set aside the judgment, this award was attacked as beyond the issues raised by the pleadings. The further grounds of this motion were that, because publication of summons was being made as to defendant Seddon, the cause was not ready for trial, and that appellant's counsel was engaged in other litigation at the time, and should have been excused for his neglect to appear at the trial.

[1, 2] These three grounds are now urged on the appeals. As to the first, the trial court was plainly in error in awarding any damages to respondent. No issue of damages was raised in the pleadings, and, the appellant being in default, no question of waiver of pleading or proof arises. Respondent does

not defend this portion of the judgment, but insists that it cannot be reviewed on this appeal because of the rule that "a judgment for more relief than is prayed for is not void as to such, and cannot be attacked in collateral proceedings." The appeal, of course, is a direct, and not a collateral, attack upon the judgment, and it is not confined to the question whether the judgment is void for want of jurisdiction.

[3] The fact that one of the codefendants had not been properly served with process did not prevent a trial as to the parties served, in the absence of an objection. Appellant having consented to the trial date, and not having brought to the attention of the court the fact that one of the defendants had not been served, she should certainly be precluded from raising that objection after the judgment has been entered.

On two separate occasions the trial court found that the excuses for appellant's failure to appear at the trial were insufficient, and we are satisfied that there was no abuse of discretion in the order refusing to set aside the judgment.

Because of the error in the award of damages, the judgment must be modified by striking therefrom the sum of \$500, and, as so modified, it is affirmed, with costs to appellant.

We concur: KOFORD, P. J.; STURTEVANT, J.

86 Cal. App. 449

THOMAS v. SPITZER. (Civ. 4980.) ★

District Court of Appeal, Second District, Division 1, California. Oct. 31, 1927.

Hearing Denied by Supreme Court Dec. 29, 1927.

Vendor and purchaser ⇄ 133—Purchaser held entitled to stop payment on check where vendor tendered Torrens certificate and title insurance instead of title guaranty as contracted.

Where vendor did not deliver nor offer to deliver to purchaser a guaranty of title issued by a responsible title company as required by land contract, but instead offered a Torrens title certificate and a policy of title insurance, there was a failure of consideration which entitled vendor to stop payment on check given for first payment.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by E. J. Thomas against H. Spitzer. Judgment for defendant, and plaintiff appeals. Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Charles Schusterman, of Los Angeles, for respondent.

McLUCAS, Justice pro tem. This is an action brought to recover the sum of \$400, for which amount the defendant gave plaintiff his check and on which defendant stopped payment. Plaintiff appeals from the judgment rendered for defendant.

Plaintiff and defendant entered into an agreement for the purchase and sale of real estate, wherein defendant gave to plaintiff his check for \$400 as first payment and agreed to pay the balance into escrow. The agreement contained a provision that the evidence of title was to be in the form of a guaranteed title to be issued by a responsible title company. It was further agreed that in the event the purchaser failed to pay the balance of the purchase price, the amounts paid thereon should, at the option of the seller, be retained as liquidated damages. It was agreed that in the event the title should not prove to be merchantable and the seller should not be able to perfect the same within a reasonable time, the purchaser should have the option of receiving back his deposit and be released from all obligations. It appears that at the time of making this agreement the land in question had been brought under the Torrens title system, of which the defendant purchaser testified he had no knowledge. The plaintiff testified that the defendant called his attention to the fact that he had a Torrens title, but that defendant did not demand a guaranteed title and said that he (the defendant) would go through with the deal. Plaintiff further testified that he was ready and willing to close the deal, but that he had not arranged with the title company to issue a policy of insurance, which he would have done had the defendant not stopped payment on the check. The defendant testified that after signing the contract he met the plaintiff at the escrow office of the Title Insurance & Trust Company, where he was informed in the presence of the plaintiff that the title company could not issue a guaranty, but would issue a policy of insurance; that he then demanded that plaintiff return his check, and upon plaintiff's failure to do so, he stopped payment on the check.

It appears from the evidence that plaintiff could not and did not deliver nor offer to deliver to defendant that which the parties contracted for, to wit, a guaranty of title issued by a responsible title company. Appellant argues that a certificate of title under the Torrens system is a guaranteed title, as that term is used in the agreement between the parties, particularly if it be accompanied by a policy of insurance issued by a responsible title company. We cannot agree with plaintiff's argument. It may or may not be, as argued by the plaintiff, that the security afforded by a Torrens title, accompanied by an insurance policy issued by a title company,

is greater than that under a guaranteed certificate of title issued by a responsible title company; yet the fact remains that a contract to do one thing cannot be performed by an offer to do another thing equally as good or better than that agreed upon. The doing of anything else or different from that designated in the contract will not suffice. *Merkeley v. Fisk*, 179 Cal. 748, 756, 178 P. 945. In our opinion, there was a failure of consideration, and defendant was justified in stopping payment of the check.

The judgment is affirmed.

We concur: HOUSER, J., Acting P. J.; YORK, J.

86 Cal. App. 248

KINSEY v. BOYES, Sheriff, et al. (Civ. 3323.)

District Court of Appeal, Third District, California. Oct. 22, 1927.

1. Sales $\S$ 479(1)—Notification by seller's assignee, to sheriff holding car under attachment issued against conditional buyer, held not to operate as forfeiture of buyer's rights under contract for nonpayment of installments.

Where, under contract for conditional sale of automobile, mere failure of buyer to pay installments as prescribed did not ipso facto operate to terminate his rights under contract or right to possession of automobile, but contract simply provided for certain remedies which seller might take upon his election, mere notification by assignee of seller to hold car for it, to sheriff holding possession of car under attachment issued against buyer, did not operate as a forfeiture of buyer's rights under the contract for nonpayment of certain installments.

2. Trial $\S$ 397(4)—Trial court need not make finding on particular subject, where not warranted by testimony.

Where there was no testimony in the record which would support a particular finding, it was not necessary for the trial court to make one upon that subject.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action in claim and delivery for automobile by W. T. Kinsey against John M. Boyes, as Sheriff, etc., and the Fidelity & Deposit Company of Maryland. From a judgment in favor of plaintiff, the last-named defendant appeals. Affirmed.

Bradford M. Melvin, of San Francisco, and Ward Sullivan, of San Jose, for appellant. E. J. Dole, of Petaluma, for respondent.

HART, J. This action is in claim and delivery, and is for the specific recovery of the possession of a certain Nash touring car, or, in case possession thereof cannot be had, to recover the sum of \$700, the alleged value thereof, together with the sum of \$400 as damages

for the alleged wrongful detention and use of said car. Judgment passed for the plaintiff in accord with the prayer of the complaint, as just indicated, and for the sum of \$676 as damages for the unlawful detention and use of said car; the sum in excess of the sum specifically alleged in the complaint for such damage being for damage alleged to have been suffered by plaintiff for such detention and use by the defendants subsequent to the time of the filing of the complaint. The defendant Fidelity & Deposit Company made a motion for a new trial, which motion was denied.

The appeal is by the defendant corporation from said judgment upon a record prepared in pursuance of the provisions of section 953a of the Code of Civil Procedure.

This case has previously been before and decided by this court; the judgment having been reversed and the cause remanded for a new trial. *Kinsey v. Ryan et al.*, 74 Cal. App. 567, 241 P. 282. The opinion in that case, written by Justice Plummer, contains a full and clear statement of the facts and the issues presented and determined, and it will subserve the purposes of the present appeal to adopt herein such statement, which is as follows:

"On the 20th day of January, 1923, the plaintiff and one J. H. Madison entered into a conditional contract of sale whereby the said J. H. Madison conditionally sold to the plaintiff a certain Nash automobile for the sum of \$900, \$360 payable in cash, and the remainder thereof as follows: \$108 on February 15, 1923; \$108 on March 15, 1923; \$108 on April 15, 1923; \$108 on May 15, 1923; and \$108 on June 15, 1923. Possession of the automobile was then and there delivered to the plaintiff. The conditional contract of sale provided, first, that, if the monthly payments were not made as provided therein, they should bear interest at the rate of 1 per cent. per month until paid. It was also further conditioned that the purchaser should keep the property insured and take other precautions for its safety, and keep it within the territorial limits of the state of California. It was then provided that, if the purchaser failed to make the payments as stipulated, the party of the first part might, at his option, retake possession of said automobile, including all new parts added thereto by the buyer, and that the rights of the purchaser should thereupon terminate, and action might be begun for the collection of the remaining installments set forth in the contract and then remaining unpaid, or might waive the conditions of the contract, consider the sale absolute, and sue for the balance due, or take possession of the automobile, sell the same, apply the proceeds toward the payment of the balance due, and, in case of deficiency, proceed against the buyer for the amount due thereon, or that the seller might avail himself of any and all rights, privileges, or elections which are or may be granted to a seller by operation of law. On the 23d day of January, 1923, said J. H. Madison for the purpose, as shown by the testimony, of giving collateral

security for general advances to be made to him by the Sonoma County National Bank assigned his interest in said contract to the Sonoma County National Bank by a written assignment in the following words:

"For value received J. H. Madison hereby transfers, assigns, and sets over all its right, title, and interest in and to the within contract, and in and to the property therein described, and to all of the moneys payable thereunder to Sonoma County National Bank, and hereby guarantees the payment of all moneys due, or to become due, under the said contract, and also the full performance by the second party therein named of all the second party's promises and covenants, and it hereby consents that the time of payment of any of the said installments therein provided may be extended at the request of the second party, notice of which is hereby waived.

"Dated the 23d day of January, 1923.

"J. H. Madison."

"Whereafter, and on the 13th day of April, 1923, in an action instituted by the Sterling Lumber company against the said W. T. Kinsey wherein an attachment was levied, the defendant John M. Boyes, as sheriff of the county of Sonoma, levied upon the automobile herein mentioned. Thereupon, and on the 20th day of April, 1923, the seller mentioned in the conditional contract herein referred to filed his third-party claim as owner of said automobile in the following words and figures, to wit:

"(Title of court and cause.)

"Notice of Claim Under Conditional Sale Contract.

"State of California, County of Sonoma ss.:

"J. H. Madison, being first duly sworn, deposes and says:

"That he is the owner of that certain Nash automobile engine No. 13856, state license No. 121,680 taken under attachment issued in the above-entitled cause from the defendant W. T. Kinsey; that said W. T. Kinsey is in possession of said automobile under a conditional sale contract dated Petaluma, Cal., January 20, 1923, for the total sum or price of \$900; that there is now due affiant from defendant the installment due on the 15th day of April, 1923, amounting to \$108, together with interest from the date of the contract at the rate of 8 per cent. per annum; that there will accrue on the 15th day of May and the 15th day of June, 1923, respectively installments of \$108, together with like interest; that affiant hereby demands of the sheriff either the possession of said car, or that said sheriff shall pay to affiant the above installments now due and to accrue in full in cash within five days from the receipt of this notice and affidavit.

"This notice and affidavit is given in accordance with sections 689, 689a, and 689b of the Code of Civil Procedure of the state of California and affiant hereby claims and demands all of the right accorded to him under said provisions of the law. J. H. Madison.

"Subscribed and sworn to before me this 18th day of April, 1923.

"[Seal] E. J. Dole,

"Notary Public in and for the County of Sonoma, State of California.

"Indorsed: Received in the sheriff's office of Sonoma Co. Cal. Apr. 20, 1923 at 35 min. past 9 o'clock a. m."

"Following the filing of this claim a representative of the Sterling Lumber Company went with said Madison and the sheriff to the place of business of the Sonoma County National Bank, where the said representative of the Sterling Lumber Company paid to the Sonoma County National Bank the unpaid portion on said contract, then amounting to the sum of \$324, and received from said Sonoma County National Bank said contract with the following indorsements thereon:

"For value received, we hereby transfer, assign, and set over all our right, title, and interest in and to the within contract and in and to the property therein described and to all of the moneys payable thereunder to the Sterling Lumber Company.

"The Sonoma County National Bank,

"By A. P. Behrens, Cashier.

"In pencil:

"W. T. Kinsey made the following payments:

February 15, 23.....	\$108 00
Mar. 15, 23.....	108 00
Sterling Lumber Company paid the balance,	
April 23-23.....	324 00
	\$540 00'

"The sheriff then stored the automobile, and retained possession thereof up to the time of the trial of this action.

"The Sterling Lumber Company was unsuccessful in its attachment suit; judgment being entered in favor of the said W. T. Kinsey, the defendant in that action and the plaintiff in this. After the rendition of judgment in favor of the defendant in the attachment suit, the plaintiff in this action, demand was made upon the sheriff for the return of the attached automobile. This demand not being complied with by the sheriff, this action was begun for its recovery, or for the value thereof. The complaint is in the usual form of claim and delivery for personal property. The defendants in this action, admitting the attachment of the property, set up in their answer the conditional contract of sale; to which we have referred, and, among other things, alleged as follows:

"That on or about the 23d day of January, 1923, said J. H. Madison assigned, transferred, and set over said contract to the Sonoma County National Bank, a corporation.

"That after defendant sheriff had levied on said automobile, to wit, on the 20th day of April, 1923, a third party claim was filed with defendant sheriff claiming title to said automobile under and by virtue of said contract of conditional sale with J. H. Madison and Sonoma County National Bank; that thereupon said Sterling Lumber Company, in pursuance of law, paid the amount unpaid under said conditional sale contract, and said contract of conditional sale was assigned and transferred by said Sonoma County National Bank to said Sterling Lumber Company; that said Sterling Lumber Company is now the owner and holder thereof."

"It is further pleaded by defendants that the said W. T. Kinsey, the plaintiff herein, did not make the three payments provided to be made on the 15th day of April, 15th day of May, and 15th day of June, respectively, and that the whole of said sums remained unpaid, and that, pursuant to the terms of the contract of conditional sale, the Sterling Lumber Company had declared all rights of said W. T. Kinsey in and to said automobile to be at an end.

"There is no testimony in the record showing that such payments have not been made by the plaintiff, nor is there any testimony in the record showing that the Sterling Lumber Company has exercised any election whatever in the matter of the forfeiture of the plaintiff's ownership or right to the automobile in question, or has taken any proceedings whatever under and by virtue of the terms of the conditional sale contract herein referred to. It may be here stated that, the conditional sale contract does not provide by any of its terms that, upon failure of the buyer to make payments as therein provided, the buyer's rights in and to the automobile shall ipso facto terminate, and thereafter be considered as ended. It provides simply, as we have hereinbefore stated, for certain remedies which the seller may take upon his election. The court, in its findings, found that the defendant sheriff is in possession of the automobile in question; that he had refused to deliver the same to the plaintiff; that his withholding thereof is not unlawful, and then the execution of the conditional contract of sale, as we have stated. The court also made the following findings:

"That on or about the 23d day of January, 1923, said J. H. Madison assigned, transferred, and set over said contract to the Sonoma County National Bank, a corporation.

"That, after defendant sheriff had levied on said automobile, to wit, on the 20th day of April, 1923, a third party claim was filed with defendant sheriff claiming title to said automobile under and by virtue of said contract of conditional sale with J. H. Madison and Sonoma County National Bank; that thereupon said Sterling Lumber Company paid the amount unpaid under said conditional sale contract, and said contract of conditional sale was assigned and transferred by said Sonoma County National Bank to said Sterling Lumber Company; that said Sterling Lumber Company is now the owner and holder thereof."

The grounds upon which the case was reversed on the former appeal were substantially these: (1) That, so far as the evidence disclosed, the title to the automobile, by virtue of the terms of the conditional sale contract, still remained in Madison, the seller, and that, the assignment of the contract to the bank by Madison having been made merely as collateral security for general advances made and to be made by the bank to Madison, therefore the assignment of the contract by the bank to the Sterling Lumber Company had the effect of transferring, not the title to the automobile, but only such interest in the contract as the bank had under the assignment thereof to it by Madison; (2) that the record contained or disclosed no evidence showing that Kinsey, the purchaser, failed to make payments on the purchase price of the automobile, as required and prescribed by the contract; (3) that there was no evidence in the record showing, or tending to show, that the Sterling Lumber Company, assuming that it acquired ownership of the contract and all the rights of Madison thereunder, ever exercised its election, as authorized by the con-

tract, to declare all the rights of the plaintiff in the automobile forfeited.

The findings made by the trial court in the trial of the action resulting in the present appeal are substantially the same as those made in the former trial of the action, as indicated in the above extract from Justice Plummer's opinion, save in a few particulars, one of which exceptions is that in the trial with which this appeal is concerned there is not, as there was at the former trial, any finding that the plaintiff had failed to make the installment payments on the purchase price of the automobile as required by the contract, and that thereupon the Sterling Lumber Company, as the successor in interest in the contract of Madison, had exercised its election to declare all the rights of the plaintiff in and to the automobile forfeited and terminated.

[1] At the second trial of the action, the appealing defendant introduced testimony to the effect that Kinsey defaulted in the payment of the installments which had fallen due under the terms of the contract. Said defendant also introduced at the second trial testimony showing that the Sterling Lumber Company paid to the bank, to be paid by it to Madison, in response to his third party claim, the installments on the purchase price of the automobile then remaining unpaid. Thus the appellant, at the retrial of the action—the trial of which this appeal is the culmination—supplied proof sufficient to uphold a finding that the plaintiff had not paid the installments as required by the contract, and also presented testimony sufficient to show that Madison in effect transferred to the bank all his interests or rights in the contract before the bank assigned it to the lumber company, or, at least, that his acceptance from the bank of payment of all that was due and to become due under the contract was sufficient, at least, as between him and the bank and its assignee, to estop him from claiming or asserting that the title to the automobile was still in him. But, while this is all true, it does not follow that the judgment must be reversed. The attachment levied upon the automobile by the sheriff in the action by the lumber company was dissolved and became *functus officio* upon the entry of judgment in the attachment suit in favor of Kinsey, defendant in that suit, and against the lumber company, plaintiff therein. Upon the dissolution of said attachment, Kinsey was entitled to an immediate return by the sheriff of the automobile to his (Kinsey's) possession. As to this, we may properly at this point set forth what the record discloses. On April 13, 1923, the sheriff took possession of the automobile from Kinsey under the writ of attachment issued in the action by the lumber company against Kinsey previously filed. On October 22, 1923, judgment in favor of defendant was entered.

in the attachment suit. On January 21, 1924, Kinsey made a demand in writing on the sheriff for the release and return to him of the automobile. The sheriff refused to comply with the demand, and still retained possession of the car. It will be observed that, so far as this record discloses, the sheriff was without any authority to retain possession of the automobile between the time that the writ of attachment was dissolved upon the entry of judgment in the attachment suit in favor of Kinsey and the time at which the present action was commenced, which was on February 4, 1924, unless it may properly be held that a certain notification by the lumber company to the sheriff to retain in his possession the automobile under an alleged forfeiture by said company of the rights of Kinsey under the contract was of legal force. As to this notification, the testimony of the secretary of the lumber company is: That in the month of January, 1924—the particular day not stated—he called on the sheriff, and orally notified him that the lumber company had declared the contract and all of Kinsey's interests thereunder forfeited; that he (the sheriff) should hold the car for it; and that it would "hold him (the sheriff) responsible for the car and the delivery of the possession of the same to it." The fact of such notification by the lumber company to the sheriff, after the discharge of the writ of attachment, which followed from the entry of judgment in favor of Kinsey in the attachment suit, implies that the company assumed, and thus indeed conceded, that the car, at the time of such notification, was in the rightful possession of the sheriff. So far as anything to the contrary appears, that assumption or concession was well founded as against the lumber company, but not as against Kinsey. It is further to be observed that, from the time the present action was begun to the present time all parties apparently treated the possession of the car by the sheriff as being by virtue of this action, and that such possession was lawful. But, however that all may be, it is plainly manifest from the record that the alleged notification to the sheriff by the lumber company to hold the car was of no legal force. In other words, it is clear that the mere notification to the sheriff by the lumber company to hold the car for it did not amount to the exercise by the company of any of the several remedies prescribed by the contract, whereby, upon default by Kinsey in the payment of the installments on the purchase price as required by the contract, the seller or his assignee might take possession of the car, or otherwise, as prescribed by the contract, have enforced payment of the moneys then due. As stated in our opinion handed down on the former appeal, under the terms of the contract the mere failure on the part of the buyer to pay the installments as prescribed by

said contract did not, ipso facto, operate to terminate the buyer's rights thereunder or his right to the possession of the automobile. The contract, as likewise stated, "simply provides for certain remedies which the seller may take upon his election." Therefore, to have effectively exercised its privilege under the contract to forfeit, and so put at an end the rights of Kinsey thereunder because of the nonpayment of certain installments, it was necessary for the lumber company to have taken possession of the car, or, if the sheriff refused to deliver possession, to have taken the necessary legal steps to recover the possession of the same from that officer. No such an attempt was made by the lumber company, and its mere notice to the sheriff that he keep possession of the car for the company, or that it would hold him responsible therefor, amounted only to a mere unexecuted mental process or a mental gesture, which, as in effect above suggested, possessed absolutely no legal force as in the exercise of the remedies available to the seller or his assignee (the lumber company) by virtue of the terms of the contract to secure possession of the car or payment of the delinquent installments. Indeed, it was tantamount only to a mere declaration by the lumber company to the sheriff—not to Kinsey—that it was the owner of the car. There is absolutely no testimony in this record showing that the lumber company proceeded in any other way or further than as above explained. Nor is there a particle of evidence tending to show that Kinsey knew anything about the purported notification by the lumber company to the sheriff to hold the car for it, or that the company had declared that it claimed a right to its possession.

[2] As we have heretofore stated, the court made no finding upon the question whether the lumber company had exercised its privilege as prescribed by the contract of taking possession of the car and declaring forfeited all of the rights of Kinsey thereunder. Since, however, there is no testimony in the record which would support such a finding, it was not necessary for the court to make one upon that subject. It follows that, upon the findings as made, together with the fact that there is no testimony that would support any finding as to the alleged forfeiture of the rights of Kinsey under the contract, the judgment must be sustained.

It should be stated that the discussion in the briefs on the present appeal of the proposition that, under section 689b of the Code of Civil Procedure, the Sterling Lumber Company became the absolute owner of the automobile upon its payment of all that was due from the buyer under the conditional contract is without pertinency to the disposition of the appeal now before us. The same proposition was urged by the Sterling Lum-

ber Company on the former appeal, and fully discussed in the briefs. As seen, in the case as it was formerly presented to this court, the only interest that the evidence showed that the bank had in the contract was that of collateral security for advances made and to be made to Madison, and, as shown above in the extract from the opinion delivered on the former appeal, it was, with obvious propriety, held that the assignment by the bank to the lumber company carried with it only such interest in the contract as the bank had, and that, therefore, the lumber company did not by said assignment acquire title to the automobile; hence section 689b of the Code of Civil Procedure had no application in that case. As has been shown, the Sterling Lumber Company lost its attachment suit against the plaintiff here, who was defendant in said suit, and, consequently as stated, the sheriff lost his right to retain possession of the automobile, so far as was concerned the writ of attachment. But the discussion as to the effect of said section of the Code on the situation presented here is academic rather than pertinent to the present consideration, for, as must be manifest, we have considered the case upon the assumption that the evidence in this record sufficiently shows that the Sterling Lumber Company became the absolute owner of the automobile by virtue of the assignment by the bank to it of the conditional sale contract and all the rights that the seller of the car had thereunder. What we hold here is that the lumber company, as to the contract, stands in the shoes of Madison, the seller; that Madison's remedial rights prior to the assignment, as is true of the lumber company as assignee of all of Madison's rights under the contract, are prescribed by the contract itself; that, therefore, in order properly to exercise any of those rights for securing the payment of the unpaid installments, the company should have proceeded, at least substantially, as the contract provides; and that, as we hold, is not what it did in the present case.

For the reasons above stated, the judgment is affirmed.

We concur: FINCH, P. J.; WEYAND, Justice pro tem.

86 Cal. App. 288

PEREZ v. WILSON et al. (Civ. 6012.)

District Court of Appeal, First District, Division 1, California. Oct. 25, 1927.

1. Appeal and error $\S$ 1060(1)—Argument in negligence case that plaintiff abandoned case against certain defendants because he would not take roof from over heads of their children, if error, held harmless.

Argument to jury, in negligence action for personal injuries, that plaintiff abandoned case

against certain defendants because he would not take the roof from over the heads of their three small children, if error, held harmless, though such arguments should be avoided.

2. Trial $\S$ 125(4)—In negligence case, counsel should avoid arguments bringing before jury facts concerning parties' ability to respond in damages.

In negligence cases, counsel, in argument, should avoid bringing before a jury anything concerning the wealth or poverty or ability of the parties to respond in compensatory damages.

3. Trial $\S$ 127—In negligence case, it is error to get before jury that defendant is insured against loss.

In negligence case, it is error for counsel to either directly or indirectly get before the jury any fact which conveys the information that defendant is insured against loss in case of a recovery against him.

4. Trial $\S$ 133(6)—Striking, or instructing jury to disregard, evidence in negligence case that defendant is insured against loss, will not cure error.

Striking evidence in negligence case, or instructing jury to disregard evidence that the defendant is insured against loss in case of a recovery against him, will not cure error of having such fact directly or indirectly brought before the jury.

5. Pleading $\S$ 46—Parties to action and their liabilities must be determined by the pleadings.

The parties to an action, and their liabilities, can only be determined by the pleadings.

6. Judgment $\S$ 248—Party, injecting into action, issues, and parties not covered by pleadings, does so at peril of any judgment he may obtain.

When parties and issues not covered by pleadings are injected into an action, the one so injecting does so at the peril of any judgment he may obtain.

7. Trial $\S$ 114—Whether arguments in negligence case are improper depends on issues and atmosphere of trial.

Whether arguments of counsel in negligence case are improper depends on the issues, the parties, and the general atmosphere of the case.

8. Appeal and error $\S$ 1060(4)—Argument in automobile injury case implying defendant carried liability insurance held not to require reversal in view of verdict.

Argument in automobile injury case, which by some remote inference could be given the idea that defendant carried liability insurance, held not to require reversal, where there was no other intimation that defendant was insured, evidence supported verdict, and it was not claimed damages awarded were excessive.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action for damages for personal injuries by Fred Perez against Joseph Wilson, Orman Crocker, and others. Judgment for plaintiff as against defendant Crocker, and he appeals. Affirmed.

Sloss & Ackerman, of San Francisco, for appellant.

Vincent W. Hallinan, of San Francisco, for respondent.

PARKER, Justice pro tem. In this action plaintiff sought to recover damages from defendants for personal injuries sustained by him as the result of defendants' negligence.

The defendants Joseph Wilson and Claire Wilson, though testifying at the trial, made no appearance in the action and plaintiff did not ask for judgment against them.

The case was tried before a jury, and a verdict returned against defendant Orman Crocker in the sum of \$7,000. From the judgment entered on this verdict and from the court's order denying his motion for a new trial the defendant Crocker prosecutes this appeal.

It is conceded that the evidence was sufficient to sustain the verdict, and no errors in the admission or rejection of testimony are noted or urged. Nor is the court's action in the giving or refusal to give instructions complained of here. The sole point before this court and the point upon which appellant asks for a reversal of the judgment is misconduct of counsel for plaintiff, as a result of which defendant was precluded from a fair trial of his cause on the merits.

The alleged misconduct arises from the following state of facts:

During the closing argument of plaintiff's counsel to the jury these proceedings were had:

"Mr. Hallinan (counsel for plaintiff): Counsel for the defendant criticizes my conduct in abandoning the suit as to defendants Claire Wilson and her husband. We would not take the roof from over the heads of the three small children of the Wilsons."

To this statement of counsel no objection was made by defendant appellant, nor was the same called to the attention of the court in any manner. Then later in the argument the following took place:

"Mr. Hallinan (plaintiff's attorney): Some time ago I saw a cartoon by Tad in the Call representing a number of men and women sitting in an insurance office. The cartoon was called 'The Fifteen Mile an Hour Club,' and all of those persons in that office were represented as saying they were not driving over 15 miles an hour.

"Mr. Ackerman (counsel for defendant Crocker): I assign that statement as error on the part of counsel, and ask that the jury be instructed to disregard the statement.

"The Court: Yes, that is not in evidence.

"Mr. Hallinan: I was not bringing in the insurance company. That was not the purpose at all.

"The Court: I will ask the jury to disregard any insinuations along that line. The courts have been very strict about the references you may make in that regard. The rule is a strict one.

"Mr. Ackerman: There is no insurance company in this case, and I ask that the jury be instructed regarding the impropriety of Mr. Hallinan's reference to an insurance company.

"The Court: If any reference has been made, I ask the jury to disregard it entirely, because, as I say, the rule laid down by our courts is very strict in that matter. You are not to take into consideration at all whether the defendant is or is not represented by an insurance company.

"Mr. Hallinan: I am sorry if I conveyed any such impression. That was not my purpose at all."

[1, 2] With reference to the first statement of counsel concerning the failure of plaintiff to urge any claim against the Wilsons, it seems that more was said on this subject than is embraced in the foregoing. While the transcript of the proceedings before us shows that in the engrossed bill of exceptions nothing further appears, yet, in the affidavits filed on the motion for a new trial in the court below and in the brief of appellant here, it is conceded that counsel for plaintiff said that it was his conclusion that the Wilsons were not liable to plaintiff, nor were they in any way to blame for the accident, and that the sole responsibility rested on the defendant Crocker, appellant here. He said further that he would sooner have plaintiff recover nothing than to unjustly take the roof from over the heads of the Wilsons and their three children either by compelling them to defend an unjust claim against them or by collecting upon a judgment unjustly obtained.

To appreciate this last contention it should be stated that in this action the plaintiff was injured while he was standing on the sidewalk, presumably in a place of safety, and that nowhere was it contended that the negligence of plaintiff in any way contributed to his injuries. The injuries to him were caused through the acts of the defendants Wilson and the appellant Crocker, whether negligent or otherwise, and in the situation presented there could have been many theories left to plaintiff's election. He could have claimed that his injuries resulted from the concurring negligence of the defendants or from the negligence of either of them. While he chose to fasten the liability upon appellant he thereby in no way restricted appellant's right to show himself entirely free from negligence and fasten the blame, if any, on the codefendants Wilson. In fact, it was the defense of appellant that the accident and its unfortunate results followed the negligence of the defendants Wilson.

Appellant concedes that the statement of counsel regarding his failure to proceed against the Wilsons might not of itself be sufficient to upset the judgment herein. We affirm his conjecture in this regard, at the same time taking now the opportunity of suggesting to counsel in all cases that this class of argument should be avoided, and that we do not approve the general idea of bringing before a jury in cases of this sort anything concerning the wealth or poverty or ability of the parties to respond in compensatory damages.

Appellant insists that the statements of counsel as to the "Fifteen Mile an Hour Club" demand a new trial and the reversal of the order of the court below.

We have given his contention fullest consideration, and are not prepared to go to the length demanded. Counsel for appellant in their closing brief use these words:

"Counsel who conduct the trial for defendant are in an awkward and difficult position. If they object to the statement assigned as misconduct, and request the admonition of the court, they emphasize the point, and involuntarily assist in impressing it upon the minds of the jurors."

It seems to us that this is exactly what was done in the instant case. Appellant has taken up the remarks under scrutiny here, and has twisted each sentence into a direct reference to the fact that defendant Crocker was being defended by an insurance company, and that any verdict returned by the jury would come out of the pocket of the company. We fail to see it, or how the words employed can be so construed.

We can accept without question all of the authorities of this and other states cited by appellant, and yet find nothing in the record to which they may be applied to the extent of requiring a reversal of the judgment and order here. All the reviewing courts of this state are in accord upon the proposition that unfair and unwarranted means of winning a lawsuit cannot be commended nor receive recognition and indorsement of the courts, instituted and maintained, as they are, on the principle of administering justice. We are not out of harmony with the principle announced in *Dameron v. Ansbros*, 39 Cal. App. 289, 298, 178 P. 874, 879, wherein it is said:

"It is altogether probable that the jury would be more inclined to find a verdict against appellant if it were believed that he was indem-

nified than if it were understood that he was to bear the burden alone."

[3,4] Without abundant citation of authority we may here reaffirm it to be the law of this jurisdiction that it is improper to either directly or indirectly get before the jury any fact which conveys the information that defendant is insured against loss in case of a recovery against him, and the striking of the answers conveying such information and the instructing of the jury not to consider it will not save the error.

[5,6] The parties to an action and their liabilities must be determined by the pleadings, and, when other parties and other issues are injected, the one so injecting does so at the peril of any judgment he may obtain. *Shay v. Horr*, 78 Wash. 667, 139 P. 604.

[7] The profession as a whole should know that the courts of this state are giving more and more scrutiny to the fairness or unfairness of the means employed in presenting issues. The Supreme Court has spoken in no uncertain terms in *Keena v. United Railroads*, 197 Cal. 148, 239 P. 1061, and this case is still recent enough to require no citation therefrom. However, quoting from the case of *Edwards v. Earnest*, 206 Ala. 1, 89 So. 729, 22 A. L. R. 1391, the question is whether or not the argument falls within that class of argumentative statements which are grossly improper and highly prejudicial, and whose evil influence and effect cannot be eradicated from the minds of the jury by any admonition from the trial judge. There is no horizontal rule by which we may be governed to determine these qualities, but each case is to be decided on its own merits, much depending upon the issues, the parties, and general atmosphere of the case.

[8] In the instant case the record discloses that throughout the trial there had not been the slightest suggestion, insinuation, or intimation of the claim that defendant was insured. It is conceded that the evidence supports the verdict, and it has not been claimed that the verdict is excessive. To hold that the language employed, which by some remote reference perhaps could have given the idea of a possible insurance, was potentially harmful and prejudicial to the extent of necessitating a new trial, would be going a step too far, and beyond the theory or reason of the rule announced.

Judgment and order affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

86 Cal. App. 402

(260 P.)

TURANO v. BAILEY. (Civ. 3226.)

District Court of Appeal, Third District, California. Oct. 27, 1927.

1. Appeal and error ⇐1002—Verdict on conflicting evidence cannot be disturbed on appeal.

Verdict on conflicting evidence cannot be disturbed on appeal.

2. Appeal and error ⇐616(3)—Instructions not authenticated as provided by statute cannot be reviewed (Code Civ. Proc. § 953a).

Where appeal was taken under Code Civ. Proc. § 953a, and instructions were not included in reporter's transcript, certified to by trial judge, but in clerk's transcript, certified by clerk only, alleged error in giving or refusing of instructions cannot be reviewed.

3. Appeal and error ⇐1031(3)—No presumption prevails on appeal that plaintiff was prejudiced by introduction of evidence which does not appear in record.

It cannot be presumed on appeal that plaintiff was prejudiced by introduction of evidence which does not appear in the record, since it may have been favorable to him.

4. Evidence ⇐378(5)—Testimony that plaintiff stated he needed no contract, that telegrams were enough, held sufficient foundation for admission of telegrams on question of defendant's agency.

In action for value of grapes, where defendant filed cross-complaint, alleging plaintiff's indebtedness for moneys advanced and denying sale, and alleging he was plaintiff's agent to sell grapes, defendant's evidence that he had drawn up a contract, and that plaintiff had seen telegrams of negotiations between defendant and prospective purchasers of plaintiff's grapes, and that plaintiff said they needed no contract, those telegrams were enough, *held* sufficient foundation for admission of telegrams in evidence on question of defendant's agency.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Angelo Turano against Lansing B. Bailey, in which defendant filed a cross-complaint. From a judgment for defendant on his cross-complaint, plaintiff appeals. Affirmed.

Gumpert & Mazzera, of Stockton, for appellant.

Glenn West, of Lodi, for respondent.

FINCH, P. J. In appellant's opening brief it is said:

"Plaintiff * * * sued defendant * * * for the sum of \$557.81, the amount alleged due from respondent on a carload of grapes, No. PFE 14632, alleging it was one of 15 cars which respondent had purchased from appellant and which had not been paid for. Respondent filed a cross-complaint, alleging that plaintiff was indebted to him in the sum of \$960.64, moneys advanced by defendant for plaintiff's use and

benefit, denying the fact that any sale had been made to defendant. The jury denied plaintiff any relief, and brought in a verdict for the defendant in the sum of \$960.64. Plaintiff moved for a new trial, which was denied, and now appeals from the judgment of the court. The sole issue to be determined is whether or not the transaction in the sale of the 15 cars, of which No. PFE 14632 was one, constituted a sale from appellant to respondent, or whether the respondent was merely acting throughout as appellant's agent."

[1] The evidence is substantially conflicting upon the issue stated, and therefore the implied finding of the jury in favor of defendant is conclusive on appeal. The defendant testified positively that he did not purchase the grapes in question, but that he sold them for the plaintiff pursuant to an agreement between the parties to the effect that he should do so. Appellant argues at considerable length that such testimony of defendant is discredited and overcome by other evidence. The argument goes to the weight of the evidence, and defendant's credibility as a witness, rather than to the sufficiency of the evidence to support the verdict. The jury, in returning a verdict for the defendant, and the trial court, in denying a new trial, impliedly found against appellant's contention. The matter being peculiarly within their province, their finding cannot be disturbed by this court.

[2] Exception is taken to the giving and refusing of instructions by the trial court. This appeal was taken pursuant to the provisions of section 953a of the Code of Civil Procedure. The instructions are not included in the reporter's transcript, certified by the trial judge, but in the clerk's transcript certified by the clerk only. Not being authenticated as provided by law, the instructions cannot be reviewed on this appeal. *Tracy Brick etc., Co. v. Wurster*, 44 Cal. App. 652, 187 P. 125; *Martin v. Pacific Gas & Elec. Co.*, 195 Cal. 544, 234 P. 321; *Finkelstein v. Cosgrave* (Cal. App.) 248 P. 704. Notwithstanding the want of power to reverse the judgment on account of errors, if any, in giving or refusing instructions, they have been carefully examined, and the rulings of the court in relation thereto appear to be free from error.

[3] Appellant contends that the court erred in admitting in evidence "18 car files." The following appears in the record:

"Note.—The car files are too voluminous to copy into the transcript."

Appellant has not called attention to anything in the record to indicate the contents of the car files, and nothing in that connection has been discovered. It cannot be presumed on appeal that the appellant has been prejudiced by the introduction of evidence which does not appear in the record. It may have been entirely favorable to him.

[4] Scattered through the record are 15 telegrams, constituting negotiations between the defendant and purchasers or prospective purchasers of the plaintiff's grapes. In appellant's brief it is said:

"Counsel for plaintiff objected to the introduction in evidence of all telegrams which passed between the defendant and third parties, purporting to show that defendant was acting as agent and not as purchaser. * * * All of these telegrams * * * were admitted in evidence, and we submit that that constituted prejudicial error."

Appellant has failed to print in his brief, as required by the provisions of section 953c of the Code of Civil Procedure, or to call attention to the portions of the record on which he relies to show that the court committed error in admitting the telegrams in evidence. He refers to the page of the record upon which his objection to the evidence appears. In relation to the telegrams referred to in that part of the transcript, the defendant testified:

"On or about October 10th, I said, 'Angelo, I have drawn up this contract covering this 15-car deal,' and he interrupted and said, 'Well, no contract is necessary.' I said, 'Never mind, this is a contract; we had better get down to business on it;' and I proceeded to read the contract to him. He said, 'Oh, we both live in this town; we understand each other; we are reliable citizens; we don't need any contract; these telegrams are enough.' He had seen all the telegrams."

This testimony related to a time before the shipment of the grapes, and was sufficient foundation for the admission of the telegrams in evidence. Appellant does not call attention to the admission of any telegram without the laying of a similar foundation.

The case appears to have been carefully tried, and there is nothing in the record to show that the jury and the trial court arrived at an erroneous conclusion from the conflicting evidence.

The judgment is affirmed.

We concur: WEYLAND, Justice pro tem.; PLUMMER, J.

86 Cal. App. 362

Ex parte McDONALD. (Cr. 1431.)

District Court of Appeal, First District, Division 1, California. Oct. 26, 1927.

1. Gaming ⚡71—Agreement to pool contributions and divide fund, less deductions, among contributors selecting winning horse held "wager" or "bet" on speed contest, within statute (Pen. Code, § 337a).

Agreement, whereby sums were contributed to a jockey club to be pooled and entire fund contributed, less deductions jockey club was au-

thorized to make, divided among contributors who selected horse winning a designated race, held a "bet" or "wager," within Pen. Code, § 337a, on result of a speed contest.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bet; Wager—Wagering Contract.]

2. Gaming ⚡88—Complaint pleading offense of betting on speed contest held good, though not averring defendant's contribution to fund was wager (Pen. Code, § 337a).

Complaint pleading offense of betting or wagering on speed contest, as denounced by Pen. Code, § 337a, held good, though it did not aver that defendant's contribution to fund thereof was a bet or wager.

3. Habeas corpus ⚡3—Proceeding in habeas corpus cannot serve office of demurrer.

A proceeding in habeas corpus cannot be made to serve office of a demurrer.

4. Habeas corpus ⚡3—If complaint states offense of which court has jurisdiction, whether facts charged constitute offense cannot be examined on habeas corpus.

Notwithstanding defective statement of facts, if complaint states offense of kind of which court has jurisdiction, whether facts charged are sufficient to constitute offense cannot be examined on habeas corpus.

Original application by James S. McDonald for a writ of habeas corpus directed to the Sheriff of San Mateo County to secure petitioner's release from custody. Writ discharged, and petitioner remanded.

Walter H. Linforth, of San Francisco, for petitioner.

Franklin Swart, Dist. Atty., and Edmund Scott, Deputy Dist. Atty., both of Redwood City, for respondent.

Joseph Edward Connolly, of San Francisco, amicus curiae.

Clarence A. Linn, of San Francisco, amicus curiae for Presbytery of San Francisco.

CASHIN, J. Petitioner is held by the sheriff of San Mateo county on a warrant issued by the city court of the city of San Bruno. He seeks to be released on habeas corpus, claiming that the complaint upon which the warrant was issued fails to state a public offense.

The complaint charged a violation of section 337a of the Penal Code, the facts being alleged as follows:

"That on the 22d day of August, A. D. 1927, at Tanforan, in said county, the San Francisco Jockey Club, an association, held a horse race on a race track controlled and operated by it for that purpose at Tanforan, in said county of San Mateo and state of California, to test the speed of horses which might be and which were regularly entered in said race, and invited the owners of horses to enter the same in said race, and offered a purse of not less than \$500, and as much more as the judge or judges presiding at said race, after 'the same had been run, should

conclude, determine, and fix for the winners in said race, to be distributed as follows, to wit: Seventy per cent. of said purse to the owner of the horse finishing first in said race; 20 per cent. to the owner of the horse finishing second in said race; and 10 per cent. to the owner of the horse finishing third in said race; and that five horses were entered in the race designated on the printed program as "Race No. 1" under the terms and conditions of the written contract of entry made between the owner of each of said horses and said San Francisco Jockey Club, which, among other things, provided as follows, to wit:

"That owner of the above entered horse hereby leases the horse to the said San Francisco Jockey Club for the above-named race under the following conditions, to wit: That should the horse finish first, said San Francisco Jockey Club will pay said owner 70 per cent. of the purse or prize as fixed and determined by the judge or judges presiding at said race, after the running of said race, said purse to be not less than the sum of \$500; should the horse finish second, 20 per cent.; and if it finishes third, 10 per cent.

"The owner agrees to deliver the horse to the paddock 15 minutes before the time set for said race in proper racing condition, with racing paraphernalia and a competent rider, and also agrees to hold said San Francisco Jockey Club blameless for any injury in said race.' And that said San Francisco Jockey Club published and circulated a printed program which designated the race or contest of speed and the horses entered therein by number, and that one of said horses so entered in said race No. 1 was designated as No. 501 on said official program, and that the above-named defendant, James S. McDonald, at said time and place handed to John H. Gagliardo, then and there an employee of and representing and acting for the said San Francisco Jockey Club, the sum of \$10 in lawful money of the United States of America, which said sum was then and there received by said John H. Gagliardo as such employee of said San Francisco Jockey Club, and thereupon the said John Gagliardo, so representing and acting for said San Francisco Jockey Club, did then and there issue and deliver to the said defendant, James S. McDonald, to evidence the terms and conditions upon which said sum of money was delivered to and received by said San Francisco Jockey Club, a receipt in return for said sum, in words and figures as follows, to wit: 'San Francisco Jockey Club. Tanforan, San Mateo county, California. August 22, 1927. (The numbers correspond with the number of the race and entry on the printed program.) Amount \$10. Race No. 1, Entry No. 501. (The above sum is received on the conditions printed on the reverse side hereof.)'

Reverse side: "The holder of this receipt has voluntarily contributed the amount indicated on the reverse side hereof to the said San Francisco Jockey Club, which becomes the absolute owner thereof, to defray expenses, provide suitable purses, and induce the entry number indicated on the reverse side hereof and other entries to enter the race indicated by the number on the reverse side hereof. The numbers correspond with the numbers on the official program. If the entry number indicated on the reverse side hereof shall be first in the race, the holder will receive the proportion of

70 per cent. of all that remains, *if any*, of the entry fees and contributions made to the race after the payment of purses and all expenses incident to or connected with the race that the amount received hereunder bears to the total amount so remaining. If the entry number indicated on the reverse side hereof shall be second in the race, the holder will receive 20 per cent. of the aforesaid amount; if the entry number indicated on the reverse side hereof shall be third in the race, the holder will receive 10 per cent. of the aforesaid amount.'

"And that in said race, the same then and there being a trial and contest of the speed of said horse so entered and racing therein, said horse known and designated as No. 501 finished first and was the winner in said race, and that the judge or judges then and there presiding at said race thereupon fixed the sum of \$600 as the purse or prize to go to the winner of said race; that under and in accordance with the terms and conditions of the aforesaid contract, under which said horse was entered in said race, said San Francisco Jockey Club paid to the owner of said horse the sum of \$420, the same being 70 per cent. of the aforesaid amount so fixed as the purse or prize to go to the winner; and the said San Francisco Jockey Club paid to the owner of said horse which finished second in said race the sum of \$120, the same being 20 per cent. of the aforesaid prize or purse; and the said San Francisco Jockey Club paid to the owner of the horse which finished third in said race the sum of \$60, the same being 10 per cent. of the amount of said purse or prize; that the said San Francisco Jockey Club paid to the defendant, James S. McDonald, to whom the aforesaid receipt was issued, and from whom the said sum of \$10 was received as aforesaid, the sum of \$12.50, the same being the proportion of 70 per cent. of the amount of entry fees paid by the owners of horses entered in said race and of all contributions made to the aforesaid race remaining after the payment of the purse aforesaid and all expenses of said race that the sum of \$10 bore to the whole amount of the aforesaid entry fees and contributions so remaining, which said sum was accepted, received, and retained by the said defendant, James S. McDonald; and that said San Francisco Jockey Club paid to all others similarly contributing and holding similar receipts the same proportion of said amount so remaining."

Subdivision 6 of section 337a of the Penal Code provides that:

"Every person * * * who lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, or any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between man, beasts, or mechanical apparatus, is punishable by imprisonment," etc.

It is held in *Hankins v. Ottinger*, 115 Cal. 454, 47 P. 254, 40 L. R. A. 76, that the giving of purses or premiums by associations or individuals not themselves competing for the purpose of encouraging trials of speed between horses, though the purse or premium be composed in part of entrance fees, is not contrary to good morals or prohibited, and competing for such premiums whatever be

their designation is not competing for a bet or wager. As the court said:

"It is betting or wagering on the event of races which is regarded by the law as immoral, and which it undertakes to discourage."

[1] The transaction described in the complaint was, in effect, an agreement whereby the sums contributed were to be pooled and the entire fund, less such deductions as the Jockey Club was authorized to make, divided among the contributors who selected the winning horse. Had the amount to be deducted been fixed in advance, as is usual, the transaction in brief would have constituted what is commonly known as a "mutual pool," and the contributions mutual bets or wagers (27 Corp. Jur. "Gaming," § 42, p. 976; *James v. State*, 63 Md. 242, 249); but it is claimed that the element of uncertainty with respect to the action of the fundholder distinguishes the arrangement from the ordinary betting pool, and that the sums contributed were by reason of such uncertainty not bet or wagered.

In support of this contention reliance is placed upon the case of *Plottel v. Boyle*,¹ decided by the Supreme Court of Missouri on August 1, 1927, in which it appears, however, that a rehearing has been granted. It was there held under a Missouri statute prohibiting the recording or registering of wagers on race horses, but not prohibiting betting thereon, that the essential characteristic of a bet or wager is the certainty that the sum to which all contribute shall become the sole property of one or some of the contributors; and, where it appeared from an agreement similar to the one in the present case that the first claims upon the fund contributed were the purse and expenses of the race and that these claims might consume the whole, there was no certainty that any part thereof would be paid to the contributors, and the sums contributed were not bets or wagers upon the result of the contest.

In *Black's Law Dictionary* a bet is defined as, "An agreement between two or more persons that a sum of money or other valuable thing shall become the sole property of one or more of them on the happening in the future of an event at present uncertain or according as the question disputed between them is settled one way or the other"; a wager being defined in *Bouvier's Law Dictionary* as, "A contract by which two parties or more agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening or not happening of a cer-

¹ No opinion rendered.

tain event"; and generally the terms are used as synonymous. 27 Corp. Jur. "Gaming," § 35, p. 974.

It is clear from the above definitions that the question whether such contributions are bets or wagers does not depend upon the certainty that a part of the fund will remain after the claims of the fundholder are satisfied, but rather upon the agreement, express or implied, that the amount remaining, if any, shall become the property of one or some of the contributors to the exclusion of the others upon the happening in the future of an event at present uncertain.

The fact, urged by petitioner as saving the transaction here entered into from characterization as a bet or wager, that there is a possibility that the whole of the sums contributed may be used by the racing association as prizes given to the owners of the winning horses and other related expenses, so that nothing would remain to be distributed to those who contributed to the common fund, is immaterial, since the character of the agreement here entered into must be judged not by what is actually done under it by the fundholder, but by what may be done. Notwithstanding the conclusion reached in the case last cited, we are compelled to hold that in transactions of the kind described in the complaint the sums contributed are bets or wagers on the result of the contest.

[2] While in the present case it was not directly averred that the sum contributed by petitioner was bet or wagered, such, nevertheless, was the effect of the facts alleged, and it was the manifest purpose of the pleading to charge an offense under the above subdivision of the section.

[3, 4] A proceeding in habeas corpus cannot be made to serve the office of a demurrer (*Ex parte Williams*, 121 Cal. 328, 330, 53 P. 706); and notwithstanding a defective statement of facts, if the complaint purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, whether the facts charged are sufficient to constitute an offense of that kind cannot be examined on habeas corpus. In the *Matter of Ruef*, 150 Cal. 665, 89 P. 605; *In re Avdalas*, 10 Cal. App. 507, 102 P. 674.

The averments of the complaint were sufficient within the above rule to charge a public offense, and the writ is therefore discharged and the petitioner remanded.

We concur: TYLER, P. J.; KNIGHT, J.

86 Cal. App. 275

GREENE v. GREENE. (Civ. 5428.)

District Court of Appeal, First District, Division 1, California. Oct. 24, 1927.

1. Divorce ⚭245(1)—Granting motion to modify divorce decree with respect to alimony rests in trial court's discretion.

Granting or refusing to grant motions to modify divorce decrees with respect to alimony rests largely in discretion of trial court.

2. Divorce ⚭286—Where no abuse of discretion was shown in denying motion to modify divorce decree by increasing alimony, appellate court could not interfere.

Where it did not clearly and affirmatively appear upon face of record that trial court abused discretion in refusing to modify divorce decree by increasing alimony from \$10 to \$50 per month, appellate court could not interfere.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Divorce action by Claretta Greene against William E. Greene. Decree for plaintiff. From an order refusing to modify the decree with respect to the alimony, plaintiff appeals. Affirmed.

Lawrence Y. Sledge, of Oakland, for appellant.

Thomas D. Johnston, H. M. Bishop, and James F. Hoey, all of Martinez, for respondent.

TYLER, P. J. Appeal from an order refusing to modify a decree of divorce with reference to alimony. It appears from the record that appellant, Claretta Greene, instituted an action for divorce against respondent, William E. Greene, on December 15, 1923. Prior to the filing of the complaint the parties entered into an agreement settling their property rights. The agreement after providing for a certain property settlement in favor of the wife recited, in substance, that the defendant would pay in addition thereto the sum of \$50 per month for a period of 4 months, and no longer. It further provided that defendant by reason of said payments was not relieved from the obligation to make further payments in a reasonable amount for the support of plaintiff after the expiration of the 4 months' period, it being recited that it was the intent and purpose of the parties that, at the expiration of such time, the amount of support to be paid by defendant to plaintiff was to be left to the mutual agreement of the parties, or, in the event that they were unable to agree upon an amount, by a proceeding in a court of competent jurisdiction. Subsequently, and on the 9th day of January, 1924, an interlocutory decree of divorce was rendered in favor of plaintiff, and in said decree it was provided that plaintiff receive as alimony the sum of \$50 per month from November 1, 1923,

to March 1, 1924, and thereafter the sum of \$10 per month, until further order of court. A final decree was entered February 15, 1925. Subsequently, on June 15, 1925, plaintiff filed a notice of motion for increase of alimony from \$10 to \$50 per month. In her affidavit filed in support thereof she alleged her inability to support herself by reason of sickness due to defendant's cruelty inflicted upon her during the time they lived together as husband and wife. An affidavit was also filed by her physician in support of her motion, which recited that she was suffering from a particular ailment. Defendant denied the allegations contained in plaintiff's affidavit and claimed that if she was suffering from the ailment alleged, such ailment was due to her own misconduct, for which defendant was not responsible. The trial court denied plaintiff's motion, and this is an appeal from such order. Respondent in support of the order insists that there was no showing made that would justify the court in modifying the original decree.

[1, 2] The granting or the refusal to grant such motions is a matter that rests largely in the discretion of the trial court. Before the appellate courts will interfere, it must be made clearly and affirmatively to appear upon the face of the record in the case that this discretion has been abused. No such showing is here made.

The order is affirmed.

We concur: **KNIGHT, J.; CASHIN, J.**

86 Cal. App. 443

FIX et al. v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR LOS ANGELES COUNTY et al. (Civ. 5914.)

District Court of Appeal, Second District, Division 1, California. Oct. 31, 1927.

Mandamus ⚭57(2)—Refusal of superior court judge to hear and determine question of sufficiency of sureties held proper case for issuance of mandate.

Where appeal was taken to Supreme Court from judgment of superior court, and in connection therewith stay-bond with two sureties was filed, and not approved because wives of sureties did not join therein, refusal of judge of superior court to hear evidence to determine question of sufficiency of sureties thereon, and also on bond to maintain attachment in force pending appeal, relating to acts which law especially enjoins as duty resulting from his office, held proper case for issuance of mandate.

Original mandamus by M. J. Fix and another against the Superior court of the State of California in and for the County of Los Angeles and another. Peremptory writ granted.

John A. Jorgenson, of Los Angeles, for petitioners.

Everett W. Mattoon, County Counsel, and S. V. O. Prichard, Deputy County Counsel, both of Los Angeles, for respondents.

CONREY, P. J. On petition filed, an alternative writ of mandate was issued. Respondents demurred to the petition on the ground that the same does not state facts sufficient to entitle petitioners to the demanded relief. The case is submitted on this demurrer.

The petitioners appealed to the Supreme Court from a judgment entered against them as defendants in an action in the Superior Court of Los Angeles county. In connection with that appeal they filed a stay bond with two sureties. In response to a demand for justification of those sureties, the petitioners, upon notice duly given, appeared before respondent judge with said sureties, for justification of the sureties. The matter being called for hearing, the judge examined the bond, and asked the attorney for petitioners whether the sureties were married. The attorney having replied that they were married, the judge thereupon stated that he would not approve the bond, because it was necessary that the wives of the sureties join in said bond on account of the community property laws in this state. The judge refused to proceed further in said matter, and refused to hear evidence of the qualification of the sureties, and wrote on the back of the bond as follows:

"This bond is not approved on statement of counsel filing same as so sureties being both married and their wives not being on bond.

"Charles S. Burnell, Judge."

Counsel for respondents have not presented any argument or cited any authorities in support of the proposition that a married man cannot, under any circumstances, be accepted as surety on such an undertaking unless his wife joins with him in executing the same. Therefore we make no decision on this question further than that for the purposes of this case we assume that a married man may, without the consent of his wife, be a surety, and a sufficient surety, upon an undertaking like that shown in the instant case.

The point relied upon by respondents is that an appeal from the court's order will furnish a plain, speedy, and adequate remedy, if the court erroneously refused to approve the bond. In support of this proposition we are referred to *Holt v. James*, 10 Cal. App. 360, 101 P. 1065, and *Oliver v. Superior Court*, 67 Cal. App. 358, 227 P. 647. It does not appear in either of these cases that the respondent court had refused to act upon a matter brought before it for hearing

and decision. Each case involved merely an alleged error of the court in the exercise of its jurisdiction. But in the case at bar it appears from the petition (which the demurrer necessarily admits to be true) that the court has refused to hear and determine the question of the sufficiency of the sureties. Such refusal, in this instance, relates to an act which the law specially enjoins as a duty resulting from the office of respondent judge. We think that this presents a proper case for the issuance of the writ of mandate.

In connection with said appeal, petitioners also filed an undertaking for the purpose of maintaining in full force, pending appeal, an attachment which they had obtained, on their cross-action against certain property of plaintiffs and cross-defendants in said action. The proceedings in respondent court, concerning this bond, were identical with those described herein with reference to the stay bond. We are of the opinion that the ruling here made is equally applicable to both undertakings.

Let the peremptory writ issue.

We concur: **HOUSER, J.; YORK, J.**

86 Cal. App. 369

DENVIR v. JUDSON FREIGHT FORWARDING CO.

SAME v. BRALEY.

(Civ. 4957.)

District Court of Appeal, Second District, Division 1, California. Oct. 26, 1927.

1. New trial $\S$ 95—Plaintiff who failed to exercise ordinary prudence to ascertain testimony of her witness cannot invoke relief on ground of surprise at testimony on cross-examination (Code Civ. Proc. $\S$ 657).

Where plaintiff, by exercise of ordinary prudence, could have ascertained what testimony of her witness would be, but failed to do so, contrary to Code of Civ. Proc. $\S$ 657, she cannot invoke relief on ground of surprise at such witness' testimony on cross-examination.

2. Appeal and error $\S$ 237(2)—One claiming surprise at testimony must ask continuance to preserve point for review.

Party who claimed to have been surprised by evidence given by her witness on cross-examination must move for continuance, or she will not be permitted to avail herself of that point on appeal.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Actions by Mrs. John B. Denvir, Jr., against the Judson Freight Forwarding Company, and against Rex E. Braley, doing business under the fictitious name and style of Braley's Garage. From judgments of nonsuit, plaintiff appeals. Affirmed.

O'Melveny, Millikin, Tuller & Macneil and J. R. Girling, all of Los Angeles, for appellant.

Hahn & Hahn, of Pasadena, and Edward T. Sherer and Welburn Mayoock, both of Los Angeles, for respondents.

McLUCAS, Justice pro tem. Plaintiff appeals from judgments of nonsuit in the above-entitled actions.

These are actions for damages arising out of the shipment of an automobile from Los Angeles, Cal., to St. Louis, Mo., during the month of October, 1920. The defendant Braley operated a garage in which plaintiff had stored her automobile. Acting upon telegraphic instructions, Braley delivered plaintiff's automobile to the defendant Judson Freight Forwarding Company for shipment to plaintiff in St. Louis, Mo. The automobile at the time of shipment was in perfect order; but, upon arrival in St. Louis, it was found to be in a greatly damaged condition, caused by water freezing in the radiator and water jacket. Plaintiff brought these two actions, which were consolidated for the purposes of trial, to recover the amounts paid by her for repairs to her automobile, necessitated by the damaged condition in which it was received, alleging that the negligence of both defendants in not seeing that the automobile was properly drained before shipment was the cause of the damage. At the trial of the consolidated actions plaintiff called as a witness one Engelman, a former employee of the Judson Freight Forwarding Company, who testified that he had seen the water drained from the automobile in question at the time of its delivery to the Judson Freight Forwarding Company for shipment. The court ordered a nonsuit in favor of both defendants. Plaintiff made a motion for a new trial upon the ground of "accident and surprise which ordinary prudence could not have guarded against." The motion was denied.

In support of plaintiff's motion for a new trial, she filed the affidavit of her attorney, stating, among other matters, that plaintiff was surprised by the testimony of the witness Engelman to the effect that he had seen the water drained from the engine of the automobile in question; that ordinary prudence could not have guarded against such testimony; and that plaintiff is now in possession of newly discovered evidence in the form of a letter from the defendants, in which the fact of the water not having been drained from the said automobile and the resultant damage thereto is admitted, but that such letter could not with reasonable diligence have been produced at the trial. The letter to which the affidavit refers reads:

"St. Louis, U. S. A., January 21, 1921.

"Mrs. Roscoe Parsons, 4950 Lindell Ave., St. Louis, Mo.—Dear Madam: In accordance with conversation with your good self while at

our warehouse at the time of taking delivery of this machine, please let us have as early as possible bills covering repairs to the machine and which damage has been brought about due to water being left in the radiator and we will send these papers on to our Los Angeles office to secure adjustment in connection with the garage company there who made delivery of the shipment to us.

"Kindly let us have the claim papers in the matter as promptly as possible, with the assurance on our part that we will exert every effort to secure settlement for you, we beg to remain

"Yours very truly,

"Judson Freight Forwarding Co.,
"Geo. W. Flynn, Agent."

A counter affidavit was filed by the attorney for the defendant Judson Freight Forwarding Company, in which he states that, prior to the trial of these cases, he was approached by an attorney associated with the attorneys of record for the plaintiff herein, "who inquired of affiant if affiant would have present at the trial of said cause the representative of the Judson Freight Forwarding Company, who had received said car from said defendant at the loading station from which the same was shipped; that affiant informed said G. T. Graves that said representative would be present; that the representative of the Judson Freight Forwarding Company, who received said car at the loading station, was one Engelman, then in the employ of said Judson Freight Forwarding Company; that said Engelman resides, and was then residing, in the city of Los Angeles, and could have been interviewed by counsel for plaintiff had he so desired, and thereby could have acquainted himself with the nature of the testimony which said Engelman might be expected to give at the trial of said cause."

[1, 2] Appellant argues that the foregoing letter caused plaintiff to believe that the Judson Freight Forwarding Company knew and acknowledged the fact to be that the automobile had been shipped without the water having been properly drained, and that it could not have been anticipated that the witness Engelman, whom plaintiff called to prove the delivery of the automobile to the Judson Freight Forwarding Company, would or might testify on cross-examination that he saw the water drained from the automobile before shipment. We do not construe the foregoing letter as an absolute admission by one of the defendants that the water was left in the radiator by either of the defendants, but rather as a statement of the forwarding company that it would use every effort to secure an adjustment and settlement from the garage company. If the testimony of Engelman, plaintiff's witness, is to be taken as true, then the water must have been placed in the radiator by some person other than the defendants. Moreover, this letter cannot be regarded as newly discovered evidence, since

it bears date of January 21, 1921, and must have been in possession of the appellant after that date and up to the date of the trial on February 27, 1924, a period of over three years. In our opinion, the facts as stated by appellant are insufficient to justify a reversal. Engelman was appellant's own witness. Appellant could not, and should not, anticipate his testimony. Appellant had the means at her command to ascertain before the trial what the witness' testimony would be. Appellant's opening brief shows that the testimony of Hopkins, who drove the car to the forwarding company, was taken, but appellant failed to take the deposition of Engelman, the person to whom it was delivered, though his name was signed to the receipt marked Plaintiff's Exhibit 3. Appellant, we believe, failed to exercise the ordinary prudence to guard against surprise as required by section 657 of the Code of Civil Procedure. Appellant, by the exercise of ordinary prudence, could have ascertained what the testimony of Engelman would be, and, having failed to do so, cannot invoke relief on the ground of surprise. *Schellhous v. Ball*, 29 Cal. 605. Appellant made no effort to secure a continuance in order to meet this contingency of adverse testimony secured from her own witness on cross-examination. It is the general rule that a party who claims to have been surprised by the evidence adduced by his adversary must move for a continuance, or he will not be permitted to avail himself of that point on appeal. *Snodgrass v. Snodgrass* (Cal. App.) 253 P. 755; *Doyle v. Sturla*, 38 Cal. 456; *Heath v. Scott*, 65 Cal. 548, 4 P. 557; *Bailey v. Richardson*, 66 Cal. 416, 5 P. 910. In *Heath v. Scott*, supra, it is said (page 552 [4 P. 560]):

"It is well settled that, if a party claiming to be surprised by the introduction of testimony, fails to apply at the time for a continuance of the cause, or to resort to other testimony, or to ask for any relief to which he might be entitled under the circumstances, his failure is attributable to his own fault, and constitutes no ground of surprise upon which a new trial will be granted. *Schellhous v. Ball*, 29 Cal. 608; *Turner v. Morrison*, 11 Cal. 21; *Delmas v. Martin*, 39 Cal. 555, as modified by *Ferrer v. Mutual Insurance Company*, 47 Cal. 416."

In *Ferrer v. Mutual Insurance Co.*, 47 Cal. 416, it is said, page 430:

"If the defendant was surprised by this testimony, there should have been a motion to continue the cause in order to procure the deposition of Francis. In such cases the application for relief must be made at the earliest convenient time, and certainly without unreasonable delay. A party should not be allowed to speculate on the chances of a favorable decision, and after he has lost his cause, move for a new trial on the ground that he was surprised by the introduction of certain testimony by his adversary. 'It is better for the purposes of justice and the convenience of courts and litigants, to afford relief at once and on the spot, if it can be done.' *Schellhous v. Ball*, 29 Cal. 608. The rule was somewhat relaxed in *Delmas v. Martin*, 39 Cal. 557. But the case was peculiar, and we are not inclined to extend the relaxation beyond the facts of that case."

In view of the foregoing, we are of the opinion that plaintiff should have moved for a continuance, instead of awaiting the decision of the court, and then moving for a new trial, especially in view of the fact that the record shows that the witness had not been questioned before the trial, and there is no evidence of deceit or collusion practiced by the witness. Neither was the testimony offered in the last stage of the trial, as in *Delmas v. Martin*, 39 Cal. 555, a case relied upon by appellant. So there was ample opportunity to present the motion for a continuance before the motion for nonsuit was made. Appellant concedes in her reply brief that it has always been the rule that a new trial would not be granted on the ground of surprise at the testimony of the adversary's witness. We see no difference in principle between such cases and the present case. Here the witness was adverse, but was not the adversary's witness; instead, he was appellant's own witness, who testified adversely to plaintiff on cross-examination by defendant.

The judgments are ordered affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

202 Cal. 390

CHICK et al. v. WHITTON. (S. F. 11498.)

Supreme Court of California. Oct. 31, 1927.

Brokers  8(3)—Evidence sustained findings that brokers in negotiating sale of defendant's property were acting for defaulting purchaser and hence not entitled to commissions.

In broker's action for commissions for negotiating sale of real property to person who ultimately purchased through a different brokerage firm after default of first prospect secured, evidence *held* to sustain findings that plaintiffs in negotiating subsequent sale were acting for purchaser who defaulted, and hence were not entitled to recover commissions of defendant.

In Bank.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by Guy Hyde Chick and Frank W. MacMillan, copartners doing business under the firm name and style of Guy Hyde Chick Company, against B. F. Whitton. Judgment for defendant, and plaintiffs appeal. Affirmed.

B. D. Marx Greene, of San Francisco, for appellants.

Clark, Nichols & Eltse, of Berkeley, for respondent.

RICHARDS, J. The plaintiffs herein, who, as copartners doing business under the firm name and style of Guy Hyde Chick Company, are real estate brokers, commenced this action to recover the sum of \$2,000 from the defendant, alleged to be due as commission for the plaintiffs' services in the matter of the sale of certain real estate in the city of Berkeley. The basis of the plaintiffs' claim consisted in a written authorization executed

by the defendant on October 2, 1923, addressed to the plaintiffs and reading in part as follows:

"Please sell for me my property situate at No. — Tunnel road on the north side of Tunnel road, known as Cheadle Hall, in the Claremont tract, Berkeley, together with the appurtenances, for the sum of forty-two thousand dollars (\$42,000). Should you succeed in selling it, or should I sell it to any one to whom you show the property, I will pay you 5 per cent. on the price obtained."

The plaintiffs in their complaint allege that the defendant is indebted to them in the sum of \$2,000 for services rendered as real estate brokers inferentially by reason of the authorization contained in said writing. The defendant in his answer denies said indebtedness or that the same arose out of any services whatever performed for the defendant at his request or otherwise. Upon the submission of the cause the trial court made its findings of fact and conclusions of law, and in so doing found that "no services were performed by the plaintiffs for the defendant, that defendant did not agree to pay plaintiffs \$2,000 or any other sum for services performed or to be performed, that nothing is due, owing or unpaid from the defendant to the plaintiffs"; and as a conclusion of law based thereon the court found "that the plaintiffs are not, nor is either of them, entitled to judgment or to the relief prayed for, or any relief; that the defendant is entitled to his costs." From the judgment accordingly entered the plaintiffs prosecute this appeal.

The facts elicited at the trial upon which the foregoing finding of fact and conclusion of law is based may be briefly stated as follows: Shortly after the above authorization of the plaintiffs to procure a purchaser for the defendant's property the plaintiffs succeeded in negotiating a sale thereof to two persons named Brown, husband and wife, who, on October 3, 1923, paid a deposit of \$2,000 on account of the purchase price of said property, and thereupon entered into an agreement in writing with the owner for the completion of the purchase thereof upon the terms set forth therein. Subsequently to the execution of said agreement and while the same was apparently in full force and effect, the plaintiffs, without any authorization from the defendant, caused the property in question to be surveyed and subdivided into a number of lots, and, having done so, erected upon the property a large sign showing that it was to be sold in subdivisions by or through the plaintiffs, the name of the owner, however, nowhere appearing upon said sign. They also caused blue prints to be made of the subdivision, which they sent forth to numerous other real estate agents with letters indicating the rates or prices which would be made upon the subdivided portions of the premises. Thereafter and about the 1st of November, one H. T. Ghirardelli saw the aforesaid sign

upon the property and that the same was to be subdivided, and thereupon telephoned to one of the plaintiffs and arranged to go and did go to see the property within a day or two thereafter, and thereupon made to the plaintiffs an offer of a trade or exchange of other properties therefor, which offer was not within the scope of the plaintiffs' authorization, and so far as the record shows was never submitted to the owner. During this negotiation the plaintiffs did not reveal the name of the owner of the property to Ghirardelli, nor did the latter know who its owner was; and there is some evidence in the record which tends to show that in thus negotiating with Ghirardelli the plaintiffs were dealing with the property as though it was the property of the Browns or was soon to become so under the latter's agreement of purchase. The plaintiffs had no further dealings with Ghirardelli. The time limit under the Brown contract to purchase the property expired on December 3, 1923. The Browns defaulted, and both the plaintiffs and the defendant treated their default as amounting to a forfeiture of the \$2,000 deposit which they had made, and thereafter and during the month of December the defendant paid over to the plaintiffs one-half of said deposit under the provisions of their said agreement, which contained a clause for such division of the deposit in the event of forfeiture. During the month of December, 1923, Ghirardelli came into relation with another real estate firm, namely, Mason-McDuffie Company, which firm was also the holder of an authorization from the defendant to sell his said property, and thereafter and on December 31st a sale of the said property was consummated to said Ghirardelli and through the agency of said last-named firm of brokers. Thereafter the plaintiffs, having learned of such sale, demanded of the defendant the payment to them of a commission in the amount of \$2,000, upon the theory, apparently, that they had shown the property to Ghirardelli while acting as the agents of the defendant and were thus, under the terms of the contract, entitled to said commission. The trial court, however, reached the conclusion as the result of its consideration of the foregoing evidentiary facts that whatever the said plaintiffs had done in the way of showing the defendant's property to Ghirardelli had been done after they had apparently accomplished a sale of said property to the Browns, and, having done so, were engaged in an endeavor to achieve a subdivision and resale thereof in the interest of the Browns and not the defendant. It seems entirely clear to us that the inferences which the trial court drew in that regard were fully justified by the evidence before it, and that this being so its findings and conclusions must be held to have been sustained by such evidence.

It follows that the judgment herein must be affirmed, and it is so ordered.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; PRESTON, J.

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DRINKHOUSE et al. v. VAN NESS (PACIFIC SURETY CO., Intervener; two cases).★
(S. F. 3552, 10733.)

Supreme Court of California. Oct. 31, 1927.

Rehearing Denied Nov. 28, 1927.

1. New trial $\S$ 163(1)—Order granting new trial could not, without proper showing of irregularity, be amended or altered by trial court, hence attempted amendment was nullity (Code Civ. Proc. $\S$ 473).

Where, in a claim and delivery action, the court granted intervener's motion for new trial for intervener and one defendant, but one week afterwards entered a so-called amended order granting new trial only to the intervener, *held*, that such second order was a nullity, since, in the absence of showing of irregularity of the original order granting a new trial, or by pursuance of Code Civ. Proc. $\S$ 473, for relief on ground of mistake, inadvertence, surprise, or excusable neglect, first order was conclusive upon the trial court and it could not thereafter amend, revoke, modify, or otherwise disturb its judgment in that regard.

2. Appeal and error $\S$ 440—New trial $\S$ 163 (1)—Where order is incorrectly entered court may amend entry, even after appeal, to make it state order as actually made.

If the order entered is not the order actually made, the court may by entry correct it, even after appeal, so that it will state the truth.

3. New trial $\S$ 111—Surety Intervening in claim and delivery against principal held entitled as collateral to right of appeal to move for new trial as to whole case.

Where the surety on the redelivery bond in a claim and delivery action for the possession of a stallion intervened and judgment was rendered both against him and his principal, the defendant, *held*, that as collateral to his right of appeal from the judgment such intervener could seek and have granted a motion for new trial as to whole case.

4. New trial $\S$ 163(2)—Effect of granting Intervener's motion for new trial, notices of which did not limit issues or parties between whom motion would be made, was to reopen all issues.

Where, in claim and delivery action for the possession of a stallion, the intervening surety on the redelivery bond moved, after verdict and judgment and pending reversal on appeal, for a new trial without having placed in his notices of motion any limitation as to the issues upon which, or the parties between whom, the motion would be made, *held*, that the effect of the order granting such motion was to reopen all issues and place all parties in the position they held before the trial.

5. Parties $\S$ 56—Allegations of Intervener's petition, where, in effect, but answer to complaint, were deemed controverted (Code Civ. Proc. $\S$ 462).

Where, in claim and delivery action for possession of a stallion, the intervener's, surety on the redelivery bond, complaint in intervention was, in effect, but an answer to the complaint of the plaintiffs, it did not constitute the plaintiffs defendants or cross-defendants, hence its allegations were deemed controverted by the plaintiffs, under Code Civ. Proc. $\S$ 462.

6. Parties $\S$ 56—Overruling intervening petitioner's demurrer to plaintiffs' so-called counterclaim and denying nonsuit against plaintiffs on same issue was reversible error, since counterclaim could not exist where intervener's petition was but answer to complaint (Code Civ. Proc. $\S$ 438, 439).

Where, in claim and delivery action for the possession of a stallion, the surety on the redelivery bond intervened making his petition but an answer to the complaint, *held* that overruling such intervening petitioner's demurrer to plaintiffs' so-called counterclaim and denying nonsuit against the plaintiffs on the same issue was reversible error because of Code Civ. Proc. $\S$ 438 and 439, since parties did not bear to each other the relationship of plaintiff and defendant.

7. New trial $\S$ 24—Where judgment was rendered against surety on redelivery bond together with judgment against principal, new trial held proper where bond was conditioned upon redelivery being "adjudged."

Where, in a claim and delivery action for possession of a stallion, judgment was rendered both against the defendant and the intervening petitioner, surety on the redelivery bond, intervening petitioner's motion for a new trial *held* properly granted where by the express terms the bond was conditioned upon the redelivery being "adjudged" so that there could be no breach, hence no cause of action against the surety, until a judgment or order was entered for return of the stallion.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adjudge.]

8. Replevin $\S$ 11(2)—Demand for possession before suing held unnecessary where answer alleged ownership and right of possession.

Where defendant in a claim and delivery action for the possession of a stallion set up in his answer his ownership and right of possession, such answer rendered proof of demand for possession by plaintiff upon defendant before bringing the action unnecessary.

9. Replevin $\S$ 72—Evidence held to support finding taking of stallion was wrongful.

In a claim and delivery action for the possession of a stallion, evidence *held* to support the jury's finding that the taking was wrongful.

10. Replevin $\S$ 69(1)—Question of accounting of stallion's earnings held not to enter into claim and delivery action.

The question of an accounting of the earnings of a stallion *held* not to enter into a claim and delivery action for his possession.

11. Replevin ☞106—Plaintiffs held entitled to judgment for stallion's value as of date of detention, where he had died after commencement of action, and to damages for taking and withholding.

Where, in a claim and delivery action for the possession of a stallion, the stallion had died before the verdict and judgment thereon, *held* that the plaintiffs were entitled to judgment for the horse's value as of the date of his taking and detention and to additional damages for the wrongful taking and withholding.

12. Replevin ☞12(1)—That stallion died after action begun held no defense.

In a claim and delivery action for the possession of a stallion, the fact that such animal had died after the action was begun, but before the verdict and judgment, *held* no defense to the action.

13. Damages ☞142—Special damages depending upon peculiar circumstances of case must be pleaded.

Such damages as do not ordinarily arise from the breach complained of, but depend upon the peculiar circumstances of the case, are special damages which must be pleaded.

14. Appeal and error ☞1039(13)—Error in admitting evidence of racing ability of stallion's progeny, where special damage was not pleaded, held not reversible.

Where, in a claim and delivery action for the possession of a stallion, evidence of the racing ability of the stallion's progeny was admitted even though no special damage was pleaded, such admission of evidence *held* not reversible error.

15. Appeal and error ☞1039(13)—Admitting evidence of stallion's value for breeding purposes during detention period held not reversible error, although special damage was not pleaded.

Where, in a claim and delivery action for the possession of a stallion, evidence of his value for breeding purposes during the detention period was admitted although no special damage was pleaded, such admission *held* not reversible error.

16. Replevin ☞71(1)—Admitting evidence of stallion's racing history and that of progeny held proper as basis for determining "peculiar value" (Civ. Code, § 3355).

Where, in a claim and delivery action for the possession of a stallion, evidence of his racing history and that of his progeny was admitted, such admission *held* proper as a basis for determining the "peculiar value" of the property, as provided by Civ. Code, § 3355.

17. Replevin ☞82—Award of \$15,000 in lieu of dead stallion and damages for detention held not improper.

Where, in action for the possession of a stallion, the jury awarded \$7,500 in lieu of the stallion which had died after the action was begun and \$7,500 as damages for the wrongful taking and detention, such award *held* not improper.

18. Replevin ☞76—Damages for stallion's detention held not restricted to interest on money value, stallion having usable value in excess thereof.

In an action of claim and delivery for the possession of a stallion, *held*, that the damages for the wrongful taking and detention were not to be restricted to interest upon the stallion's value where such stallion had a usable value in excess thereof.

19. Replevin ☞80—Where it was probable that general sum awarded included attorney's fees for locating stallion before replevin action, judgment ordered reduced by such amount.

Where, in claim and delivery action for the possession of a stallion, it was probable, because of evidence introduced and instructions by the court relative thereto, that the jury had awarded a certain sum to the plaintiff as a part of the general award, as attorney's fees expended by him in pursuing and locating the horse prior to the commencement of the action, judgment upon appeal ordered reduced by the probable amount so awarded.

20. Release ☞27—Where defendants were not joint tort-feasors, agreement releasing one, not amounting to retraxit, did not release other.

In a claim and delivery action for the possession of a stallion where the evidence showed defendants were not joint tort-feasors, an agreement between the plaintiffs and one defendant releasing such defendant, which agreement did not amount to a retraxit, did not release other defendant.

21. Trial ☞295(10)—Giving instruction assuming wrongful taking held not error, where charges read as whole were correct as to taking.

Where, in a claim and delivery action for the possession of a stallion, certain instructions relative to the wrongful taking of the horse erroneously assumed, to some extent, a wrongful taking, giving such instruction *held* not error where, as a whole, the charges correctly submitted to the jury the question whether there was a taking, and, if so, whether it was wrongful.

22. Appeal and error ☞1064(1)—Where one defendant in replevin repudiated existence of partnership and evidence would not support partnership finding, improper instruction on burden of proving partnership held harmless.

Where, in a claim and delivery action for a stallion's possession, defense was introduced based upon the existence of a partnership of defendants, but one of the defendants had repudiated the existence of a partnership and the evidence would not support the finding that a partnership existed, *held*, that an improper instruction on the burden of proving partnership was harmless error.

In Bank.

Appeals from Superior Court, City and County of San Francisco; William R. Daingerfield, Judge.

Action by William M. Singerly and another, John A. Drinkhouse, administrator of the estate of William M. Singerly, deceased, being substituted as party plaintiff, against Frank Van Ness and others, in which action the Pacific Surety Company intervened. Judgment for plaintiff, and the intervener, Pacific Surety Company, appeals. From the orders granting a new trial, plaintiffs appeal. Original judgment modified, and, as modified, affirmed, and order granting new trial affirmed in part and reversed in part.

Cooley & Gallagher, of San Francisco (Goodfellow, Eells & Orrick, of San Francisco, of counsel), for intervener appellant.

A. E. Shaw, of San Francisco, for respondents.

WASTE, C. J. This case holds the record in this jurisdiction for Rip Van Winkle litigation. The action was initiated in the lower court on the 29th day of January, 1896. A complaint in intervention was filed August 31, 1899, and various and amended pleadings were interposed. On the 31st day of May, 1900, a jury rendered a verdict for the plaintiffs, and judgment was entered against one of the defendants and against the intervener. Notices of appeal from the judgment were filed in July following. In May, 1902, the trial court entered an order and an amended order on motion to vacate judgment and for a new trial. Notices of appeal from these orders were filed in June, 1902. No further proceedings intervened in the lower court or here, other than the preparation and filing of the transcript on appeal on June 15, 1923.

In the "foreword" to their opening brief appellants say:

"Since [the trial] many changes have taken place in California procedure, numerous and large volumes of statutes have been added to our libraries by ambitious legislators, and many decisions have been handed down interpreting our laws, old and new."

With this brief, but accurate, historical review, and a plea for "indulgence" should their brief "run into more than the usual number of pages," appellants launch their attack on the almost forgotten judgment and rulings of the lower court. In justice to the attorneys now representing both appellants and respondent, it must be stated that they are appearing for the first time in the litigation, the breath of life having been infused into the case through a peremptory order of this court directing the parties to appear and show cause why the appeals should not be dismissed for want of prosecution. After a quarter of a century, mainly given over to repose, the cause stands submitted on points and authorities expeditiously prepared by present counsel.

The action is one in claim and delivery, based upon an alleged wrongful taking. It was instituted by William M. Singerly (now

deceased and represented by John A. Drinkhouse, his administrator) and Louis Lamertz, as plaintiffs, against Frank Van Ness, James B. Chase, and certain fictitious defendants, to recover possession of a horse named "Morello," alleged to be worth \$10,000, together with \$10,000 damages for the wrongful taking and detention. Pursuant to proceedings for that purpose, the sheriff took the horse from the possession of the defendant Chase. The defendant Van Ness thereupon gave a redelivery bond in the sum of \$20,000, executed by Pacific Surety Company, the intervener, and now an appellant here, and the horse was delivered to Van Ness, in whose possession it remained until its death, which occurred before the case came on for trial. Van Ness answered the complaint, denying all the allegations of the plaintiffs, and alleged himself to be the sole owner of the horse and entitled to its possession. Subsequently the Pacific Surety Company, by permission of the court, filed a complaint in intervention, in which, after reciting the various steps in the litigation, and the death of the horse, it alleged that Van Ness was insolvent, and had abandoned the defense to the action, and that the Surety Company, by reason of its having given the redelivery bond, had an interest in the success of the defendant Van Ness in the action and in the defeat of the plaintiffs. It also alleged, as a further defense, a dismissal of the action as to defendant Chase, and his release and discharge by the plaintiffs from the alleged cause of action set forth in the complaint, and from all claims and demands which the plaintiffs had or claimed against him by reason of the matters alleged in their complaint. The Surety Company did not ask for a judgment or for any relief other than that it might be allowed to intervene in the action and unite and join as a defendant, and be permitted to defend against the plaintiffs. The defendant Van Ness failed to plead to the complaint in intervention, and his default was entered. The plaintiffs answered, denying the various allegations, alleging that the Surety Company was amply indemnified for any liability upon the redelivery bond, and putting in issue the allegation as to the release of Chase. In a "supplemental answer to said complaint in intervention" the plaintiffs sought a judgment against the intervener for such amount as by the verdict and judgment in that action might be found to be due from defendant Van Ness to the plaintiffs, not exceeding the amount specified in the redelivery bond. By a subsequent amendment the plaintiffs alleged that, owing to the death of the horse, it could not be redelivered, and pleaded the matter contained in the "supplemental answer" as and "for a counterclaim against said Pacific Surety Company."

A general and special demurrer of the Surety Company to the answer, challenging the jurisdiction of the court to grant in that

action any relief based on the bond, was overruled, and its motions to strike from the files the supplemental answer to the complaint in intervention, and the amendment thereto, were denied. In a second amended complaint, filed by plaintiffs just prior to the trial of the cause in May, 1900, Van Ness was named as the sole defendant, and the death of the plaintiff Singlerly and the appointment of John A. Drinkhouse as his administrator were alleged.

Trial was had with a jury. A large amount of evidence was introduced as to the ownership and value of the horse. At the close of the testimony, the intervener moved for a nonsuit as against the plaintiffs "upon their cross-complaint" against it, and asked for a directed verdict in favor of the defendant Van Ness upon various grounds. Both motions were denied. The issues were thereupon submitted to the jury, which rendered a verdict for the plaintiffs against the defendant Van Ness for the return of the horse, or \$7,500, its value, in case delivery could not be made, and for \$7,500 damages for the detention. By the same verdict it also found "against the intervener, the Pacific Surety Company, a corporation, and in favor of the plaintiffs, upon the bond or undertaking set forth in its complaint in intervention herein in the sum of \$15,000, being the aggregate sum recovered against defendant Van Ness, it being impossible to deliver or return the stallion Morello, he having died on November 29, 1896, subsequent to the commencement of the action." The judgment entered followed the findings and verdict of the jury.

The Pacific Surety Company thereupon appealed (S. F. No. 10733) from the judgment against itself and from the judgment rendered against the defendant Van Ness. It also gave notice of its intention to move the court to vacate the verdict of the jury and the judgment of the court in favor of the plaintiffs and against the defendant Van Ness, and in favor of the plaintiffs and against itself as intervener, and to grant a new trial upon statutory grounds, specifying more than 150 particular errors in the admission of evidence and in the charge to the jury alleged to have occurred at the trial, and more than 40 particulars in which the evidence is alleged "to be insufficient to sustain the verdict of the jury." Nearly two years afterwards, on May 1, 1902, the trial court entered the following order:

"In this action the motion for a new trial having been heretofore submitted to the court for consideration and decision and the court having fully considered the same, it is ordered that the said motion be and the same is hereby granted. (Opinion filed.)"

One week later, the following "amended order" was entered:

"In this action it is ordered that the order of May 1, 1902, be and the same is hereby

amended to read as follows: Motion of defendant Frank Van Ness for new trial be denied, and motion for new trial of intervener be granted."

Following the entry of these orders, the Pacific Surety Company appealed from the order of May 1, "as amended by the order * * * denying the motion of the defendant Frank Van Ness for a new trial of said action, and from so much of said orders as may, or may be deemed to, deny the motion of said intervener on behalf of said defendant for a new trial of said action, or to deny any part of the said motion of said intervener for a new trial." Although the defendant Van Ness did not appeal, the intervener asserts that it appealed "in his behalf." The plaintiffs appealed (S. F. No. 3552) from the order of May 1 and from that part of the amended order of May 8 granting a new trial to the intervener, Pacific Surety Company. By stipulation of the parties, and under an order of this court, all appeals are to be heard and determined on the same points and authorities covering all matters before the court for consideration. As the situation of the parties is changed in their relation to the different appeals before the court, it will be less confusing to retain the designations born in the lower court, to wit, "plaintiffs," "defendant," and "intervener," or to refer to them by name, rather than to use the usual designations, "appellant" and "respondents."

[1] In view of the several appeals taken, it becomes necessary to first determine the effect of the two orders entered by the trial court in its ruling on the motion for a new trial. If valid, the order of May 8 supersedes the order first made, and is the only order of the court upon the motion for a new trial. *Garoutte v. Haley*, 104 Cal. 497, 500, 33 P. 194. If the order of May 8 were before us on an appeal on the judgment roll alone, the intendments and presumption of regularity, which lend support to judgments and orders of trial courts under review on appeal, would sustain it, but the matter is before us on a bill of exceptions. It is the contention of the intervener that when the lower court entered the order of May 1 granting a new trial, it exhausted its power to pass on the motion, and could not thereafter amend, revoke, modify, or otherwise disturb its judgment in that regard. The second order, that of May 8, it contends, was a nullity and in no wise affected the status of the case with respect to the first order which, in general terms, granted the motion for a new trial. The contention must be upheld. *United Railroads v. Superior Court*, 170 Cal. 755, 760, 151 P. 129, Ann. Cas. 1916E, 199; *Holtum v. Greif*, 144 Cal. 521, 524, 78 P. 11; *Odd Fellows Savings Bank v. Deuprey*, 66 Cal. 168, 4 P. 1173. When a motion for a new trial has been made in due form, upon a settled statement, and the court has passed on the motion, the order regularly

made is conclusive so far as the court making it is concerned. It cannot afterwards even on motion, vacate the order and decide the matter anew. *Coombs v. Hibberd*, 43 Cal. 452; *Dorland v. Cunningham*, 66 Cal. 484, 6 P. 135. There are, of course, exceptions to the general rule. An order irregularly made is not subject to it, and may be set aside on a proper showing, if application is made therefor. *Holtum v. Greif*, supra; *Morris v. De Celis*, 41 Cal. 331. But it should be first made to affirmatively appear that the order was irregularly or improvidently made. *Carpenter v. Superior Court*, 75 Cal. 596, 19 P. 174. In this case there is nothing in the record, or on the face of the later order, to impeach the correctness of the order of May 1. No application was made by proceedings under section 473 of the Code of Civil Procedure, for relief on the ground of mistake, inadvertence, surprise, or excusable neglect, or by a proceeding for an entry nunc pro tunc. Consequently the trial court was without power to change the order on any of those grounds. *Frost v. Los Angeles Ry. Co.*, 165 Cal. 365, 368, 132 P. 442.

[2] The plaintiffs contend that the order of May 1 was not the one actually made on the motion for a new trial, and that the order of May 8 was undoubtedly made to correctly state the fact. If an order entered is not the order made, the records may be corrected to make the entry speak the truth (*Whitney v. Superior Court*, 147 Cal. 536, 541, 82 P. 37), and the right of the court in this respect is not suspended or impeded by an appeal from the order, nor because the record itself does not show that the entry was incorrect (*Biaggi v. Ramont*, 189 Cal. 675, 209 P. 892). But the trial court has no authority, under the guise of an amendment, to correct a judicial error, or make of record an order that was never made. *Kaufman v. Shain*, 111 Cal. 16, 19, 43 P. 393, 52 Am. St. Rep. 139. Yet the record indicates that is precisely what was attempted to be done in the present case. The later order does not purport to correct the entry of the first, neither is there anything on its face or in the record from which it may be gathered that such was its purpose. It stands out clearly as an order purporting to "amend," that is, to change, an order previously made.

Plaintiffs assert that, with "two motions" for a new trial before it, the trial court merely "granted the motion," making its order void for uncertainty; that it was impossible to ascertain therefrom which motion was granted; and "it was therefore the duty of the court of its own motion to so amend its order as to definitely dispose of both motions for a new trial rather than leave it in such uncertainty as to be void on its face, for all parties to the litigation were entitled to have it definitely known whether both motions were granted, or if both were not granted,

then which one was granted." The fallacy of this contention lies in the fact that there was but one motion for a new trial, that of the intervener. It alone was "submitted to the court for consideration and decision," and the court, "having fully considered the same," "granted" the motion by an order couched in plain, certain, and unambiguous language. For that reason, therefore, the contention of the plaintiffs that, if the amended order of May 8 is void, the "motions for a new trial" have not been determined and are still pending falls of its own weakness. It therefore follows that the order of May 8, purporting to amend the order granting intervener's motion for a new trial, must be held to be a nullity and effective for no purpose.

[3, 4] This conclusion brings us to the consideration of the correctness and effect of the order of May 1 granting a new trial. The interest of the Pacific Surety Company in the success of the defendant Van Ness was apparent, for the judgment, if any, to be rendered against him would fix its liability upon the redelivery bond. Upon being permitted to intervene, it became a party to the action, "uniting with the defendant" in resisting the claims of the plaintiffs. As such party it was entitled to avail itself of all the procedure and remedies to which the defendant would be entitled for the purpose of defeating the action or resisting the claims of the plaintiffs, including the right of appeal from any judgment against the defendant. *People ex rel. Fogg v. Perris Irr. Dist.*, 132 Cal. 289, 290, 64 P. 399, 773; *Boskowitz v. Thompson*, 144 Cal. 724, 729, 78 P. 290. It was aggrieved, in the first place, by the judgment against Van Ness (*Coburn v. Smart*, 53 Cal. 742, 745), and, in the second place, by the judgment against itself on the redelivery bond, and appealed from each. Collateral to the appeal, it sought to have the judgments vacated through the medium of a motion for a new trial. In the notices of motion the intervener placed no limitation as to the issues upon which, or the parties between whom, the motion would be made. It gave notice that it would move the court to vacate the "verdict" and the "judgment," "and to grant a new trial of said action." The order of the court granting the motion was in like general terms. Its effect therefore was to vacate and set aside the verdict and the judgment resting thereon, and, pending a reversal on appeal, to reopen all issues in the case for a retrial. The parties were thereby placed in the position they held before any trial had been had. *Kent v. Williams*, 146 Cal. 3, 7, 79 P. 527.

[5-7] Little need be said in affirming the action of the lower court in granting a new trial to the intervener. Plaintiffs concede that they could not have joined the surety, in an action upon the redelivery bond, with the defendant Van Ness in the action based upon

his tort, yet that is what was actually attempted to be done. Although the pleading filed by the intervener was, as is usual, denominated a "complaint in intervention," it was, in effect, but an answer to the complaint of the plaintiffs. It in no sense constituted the plaintiffs defendants or cross-defendants. Its allegations were deemed controverted by the plaintiffs, under section 462 of the Code of Civil Procedure. *People ex rel. Fogg v. Perris Irr. Dist.*, supra. Consequently the plaintiffs were not in position to interpose a "counterclaim" against the intervener, for a counterclaim "must be one existing in favor of a defendant and against a plaintiff." Code Civ. Proc. §§ 438, 439. It must, in some way, qualify or defeat the judgment to which the plaintiff is otherwise entitled. *Meyer v. Quiggle*, 140 Cal. 495, 499, 74 P. 40. The trial court, therefore erred in overruling the demurrer interposed by the intervener to the so-called "counterclaim" advanced by the plaintiffs, and in denying intervener's motion for nonsuit as against plaintiffs on the same issue, and its error warranted the granting of a new trial. The granting of the motion was justified for another reason. The liability of the intervener on its undertaking was, by the express terms of the bond, conditioned upon such redelivery being "adjudged." There could be no breach of the condition to deliver the property to the plaintiffs, in case return thereof should be awarded, until a judgment or an order was entered for a return. 34 Cyc. 1576; *Wells on Replevin*, § 430; *Cobbey on Replevin*, § 1311. See, also, *Mitchum v. Stanton*, 49 Cal. 302. Therefore, the attempt to recover on the redelivery bond in the action for the recovery of the horse was premature, and no cause of action was stated. Plaintiffs contend that, because the intervener "injected itself into the litigation * * * and the trial court * * * in the exercise of its general jurisdiction, had the power to entertain and decide such a suit [on the redelivery bond] when properly commenced, based on the judgment against Van Ness," it should not be held reversible error "because the court did in this action what it would have been compelled to do if a separate action had been commenced by the plaintiffs against the intervener upon the bond." The contention does not require further consideration.

[8] We are now brought to a consideration of the appeal of the plaintiffs (No. 3552) from the order of May 1 granting a new trial of the action. The intervener, now the respondent, takes the position that the plaintiffs failed to establish their right to institute and maintain the action, for which reason it contends the motion was properly granted. Briefly, its contentions are that the evidence was insufficient to show a wrongful taking; that there was no proof of a demand made on the defendants before suit was begun; and

that it was shown that a partnership existed between the plaintiffs and defendant Van Ness for raising, handling, and maintaining the horse, which was a part of the capital of the partnership, of which there had been no dissolution or a final accounting. As to the necessity of proof of a demand for the return of the horse, the evidence clearly indicates that the possession of the defendant Chase was but the possession of the defendant Van Ness. A demand was made on Van Ness by the attorney for the plaintiffs, and on their behalf, before the action was begun. Had that not been done, it would not have availed the defendants. The defendant Van Ness in his answer set up ownership and right of possession in himself, which rendered proof of demand unnecessary. 5 Cal. Jur. 169.

[9, 10] We are of the view that the evidence warranted the finding of the jury and the judgment that the plaintiffs were the owners of Morello, and that no partnership in the horse existed between them and the defendant Van Ness. Taking the documentary evidence and the oral testimony of the parties as a whole, there are some conflicts, but the purport of it is that, in 1892, the horse, then 2 years old, was purchased by or through defendant Van Ness, who immediately transferred a half interest in the animal to plaintiff Singlerly for the sum of \$2,250, executing a receipt for the amount as "a bill of sale." At or about the same time, by another bill of sale, he transferred the other one-half interest in the horse to the plaintiff Lammertz for a like amount, "and \$250 on said colt's first winnings." The fact is that Van Ness bought the horse with the money of the two plaintiffs, and never had or retained any interest whatever in the animal. Neither Singlerly nor Lammertz knew of the interest of the other in the horse, but each supposed that Van Ness and he owned Morello. Laboring under such misapprehension, the owners permitted Van Ness to train and handle the horse for racing, and later for breeding purposes, on the basis of equally sharing the expenses and dividing the profits. Morello was a success both as a race horse and as a sire of colts, and Van Ness paid to each of the plaintiffs, while he was handling the horse something like \$20,000 as his share of the earnings. It appears that Van Ness was able to successfully carry out his deceit concerning the ownership of the horse until the two owners discovered the real facts shortly before the commencement of the replevin suit. There was, it is true, the arrangement between the three parties (its exact details unknown to the owners) for the racing, handling, and maintenance of the horse, but the record is devoid of any evidence to support the contention that any partnership in the ownership of the horse existed. Its earnings actually belonged to the plaintiffs. The expenses were paid out of the earnings. The

arrangement was one by which Van Ness was an employee of the plaintiffs, his compensation being one-half of the net proceeds derived from the use of the horse. Under the facts here disclosed, the owners had the undoubted right to terminate the arrangement at will. They were certainly justified in doing so on learning of the true relation they bore to each other and to Van Ness, and in demanding and taking possession. The question of any accounting of the earnings of the horse cannot enter into this action to recover possession. The defendant Van Ness did not claim a partnership existed. His line of defense was that he was the sole owner of the horse, that the interest of the plaintiffs was merely that of lienholders, and that the debt secured by such liens had been paid. The evidence supports the finding of the jury and the judgment as to these contentions, and establishes that the taking was wrongful.

[11] This action being one in replevin, the plaintiffs were entitled to a judgment for the value of the horse, not as damages for its conversion, but as a substitute for and in lieu of the property, and were, in addition, entitled to a judgment for damages for the taking and withholding of the property. *Nahhas v. Browning*, 181 Cal. 55, 57, 183 P. 442, 6 A. L. R. 476. They introduced much evidence for the purpose of establishing the value of the horse at the time of the wrongful taking, and the court instructed the jury that in case it found for the plaintiffs it must, in fixing damages, find the value at that time and award that amount to the plaintiffs. The jury followed the instructions, and returned a verdict for the plaintiffs and against the defendant Van Ness for the return of the horse, or, if a return could not be had, then for the value at the time of the taking, which value it found to be \$7,500. The intervener contends that the value of the horse should have been assessed as of the time of the trial, and not as of the time of the wrongful taking, citing a number of authorities which support the contention. *Phillips v. Sutherland*, 2 Cal. Unrep. 241, 2 P. 32; *Nelson v. Yonge*, 73 Cal. App. 704, 710, 239 P. 67; *Gray v. Robinson*, 4 Ariz. 24, 33 P. 712; *Gardner v. Brown*, 22 Nev. 156, 158, 37 P. 240. In *Phillips v. Sutherland*, supra, the court said:

"If plaintiff recover in such an action [replevin], he is entitled primarily to the very property, and the value which he is to receive, instead of the property, is the value as of the day of trial."

There are decisions from other jurisdictions holding a directly contrary view. See 42 Am. Dig. (Cent. Ed.) p. 2447, § 420 et seq. There is considerable divergence in the decisions as respects the time at which the value of the property should be assessed, and this is due largely to the difference in the statutes. 34 Cyc. 1570. The general rule in replevin is,

according to the editors of *Ruling Case Law*, that the damages will be the value of the property at the time of taking, with interest from that time; "but," they say, "a number of well reasoned cases support the rule that the value to be assessed is the value at the time of the trial." Vol. 23, p. 914. "The proper rule * * * is to assess the value at the date of the wrongful taking. * * * The right of a party in replevin depends upon his right to possession at the time of commencement of the action and damages can only be given for interference with that possession." *Cobbey on Replevin*, p. 507. But assuming that the general rule in this state is as laid down in *Phillips v. Sutherland*, supra, and *Nelson v. Yonge*, supra, it can apply only when the property sought to be recovered is in existence at the time of the trial. If it is not in existence at that time, it is impossible to assess its value as of that date.

[12] In the present case, the horse, the subject of the action, was dead when the cause came on for trial, and, of course, had no value. Notwithstanding that fact, the defendant Van Ness and his surety, the intervener Pacific Surety Company, are liable to the plaintiffs on the redelivery bond for the value of the horse. *Jacobs v. Walker*, 90 Okl. 209, 216 P. 935, 31 A. L. R. 1287. The measure of recovery by the plaintiffs was not affected by the death of the property in suit in the hands of the defendant, whether by accident or through the fault of the latter. 34 Cyc. 1567; *Wells on Replevin*, §§ 600, 601; *Hinkson v. Morrison*, 47 Iowa, 167. The decided weight of authority appears to be to the effect that neither a plaintiff in replevin who has given a bond and taken property, nor a defendant who, by giving bond, has retained or repossessed himself of the property, is relieved of liability therefor under his bond by its loss or destruction while in his possession pending the action. *De Thomas v. Witherby*, 61 Cal. 92, 97, 44 Am. Rep. 542; *Three States Lumber Co. v. Blank* (C. C. A.) 133 F. 479, 69 L. R. A. 283, and note. In *De Thomas v. Witherby*, supra, this court said (p. 99):

"To permit a defendant who wrongfully takes possession, to claim that he holds it at the risk of the real owner, and not at his own, and claim immunity for accident, would be unjust in the extreme. The wrongful taker of property, when called upon to surrender it to the rightful owner or pay the value, cannot defend himself from judgment by showing his inability to deliver it through death or otherwise."

It was, therefore, proper, in this case, for the court to admit the evidence complained of, and to instruct the jury to assess the value of the horse as of the date of the wrongful detention, in case it should find for the plaintiffs. Its further instruction, that the fact that the horse died after the action was begun was no defense to the action, was also proper.

It was alleged in the complaint that the

defendants unlawfully held and detained the horse from the possession of plaintiffs, to their damage in the sum of \$10,000, the value of the property, "and the further sum of \$10,000 damages for the detention thereof." There are no allegations of special damage. In addition to assessing the value of the horse at \$7,500 at the time of the taking, the jury also found for the plaintiffs "for the sum of \$7,500 damages for the taking and detention." Over repeated objections of the intervener that the plaintiffs were seeking to introduce evidence outside the issues, the trial court admitted much documentary evidence and oral testimony. A compilation prepared from Goodwin's Turf Guide, devoted to giving the results of horse races, was admitted, from which it appeared that Morello had won more than \$80,000 as a race horse, and had sired many colts which, in turn, had won much money on the track. No objection was offered to the compilation instead of the Guide, but the introduction of the evidence was objected to on the ground that it did not tend to prove any issue in the case, "there being no allegation of special damage for money lost by reason of the racing qualities of the horse." Evidence of witnesses as to the character and performance of the various colts was also objected to as not within the issues made by the pleadings, and as calling for an opinion or estimate of the value of the horse for special purposes, and for damages special in their nature and not alleged in the complaint. In connection with this evidence and testimony, the plaintiffs, by way of a stipulation, admitted that at the time of the taking in January, 1896, the horse was not used or useful for race horse purposes because of a defect in one of his hoofs or legs, due to his breaking down on the race track, and was at that time used only for the purpose of siring. It was also admitted that, as the plaintiffs did not own the colts, they did not claim to have been damaged by reason of any money won by the progeny. Over the same objection, that it tended to prove a special element of damage not pleaded, evidence was introduced as to the value of the use of Morello for breeding purposes "at the time of the supposed conversion, or during the supposed period of detention."

[13-15] It is, of course, the rule that such damages as do not ordinarily arise from the breach complained of, but depend upon the peculiar circumstances of the case, are special damages, which must be pleaded. *Berry v. Bank of Bakersfield*, 177 Cal. 206, 210, 170 P. 415. In *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107, the plaintiff in an action for the recovery of a mare and colt sought, under a general allegation of damage, to recover for the loss arising from the act of the defendants in giving the animals poor pasturage, and the further circumstance that the mare was a brood mare and, by the de-

tention, the breeding season was lost. Commenting on that case, the court in *Berry v. Bank of Bakersfield*, supra, said:

"It was very properly held that the first of these items did not result from the detention itself, but from the improper conduct of the defendants in keeping the animals, while the second item depended upon the extraordinary value of the animal for a particular purpose. These items, therefore, were not embraced within an allegation of general damage."

While not disputing the force of the rule contended for by the intervener, we are not prepared to say that the admission of the evidence objected to warranted the granting of a new trial. We are of the view that it does not warrant a reversal of the judgment. Since the trial of this case in the court below, and pending the submission of the appeal, the constitutional provision (section 4½, art. 6) has been adopted, greatly extending the powers of this court to consider the evidence in passing on alleged errors relied upon for a reversal of a judgment. After our examination of this entire cause, including the evidence, we are satisfied that the error in the admission of the evidence complained of did not result in a miscarriage of justice. The stipulation or admission of the plaintiffs, that, at the time of the taking of Morello by the defendants, the horse was no longer fit for racing purposes, entirely removed from the consideration of the jurors any possible claim that the horse longer had any value for such purposes. Furthermore, and notwithstanding the previous objection to their introduction, we find that, by stipulation of the parties, the books, "Goodwin's Turf Guide," were admitted in evidence "for all purposes."

[16, 17] Aside from these considerations, the testimony and evidence as to the racing history of Morello and as to the character of the progeny and their racing ability tended to establish the worth of the horse as a sire of colts, the only purpose for which, the admission of the plaintiffs and the intimate knowledge of all those connected with the action showed, the horse was fitted at the time of the taking. It tended to fix the peculiar value of the horse as a sire of valuable racing stock. The horse undoubtedly had such a peculiar value to the plaintiffs, and the defendants had intimate and full knowledge of such fact, for Van Ness had been handling the horse for the very use that gave it that peculiar value. Such value was therefore "deemed to be its value" against the defendants (Civ. Code, § 3355), and the court properly so instructed the jury. This was the theory accepted by the trial court, for, while there was a wide divergence in the testimony as to the value of Morello, varying, according to the estimates of the witnesses, from a few hundreds to many thousands of dollars, the court instructed the jury that it

should assess the value "at the reasonable market value of the horse at the time of the taking * * * what the horse could have reasonably been sold for as a stallion for breeding purposes, to a person who wanted him for that purpose, if he was offered for sale in the open market." In view of the evidence and the instruction, we cannot say that the amount arrived at by the jury was not proper.

[18] Ordinarily, in replevin, loss of use and other injuries resulting from the taking and withholding of personal property may be compensated by allowing the successful party to recover interest on the value of the property from the time of the taking to the date of the verdict. However, he is not confined to interest as damages, if he can establish the fact that the value of the use of the property of which he was deprived exceeded the interest. Where the property has such a usable value, he is entitled to recover as damages for the detention the reasonable value of such use during the period he was wrongfully deprived thereof up to the time of the rendition of the judgment. *Nabhas v. Browning*, supra. The reasons for this rule are clearly stated in *California Jurisprudence*, Volume 5, p. 208. By depriving the plaintiffs of the possession of Morello, the defendant Van Ness prevented them from obtaining any earnings from him as a sire of colts. Evidence was introduced by both sides as to the physical condition of the horse and his soundness and health at the time of the commencement of the action. While the evidence was contradictory, there is much in the record from which we may conclude that the jury was warranted in finding that, at the time, the horse was in good health and physical condition, and in every way fitted for use as a stud for breeding purposes, and that he was in good condition and in the best of health at the time he was repossessed by Van Ness under the redelivery bond. The stallion was then about 6 years old, and there was testimony that he might reasonably be expected to be good as a sire until he was 18 or 20 years old. The case was tried more than 4 years after the taking, and the evidence was to the effect that the reasonable value of his services during that period would have been from \$4,500 to \$6,000 per year.

[19] Evidence was admitted, over the objection of intervenor, as to expenses incurred by plaintiffs in pursuit of and for locating the horse prior to the commencement of the action, including \$500 for the services of an attorney in that regard. Plaintiffs admit that the admission of the testimony constituted error, but contend that "the items were small, and apparently the jury gave no consideration thereto." The testimony was that such expenses amounted to nearly \$1,000, in-

cluding the services of the attorney. The court instructed the jurors that:

They "must allow the plaintiffs as damages for the taking a fair compensation for the time and money properly expended in the pursuit of the horse."

The award for damages is not segregated as to the items allowed, but is for a lump sum. Therefore, we cannot say in view of the large amount of the special damages fixed by the jury, that the evidence was not considered. It appears to be the practice in this court not to reverse judgments improperly allowing counsel fees incurred for the "pursuit of the property" for such error alone, but to direct a modification of the judgment by deleting therefrom the amount allowed. *Hays v. Windsor*, 130 Cal. 230, 236, 62 P. 395; *Harris v. Smith*, 132 Cal. 316, 319, 64 P. 409. In this case the amounts claimed to have been so spent were, no doubt, definitely fixed in the minds of the jurors and, in view of the court's instruction, we may safely assume that they included the entire amount of the \$500 attorney's fees in their award of damages. For that reason the judgment against the defendant should be reduced by that amount.

[20] Another contention of the intervenor is that the defendants Van Ness and Chase were joint tort-feasors, and that, by their voluntary dismissal of the defendant Chase, the plaintiffs released the defendant Van Ness as well. The action was dismissed as to Chase "without costs to either plaintiffs or said defendant," pursuant to an agreement between the plaintiffs and Chase, by which the plaintiffs released him "from all claims and demands of whatsoever nature and description," excepting claims for moneys collected by Chase from third parties for the use of the stallion. Chase, in like terms, released the plaintiffs, the consideration of the agreement being the "mutual release of all claims" each to the other. Chase testified that he did not receive anything or pay anything for executing the release; that at the time it was executed he had no claim against the horse; that the plaintiffs had no claim against him; and that the release was executed to relieve him of costs in the suit. The question whether Chase was a joint tort-feasor with Van Ness had not been determined. On the evidence subsequently admitted it would appear that he was not. The plaintiffs received nothing from Chase. Nothing which he did amount to or was received as a satisfaction of the claim. The plaintiffs were not paid for the loss and injury they had suffered. There was nothing, as we view it, in the transaction between the plaintiffs and Chase, relating to or included in the dismissal, that amounted to a retraxit. Under a proper instruction on the subject, the jury reached the same conclusion.

[21, 22] Complaint is made by the intervenor about certain instructions given to the jury. It is contended that certain portions of the charge assumed a "wrongful taking" of the horse. Read in their severality they might have that effect, but the charge as a whole correctly submitted to the jury the question whether there was a taking, and, if there was, whether it was wrongful. The instruction that it required proof of the existence of a copartnership between plaintiff Singerly and defendant Van Ness to the "satisfaction" of the jury "by a preponderance of the evidence" should have been followed by a further instruction defining what is meant by preponderance of the evidence, and that such preponderance would be sufficient to justify a finding in favor of the party having the burden of proof. *Boa v. S. F., etc., Terminal Rys.*, 182 Cal. 93, 187 P. 2; *Fidelity, etc., Co. v. Paraffine Paint Co.*, 188 Cal. 184, 195, 204 P. 1076. But, as the defendant Van Ness himself repudiated any claim of partnership, and as the evidence would not have supported a finding that there was a partnership, the giving of the instruction cannot be held to have been prejudicial error. Other contentions concerning the giving and refusal of instructions are answered by our discussion and conclusion on the matters already considered.

The order of the trial court granting the motion for a new trial is affirmed as to the intervenor Pacific Surety Company and reversed as to the defendant Van Ness.

The trial court is directed to modify the judgment appealed from by reducing the amount of the damage awarded for the wrongful detention of the horse to \$7,000, and as thus modified the judgment shall stand affirmed as to the defendant Van Ness, to wit, for the sum of \$14,500.

We concur: CURTIS, J.; RICHARDS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

202 Cal. 394

WEHLE v. PRICE et ux. (S. F. 11638.)

Supreme Court of California. Oct. 31, 1927.

1. Mortgages $\S$ 32(3)—Deed, absolute in form, if intended merely as security for payment of debt, will be held mortgage (Civ. Code, $\S\S$ 2924, 2925).

Rule is well settled that deed, absolute in form, if intended as security for payment of debt, is, under Civ. Code, $\S\S$ 2924, 2925, merely mortgage.

2. Appeal and error $\S$ 1010(1)—Court's findings, supported by proper evidence on question whether deed, absolute in form, is in fact mortgage, will not be disturbed.

Question whether deed, absolute in form, is in fact mortgage is primarily question of fact

upon which findings of trial court, supported by proper evidence, will not be disturbed, even though testimony is conflicting.

3. Mortgages $\S$ 38(1)—Findings that deed, absolute in form, constituted purchase and not mere security for loan, held sustained by evidence in action to quiet title.

In action to quiet title, evidence showing grantor conveyed property by deed, absolute in form, in order to raise money to pay fine, and that grantee executed deed for reconveyance to be held in escrow, held to sustain findings that transaction constituted purchase and not mere security for note, where amount paid was found not disproportionate to value.

4. Mortgages $\S$ 36—Presumption is that deed, absolute in form, constitutes actual conveyance, and burden is upon party claiming instrument is mortgage.

Presumption is that deed, absolute on its face, is what it purports to be, and burden of proof is upon party claiming deed constitutes merely mortgage.

5. Mortgages $\S$ 32(2)—Deed, absolute in form, will not be held mortgage unless it appears that all parties intended it as security.

In order to hold deed, absolute in form, merely mortgage, it must appear to court beyond all reasonable controversy, that all parties to transaction intended deed should be given merely for security.

6. Judgment $\S$ 747(1)—Judgment in ejectment by grantee against grantor held res judicata of question of title in grantor's action to have deed declared mortgage and to quiet title.

In action by grantor to have deed, absolute in form, declared mortgage, and to quiet his title, judgment previously obtained in ejectment action by grantee against grantor barring grantor from all claim to title to premises, held res judicata of question of title.

7. Judgment $\S$ 743(2)—Decision as to title following assertion of right to possession becomes res judicata to extent that determination was essential to judgment.

Where title is alleged by either party as basis of his right to possession, judgment becomes res judicata to extent that adjudication of title was essential to judgment.

In Bank.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Reinhold Wehle against Walter F. Price and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

R. M. Quackenbush, of Santa Rosa, for appellant.

W. F. Cowan and H. W. A. Weske, both of Santa Rosa, for respondents.

PRESTON, J. Plaintiff and appellant seeks by this action to have a deed executed by him to defendant Walter F. Price declared

to be a mortgage, and to quiet his title to the land described therein.

The complaint alleges plaintiff's ownership of certain real property valued at \$8,000; that about December 3, 1923, as security for an interest-bearing note of \$900, he executed a deed of grant, purporting to convey said property to defendant Price, but that at said time it was understood by both parties that the deed was given as security for a \$900 loan, and upon repayment of said sum said defendant should reconvey the premises to plaintiff. It further alleges that about July 11, 1924, defendant commenced an action in ejectment against plaintiff, and on August 22, 1924, secured judgment by default in his favor.

Defendants, answering, deny that said deed constituted a mortgage. By way of separate defense they plead that the judgment in the prior action in ejectment between the same parties constitutes a bar to this action, and by way of cross-complaint they ask that plaintiff be enjoined from asserting any claim to the lands in question and that their title thereto be quieted. From judgment in their favor plaintiff prosecutes this appeal, urging that the facts indicate that the conveyance in question was intended by the parties as a mortgage and that the evidence is insufficient to support the findings and judgment.

The facts and circumstances surrounding the execution of the deed appear to be substantially as follows: Plaintiff was endeavoring to raise \$700 to pay a fine imposed upon him for violation of the Volstead Act (27 USCA). He consulted defendant Price, who, after securing for him an extension of ten days within which to pay said fine, advised him to secure a loan from the Bank of Italy, where he had already borrowed \$2,600, or from some other bank, or from his friends. After expiration of the ten-day period plaintiff again consulted defendant, stating that his efforts to raise money had been unsuccessful, and asking if defendant would not let him have the money and take a second mortgage upon his property. Defendant refused to do this, but finally stated that he would take plaintiff's property for \$700, giving him the privilege of buying it back at any time within six months for \$900, plaintiff to pay interest on that sum and all interest due the bank. Pursuant to this agreement, an attorney satisfactory to plaintiff prepared a grant, bargain, and sale deed from plaintiff to defendant, which recited a consideration of \$900 and was subject to the \$2,600 mortgage. Defendant then executed a grant, bargain, and sale deed back to plaintiff as grantee and an escrow agreement reciting the terms and conditions of purchase, which documents, together with escrow instructions, were delivered to the Bank of Italy. Upon verbal agreement of the parties, plaintiff remained in possession of the premises during the period within

which he could repurchase the property. Upon his failure to comply with the terms of the escrow agreement, and after due notice, defendant demanded that he vacate the premises, whereupon, after his failure to so vacate, defendant instituted an action in ejectment against him, securing judgment by default. Within two or three weeks after making said deed, plaintiff was again arrested for violation of the Volstead Act, and in order to raise bail placed what purported to be a third mortgage of \$1,250 on the property. Both parties claim to have paid and evidently did pay the second installment of taxes for the year 1924.

[1-3] The courts have been watchful against all schemes of money lenders to deprive unfortunate debtors of their lands at less than their true value under the claim that the transaction is a purchase and not a loan, and the rule is well settled that a deed absolute in form, if intended as security for the payment of a debt, is a mortgage. Civ. Code, §§ 2924, 2925; 17 Cal. Jur. § 41, p. 735 et seq. The question is primarily one of fact, upon which the findings of the trial court, if supported by proper evidence, will not be disturbed, notwithstanding conflict in the testimony. 17 Cal. Jur. § 59, p. 758 et seq. Here there is ample evidence to support each and every one of the findings, and we hold them to be binding and conclusive.

[4, 5] It is apparent from the record that the evidence falls far short of those requirements necessary to justify the overthrow of a deed absolute on its face, for the presumption is that such a deed is what it purports to be, and the burden of proof is upon the party claiming that it is only a mortgage. It must appear to the court beyond all reasonable controversy that it was the intention of not only one, but all, of the parties, that the deed should be a mortgage. "A mere secret intention on the part of one of the parties, not disclosed or communicated to the other, will not have the effect of changing the character of the transaction. Still less, of course, will this result where the parties testify to directly contradictory intentions." 41 Corpus Juris, pp. 331, 332, § 96. The evidence must be "something more than that modicum of evidence which appellate courts hold sufficient to warrant a finding where the matter is not so serious as the overthrow of a clearly expressed deed, solemnly executed and delivered. The evidence must be clear, satisfactory and convincing; explicit, unequivocal and indisputable. * * *" 17 Cal. Jur. § 58, p. 756 et seq.

The testimony relative to value of the real estate is in direct conflict. Against a value of from \$8,500 to \$10,000 placed upon it by plaintiff, defendant estimated that it was worth not to exceed \$4,500. Other evidence tends to establish the correctness of the latter figure, for instance, the refusal of the

Bank of Italy or other banks to loan more than \$3,000 on the property or to take a second mortgage, and the fact that plaintiff for tax assessment purposes during 1923 gave the value of the real estate as \$750 and improvements \$450, a total of \$1,200, which probably represented from 30 to 40 per cent. of its actual value. At any rate, the court found that the lands and premises did not exceed in value the sum of \$4,500. This finding is binding upon us and obliterates the contention that the great disparity in value between the property conveyed by plaintiff and the money paid to him establishes the fact that a mortgage and not an actual sale was contemplated by the parties.

Although the complaint alleges that the deed was given by plaintiff as security for an interest-bearing note, no such note was produced, and the court found that as a matter of fact none was ever executed. Furthermore, defendant testified, and his testimony is corroborated by that of the attorney and another witness, that he specifically stated at the time of this transaction that he was no more willing to accept a mortgage than the banks were, and that the only condition upon which he would advance money to plaintiff was that of conditional sale of the land to him, plaintiff having the privilege of repurchase within a specified time. Apparently both plaintiff and his attorney thoroughly understood the situation.

[6] We further hold that plaintiff's action is estopped by the prior judgment in ejectment obtained against him, which established defendant's title to the property. The judgment roll in said action appears in the record as Defendant's Exhibit 2. The complaint alleges plaintiff's (defendant here) ownership of the premises in question, and their wrongful possession by defendant (plaintiff here). The court found that plaintiff was the owner in fee and entitled to possession of the premises and adjudged "(1) that the plaintiff is the owner in fee simple and entitled to the possession of the premises described in the complaint and situate [description] * * * and that he have and recover the possession thereof;" and "(3) that the defendant, together with all persons claiming under him, shall be forever barred of a recovery of said premises and all claim of title thereto, and the title to said premises is absolutely vested in the plaintiff, and that the plaintiff be not molested in the possession of said premises by the defendant, or by any person claiming under said defendant."

[7] As said in *Freeman on Judgments* (5th Ed.) vol. 2, §§ 866, 867, pp. 1830-1832:

"Primarily an action of ejectment or its equivalent or substitute action under the statute or Code is possessory in its nature. It may, however, and frequently does become the means of trying title, since either party may base his right to possession entirely upon some claim of title. * * * Where title was alleged by either

party as the basis of his right to possession the judgment becomes *res judicata* to the extent that an adjudication of it was essential to the judgment, but not otherwise (citing *Lantz v. Cole*, 172 Cal. 245, 156 P. 45; *Miles v. Ryan*, 172 Cal. 205, 157 P. 5; *Cassin v. Nicholson*, 154 Cal. 497, 98 P. 190; *McLean v. Baldwin*, 136 Cal. 565, 69 P. 259; *Graves v. Hebbbron*, 125 Cal. 400, 58 P. 12; *Breon v. Robrecht*, 118 Cal. 469, 50 P. 689, 51 P. 33 [62 Am. St. Rep. 247]; *Carpenter v. Natoma Water & Min. Co.*, 63 Cal. 616; *Valentine v. Mahoney*, 37 Cal. 389; *Simon v. McCoy*, 28 Cal. App. 523, 153 P. 406). * * * Where both title and right of possession are in issue and determined, the judgment is conclusive as to both. Title is put in issue by an allegation of ownership in fee simple. * * *

In the case of *Avery v. Superior Court*, 57 Cal. 247, in an action for mesne profits, after a judgment in ejectment, the court said:

"The title to the land was put in issue in the pleadings, and the judgment in the action of ejectment established *Avery's* title to the land. * * *

Graves v. Hebbbron, 125 Cal. 400, 58 P. 12, was an action to quiet title brought by a patentee of a quarter section of land against a patentee of adjoining land involving the location of the common boundary line. A former judgment in an action of ejectment brought by the defendant against the plaintiff settling the location of said boundary line in favor of defendant was held to be admissible against the plaintiff as a former adjudication of the subject-matter.

In the case of *Breon v. Robrecht*, 118 Cal. 469, 50 P. 689, 51 P. 33, 62 Am. St. Rep. 247, the court, quoting with approval *Marshall v. Shafter*, 32 Cal. 177, said:

"If the respective titles of the parties, or their right to the possession of the demanded premises, are put in issue and tried in ejectment, and the plaintiff recovers judgment for possession, the judgment is an estoppel, and the defendant, to avoid the estoppel in a subsequent action to recover the same premises, must show some other right of possession than he had when the judgment was entered.' In *Byers v. Neal* [43 Cal. 210] *supra*, it was declared that 'a judgment for plaintiff in ejectment, when the title has been brought directly in issue, concludes the defendant against setting up in a subsequent proceeding any mere legal defense which he might have made in such suit. * * *'"

See, also, *Parnell v. Hahn*, 61 Cal. 131, *Philbrook v. Newman*, 148 Cal. 172, 82 P. 772, and *Price v. Sixth District* (Cal. Sup.) 258 P. 387, to the effect that a judgment is conclusive upon all questions involved in an action and upon matters which, under the issues, might have been litigated and decided in the case.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.

202 Cal. 345

(260 P.)

WARFIELD v. ANGLO & LONDON PARIS NAT. BANK et al. (S. F. 11641.)

Supreme Court of California. Oct. 31, 1927.

1. Evidence ⚡18—Court may judicially notice that municipal securities bearing usual rate could not be marketed at par during and after war in large quantities.

Where a taxpayer of a city and county brought suit against the buyers of municipal bonds for additional payment therefor upon the ground that they had been unlawfully sold at too low a price, *held* that court may judicially notice that municipal securities bearing the usual rate could not be marketed at par during and after the war in large quantities.

2. Municipal corporations ⚡999—Act of officials estopping municipality from asserting right to rescind bond sale held to estop taxpayer.

Where, in a taxpayer's action to recover for the city and county money claimed to be due because of municipal bonds having been purchased by defendant at an unlawfully low price, it was shown that the actions of the mayor, the board of supervisors, and the grand jury were such as to approve, expressly or impliedly, the purchase and sale so that the municipality would have been estopped to assert a right to rescind the contract, *held* that such facts estopped the taxpayer.

3. Municipal corporations ⚡1000(1)—Municipality's delay of three years without asserting rights relative to bond sales, where purchaser had changed position, held to bar taxpayer's suit.

Where during the three years following the sale by city and county of municipal bonds, neither the city nor county had asserted rights on such sale contract against the buyer so that the buyers had changed position because of such purchase, such delay, being sufficient laches to bar the municipality from suing, *held* to bar the taxpayer's suit.

4. Municipal corporations ⚡1000(1)—More than ordinary promptness is required of taxpayer seeking to rescind bond sale.

In taxpayer's action, brought three years after a municipality had sold bonds to defendant, relative to the municipality's rights under such transaction, *held* that more than ordinary promptness is required of one seeking to rescind a contract where the property is of a speculative or fluctuating character.

5. Equity ⚡65(1)—Where, in taxpayer's action to recover from buyer of municipal bonds difference between purchase price and par value, complaint showed buyer's good faith, "clean hands" doctrine held not to defeat defense of laches.

Where, in a taxpayer's action to recover additional money from the buyer of municipal bonds on the ground that the buyer had unlawfully purchased such securities at too low a price, the complaint showed the buyer's good faith, *held* that to meet the claim of laches raised by the defendants the plaintiff could not

avail himself of the "clean hands" doctrine; such doctrine having no application.

6. Municipal corporations ⚡1000(1)—Defense of laches in taxpayer's action to recover from buyer of municipal bonds difference between purchase price and par value held properly raised by demurrer.

In a taxpayer's action brought three years after sale of municipal bonds to recover from the purchaser thereof money which he claimed was owing to the municipality because of such bonds having been purchased at too low a price, defense of laches *held* properly raised by demurrer.

7. Equity ⚡87(2)—Laches doctrine is not dependent upon a delay sufficient to make statute of limitations operative.

The application of the doctrine of laches is not dependent upon a delay of sufficient duration to call into operation the statute of limitations.

8. Constitutional law ⚡143—Municipal corporations ⚡907—Charter amendment authorizing sale of bonds previously voted at less than par did not impair contract obligation or invade taxpayers' rights (Const. art. 11, § 8; St. 1921, p. 1786).

Where city and county voted bonds by a two-thirds vote as required, and the charter provided that such bonds could not be sold below a certain price, a change in the charter (St. 1921, p. 1786), made by a majority vote as provided by Const. art. 11, § 8, after the bonds were issued, authorizing sale of such bonds at less than par, was not impairment of obligation of contract or invasion of elector's rights.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Taxpayer's action by Henry Warfield, suing as a taxpayer of the city and county of San Francisco, against the Anglo & London Paris National Bank and others. Judgment for defendants, and plaintiff appeals. Affirmed.

H. W. Hutton, of San Francisco, for appellant.

McKinstry, Haber & Firebaugh, of San Francisco, for respondent Anglo & London Paris Nat. Bank.

William F. Humphrey and Robert Mack Light, both of San Francisco, for respondent Construction Co. of North America.

Robert M. Searls, Sp. Counsel, and George Lull, City Atty., both of San Francisco, for respondent City and County of San Francisco.

LANGDON, J. This is an action brought by a taxpayer of the city and county of San Francisco, on behalf of said municipal corporation, to compel the defendants, other than the municipal corporation, to pay into the treasury of the municipality \$2,888,537 be-

cause of their purchase from the city and county of San Francisco of certain bonds known as "water bonds," of the par value of \$21,826,000, for a purchase price of \$18,937,463 at a public sale, held on or about August 1, 1921. The contention of appellant is that the sale was illegally made, and that the defendants have converted the bonds and should be liable for their par value. In reaching this conclusion, appellant urges a construction of the law governing the sale of these bonds, which would have prevented their sale at the date named, when the bond market was depressed, and also urges that a charter amendment permitting the sale of the bonds below par was unconstitutional. While the questions raised by these contentions are very interesting and intricate, we are of the opinion that it is unnecessary to determine them upon this appeal, because of our concurrence in the view of the learned trial judge that the complaint shows on its face such a delay in the enforcement of the asserted claim as to amount to laches and bar the right of recovery, if it ever existed.

After alleging that the plaintiff was a citizen, resident, and taxpayer in the city and county of San Francisco, Cal., at the time of the sale of said bonds and, thereafter, until the date of the action, July, 1924, the incorporation of the defendants and the fact that the city and county of San Francisco had refused to join as plaintiff and was made a defendant because of that fact, plaintiff alleged:

"That on the 14th day of January, 1910, the qualified electors of the said city and county of San Francisco, by a vote of more than two-thirds of those voting thereon, voted in the affirmative to issue bonds in amount of \$45,000,000 for the purpose of furnishing money to construct a water supply system for the people of said San Francisco, which said system is commonly known as the 'Hetch Hetchy' system, and thereafter such bonds were executed in proper form, and in denominations of \$1,000 each, and were designated and known as 'water bonds' and each of said bonds was dated July 1, 1910, the aggregate amount of such bonds of said denomination and value being the said sum of \$45,000,000. And upon such execution of said bonds, they were deposited in the treasury of the city and county of San Francisco, to be sold by the Board of Supervisors of said City and County of San Francisco from time to time as money was needed to pay for the work of the construction of said water supply system as such work progressed.

"That during the year 1920, the said city and county of San Francisco determined to construct an adequate part of said water supply system and thereupon it entered into a contract in writing with defendant Construction Company of North America, said contract being numbered 77c, and in and by said contract the said city and county of San Francisco agreed to pay for all of the labor and material performed and used in the work of the construction of said aqueduct, and it hired and employed said defendant Construction Company of North

America, to superintend and manage said work of said construction for it, for a percentage of the total cost of said work which was estimated to be the sum of \$8,000,000, and there was thereupon set aside by said city and county of San Francisco, from the water bonds hereinbefore mentioned, bonds in amount of \$8,000,000 to pay for the said work, and in and by said contract the said Construction Company of North America agreed to purchase sufficient of said bonds at par plus accrued interest at the commencement of each fiscal year while said work was progressing to pay for the work that would be done on said aqueduct during said fiscal year according to the estimate for such work that should be made by the city engineer of said San Francisco prior to the commencement of such fiscal year, and said Construction Company of North America commenced such work of superintendence during the said year 1920, and was in the employ of the said city and county of San Francisco during all of the times hereinafter stated.

"That on or about the 13th day of May, 1921, M. M. O'Shaughnessy, who was then and there the regularly appointed qualified and acting city engineer of the city and county of San Francisco, made an estimate of the amount of said bonds it would be necessary to sell to carry on the work of constructing said Hetch Hetchy water project for the fiscal year 1921, 1922, which estimate was the sum of \$4,000,000, and in said estimate computed that the amount of said bonds that it would be necessary to sell to carry on the work of said aqueduct under said contract 77c, was the sum of \$2,750,000, and communicated such estimate to the board of supervisors of the said city and county of San Francisco, on or about said date.

"That on the 1st day of July, 1921, the said city and county of San Francisco had in its treasury or in banks for it available for the work of the construction of said water project, including the said aqueduct, all the proceeds of the sale of said water bonds or from income derived from operating parts of said project the sum of about \$6,479,677.29, without the sale of any of the bonds so estimated by said city engineer as necessary to be sold, and the expenditures for the whole of said water project, to wit, its construction including the amounts expended under contract 77c for the fiscal year 1921, 1922, was the sum of \$6,681,580.04, which was expended in average monthly amounts during said fiscal year, and the purchase of said water bonds in amount \$2,750,000 by defendant Construction Company of North America would have left in the treasury of said city and county of San Francisco the sum of \$2,548,097.20 or thereabouts available for the construction of said water project on the 1st day of July, 1922.

"That for some two or three years prior to the 1st day of August, 1921, the value of bonds of every description throughout the United States was temporarily depreciated in the selling markets, but it was a matter of common knowledge that such depreciation was but temporary and on or about said 1st day of August, 1921, bonds of all characters throughout the United States began to appreciate in value, and all bonds and the water bonds hereinafter mentioned were salable at par long prior to the time the city and county of San Francisco was required to sell any thereof other than the said amount of \$2,750,000 worth under said contract

77c, and it was a matter of common knowledge on said 1st day of August, 1921, that said water bonds could be sold at par prior to the 1st day of July, 1922, to wit, the whole of the said water bonds hereinafter mentioned.

"That on the 1st day of August, 1921, the city and county of San Francisco aforesaid, was the owner of, in possession of and entitled to the possession of 21,826 of said water bonds then unsold of the total par value of \$21,826,000, said bonds being of the par value of \$1,000 each, which the defendants in the caption hereof named excepting only the city and county of San Francisco, converted to their own use in the manner following, to wit:

"That prior to the 1st day of August, 1921, the board of supervisors of said city and county of San Francisco, advertised for bids for the purchase of said water bonds, which bids were to be received and acted upon by said board of supervisors on the said 1st day of August, 1921, and upon that day the defendant Construction Company of North America tendered a bid for the purchase of 21,826 water bonds at the average price of about \$851.78 for each of said \$1,000 bonds, and thereupon the said board of supervisors entered into a contract in writing under and by which it agreed to sell the whole of said water bonds to said Construction Company of North America under said contract, it being a single contract, at the said tendered price of \$851.78 for each of said bonds, and thereafter the whole of said 21,826 water bonds were delivered to said Construction Company of North America, between the 16th day of August, 1921, and the 17th day of November, 1921, the delivery thereof all being under said contract of sale so made by said supervisors and said board of supervisors and the delivery thereof being made by said city and county of San Francisco at the said Anglo & London Paris National Bank for the said Construction Company of North America, and the whole of said transaction with said city and county of San Francisco was conducted by said the Anglo & London Paris National Bank with said city and county of San Francisco, for said Construction Company of North America, and the said city and county of San Francisco took from the said Anglo & London Paris National Bank and the said Construction Company of North America, United States bonds of the par value of \$16,750 for said water bonds and \$2,187,468 in money for said water bonds so delivered but neither the whole nor any part of the sum of \$2,888,537, the remaining part of the par value of said 21,826 water bonds has been recovered by said city and county of San Francisco, or paid.

"That the bonds aforesaid which the said Construction Company had agreed to buy at par plus accrued interest in the extent of \$2,750,000 were included in the 21,826 sold as aforesaid for the price of \$851.78 each. That by reason of the premises the said city and county of San Francisco and the taxpayers thereof have been damaged in the sum of \$21,826,000 less the sum of \$18,937,463 so recovered by it, but neither the whole nor any part of the said remaining sum of \$2,888,537 has been paid. That the market price of the bonds so converted during the greater portion of the year 1922 on the bond market in the said city and county of San Francisco, State of California, was in excess of the sum of \$1,040 for each

of said \$1,000 bonds, and at about the close of the year 1922, defendant Anglo & London Paris National Bank offered to resell some of said bonds to the said city and county of San Francisco at the then market price on said bond market, the said price being in excess of the sum of \$1,040 for each of said \$1,000 bonds.

"That the said city and county of San Francisco cannot be induced to commence or prosecute an action to recover the said sum of money herein sought to be recovered as is shown by the following facts:

"It has neglected to commence any action to recover said sum and no action relating to said bond transaction other than this action has ever been commenced. That about the month of August, 1922, one James B. McSheehy, who was then and there a regularly elected member of the board of supervisors of said city and county of San Francisco, and duly qualified and acting, requested said board of supervisors to investigate said sale of bonds and all matters in connection therewith, and after some months of delay and great difficulty on his part in getting said board of supervisors to act thereon, it finally at about the month of January, 1923, approved said sale, declared it was for the best interests of said San Francisco that it should have been made and that it was a legal and proper sale, and the said board of supervisors now and at the time of the commencement of this action was composed of members more than a majority of which acted as above.

"That James Rolph, Jr., is now and for more than ten years last past has been the regularly elected, qualified and acting mayor of the city and county of San Francisco, and he approved of such sale of said bonds at the time it was made and at the time of the said deliveries thereof, and on or about the 5th day of December, 1922, he publicly stated at a meeting of said board of supervisors, that everything that was done about the sale of said bonds was right and that if he had to do it over again he would favor the sale under the same conditions.

"That the said mayor has at other times and places that plaintiff cannot specify reiterated the same sentiments and neither he nor a majority of the members of said board of supervisors have changed their erroneous opinions on said matter but are still in the same frame of mind.

"That George Lull has been the regularly elected, qualified and acting city attorney of the said city and county of San Francisco, state of California, for more than five years last past, and is now such, and he approved of said bond sale and has taken no action to recover the said sum of money sought to be recovered herein either by suit brought in the name of said city and county or at all, and on the 7th day of March, 1925, plaintiff served a demand on him in this action in the words and figures following, to wit:"

After setting forth the demand, the complaint continues:

"That the said city attorney signed a receipt for said demand, but failed to signify his intention to comply therewith nor has he complied therewith in any particular.

"That during the month of January, 1923, two voluntary unincorporated associations of persons, each being composed of members residing in said city and county of San Francisco,

one being named the 'Taxpayers' Association of San Francisco,' and the other being named 'Caravan No. 6, Order of Camels,' requested a grand jury of said city and county of San Francisco, then sitting after having been regularly impaneled, to instruct the district attorney of said city and county of San Francisco to institute suit to recover the money sought to be recovered in this action, but the said grand jury after holding such request for some months refused to so instruct or order said district attorney to institute such action, and no such order has ever been given by any grand jury, and no such action has ever been instituted, the request of such voluntary associations having been made to said grand jury on behalf of said city and county of San Francisco and the taxpayers thereof.

"That the vote of the people of the said city and county of San Francisco, state of California, taken on the 14th day of January, 1910, as hereinbefore mentioned, was taken at a special election held on said day for the purposes of voting on said bond question, and the proposition submitted to the voters at said election was to create a bonded indebtedness to finance said water project, said bonds to bear interest at a rate not exceeding 5 per cent. per annum, and the whole of said bonds were executed and deposited in the treasury of said city and county of San Francisco to be sold and issued and on their face expressed that the rate of interest to be paid thereon was $4\frac{1}{2}$ per cent. per annum, and thereafter and on the 2d day of November, 1920, the said board of supervisors of the said city and county of San Francisco, state of California, at a general election held on said date, submitted a proposed amendment to the charter of said city and county of San Francisco, proposing to amend article 12 of said charter by adding thereto a section to be known as section 10b, the said proposed amendment being found in the Statutes of California, for the year 1921, at page 1786, and at said general election 74,652 electors voted in favor of said proposition, and 45,979 of such electors voted against the same, but thereafter and on the 21st day of January, 1921, the Legislature of the state of California approved said proposition, and all of said water bonds that were sold and issued prior to the 1st day of August, 1921, were sold at their par value and to bear a rate of interest of $4\frac{1}{2}$ per cent. per annum, over \$20,000,000 of such bonds having been so sold and issued prior to the said 1st day of August, 1921.

"That plaintiff did not discover the facts constituting the foregoing cause of action until about the month of May, 1924, and brings this action for the benefit of himself and all taxpayers of said city and county of San Francisco, and all persons legally interested in the recovery of the money sought to be recovered herein, and further alleges that the said Construction Company of North America entered into said contract of August 1, 1921, to purchase the bonds aforesaid, with the full knowledge, consent, and approval of the defendant the Anglo & London Paris National Bank, and the last named corporation participated in the conversions hereinbefore complained of from the time of the last delivery of said water bonds and the delivery of said United States bonds by said the Anglo & London Paris National Bank, to said San Francisco, each of said deliveries of such

United States bonds being a part of the said sale of bonds herein complained of."

[1] There is nothing to indicate in the foregoing allegations that the sale of the bonds was not in entire good faith on both sides, nor does it appear that the city and county of San Francisco could have disposed of the bonds at a higher price. It is a well known fact, of which this court may take judicial notice, that municipal securities during and after the war could not be marketed in large quantities at par unless the usual interest rate thereon was considerably increased. The matters pleaded by plaintiff have all been matters of common knowledge, yet the city authorities and the taxpayers in general have acquiesced in the transaction and the plaintiff himself has acquiesced in it for three years. It is also obvious that the position of the defendants has been altered during this period of delay. If the transaction had been attacked with reasonable promptness and diligence, the bonds might have been returned and the purchase price thereof invested in other bonds which were at that time also greatly depressed in value and which would have appreciated with the rising market as did the bonds which were purchased from the municipality. It appears from the complaint, and the matters judicially noticed, that during the period of delay, which was operating to the disadvantage of the purchaser in the manner before stated, the city and county of San Francisco has been receiving the benefit of the purchase price of the bonds and of the increased value of the United States government bonds taken as a part of such purchase price.

The complaint also reveals additional circumstances which would estop the city and county of San Francisco from asserting a right to rescind this contract at this late date, in its recitals relating to the actions of the mayor and board of supervisors, as well as the grand jury, duly empaneled, all of whom, expressly or impliedly, approved of the purchase and sale and lulled the purchasers into security and thus justified them in proceeding to change their position in reliance upon the validity of the contract.

The delay in this case is particularly inexcusable in view of the speculative elements involved in the transaction. A long period of delay, such as occurred in the instant case, enables a litigant to await changes in the market value of securities, and act only if the change is to his advantage.

[2-4] It is settled that the plaintiff can assert no better cause of action on behalf of the municipality than that corporation could have asserted upon its own behalf. *Cathers v. Moores*, 78 Neb. 17, 113 N. W. 119, 14 L. R. A. (N. S.) 302; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 93, 12 S. Ct. 142, 35 L. Ed. 943. And we think that the foregoing recitals show an inexcusable delay

upon the part of the municipality in asserting any right which it might have had. "If, in the course of an inexcusable delay in the assertion of a right, changes occur in the subject-matter of the transaction in suit or in the relative positions of the parties thereto, as a result of which it is impossible to place the parties in statu quo, and the enforcement of the right would work inequity, relief will be denied because of laches." 21 C. J. 231. "A marked appreciation or depreciation, according to circumstances, in the value of the property involved, where the right might have been asserted before such change, and the granting of relief would in consequence of the change work inequity, is ordinarily fatal to plaintiff's case." 21 C. J. 233. "If the property involved is of a speculative or fluctuating character, more than ordinary promptness is required of a claimant." 21 C. J. 225.

[5] To meet the claim of laches raised by the defendants, the plaintiff and appellant asserts that this equitable doctrine may not be invoked by one who does not come into court with clean hands, and that the defendants are precluded by their conduct from raising this defense. In reply, we repeat, that the complaint contains no allegation of bad faith nor of fraud, but on the contrary, alleges facts from which it appears that both parties to the sale acted in good faith, in view of the conditions existing at the time, and, therefore, the principles contended for by appellant can have no application in a ruling on demurrer.

[6, 7] The defense of laches was properly raised by the demurrer filed to the complaint. *Marsh v. Lott*, 156 Cal. 643, 105 P. 968; *Superior California Co. v. Grossman*, 32 Cal. App. 357, 162 P. 1046; 21 C. J. pp. 257, 435. It is well established that equity will not relieve against culpable negligence or inexcusable laches. *Tynan v. Kerns*, 119 Cal. 447, 51 P. 693; *Blethen v. Pac. Mut. L. I. Co.*, 46 Cal. App. Dec. 765.¹ "Nothing can call a court of chancery into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing." *Blethen v. Pac. Mut. L. I. Co.*, supra. The application of the doctrine of laches is not dependent upon a delay of sufficient duration to call into operation the statute of limitations. *Boone v. Templeman*, 158 Cal. 290, 110 P. 947, 139 Am. St. Rep. 126; *Shiels v. Nathan*, 12 Cal. App. 604, 619, 108 P. 34; *Blethen v. Pac. Mut. L. I. Co.*, supra.

The judgment appealed from is affirmed.

I concur: CURTIS, J.

SHENK, J. [8] I concur in the foregoing opinion, and I place my concurrence in the

judgment on the additional ground that in my opinion the sale of the bonds was lawful, as contended by respondents. The appellant places his chief reliance on the case of *Peery v. City of Los Angeles*, 187 Cal. 753, 203 P. 992, 19 A. L. R. 1044; but there is, I think, a wide distinction between the situation presented in that case and in the case at bar. In that case the city was proceeding under the provisions of the general state law with reference to the issuance of its municipal bonds. That procedure was authorized by the city charter. The bond issue was voted by the electors of the city under a law which required that the bonds should be sold at not less than par and should bear interest not exceeding 6 per cent. per annum, such rate to be specified in the ordinance calling the election. The rate of interest specified in the ordinance was 5 per cent. and was not to be exceeded in the issuance of the bonds. The bonds remained unsold. The Legislature in 1921 amended the statute so as to provide that municipalities might sell their bonds theretofore duly authorized and remaining unsold at a rate of interest not exceeding 6 per cent. The city authorities were proceeding to sell the bonds specifying a 6 per cent. interest rate, when the action was brought by a taxpayer to enjoin the sale as legally unauthorized. It was held that when the bonds were voted upon the express condition that the rate of interest was to be 5 per cent. a status analogous to a contractual relation was created between the electors of the city and the officials thereof that could not constitutionally be disturbed and that it was incompetent for the Legislature to authorize the city officials to sell the bonds to bear a higher rate than 5 per cent. The sale was declared void, not because there was any constitutional inhibition against the sale generally of municipal bonds bearing 6 per cent. interest, for there was none, but because the Constitution protected one of the parties to the contractual relation, to wit, the electors of the city, against any impairment of that contract right without their consent. There is no provision in our Constitution which directly or indirectly prohibits the sale of bonds of the city and county of San Francisco at less than par. In the present case it appears that the electors of San Francisco had, before the bonds in question were sold, duly signified their assent to a change in the rate from 4½ per cent. to 5½ per cent. and for a sale at less than par. This assent was evidenced in the manner provided by law by an amendment to the city charter approved in 1921. Stats. 1921, p. 1786. By that amendment the electors of San Francisco specifically authorized the board of supervisors to sell certain school bonds, not involved in this case, and the water bonds here in question, for less

¹ For hearing in Supreme Court, see 198 Cal. 91, 243 P. 431.

than par and at a rate of interest not in excess of 5½ per cent. By that charter amendment the principals in the contractual relation, namely, the electors of the city and county of San Francisco, specifically authorized the other parties to the transaction, namely, the officials of the city, who constitute the representatives and agents of the electors, to do what was in fact done pursuant to the authority granted. The issuance and sale of said bonds was peculiarly a municipal affair, which it was entirely competent for the electors of the city and county of San Francisco by charter amendment to control by a proper delegation of power to the board of supervisors. The fact that a two-thirds vote was required to authorize the issuance of the bonds did not militate in the least against the power of the electors to express their assent to a change in the terms of sale by a majority vote on the charter amendment. Section 8 of article 11 of the Constitution provides not only that the original charter but amendments thereto shall be approved by a majority vote. Under this constitutional provision a majority of the electors of the city constitute the legislative or governing unit in amending the charter and in thus controlling matters of local concern. When the majority acts as constitutionally permitted or authorized, all of the electors and taxpayers of the city and the officers of the city are bound to conform. A majority of the electors imposed the original charter condition as to the terms of sale, or at least a majority was all that was necessary to impose the condition. Likewise a majority authorized by charter amendment the change in the terms of sale. When, as in this case, a majority acted within constitutional bounds no question of the impairment of contract rights can arise. It is fundamental that contracting parties, lawfully agreeing in the first instance, may thereafter change or modify such agreement by assent lawfully expressed. This assent was legally accomplished in this case. The Peery Case and other cases of like import can have no application to the situation here presented.

I find no merit in the contention of the appellant that the respondent construction company, under the facts alleged, was an officer or employee of the city and county. The relation was clearly that of a contractor. Nor does the complaint show bad faith or abuse of discretion on the part of the board of supervisors in ordering the sale of the unsold bonds as a whole. The demurrer was properly sustained, and, as the appellant expressly declined to amend his complaint, the judgment was lawfully entered.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; SEAWELL, J.

86 Cal. App. 441

PEOPLE v. COOPER. (Cr. 1419.)

District Court of Appeal, First District, Division 2, California. Oct. 31, 1927.

Criminal law §369(2)—In prosecution for pimping, evidence of defendant's living in adultery with prosecuting witness held admissible, since tendency was to prove crime charged (St. 1911, p. 10, § 1, as amended by St. 1921, p. 96).

In prosecution for pimping, as defined in St. 1911, p. 10, § 1, as amended by St. 1921, p. 96, evidence of defendant's having come to the city with the prosecuting witness and having lived with her at a named address *held* admissible, since a showing of an adulterous relationship had a tendency to prove the crime charged.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

John Cooper was convicted of pimping, and he appeals. Affirmed.

Harold D. Perry, of Oakland, for appellant. U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

STURTEVANT, J. The district attorney filed an information against the defendant charging him with committing the offense defined in section 1 of the Statutes of 1911, p. 10, as amended by the Statutes of 1921, p. 96. A trial was had in the trial court before the court sitting with a jury. The jury returned a verdict of guilty. The defendant made a motion for a new trial; the motion was denied; and he appealed from the order denying him a new trial and from the judgment rendered on the verdict. At this time he makes one point, and that is that certain evidence was improperly admitted by the trial court.

The information followed the statute and pleaded that the defendant lived with the prosecuting witness. The defendant took the stand as a witness and testified in his own behalf. On cross-examination he was asked these questions:

"You came to Oakland with Marie Cooper? That was at 716 Market street, and that is where you lived with Marie Cooper?"

To each of those questions the defendant's counsel objected on the ground, among others, that in the information he was charged with the commission of one offense, but that the questions tended to prove that he was also guilty of another offense, to wit adultery. The objections were overruled and the questions were answered in the affirmative. The defendant contends that the rulings were erroneous, and he cites and relies on *People v. Lane*, 100 Cal. 379, 34 P. 856; *People v. Glass*, 158 Cal. 650, 112 P. 281; *People v. Martin*, 13 Cal. App. 96, 108 P. 1034; *People*

v. Canfield, 173 Cal. 309, 159 P. 1046. The Attorney General replies that the authorities relied upon are not in point and that the rule applicable is stated in *People v. Morani*, 196 Cal. 154, 236 P. 135. This reply is clearly correct. Commencing at the bottom of page 157 (236 P. 136), the court said:

"It is well settled that a defendant in a criminal case can be tried for no other offense than that charged in the indictment or information, and therefore it is not competent for the prosecution to prove the commission of independent crimes by the defendant, the evidence of which has no tendency to prove some material fact in connection with the particular crime charged. But this rule does not exclude such evidence when it logically tends to prove any fact necessary or pertinent to the proof of the crime for which the defendant is being tried."

We find no error in the record. The judgment and order appealed from are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

36 Cal. App. 497

PEOPLE v. HUDSON. (Cr. 1520.)

District Court of Appeal, Second District, Division 1, California. Nov. 1, 1927.

1. Criminal law §369(1)—Evidence of separate offenses, unconnected with crime charged, is inadmissible.

Evidence of defendant's commission of independent offenses, not tending to prove guilt of crime charged, is inadmissible over defendant's objection.

2. Criminal law §1186(4)—In robbery prosecution, evidence respecting other offenses and district attorney's remarks respecting defendant's association with married woman held prejudicial (Const. art. 6, § 4½).

In prosecution for robbery, admission in evidence of defendant's commission of other crimes of larceny, not tending to prove crime charged, and the remarks of district attorney in opening statement, respecting alleged fact that defendant had been associating with a married woman, not his wife, held to deprive defendant of a fair and impartial trial requiring reversal, notwithstanding Const. art. 6, § 4½, in view of uncertainty of identification of defendant and of alibi testimony.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

F. J. Hudson was convicted of robbery, and he appeals. Reversed.

A. S. Maloney and Joe Rensch, both of San Bernardino, for appellants.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime of robbery

and from an order denying his motion for a new trial.

From the record it appears that the complaining witness was an employee in charge of a gasoline and oil service station located at the town of Upland, in San Bernardino county, and in that connection he had the custody of the cash receipts of the business conducted by him; that at about 8:20 o'clock p. m. on the evening of March 1, 1927, he closed the service station at which he was employed, placed the cash receipts of the day, amounting to the sum of approximately \$89, in a leather pouch which he carried in one hand, and started to go up an alley to enter his home from a rear door. At a point in the alley opposite the rear entrance of a garage which abutted on the alley, two masked men proceeded to and did rob the employee of the \$89 contained within the leather pouch. In perpetrating the robbery one of the robbers, who had a rifle in his possession, approached the employee from one side; the other robber approached the victim "from behind" and searched the employee, who suddenly threw away the money which he had in the pouch, which was shortly thereafter found by the robber. The employee was then ordered "to beat it down the alley." It further appears that the employee had some acquaintance with the men whom he supposed were the robbers. Immediately after the robbery occurred, the employee reported to the police officers that "one of them was Matthis, and I thought one was Hudson (the defendant)." Three days thereafter the employee received a letter from defendant inclosing a \$1 bill in payment of a balance of 90 odd cents which defendant owed to the proprietor of the service station for supplies furnished to defendant. On that dollar bill was a red smear or blot, and by such mark was recognized by the employee as a part of the money of which he had been robbed. A few days later, and after the employee had sworn to a complaint charging defendant with the crime of robbery, defendant visited the home of the employee at about 9:30 o'clock p. m., where he remained approximately 15 minutes. At that time defendant "was nervous"; he stated that "they have arrested Matthis," and with reference thereto inquired of the employee, "Did you know it was him?" and "You are sure, are you?" to both of which questions the employee answered, "Yes." Although the father of the employee was present throughout the time of the visit made by defendant to the employee, no charge or suggestion resembling an accusation was made to defendant by either the employee or the father that defendant was in any way connected with the commission of the crime of robbery in question, nor was any effort made at that time to arrest or detain defendant. Ten or 15 minutes after defendant

had concluded such visit, the employee went to the police headquarters at Upland and there told a deputy sheriff "about it." At the trial of the case, on cross-examination the employee stated, in substance, that before the robbery occurred the last time he had seen defendant was on the 6th day of February, which would have antedated the robbery by 23 days. In response to the question as to whether the employee ever saw defendant after the 6th day of February, until he again saw him at the home of the employee as hereinbefore narrated, the employee stated, "Never saw him for sure." The deputy sheriff, to whom the employee reported the fact concerning the receipt by him from defendant of the dollar bill which had upon it a smear or blot, was a witness on the trial of the action. Regarding the identification by the employee of defendant as being one of the robbers, the deputy sheriff testified, in part:

"Q. When did you first receive information and from what source that Hudson [the defendant] and Matthis were claimed to have committed this burglary, robbery? A. The first information in regard to the names was from Upland, and then the next day I talked to Sabin [the employee] himself, and he told *who he suspected.*"

Other questions propounded on cross-examination to the employee, together with his answers thereto, illustrate the lack of certainty in the mind of the employee with reference to his identification of defendant as one of the men who "held him up":

"Q. * * * You kind of guessed that was Floyd Hudson [the defendant] when you told the officer? A. I wasn't certain; I thought it was him, but I wasn't sure.

"Q. And you had known him and talked to him and knew his voice, but you told the officer you were not sure of him? A. No, sir; *because he didn't talk that night.*"

It also appears that the employee only swore to a complaint charging Matthis and defendant with the crime of robbery 4 days after its occurrence; which delay, however, is explained by the employee by the fact that he did so as soon as he was requested so to do by the police officers, following the receipt by the employee from the defendant of the dollar bill with a smear or blot on it.

The defense to the accusation against defendant consisted of evidence to the effect that at the time the crime was committed he was at a place located about 7 miles from the town of Reedley, 280 to 300 miles distant from the city of Upland, the scene of the robbery. One witness, apparently of intelligence and probity, testified positively to the fact that at about the hour of 10 o'clock on the morning preceding the day of the robbery the defendant came to his home (which was located, as aforesaid, 280 to 300 miles distant from the place where the robbery occurred) and there remained until 10 o'clock

a. m. the following day, at which latter time defendant left the home of the witness, returning thereto the next day between 1 and 2 o'clock in the afternoon, and that thereafter for a period of several days he did not leave the home of the witness except for the purpose of making short business or social trips to a nearby town. The witness further testified that immediately after defendant was arrested, which occurred 10 days after the robbery took place, from various things that had happened within his knowledge, he was able to accurately determine the date when defendant first came to his home. Another witness testified to the fact that she met defendant at the post office in the city of Madera, which is located approximately 300 miles from the town of Upland where the robbery occurred, at about 2 o'clock on the 1st day of March, 1927, and left him at 9 o'clock in the evening of the same day. The witness further testified that during the time that she was with defendant he had some repairs made on his automobile, and that on that day she gave him \$10 and \$12 on the day following. From records of the garage where the repairs were made, it appeared that the repairs were made on the 2d day of March, 1927.

Defendant denied his guilt, and accounted for the dollar bill which he sent to the employee of the service station by the statement that he received it from a storekeeper at the town of Herndon, where he mailed the dollar bill to the employee. He also testified that on February 28th, at Madera, he wrote a letter to Mrs. Iva Hooper, who testified to having received such letter on the same day on which it was written, and that the envelope in which the letter was inclosed, and which was produced in court, bore the postmark date, "1927, February 28."

The principal point made by appellant for reversal of the judgment and order denying defendant's motion for a new trial is that, over defendant's objection, the trial court erred in admitting in evidence the testimony given by the arresting officer relating to the commission of another offense by defendant. In making his opening statement to the jury, the district attorney included therein the following remarks:

"I think the evidence will show that this defendant had been living in the vicinity of Upland, and on the night of March 2d he drove into a garage at Merced in company with a Mrs. Iva Hooper, who is a married woman, whose husband lives up in that country, but who had formerly lived in the same house down here in Upland with this defendant, showing that the defendant went from the scene of the robbery, which was about 8:15 or around 8 o'clock on the night of March 1st, directly back up to that country and associating himself with a woman, a married woman, who had prior to that time a short time lived with him or in the same house down here in the city of Upland, where her husband came down and took their little baby two

or three or four months of age away, and that she went back up there and corresponded with this defendant. * * * And I think we will show to you that this defendant was using a certain Ford touring automobile which was equipped with stolen parts from other automobiles at the time he committed this burglary; that he and this fellow Matthis had visited from time to time, or called from time to time—"

An objection by defendant having been made to such remarks, particularly regarding the stolen part from other automobiles, the judge of the trial court instructed the jury to "disregard the statement made by counsel with respect to the equipment of the automobile with stolen parts."

In the course of the trial, on the theory that evidence was admissible to show how and in whose car defendant had been traveling from place to place, and what, if anything, on being arrested, defendant had said with reference to the charge preferred against him, the trial court, over defendant's objection, permitted the arresting officer to testify as follows:

"A. What was the question before that?

"Q. The question before that was who was present and whether there was any promises made, and I told you to relate the conversation. What did he say? A. The main part of the conversation was about the car. I asked whose car it was.

"Mr. Maloney: Objected to as incompetent, irrelevant, and immaterial.

"The Court: Overruled.

"A. He said it belonged to Iva Hooper, but she had transferred it to him. I asked him about the running gear part of it, and he said that was taken from a car stolen from Pomona.

"Mr. Maloney: Objected to as incompetent, wholly irrelevant, and I ask that it be stricken out.

"The Court: Motion denied; overruled.

"A. I asked him if Matthis was with him when he stole this car, and he said, 'No.' Ronald had nothing to do with it, only he helped him change the body from one car to the other. He said he tried to change the engine, but he wasn't mechanic enough to change the numbers on it. I asked if Floyd Sabin had any connection with stealing any of these cars, or accessories, and he said, 'No.' In regard to this robbery on the 1st of March, he told me he left Upland Saturday night prior to that, and had not been back until just before he came down to the Valley. He said 'Had I known you fellows were after me, you would never have found this car. I would have set fire to it and burned it up, and gone on afoot.' * * *

"Q. What was done with that car? A. I turned the body and engine over to his brother, and the chassis and wheels and battery and some accessories over to the man who owned it, Mr. Cappel, of Chino."

[1] The law is well settled by a host of authorities that in circumstances such as are here present the evidence to which defendant objected was inadmissible on a trial of defendant on the charge of robbery. 8 Cal. Jur. § 167, and cases cited. No relationship

whatsoever was shown to exist as between the crime of robbery, for which defendant was being tried, and the offense of larceny, which the questioned evidence tended to prove had also been committed by defendant. It had no tendency to prove the commission of the crime for which defendant was placed on trial.

[2] In the instant case the identification of defendant as one of the men who committed the crime in question was not wholly satisfactory. Although on the trial the victim of the robbery unhesitatingly testified at one time that defendant was one of the "parties" that "held him up," it will be remembered that the robbery was committed at about 8:20 o'clock p. m.; that the robber supposed to be defendant was masked, approached the victim "from behind" and that "he didn't talk that night." Further testimony given by the employee shows that immediately after the crime was committed he merely suggested defendant as a person "whom he suspected," and that he "never saw him (defendant) for sure; * * * I wasn't certain; I thought it was him, but I wasn't sure." It is therefore apparent that the identification of defendant as one of the robbers became a certainty in the mind of the victim from some circumstance which occurred subsequent to the robbery, and hence that the identification of defendant arose, not primarily from a sense of sight or of hearing of the employee, but that it was the result of deductive reasoning.

On the other hand, the alibi of defendant, while from his standpoint at least, not all that might have been desired, nevertheless was of that quality which in ordinary circumstances might be expected to create a reasonable doubt in the minds of the members of the jury regarding the guilt of defendant. In such a situation the unchecked, although prejudicial, remarks made by the district attorney on his opening statement to the jury regarding the alleged fact that defendant had been "associating" with a married woman not the wife of defendant, together with the erroneous admission of evidence which tended to establish the commission by defendant of the separate crime of larceny, may have been sufficient to turn the scale against defendant, with the result that he was found guilty of the crime of robbery. This court is not unmindful of the provisions of section 4½ of article 6 of the Constitution relating to the duty of the appellate court, notwithstanding error in the course of the trial, to affirm a judgment, "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." After such examination, including a consideration of the evidence relied upon by the prosecution, this court is of the opinion that the error of

which complaint is made by appellant deprived defendant of a fair and impartial trial, which may have resulted in "a miscarriage of justice." While for the stability of the government it is important that the laws should be enforced and that guilty men should be punished for their crimes, it is of much greater importance that justice should be done in that every accused person should have a fair trial on the charge preferred against him. It is most apparent that any substantial departure from such principle would amount to a menace to our institutions.

Although other alleged errors occurring on the trial are suggested by appellant for the consideration of this court, it becomes unnecessary to devote attention to them.

It is ordered that the judgment and the order denying the motion for a new trial be and they are reversed.

We concur: CONREY, P. J.; YORK, J.

86 Cal. App. 324

LITTLE v. KENNEDY et al. (Civ. 4933.)

District Court of Appeal, Second District, Division 1, California. Oct. 25, 1927.

1. Vendor and purchaser $\S$ 335—Where escrow agreement provided for deposit of purchase price before deposit of deed, purchaser not making deposit held in default, though vendor made no tender.

Under escrow agreement providing that purchaser should deposit purchase price ten days before vendor should deposit deed, purchaser, not making deposit, held in default as respects right to recover payments made, whether or not vendor had acquired title to the property and tendered it.

2. Vendor and purchaser $\S$ 335—Defaulting purchaser cannot recover sums previously paid on contract for sale of land.

A purchaser in default, in the absence of a mutual rescission of a contract for the sale of land, cannot recover sums previously paid on account of the contract.

3. Vendor and purchaser $\S$ 46—Instructions by purchaser and vendor, signed on same day, and constituting one document, are to be considered together.

Instructions by purchaser and vendor, signed on the same day, and as part of the same transaction, and constituting one document, are to be read and considered together.

4. Frauds, statute of $\S$ 103(1)—Escrow instructions, requiring deposit of money and deed, and signed by parties, constituted contract in writing for sale of land.

Escrow instructions, one signed by vendor, and the other signed by purchaser of land, wherein one agreed to deposit purchase price, and the other agreed to deposit deed, held to

constitute a contract in writing for the sale of land.

5. Vendor and purchaser $\S$ 341(3)—Evidence, in action for money paid under agreement for purchase of land, held to justify trial court's conclusion that transaction failed due to plaintiff's default.

Evidence, in action for money paid under a verbal agreement for the purchase of land, held to justify trial court's conclusion that consummation of the purchase under a subsequent written contract failed due to plaintiff's default in not paying purchase price, which he was obligated to do before vendor was obligated to deposit deed.

6. Vendor and purchaser $\S$ 341(3)—Evidence, in action for money paid under agreement for purchase of land, held sufficient to support trial court's conclusion of no rescission by mutual consent.

In action for the money paid under a verbal agreement for the purchase of land, which was followed by a written contract, defendant's denial of plaintiff's testimony as to rescission by mutual consent, or statements that she did not recall circumstances stated by plaintiff, held sufficient to support trial court's conclusion that there was no rescission by mutual consent of the parties.

Appeal from Superior Court, Los Angeles County; John L. Hudner, Judge.

Action for money had and received by Olin W. Little against Ruth Kennedy and another. Judgment for defendants, and plaintiff appeals. Affirmed.

D. P. Hatch, of Los Angeles, for appellant. Jennings & Belcher, of Los Angeles, for respondents.

McLUCAS, Justice pro tem. Plaintiff appeals from a judgment rendered in favor of the defendants in an action brought for money had and received.

Plaintiff and defendants entered into a verbal agreement for the sale of real property whereon plaintiff made a payment of \$1,000 to the defendants, which payment was to be applied upon the purchase price of \$9,250. Thereafter, on April 9, 1923, the parties went into escrow, and plaintiff signed escrow instructions containing the following language:

"I will hand you \$8,250 in 20 days, and will deliver to you any instruments which this escrow requires shall be executed by me, all of which you are instructed to use, provided within 30 days from date the necessary instruments are delivered to you to enable you to have a Guarantee Certificate of Title or a Continuation Certificate of Title made by the T. I. & T. Co. covering the following described property: [Here follows a description of the property.] Showing title vested in O. W. Little and Josephine M. Little his wife, as joint tenants. Free from incumbrance except: 1. All taxes for fiscal year 1923-1924. 2. Conditions, restrictions and reservations of record. [Here follow certain

agreements made by the buyer, together with provisions relating to the certificate of title.] In the event that the conditions of this escrow have not been complied with at the expiration of the time provided for herein, you are instructed to complete the same at the earliest possible date thereafter, unless I shall have made written demand upon you for the return of the money or instruments deposited by me.

"[Signed] O. W. Little."

Defendants' escrow instructions were given at the same time, as a part of the same instrument, and contained the following:

"The conditions as above are hereby approved, and I will hand you herewith a deed executed by Blanche McKee and Ruth E. Kennedy in favor of O. W. Little and Josephine M. Little, conveying property above described which you are authorized to deliver provided you hold for my account the sum of \$8,250, together with above-mentioned instruments executed as above set out, within the time as above provided. [Here follow provisions relating to payment of fees and an agreement that the property is to be free and clear of incumbrance.] All of the demands of the purchaser of the property, as set forth above are hereby agreed to and the provision for extension of time within which escrow may be closed applies equally to me.

"[Signed] Mrs. E. L. Kennedy."

The sum of \$8,250 nor any other sum was ever deposited in escrow by the plaintiff; neither was the deed conveying the property ever deposited in escrow by the defendants.

[1] Appellant contends that plaintiff and appellant was not in default, and was not required to pay his money in advance of receiving title to the property; that defendants and respondents were in no position to demand the money or to declare a forfeiture of the money paid on the purchase price until they had acquired title to the property and tendered it to plaintiff and appellant; that tender of the money by plaintiff was excused, and that the defendants and respondents by their acts, statements, and agreements rescinded the contract, and that therefore plaintiff and appellant is entitled to recover the amount paid on the purchase price. We cannot agree with appellant's claim that appellant was not in default, in view of the express provisions contained in the escrow instructions signed by appellant and dated April 9, 1923. These provisions required the appellant to place in escrow the sum of \$8,250 within 20 days, and appellant was clearly in default on April 29, 1923, unless an extension of time was granted by respondents. No evidence was offered showing any such extension; to the contrary, evidence was offered by respondents of three separate demands for the payment of the money into escrow. This is not a case where the obligations of the parties are mutual, concurrent, and dependent, as is held in the cases cited by appellant. As said in *Hill v. Grigsby*, 35 Cal. 656, 662:

"In contracts of this description the undertakings of the respective parties are always considered dependent unless a contrary intention clearly appears."

[2] But here a contrary intention clearly appears. Appellant agreed to make the deposit in escrow on or before April 29th, and respondents were not bound to tender performance by depositing their deed in escrow until ten days thereafter, nor until appellant had made such deposit. The rule is well settled that a vendee in default, in the absence of a mutual rescission, cannot recover sums previously paid on account of the contract. *Tomboy Gold & Copper Co. v. Marks*, 185 Cal. 336, 339, 197 P. 94.

[3, 4] As distinguished from *Holland v. McCarthy*, 173 Cal. 597, 160 P. 1069, the transaction herein was a contract of sale entered into by the parties thereto; while in the *Holland Case* the parties had no negotiations between themselves and did not enter into any contract of sale, but merely delivered certain writings to an agent which were not construed as a contract of sale, nor as authorizing the agent to make a sale. In the case at bar these instructions having been signed on the same day and as a part of the same transaction, and constituting one document, are to be read and considered together. When so read and considered, the instrument contains all the necessary constituent elements to make a contract, and is to be regarded as a contract in writing between the parties. *Thoroman v. David*, 199 Cal. 386, 390, 249 P. 513; *Neher v. Kauffman*, 197 Cal. 674, 683, 242 P. 713; *Tuso v. Green*, 194 Cal. 574, 581, 229 P. 327.

[5] On the first Sunday in June, 1923, plaintiff presented to defendant Ruth Kennedy a written demand to return the sum of \$1,000 paid upon the purchase price of said property, which demand was dated May 31, 1923. It is claimed by appellant that, by reason of the conduct and declarations of the defendants, he was not required to make a tender at that time. The conduct relied upon by the plaintiff is that he was advised by defendants that they had decided to purchase only a portion of the property and had made arrangements to that effect. It is argued by appellant that, because the defendants did not acquire all of the property, plaintiff was under no obligation to tender the balance of the purchase price to defendants, for the reason that defendants were not in a position to convey to plaintiff. According to the evidence submitted by defendants, defendants at all times had sufficient money to complete the entire transaction, if plaintiff paid in the balance due from him; and the parties who had agreed to sell the property to the defendants were willing to make a deed of the entire property when the required amount of money was placed in escrow. Upon plaintiff's failure to make the required deposit

of \$8,250 defendants were unable to complete the purchase of the entire property, and thereupon made arrangements to purchase a portion thereof. This evidence was sufficient to justify a conclusion on the part of the trial court that the failure of the entire transaction was due to plaintiff's failure to perform under his agreement. We see no merit in appellant's contention that tender on the part of plaintiff was excused.

[6] Rescission by mutual consent of the parties is urged by appellant, and is based upon an alleged course of conduct between the parties indicating an intention to rescind. Appellant relies upon certain statements which he testified were made by respondents to the effect that on June 3d plaintiff demanded the return of his money; that the defendants stated they would tender him a deed the next day; that two days later he was advised by defendants that they had decided to purchase only a portion of the property; and that they had sold 90 feet of it to other parties. Much of plaintiff's testimony was specifically denied by defendant Ruth Kennedy, and other portions she did not recall. In view of this conflict, we conclude that the evidence was sufficient to support the conclusion of the trial court that there was no rescission by mutual consent of the parties.

The judgment is ordered affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

86 Cal. App. 436

CRANE v. BALLOU. (Civ. 6025.) ★

District Court of Appeal, First District, Division 1, California. Oct. 31, 1927.

Hearing Denied by Supreme Court Dec. 29, 1927.

1. Alteration of Instruments ⇨29—Evidence that drawer of check admitted liability on altered note, to pay which check was given, and afterward stopped payment on check held to support findings for plaintiff.

In action against drawer of check on which he had stopped payment, evidence that drawer had signed accommodation note and, with knowledge that name of payee therein had been changed, ratified such change by giving check to pay note, but afterward stopped payment on check, held to support findings in favor of plaintiff.

2. Alteration of Instruments ⇨13—What constitutes ratification of altered instrument depends on facts in each particular case.

As to what constitutes ratification of altered instrument no general rule can be stated, as it depends entirely on facts in each particular case.

3. Alteration of Instruments ⇨13—Party's agreement, with full knowledge of facts, to pay amount of altered instrument constitutes "ratification" thereof.

Where party, with full knowledge of alteration of instrument, agrees to pay amount thereof, such act constitutes "ratification" of alteration which was unauthorized when made.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ratification.]

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by T. L. Crane against M. H. Ballou. From a judgment for plaintiff, defendant appealed, and upon his death pending appeal Harry Ballou, executor of his last will and testament, was substituted as appellant. Affirmed.

Thomas C. Jordan, of San Francisco, for appellant.

Thomas P. Boyd, of San Rafael, and Francis L. Ashe, of San Francisco, for respondent.

TYLER, P. J. Action upon a check executed by M. H. Ballou and delivered by him to plaintiff. The check had not been paid by reason of a "stop payment" order. Since the taking of the appeal defendant, M. H. Ballou, has died and his executor has been substituted as appellant herein. The complaint alleged, in substance, that Ballou, on the 12th day of January, 1924, drew the check upon a certain bank in favor of one Thomas P. Boyd in the sum of \$6,718.10 and delivered the same to said Boyd. The check was presented to the bank upon which it was drawn, but payment was refused for the reason that Ballou had stopped payment thereon. Boyd thereafter assigned all his rights in the transaction to plaintiff, who brought suit thereon. Judgment was prayed for in the amount stated in the instrument, with interest. The answer alleged lack of consideration, and as a separate defense set up that a change had been made in the name of the payee without the authority or consent of defendant.

[1] It appeared at the trial that on or about the 15th day of August, 1923, M. H. Ballou, a banker, was desirous of assisting his friend, S. P. Brownlee, to obtain certain credit, and with this object in view he joined with him in the execution of a promissory note. Brownlee and several witnesses were called by plaintiff in an attempt to establish the fact that, at the time the note was executed and left defendant's hands, the space for the name of the payee had been left blank. Other witnesses testified that the name of a payee was inserted in the note, but they were unable at the trial to remember just who the payee was. The trial court found

that a payee had been named and that the note was delivered to Ballou, in order that the same might be negotiated with the payee named therein. Thereafter, the name of the original payee was erased by some unknown person and Brownlee caused plaintiff's name to be inserted into the note as the payee thereof. This alteration was made without the knowledge of defendant, Ballou. After the alteration was made the note was negotiated by Brownlee to plaintiff, who paid full value therefor and received the note in exchange for the sum paid. At the time Brownlee negotiated the note it had not matured, and plaintiff did not know there had been any change made in the name of the payee, and he was not a party to any such change. After maturity of the note and some time in December, 1923, Thomas P. Boyd, acting as attorney for plaintiff, wrote to Ballou advising him that the note was due and demanded payment. In response thereto Ballou called upon Boyd and promised to make payment in January or March of the following year. At this time Ballou knew that the name of the payee had been changed. On the 12th day of January, 1924, Ballou, in accordance with his promise, delivered to Boyd his check for the amount of his obligation and received in exchange the note as altered with the inscription on its face, "Paid, T. L. Crane, per Thos. P. Boyd." The day following, Sunday, January 13, 1924, Ballou called on Brownlee. At his request Boyd and one Deysher accompanied him, and in the presence of the parties Ballou stated to Brownlee that he had been compelled to pay the note in question and demanded that Brownlee execute a chattel mortgage on certain property to him, the principal amount of which would include certain moneys owed by Brownlee to Ballou, including the amount of the check sued upon. Brownlee, however, refused to execute such an obligation, and defendant, Ballou, thereafter stopped payment on the check he had given to Boyd. Under these facts the trial court found, in substance, among other things, that when defendant delivered his check to Boyd he was aware that the note had been altered after its execution and delivery, by the insertion of a different payee, and that he assented to such alteration, and delivered his check in consideration of receiving the note; that with such full knowledge he thereby ratified the alteration. Judgment followed in favor of plaintiff. It is here claimed that the findings are entirely unsupported by the evidence. We are of a contrary opinion. The evidence of defendant himself is amply sufficient to support the findings.

[2, 3] As to what constitutes ratification of an altered instrument, no general rule can be laid down, as it is a matter that depends entirely upon the facts in each particular

case. Where, however, as here, a party with full knowledge of the facts agrees to pay the amount of an altered instrument, such act constitutes a ratification of the alteration which was unauthorized when made. 1 R. C. L. 1033; 2 Corp. Jur. 1257. Here the evidence, as above recited, clearly shows a recognition by Ballou of the validity of the instrument, which amounts to a ratification and estops him from denying his liability. Further discussion upon the subject of ratification would answer no useful purpose. Respondent urges the additional argument in support of the judgment, that plaintiff being an innocent holder of an altered note, in due course, may, under the provisions of section 3205 of the Civil Code, enforce the check given in payment or exchange therefor, because such note could be enforced according to its original tenor, and therefore the surrender of said note was ample and sufficient consideration for the check sued upon. The conclusion we have reached upon the subject of ratification renders a discussion of this question unnecessary.

The judgment is affirmed.

We concur: CASHIN, J.; KNIGHT, J.

86 Cal. App. 439

EBERLY v. EGAN et al. (Civ. 6011.) ★

District Court of Appeal, First District, Division 1, California. Oct. 31, 1927.

Hearing Denied by Supreme Court Dec. 29, 1927.

Continuance ⇨ 22—Refusing continuance held proper where deposition of witness, indisposed at time of trial, was taken under stipulation and read in open court.

Refusing continuance held not error, where record showed that at time of trial witness was present, but, owing to indisposition, unable to testify, and trial by stipulation of parties was continued for 30 days, during which time witness' testimony pursuant to agreement was taken by deposition, which was read in open court and made part of record.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action to quiet title by W. Eberly against Frank J. Egan, also known as F. J. Egan, and others, in which defendants filed a cross-complaint. From the decree, plaintiff appeals. Affirmed.

Robert D. Duke and Lawrence A. Cowen, both of San Francisco, for appellant.

Bert Schlesinger and S. C. Wright, both of San Francisco, for respondent Egan.

CASHIN, J. An action was brought by appellant against respondent to quiet title to certain real property situate in the city of

San Francisco. Respondent filed with his answer a cross-complaint alleging that on May 22, 1922, James C. Peabody, the predecessor in interest of appellant, executed to respondent a deed to the property absolute in form but intended as a mortgage to secure the payment of certain debts incurred by Mrs. Peabody for legal services rendered and moneys advanced and to be advanced by respondent. These sums the respondent asked to have declared a lien on the property, and it was stipulated at the trial that the only issue involved in the action was the amount due respondent. The trial court found this amount to be \$9,282.98, and entered its decree accordingly.

Appellant contends that this finding was unsupported, and that the court erred in refusing to continue the trial of the action in order to permit Mrs. Peabody, a witness for appellant, to testify in open court.

The sum found to be due was the aggregate amount of a number of charges for services rendered and moneys advanced. It was shown that services were rendered in connection with litigation which covered a considerable period and in which the interests of Mrs. Peabody were involved; and, while the testimony as to the extent of the services rendered and the amount of the advances was conflicting, the findings of the court in these respects and its conclusion as to the value of the services were supported by the evidence.

We find no merit in the contention that the court erred in refusing a continuance of the trial. The record shows that at the time of the trial Mrs. Peabody, who was present as a witness for appellant, was, owing to an indisposition, unable to testify. Due to this fact the trial was by stipulation of the parties continued for 30 days; it being agreed that in the meantime her testimony should be taken by deposition. Pursuant to the stipulation the deposition was taken and was read in open court and her testimony so given made a part of the record.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

86 Cal. App. 355

ALKUS v. DAVIES. (Civ. 6007.)★

District Court of Appeal, First District, Division 1, California. Oct. 26, 1927.

Hearing Denied by Supreme Court Dec. 22, 1927.

1. Municipal corporations ⇨706(8)—Instruction on liability, where negligence of two or more persons contributes to accident, held applicable to automobile collision.

In action for damages for personal injuries sustained in automobile collision, instruction, that where negligence of two or more persons

approximately contributes to accident, then all such persons are jointly and severally liable for injuries resulting if person injured was in exercise of ordinary care, and if all persons so guilty of negligence are not sued jointly, verdict must be against person sued, *held* warranted, under evidence showing that plaintiff had blamed driver of another car for accident and had shifted her claim of her responsibility to defendant.

2. Trial ⇨295(1)—Appellate court must consider instructions as whole for error.

In considering error in instructions, appellate court must take instructions as a whole, and, if giving or refusing of certain instruction might seem improper or erroneous, court should consider remaining instructions given in order to determine whether or not harm resulted from court's action.

3. Trial ⇨296(3)—Instructions relating to liability, where negligence of two or more persons contributes to accident, held not erroneous as stating that automobile passenger could recover if her driver and defendant jointly caused accident, in view of other instructions.

In action for personal injuries sustained in automobile collision, instruction, that where negligence of two or more persons approximately contributes to accident, then all such persons are jointly and severally liable for injuries resulting if person injured was in exercise of ordinary care, and if all persons so guilty of negligence are not sued jointly, verdict must be against person sued, *held* not erroneous as stating that automobile passenger could recover if driver and defendant jointly caused accident, where throughout trial it was accepted theory of case that negligence of plaintiff's son, the driver, precluded recovery by plaintiff, and in view of other instructions.

4. Courts ⇨91(1)—Where instruction, claimed erroneous, had received approval of Supreme Court, appellate court will not attempt minute analysis of same.

Where instruction as a whole has received approval of Supreme Court, appellate court will not attempt minute analysis of each clause, phrase, or word used to determine if it was erroneous.

5. Witnesses ⇨269(2)—Where plaintiff was called only to prove injuries, court rightfully restricted cross-examination to matters testified to on direct examination (Code Civ. Proc. § 2055).

In action for damages for personal injuries sustained in automobile collision, where plaintiff, as witness in her own behalf, testified that she was injured in accident, that she was sitting on back seat, and that after collision she was still in auto until some one helped her out, and remainder of her testimony covered injuries received, court properly sustained objection to cross-question, "Do you remember a Ford car driving ahead of you as you came south just before the accident?" on ground that it was not cross-examination, since defendant could have called plaintiff, under Code Civ. Proc. § 2055, if he desired to examine her further.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action for damages for personal injuries by Hattie L. Alkus against Arthur Davies. From a judgment for plaintiff, defendant appeals. Affirmed.

Donahue, Hynes & Hamlin, of Oakland, for appellant.

Ford, Johnson, & Bourquin, of San Francisco, and Phillip M. Carey, of Oakland, for respondent.

PARKER, Justice pro tem. This is an appeal from a judgment rendered upon a verdict in favor of the respondent in the sum of \$5,000.

The action arose out of an automobile accident wherein plaintiff sustained certain injuries as the result of the alleged negligence of defendant. Such facts as may be necessary to a determination of the appeal will appear hereinafter.

The appellant seeks a reversal of the judgment, and his contentions may be divided into two groups, viz., error in instructions given to the jury, and error in rulings on the admission and rejection of testimony. The instructions complained of are three in number. The first one reads as follows:

"I instruct you that if an accident occurs in which a person is injured by reason of the negligence of two or more other persons, and the negligence of each of said other persons proximately contributed to the accident, then all of such persons are jointly and severally liable for any injuries proximately resulting therefrom if the person who was injured was in the exercise of ordinary care, and the degree of negligence which may be attributed to such persons so guilty of negligence is not to be considered by the jury in arriving at a verdict. In other words, the verdict in such case must be against such persons jointly who are thus guilty of negligence, provided all have been sued as defendants, regardless of the degree of culpability, and if all of such persons so guilty of negligence are not sued jointly but only one of such persons is so sued, then the verdict must be against such person."

The appellant does not criticize this instruction as a statement of the law in the abstract. He contends that under the facts of this case the instruction was misleading and tended to give to the jury an erroneous idea of the application of the law to the facts involved. He contends further that the instruction was wholly inapplicable to the facts at bar, and that the giving thereof was highly prejudicial. Here it becomes necessary to set forth sufficient of the facts to illustrate this contention.

At the time of the accident plaintiff was riding in a car driven and operated by her son, Irving Alkus. It was conceded at the trial and the case was tried and argued upon the theory that Irving Alkus, the son, was the servant of plaintiff and under her direct

control, and that plaintiff was chargeable with the son's negligence, and that if that negligence contributed proximately to the accident plaintiff could not recover. At the trial plaintiff strenuously maintained that her car was in its proper place on the highway and carefully and skillfully operated. The defendant as vehemently urged his freedom from negligence. There was on the highway at the time and place of the accident another car operated by one Jacob Hebner and referred to as the Ford. Plaintiff claimed her car was behind the Ford, and upon reaching an intersection the Ford made a turn, and at that time the car of defendant veered to the left around the Ford and struck plaintiff's car. Defendant, on the other hand, contended that plaintiff was driving on the wrong side of the street and on the left of the Ford, and that when the latter turned plaintiff's car came in swiftly behind the Ford and crossed the path of defendant's car, causing the accident. Throughout the trial it was attempted to show that plaintiff had blamed the Ford driver, one Jacob Hebner, who was not made a party to the action. The said Hebner was called as a witness for defendant and admitted his hostility to plaintiff and based that hostility on the fact that plaintiff had declared him responsible for the accident.

[1] Thus sufficient appears to warrant the giving of the instruction. Certainly, throughout the case it was at least inferentially urged that plaintiff had for reasons of her own shifted her claim of responsibility from Hebner to defendant, and it was conceded that in the circumstances surrounding the accident the Ford of Hebner was in some way involved. Therefore, the claim of appellant as to the total inapplicability of the instruction is without merit.

[2, 3] Further, the appellant insists more strongly that, even if applicable, under the facts the instruction was so misleading and confusing as to give the jury an absolutely erroneous idea, and this contention is based upon this argument; namely, that the admitted fact of the case is that plaintiff's car was being driven by her son, Irving Alkus, for whose negligence plaintiff conceded liability. Therefore, appellant argues, the jury were practically told, or at least left with an irresistible impression, that if the negligence of the son, Alkus, and the defendant jointly caused the accident, then plaintiff could recover from the defendant notwithstanding.

It is a well-established principle of law in this state, and needs no citation of authority to support it, that in considering error in instructions we must take the instructions as a whole, and, if the giving or refusing of any certain instruction might seem at first blush improper or erroneous, consider the remaining instructions given in order that we may determine whether or not any harm resulted

from the action of the court, and also whether any apparent confusion of ideas has been removed or whether the subject had been sufficiently covered.

In this examination in the instant case we find that the jury were instructed as follows:

"When the court in these instructions has used or may use the word 'plaintiff' in connection with her duty to use ordinary care, or with reference to any contributory negligence upon her part, you are to understand that it includes also any negligence or want of ordinary care upon the part of her son in the operation of the automobile as his negligence, if any, is to be imputed to plaintiff."

Also:

"You are instructed that it is an admitted fact in this case that Irving Alkus was driving the automobile in which plaintiff was riding at the time of the accident, and that in so doing he was acting as the agent and servant of the plaintiff. If, therefore, you believe from a preponderance of the evidence that at the time and place of the accident said Irving Alkus was negligent in the manner in which he drove the automobile in which plaintiff was riding, and that said negligence proximately contributed to the injuries complained of by her, then you must return a verdict in favor of defendant regardless of whether you believe that the defendant was also negligent."

As already stated, throughout the trial it was the accepted theory of the case that the negligence of the son precluded the recovery by plaintiff, and this theory was kept constantly before the jury. We find no error in the giving of the instruction.

The next instruction on which appellant predicates prejudicial error is an instruction which was approved almost word for word in the case of *Meyers v. Bradford*, 54 Cal. App. 157, 201 P. 471, in which case a rehearing was denied by the Supreme Court. The same instruction was subsequently adopted and approved by the Supreme Court in the case of *Rush v. Lagomarsino*, 196 Cal. 303, 237 P. 1066. This will suffice the needs of the instant case. We might add that appellant further urges that the instruction is inapplicable here, which we find without merit.

The third and last instruction objectionable to appellant is the precise instruction approved of by the Supreme Court in the case of *Olsen v. Standard Oil Co.*, 188 Cal. 20, 204 P. 393. Appellant directs his criticism to the last sentence in the instruction, with particular reference to that portion referring to the term "satisfactory evidence." Appellant says in his brief:

"But the objection which we level at this instruction was never mentioned in the *Olsen* Case. We make no point of the correctness of the presumption therein referred to, or of the fact that this presumption is in itself a species of evidence, but we do energetically object to having the jury told that this presumption must be overcome by *satisfactory evidence*. The

vice of the instruction was apparently never raised in the *Olsen* Case."

[4] However, the instruction as a whole having received the approval of the Supreme Court, we do not feel that it is the function of this court to attempt a minute analysis of each clause, phrase, or word used, or to assume that the Supreme Court has followed other than its usual course of giving due consideration to every phase of the approved instruction.

We might add that in the instant case the jury were fully instructed as to the burden of proof resting on defendant to prove negligence on the part of plaintiff, and the term "preponderance of evidence" properly explained. It is noted with reference to the last two instructions herein referred to that the appeal in this case was taken directly to the Supreme Court and the briefs of appellant directed to that court. In the frequently adopted course the case was by that tribunal referred to this court for determination. This is noted in justice to counsel for appellant merely to indicate that his request for a reconsideration of the disputed instructions was made directly to the Supreme Court, and to negative any inference that counsel is at all unmindful of our judicial system which declares the Supreme Court to be the court of highest authority. In any event, there is still available the opportunity of convincing that court on his contentions.

The remaining points of appellant have to do with the trial court's rulings on the reception of testimony.

[5] The plaintiff, called as a witness in her own behalf, testified on her direct examination that she was injured in the accident; that she was sitting on the back seat; and that after the collision she was still in the auto until some one helped her out. The remainder of her testimony covered the injuries received. On cross-examination she was questioned as to the speed of her car over the objection of her counsel. She was then asked this question:

"Do you remember a Ford car driving ahead of you as you came south just before the accident?"

Plaintiff's counsel interposed an objection on the ground it was not cross-examination, and the objection was sustained by the court on the ground stated.

No useful purpose can be served by an analysis of all of appellant's points. The record here discloses a full inquiry into the facts and the testimony of many witnesses. If appellant desired to examine plaintiff further he could have called her, under section 2055 of the Code of Civil Procedure, and gone into the case fully. The witness was called for the sole purpose of proving her injuries, and we think that the trial court rightfully restricted her cross-examination to matters tes-

tified to on direct examination. The case of *People v. Teshara*, 141 Cal. 633, 75 P. 338, does not support the appellant in the case at bar. The most that can be conceded under the rule of the *Teshara* Case would be that possibly a contrary ruling by the trial judge here would not have been prejudicially erroneous. Aside from this the case cited applies the doctrine announced to a state of the case not at all similar to the present.

The witness Jacob Hebner, called by defendant, was the driver of the Ford herein-after mentioned. In the appendix to the brief of appellant he sets forth a portion of the testimony of this witness and certain rulings of the trial court thereon. Nowhere in the briefs is there made any claim of error in this connection, so we assume that appellant has abandoned any point he may have had in mind. However, we have noted the testimony presented and the rulings of the trial court thereon, and find nothing warranting discussion.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

86 Cal. App. 505

STOCKTON LUMBER CO. v. MULCAHY.
(Civ. 3314.)

District Court of Appeal, Third District, California. Nov. 1, 1927.

Sales — 178(4)—Seller of "grape stakes" could recover price, where buyer made no complaint of quality until year after delivery and use of stakes.

Seller of 2,400 grape stakes held entitled to recover price thereof from buyer claiming that stakes were unfit for purpose, where 700 were seen by buyer at time of purchase, and all of them were delivered within a short time, and 700 were used in the spring of 1925, and the remainder in the spring of 1926, and buyer made no complaint until thereafter.

Appeal from Superior Court, San Joaquin County; Malcolm C. Glenn, Judge.

Action on promissory note and for goods sold by the Stockton Lumber Company against James Mulcahy, who filed a cross-complaint. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant.
Case & Forslund, of Stockton, for respondent.

WEYAND, Justice pro tem. The Stockton Lumber Company, respondent herein, and plaintiff in the lower court, brought suit against the appellant, upon two causes of action; one being upon a promissory note

for \$389.50 and the second cause of action being upon an account for lumber, to wit, a lot of "grape stakes" sold to appellant, amounting to the sum of \$229.36. Judgment was in favor of the plaintiff in that suit for said sums, and for \$75 attorney's fees, the note providing for a reasonable attorney fee.

By way of cross-complaint the defendant, appellant here, made claim that the grape stakes so furnished were "unsound, and not good or merchantable, or fit to be used for grape stakes, in this, that it (the lumber) was dry rotted, brittle, worthless, and totally unfit for the purpose." He further alleges that he used the stakes, and that many of them broke, because of their alleged unfit condition, and caused some seven tons of the grapes in appellant's vineyard to fall upon the ground, and thus damaged appellant in the sum of \$640, the value of the grapes destroyed, and an additional \$200, the value of labor expended in the erection of the grape trellis.

There was no dispute as to the amount of the claims of respondent, the controversy being wholly as to the condition of the grape stakes sold to appellant, and the alleged damage to his grapes.

It fairly appears from the evidence that appellant saw a portion of the stakes in the lumber yard of respondent, at the time he made the purchase. These were delivered to his ranch. Shortly thereafter, on the arrival of more stakes at the lumber company's yard, the full amount of the purchase was delivered to appellant. A total of 2400 stakes were delivered; about 700 thereof having been seen by appellant at the time of the purchase. Both appellant and his farm manager had ample opportunity to examine the stakes after delivery at the ranch; 700 of the stakes were used in the spring of 1925, and 700 were not used until the spring of 1926. During the intervening time the unused stakes were in appellant's barn at his ranch, and during said time no complaint was made in behalf of appellant as to their condition. A number of written requests were made by the lumber company for payment of the account, and it appears that at one time defendant promised to pay the account. There are some very slight contradictions of the above testimony.

The judgment of the trial court should be upheld. It was for the trial court to determine with which side truth coincided. A buyer to whom delivery of goods is made must inspect the same within a reasonable time after delivery, and if, having ample time and opportunity to examine the delivery, such buyer makes use of the goods delivered, he cannot then complain as to their condition. It would seem to be wholly unnecessary to cite authorities to support the judgment of

the trial court; nevertheless we will cite 22 Cal. Jur. 983, and 35 Cyc. 229, and the cases in illustration of the text, as fully covering this situation.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

86 Cal. App. 382

TAYLOR et al. v. UNITED STATES FIDELITY & GUARANTY CO. (Civ. 5956.)

District Court of Appeal, First District, Division 2, California. Oct. 27, 1927.

1. Appeal and error ⇨931(1), 1011(1)—Finding of trial court on conflicting evidence is conclusive, and all reasonable inferences are indulged to support it.

Any finding of trial court on conflicting evidence is conclusive on appeal, and all reasonable inferences are to be indulged in support of it.

2. Appeal and error ⇨901—Burden is on party claiming error to show its existence.

The burden is on the party who claims error to show its existence.

3. Appeal and error ⇨989—Power of reviewing court begins and ends with inquiry whether trial court's conclusion is supported by substantial evidence.

When it is claimed that trial court's finding is not supported by evidence, power of reviewing court begins and ends with inquiry whether there is substantial evidence which supports conclusion reached.

4. Appeal and error ⇨931(1)—Assumption on appeal is that trial court resolved conflicting testimony in favor of prevailing party.

If on material point testimony is in conflict, it must be assumed on appeal that trial court resolved conflict in favor of prevailing party.

5. Appeal and error ⇨1011(1)—Finding of trial court that leased oil property had not been disproven as oil lands, supported by evidence, held conclusive.

Finding of trial court on conflicting evidence that leased property had not been disproven as oil lands, supported by evidence, held conclusive on appeal.

6. Evidence ⇨598(1)—Mere number of witnesses is without bearing if plaintiff's one witness convinced court's mind against greater number testifying for defendant (Code Civ. Proc. § 2061, subd. 2).

Under Code Civ. Proc. § 2061, subd. 2, mere number of witnesses on issue whether leased property had been disproven as oil lands has no bearing if plaintiff's one witness convinced court against greater number testifying for defendant.

7. Mines and minerals ⇨78(6)—Breach of lease of oil lands held "willful" within statute relieving from forfeiture except for willful breach (Civ. Code, § 3275).

Breach of lease of oil lands, providing that if lessee fails to commence actual drilling with-

in 90 days following furnishing of certificate of title as guaranty of good faith named sum should be paid to lessors as additional rent unless property is disproven as oil lands, being voluntary, was "willful," within Civ. Code, § 3275, relieving from forfeiture except in cases of willful breach of duty.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful—Willfully.]

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by G. R. Taylor and others against the United States Fidelity & Guaranty Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Lewis, Fleming & Goodwin and John M. Martin, all of Los Angeles (Clarence E. Fleming, of Los Angeles, of counsel), for appellant.

McWhinney & Clock, of Long Beach, and H. S. Clewett, of Los Angeles, for respondents.

PRESTON, Justice pro tem. This is an appeal by the defendant, United States Fidelity & Guaranty Company, a corporation, from a judgment entered against it in favor of plaintiffs, based upon a bond and undertaking executed by said defendant as surety for the United States Royalties Company, a corporation. The case was tried by the court sitting without a jury.

The facts not in dispute are these: The plaintiffs were the owners of two lots in the Signal Hill oil district at Long Beach, Los Angeles county, Cal., and on February 3, 1923, plaintiffs, as lessors, made and executed an oil and gas lease covering this property to said United States Royalties Company, as lessee. This lease was never recorded but at all times held in escrow by the Long Beach National Bank, to whom it was delivered by the parties thereto with certain written instructions. By the terms of said lease it was provided, among other things, that said lessee would within 90 days following the furnishing of a certificate of title showing the premises vested in the lessors, commence the actual drilling of a well on some portion of the leased property; or, at its option, to be entitled to a further extension of time for a limited period by the payment of certain additional rentals as provided in the lease. It was further provided in said lease as follows:

"As a guaranty of good faith and of the actual drilling of a well under this lease, the lessee shall, within five days after the furnishing of a certificate of title by the lessors, as above provided, likewise place in escrow with some bank or trust company holding said lease, either a cash deposit of \$5,000, or a surety company bond in the sum of \$5,000, conditioned and with instructions that if the lessee fails to commence the actual drilling of a first well on said premises within the time and in accordance with the pro-

visions of said lease, *unless and within said time said property is disproven as oil land and this lease abandoned by lessee and a quitclaim deed delivered to lessors*, the said \$5,000 cash deposit, or the sum of \$5,000 under said bond, shall be paid to parties of the first part and second part (plaintiffs and respondents) share and share alike, *as additional rental for said premises hereunder*, and with the further provision that upon the actual spudding in of a first well on said premises in accordance with the provisions of this lease, and within the time herein provided, the said cash deposit or said bond, as the case may be, shall be returned to lessee. * * *

Said lessee, United States Royalties Company, in accordance with the above provisions of said lease, elected to, and did, deliver a bond of \$5,000, executed by this defendant and appellant, as surety, in lieu of the cash deposit of \$5,000. The certificate of title to be furnished by the lessors under the lease was delivered on February 3, 1923, and the 90-day period within which the said United States Royalties Company was to start drilling operations began to run on that date, making the last day of said 90 days fall on May 4, 1923.

The said United States Royalties Company never commenced drilling operations of any kind on the leased property, but on April 28, 1923, notified the Long Beach National Bank, in writing, that it was convinced that the leased property had been "disproven" as oil lands, and requested the bank to return the lease to the lessors and cancel the entire transaction. Said bank in turn notified the lessors of the action of said United States Royalties Company, the lessee. Thereafter, the said United States Royalties Company offered to execute a quitclaim deed to the lessors, surrendering any interest it might have in the leased premises. This offer was not accepted by the lessors, but, on the contrary, they insisted that the property had not been "disproven" as oil land, and demanded of said United States Royalties Company that drilling operations be commenced within the time specified in the lease, or pay the additional rental of \$5,000 provided for in said lease and secured by said bond. Neither of these demands was complied with by said United States Royalties Company, and thereafter the lessors, who are the plaintiffs and respondents herein, instituted this action against the United States Fidelity & Guaranty Company upon said bond.

The trial court, after hearing the testimony of all the witnesses in the case, found that said leased premises had not been "disproven as oil lands prior to May 4, 1923," and gave judgment for plaintiffs for \$5,000, the amount of said bond, together with interest thereon at 7 per cent. per annum from the 5th day of May, 1923.

Appellant contends that this finding is not supported by the evidence; on the contrary,

respondents contend that the evidence is ample to support this finding of the trial court.

[1, 2] The law, of course, is well established that any finding of the trial court upon conflicting evidence is conclusive, and all reasonable inferences are to be indulged in support of such finding. *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25; *Wilbur v. Wilbur*, 197 Cal. 7, 239 P. 332. The burden is upon appellant, who claims error, to show its existence. *Hayne on New Trial and Appeal* (Rev. Ed.) p. 1574; *Wilbur v. Wilbur*, supra.

[3, 4] When appellant contends, as it does in the case at bar, that any particular finding is not supported by the evidence, our power begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the trial court. If upon any material point the testimony is in conflict, it must be assumed that the trial court resolved the conflict in favor of the prevailing party. *Gjurich v. Fieg*, 164 Cal. 429, 129 P. 464, Ann. Cas. 1916B, 111; *Treadwell v. Nickel*, supra. Therefore the sole question presented on this appeal is whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the trial court that the land in question had not been disproven as oil land within 90 days from and after February 3, 1923.

[5] Appellant, while recognizing the above mentioned well-established rules, insists that there is no dispute or conflict in the evidence and that only one conclusion can be drawn from all the evidence, and that conclusion is that the land was disproven as oil land prior to May 4, 1923, and, the trial court having reached a different conclusion, the judgment should be reversed. We cannot agree with this contention. The one disputed question of fact in the case, to wit, the character of the land, whether oil-bearing or nonoil-bearing, was not a fact capable of demonstration prior to May 4, 1923, but was one depending entirely upon the opinion of witnesses and circumstances existing at and prior to that date.

[6] At the trial both sides offered the testimony of experts in the oil industry in support of their respective contentions regarding the oil-bearing character of the land in question. Plaintiffs produced only one witness who testified directly upon this question, while defendant produced four or five, but the mere number of witnesses, of course, has no bearing, if the one witness produced by plaintiffs was sufficient to produce conviction in the court's mind against a greater number testifying on behalf of defendant. Section 2061, subd. 2, Code Civ. Proc.

The plaintiff's witness was Mr. Martin Van Couvering, a petroleum engineer. No point was urged whatever as to the qualifications of Mr. Van Couvering as such engineer. He

produced, and there was received in evidence, a map prepared by him of a portion of the Signal Hill oil field section, near the land in question, showing the condition of the various wells in that locality on the date in question, and his testimony was that he had done either all or a part of the engineering work on a great many of the wells shown on the map. The wells upon which he had done work were enumerated by the witness, which amounted to more than 30 in number. This witness further testified, positively, as to the condition and depth of a great number of wells on May 4, 1923, which were adjacent to the property in question, and his testimony shows that he had a very accurate knowledge of the exact condition of the wells in the Signal Hill oil field on and prior to May 4, 1923.

The testimony shows that the land in question is located on the northwest corner of Hill and Walnut streets at Signal Hill. Mr. Van Couvering testified that the general trend of the oil structure at Signal Hill is northwest and southeast, and that at the time the lease was made numerous wells were drilling, both to the north and to the east of the land in question, and on the date the lease was executed (February 3, 1923), the extent of the field to the southwest had not yet been determined, and at that time the lands of plaintiffs were potential oil property.

Mr. Van Couvering further testified, among other things, that on May 4, 1923, the Old Colony Trust Company's No. 1, located only 250 feet from the land in question, was drilling at a depth of 1,780 feet. The testimony of all the witnesses was to the effect that the first showings of oil, or as they term it, "top of the oil horizon," was not expected to be found until a depth of 3,500 feet, or more, had been reached. Mr. Van Couvering also testified that the Petroleum Midway Company's Clark No. 1, located about 150 feet north of the Old Colony Trust and the same distance from the lands of the plaintiffs, was likewise, on May 4th, drilling at a depth of 1,780 feet, and that the Harmony Dobyns No. 1, located somewhat farther from plaintiffs' property, had at that time reached a depth of 3,585 feet which, under the evidence, was about where they would expect to pick up the oil sand, but there is nothing in the evidence to show whether any production test had been made at that depth, or any effort made to bring the well in. This same witness also testified concerning specific conditions of numerous other wells in the field, their depth, production, etc., and testified that in his opinion, on May 4, 1923, the land in question had not been disproven as oil land, and that he was still at that time in doubt as to how far to the southwest the oil-bearing horizon might extend.

Under cross-examination, Mr. Van Couvering was questioned as to the meaning of the

word "disproven" in a commercial or trade sense, and the answer given was as follows:

"A. Well; to me it means, did I think that it was quite sure that they would not make it pay if they drilled a well there. That is what I think you mean, and I did not know that, at that time—that that was the case.

"The Court: Does it not mean this: That judging from the development of surrounding properties it had not been established to your satisfaction that it was not oil-producing property, is that what you mean? A. Your honor is correct.

"Q. You just used the word 'oil-producing'; you mean 'oil-producing' in paying commercial quantities? A. Yes."

The testimony also shows that subsequent to May 4, 1923, there were a number of cases in which new rigs were erected adjacent to the property in question, particularly the H. C. Noonan No. 1, only 270 feet distant, the California Signal Petroleum Syndicate 4, Horseshoe 2, the Black Star Oil Company 2, and the J. L. Benwell, Inc., well No. 1; and it was also shown on cross-examination of one of the witnesses for defendant that even up to the first part of November, 1923, not a single well in the portion of the field adjacent to the property in question was officially abandoned or a single rig dismantled, while, on the contrary, several new rigs were erected during that period of time.

For appellant, Mr. Templeton, Mr. Swarts, Mr. Shaver, and Mr. Soyster, all qualified experts, testified that in their opinion the property was disproven as oil lands during the latter part of April, 1923, and prior to May 4, 1923, and each of these witnesses explained in detail the reasons for their conclusions. These witnesses were also examined and cross-examined in detail as to the operation, depth, and condition of the various other wells in the immediate vicinity, etc.

Appellant lays great stress upon the fact that in the cross-examination of plaintiffs' witness, Van Couvering, he admitted that all of the wells, about which he had testified, proved to be nonproducing, and that subsequent developments demonstrated that the land in question was nonoil-bearing in commercial quantities, as contended by appellant. In fact, it was stipulated by plaintiffs at the time of the trial, which occurred in November, 1924, that many months after May 4, 1923, it was definitely established that the land in question was nonoil-bearing. These admissions would certainly appear to us to have the effect of seriously impairing the value of Van Couvering's opinion theretofore given to the court that on May 4, 1923, said lands had not been disproven as oil land, but by these admissions alone we cannot say, as contended by appellant, that the entire testimony of the witness Van Couvering is valueless and raised no conflict in the evidence. The weight to be given the entire testimony

of Van Couvering, as well as that to be given the testimony of all the other witnesses examined in the case, was a matter solely to be determined by the trial court, and it is obvious, from the conclusion reached by the trial court, that it gave more weight to the opinion of Van Couvering, notwithstanding his admissions that subsequent developments showed that his opinion was erroneous, than it gave to a contrary opinion of all five of the expert witnesses for appellant.

We have not set forth all the evidence adduced at the trial, but have examined the entire record with care, and we are of the opinion that there is a substantial evidence to sustain the findings of the trial court; therefore such findings are conclusive on appeal.

[7] Appellant has argued that the judgment here represents a forfeiture from which it should be relieved. If it is in the nature of a forfeiture, no way is pointed out in which such fact should change the judgment in this case under the record. It cites section 3275 of the Civil Code, to the effect that one may be relieved from a forfeiture, except in case of a grossly negligent, willful, or fraudulent breach of duty. The breach here was spontaneous and voluntary, and therefore willful within the meaning of the interpretation of that section given in *Parsons v. Smilie*, 97 Cal. 647, 654, 655, 32 P. 702.

Appellant did not by its answer plead any equitable matter, nor ask the court to be relieved as from a forfeiture under Civil Code, § 3275 (*Clifford v. Fleshman*, 85 Cal. App. 762, 225 P. 45), nor has it offered to pay actual damages nor suggested what admeasurement of actual damages it is possible to apply for its breach of the condition (see *Parsons v. Smilie*, supra).

We think the judgment of the trial court must be affirmed; and it is so ordered.

We concur: KOFORD, P. J.; STURTEVANT, J.

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PEOPLE v. WESTCOTT. (Cr. 1483; 3086.)★
District Court of Appeal, Second District, Division 1, California. Oct. 25, 1927.

Hearing Denied by Supreme Court Dec. 23, 1927.

1. Witnesses ⇨383—Defendant could not impeach witness on immaterial question as to statements of deceased by proof of witness' contradictory statements.

In murder prosecution, where question whether conversation between deceased and witness occurred while witness was washing wound or afterwards was immaterial, defendant could not impeach witness' testimony by proof of contradictory statements made by him.

2. Witnesses ⇨413—State could not corroborate testimony of witness on immaterial point.

In murder prosecution, where question whether conversation between deceased and

witness occurred while witness was washing deceased's wound or afterwards was immaterial, prosecution was not entitled to corroborate witness thereon.

3. Witnesses ⇨413—Permitting testimony of witnesses when recalled, to corroborate testimony after admission of defendant's impeaching testimony on immaterial matter, held error.

In murder prosecution, where defendant's attempt to impeach testimony of state witness as to conversation between him and deceased could have been prevented by proper objection as being immaterial, but was admitted, it was error to permit state to recall witnesses and admit their testimony in corroboration of such immaterial matter.

4. Criminal law ⇨366(3)—Declarations made by deceased after assailant had fled and in response to question held inadmissible as *res gestæ* (Code Civ. Proc. § 1850).

Where deceased was shot when answering a knock at his front door, declarations made by him after he shut the door and assailant had fled in response to question of witness who arrived after interval, during which deceased was unconscious, and his wife had attempted to get him to speak to her, held not natural and spontaneous outgrowth of murderous assault on him, but narrative of past transaction, and not part of *res gestæ*, admissible under Code Civ. Proc. § 1850.

5. Homicide ⇨203(3)—Deceased's statement, "I am sick," held not to show realization of dying condition so as to make statement identifying assailant admissible as dying declaration (Code Civ. Proc. § 1870, subd. 4).

In murder prosecution, where deceased was shot while answering knock at front door, and then shut the door, and fell backward on the floor, and became unconscious, statement by him when regaining consciousness, "I am sick," held insufficient to show knowledge of impending death so as to make his statement of name of his assailant admissible as his dying declaration under Code Civ. Proc. § 1870, subd. 4.

6. Criminal law ⇨670—Defendant's acquiescence in prosecution's demand that entire evidence at coroner's inquest be read held not abandonment of offer of testimony as impeaching.

In murder prosecution, where state witness testified deceased spoke to him while he was washing his wounds, and defense offered witness' testimony at coroner's inquest to impeach witness, defendant's acquiescence in state's demand that whole sentence of statement that deceased finally mentioned name of assailant be read held not abandonment of offer of testimony as merely impeaching.

7. Witnesses ⇨397—Contradictory statements may be considered only as affecting credibility, and, if timely request therefor is made, jury may be so instructed.

Impeaching evidence of contradictory statements does not establish truth of matter contained therein, but may be considered only as it affects credibility of witness sought to be impeached, and, if timely request therefor is

made, party is entitled to have jury so instructed.

8. Criminal law §783(2)—Refusal of defendant's instruction that testimony was admitted to impeach witness held proper, where it was admitted to corroborate him.

In murder prosecution, refusal of defendant's instruction that testimony of witness was admitted for limited purpose of impeaching another witness, and could be considered for that purpose only, was proper, where evidence was admitted to corroborate witness.

9. Criminal law §673(3)—Error in defendant's instruction as to impeachment of witness held insufficient to justify refusal of any instruction on point therein.

In murder prosecution, error in defendant's proposed instruction that evidence as to witness' statement at coroner's inquest could be considered only to impeach witness, and not as proof of guilt or innocence of defendant, held insufficient to justify court's refusal to give any instruction on point thereof under circumstances.

10. Homicide §338(4)—Error in admitting deceased's declaration, identifying assailant, held not cured by instruction to consider it for purpose of impeachment or to disregard it.

In murder prosecution, error in admission of evidence of deceased's declarations that his assailant was defendant, admitted solely for purpose of impeachment of state's witness, held not cured by court's instruction to consider it for purpose of impeachment only or to disregard it altogether.

11. Criminal law §730(7)—Unwarranted argument of state counsel in murder prosecution disregarding court's admonitions held prejudicial.

In murder prosecution, argument of prosecuting attorney as to defendant's appearance at police station after reading in newspaper that he was accused of killing his father, and which showed persistent disregard of directions and admonitions of court, held prejudicial misconduct.

12. Criminal law §1186(4)—Error in permitting evidence of deceased's declaration and prejudicial argument of district attorney thereon held reversible (Const. art. 6, § 4½).

In prosecution for murder, error in permitting testimony as to declarations of deceased made to witness shortly after assault, and prejudicial argument of district attorney thereon, held reversible; Const. art. 6, § 4½, providing for reversals of conviction only when error affects substantial rights, being inapplicable.

13. Criminal law §829(7)—Refusal of instruction on alibi containing statement, substance of which was included in instruction given, held not error.

In murder prosecution, refusal of defendant's instruction on alibi, substance of which was statement of impossibility for same person being in two different places at same time, and which was included in instruction given, was not error.

14. Criminal law §775(3)—Refusing alibi instruction that defendant could not be in two places simultaneously held not error.

Refusal of instruction on alibi containing commonplace that it is impossible for same person to be in two different places at same time, which would be known to intelligent jury, is not error.

15. Criminal law §784(5)—Instruction on circumstantial evidence referring to standard rule of certainty held vague.

In murder prosecution, it was not error to omit from defendant's instruction on circumstantial evidence that independent circumstances must be such as to generate and justify full belief according to "standard rule of certainty," since such standard would have introduced expression of vague and uncertain meaning.

16. Criminal law §784(4)—Instruction that mere union of independent circumstances would not justify conviction held too favorable to accused.

In murder prosecution, it was not error to omit from defendant's instruction on circumstantial evidence that mere union of limited number of independent circumstances, each of imperfect and inconclusive character, would not justify conviction, since statement thereof was too favorable to defendant.

17. Criminal law §829(15)—Omission from requested instruction on circumstantial evidence held covered by general instruction.

In murder prosecution, omission by court from defendant's instruction on circumstantial evidence was not error, where language omitted was fully covered by general instruction on reasonable doubt.

18. Criminal law §829(1)—Refusal of instructions fully covered by instructions given at defendant's request held not error.

In murder prosecution, refusal of instructions, law of which was fully set forth in instructions given at defendant's request, was not error.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Carl Westcott was convicted of murder in the first degree, and he appeals. Reversed, and new trial ordered.

M. C. Spicer and H. C. Compton, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John Flynn and James S. Howie, Dep. Attys. Gen., for the People.

SHAW, Justice pro tem. After a trial upon an indictment charging him with the murder of Charles G. Westcott, the appellant was convicted of murder in the first degree, and his punishment was fixed at imprisonment for life. He appeals from the judgment and from an order denying his motion for a new trial.

Charles G. Westcott was the father of appellant, and lived in the city of Los Angeles.

On this appeal it is conceded that he was murdered by some one on October 20, 1927. About 8 o'clock in the evening of that day he was sitting in the living room of his house with his wife. The doorbell rang, and the deceased arose, went to the door, and opened it. After opening it, he said, "Oh," immediately following which two shots were fired from the front porch; then he shut the door, said to his wife, "Call the police," and fell over backward, with a fatal wound in the abdomen. He never arose from this position, but later was lifted into an ambulance, and died on the way to the hospital about one-half hour after he was shot. No witness saw the person by whom the fatal shots were fired. The evidence tending to identify the appellant as the perpetrator of the crime is entirely circumstantial, unless we except from that designation the evidence herein-after considered regarding an alleged dying declaration by the deceased.

A witness named Eldridge heard the shots, and went to the Westcott house, arriving there not more than three minutes later. He got from Mrs. Westcott a towel, and washed some of the blood from the body of deceased. While he was doing so, Westcott said to the witness that he was sick, but made no other statement as to his condition. Eldridge then stated that he asked the witness a question, and received an answer, but did not state the words or purport of either. Upon objection to this conversation, the jury was taken from the courtroom, and in their absence the witness testified for the information of the court as to what happened between him and the deceased. During his testimony in the absence of the jury, Eldridge made the following statement:

"Well, during the—while I was cleaning his wounds, I asked the man—they called him Mr. Westcott, although I didn't know it at the time—who shot him, to which he replied, 'Carl.' I then said, 'Carl who?' But I received no reply to that. * * * Q. By the Court: Now, was this statement made by him after you had washed his wound? A. I think during the washing, and probably once afterwards."

After further testimony regarding the circumstances under which this conversation was had between Eldridge and the deceased, and before the jury was called back into the courtroom, the court sustained the objection of appellant to the conversation on the ground that it was not a part of the res gestae and could not be admitted as a dying declaration, because not made under a sense of impending death. Thereupon the jury was called back and, after a few questions on unimportant matters in direct examination, the witness was cross-examined by appellant's counsel. Upon the cross-examination the following occurred:

"Q. Until after you had finished bathing or attending the wounded man, dressing the wounds of the deceased—or the injured man—

the injured man had not said anything to you or spoken to you, had he? A. He had spoken to me before I had cleaned the wounds, before I had finished cleaning the wounds. Q. Well, now, you testified before the coroner's inquest, didn't you? A. I did."

The witness was then shown a transcript of the testimony taken at the coroner's inquest, and asked to read a certain passage in it, identified in the question by line and page, and, after doing so, said that he so testified. Thereupon the following occurred:

"Mr. Spicer (counsel for appellant): May I read it in evidence, your honor?

"The Court: Yes.

"Mr. Spicer (reading): 'Q. Did you say anything to him or did he say anything to you? A. Not at that time. I went into the room, and opened his shirt and his undershirt, and asked whom I presume was Mrs. Westcott for a damp cloth. Soon after she brought me a cloth, but, as it looked soiled, I asked her for a cleaner one. As she started to obtain this, I followed her to the linen closet, and obtained myself a clean towel, which I moistened, and then returned to the deceased and cleaned his wounds. Soon after that, I would say approximately one or two minutes after I finished cleaning the wound, I asked the deceased who shot him. At first he mumbled, as he apparently had quite a little trouble in articulating, but finally mentioned'—and so forth.

"Mr. Hill: Oh, no; finish it; you have offered it; 'finally mentioned the name Carl.'

"Mr. Spicer:—'finally mentioned the name Carl.' Very well. That is all."

Later, Eldridge was recalled by the prosecution, and testified as follows:

"Q. Mr. Eldridge, referring to the time when you were in the Cochran house, 909—the house of Mr. Westcott—and referring to your testimony that you asked the question, 'Who shot you?' what, if any, reply was made by Mr. Westcott?

"Mr. Spicer: That is objected to as not proper examination; not proper rebuttal; no foundation being laid for its introduction.

"Mr. Hill: We are offering the witness for further examination in chief, if your honor please.

"The Court: It appearing that this particular conversation is the one that you referred to yesterday, I take it?

"Mr. Hill: Yes, sir.

"Mr. Compton: I object to that as having already been testified to.

"The Court: The objection is overruled, limiting it to only that one conversation.

"Mr. Hill: You may answer.

"A. The answer was 'Carl.'

"Q. And who made that answer? A. Mr. Westcott."

After the cross-examination of Eldridge the prosecution called as a witness John Wesley Smith, who testified that he accompanied Eldridge to the Westcott house on the night of October 20th, and further testified as follows:

"Q. Did you hear Mr. Eldridge say anything to Mr. Westcott? A. I did.

"Q. What did you hear him say?

"Mr. Spicer: That is objected to as hearsay; no proper foundation having been laid, incompetent, not part of the *res gestæ*.

"The Court: That objection will be overruled. A. Either 'Who shot you,' or 'Who did it?'

"Q. By Mr. Dennison: Did you hear Mr. Westcott make any reply? A. I did.

"Mr. Compton: Now, if the court please, we object to that—

"The Court: Objection overruled. The answer 'I did' may stand.

"Q. By Mr. Dennison: What did you hear Mr. Westcott say in reply to that question?

"Mr. Spicer: That is objected to on all the grounds heretofore made as to the admissibility as a dying declaration, or admissibility as part of the *res gestæ*.

"The Court: By reason of the fact that this particular conversation has gone into evidence by way of a recital yesterday afternoon, the people, I take it, have a right to show the truth or falsity of that statement as already in evidence. The objection is now overruled to that one conversation only as to Eldridge.

"Q. By Mr. Dennison: You may answer the question. A. 'Carl.'

"Mr. Spicer: I move that that answer be stricken from the record, for the reason that it is not introduced, nor shown to have been introduced, for the purpose of contradiction, it being the same answer that was shown by the record that was introduced as an impeaching question, and for the further reason it is hearsay, incompetent, no foundation having been laid for its introduction.

"The Court: Motion to strike out denied.
* * *

"Q. Did you see what Mr. Eldridge had been doing just previous to asking the question? A. Yes, sir.

"Q. What was Mr. Eldridge doing? A. He was trying to stop the bleeding.

"Q. In what way? A. He had a cloth in his hand."

[1, 2] Appellant complains that the court erred in admitting the testimony of Smith and in refusing to give an instruction requested by appellant as to the purpose for which it was admitted, and also that the district attorney was guilty of prejudicial misconduct by the use he made in his argument of the testimony given by Eldridge before the coroner's jury.

Had the court, on a proper showing that deceased spoke under a sense of impending death, allowed Eldridge to testify as to the conversation between him and the deceased, the exact time or stage of the transaction at which this conversation occurred might have been material, but, upon the court's refusal to permit this testimony, there was no other phase of the case to which an inquiry as to the time of the conversation could relate. The question whether the conversation occurred while Eldridge was washing the wound or afterwards was therefore immaterial. Consequently appellant was not entitled to impeach any testimony given by Eldridge on this question by proof of contra-

dictory statements made by him. *People v. Cole*, 127 Cal. 545, 59 P. 984; *People v. Smith*, 189 Cal. 31, 207 P. 518; 27 Cal. Jur. 107, 152. For the same reason, the prosecution was not entitled to corroborate Eldridge on this point. "It is not permissible to corroborate a witness as to collateral, irrelevant, or immaterial matters." 40 Cyc. 2784, citing cases. This rule, and the reason for it, are stated in *Stevens v. Beach*, 12 Vt. 585, 36 Am. Dec. 359, where, after plaintiff's witness Steele had testified to an immaterial fact, a witness for the defendant testified to the contrary, and the plaintiff then offered to corroborate Steele by other witnesses. The court said:

"It is no doubt competent for the party to put almost any question, upon cross-examination, which he may consider important to test the accuracy or veracity of the witness. But if the question is in regard to a fact collateral to the issue, he must be content with the answer of the witness, and cannot contradict him by independent proof. If this were allowed, a single issue would branch out into an indefinite number of collateral ones. 1 Stark. Ev. 182 (6th Ed.), and authorities referred to. Hence, if in regard to any of those collateral questions, the witnesses should not agree, it is not, for the reason above stated, competent for either party to adduce evidence in regard to such collateral fact. The question put to Steele, for the purpose of testing his consistency, might be perfectly competent, but the testimony given by the defendant's witnesses upon this point, as it had no tendency to prove the main issue, was not competent, and, had it been objected to, would have been rejected. Hence, as Steele could not legally have been impeached by this collateral proof, neither could he be supported in that manner."

[3] Appellant's attempt to impeach the testimony of Eldridge on this point might therefore have been prevented by a proper objection, but, as none was made, the evidence was allowed. According to the authorities above cited, this would not entitle the prosecution to corroborate him upon this point, and the court therefore erred in ruling that the testimony of Smith and also that of Eldridge, when recalled, was admissible for that purpose. Even if such corroboration had been proper, the ruling would nevertheless have been erroneous. The point, if any, upon which Eldridge was impeached by his testimony given at the coroner's inquest was as to the stage of the proceedings at which he talked with the deceased, and we doubt if he was even impeached on this point to any substantial extent. He had given no testimony before the jury trying this case as to the declaration made to him by the deceased. That was presented to the jury for the first time in the supposed impeaching statement read by appellant's counsel from the testimony at the inquest. Smith, in the testimony to which the objection was made, said nothing about the time at which this declaration of deceased was made, nor did Eldridge when

recalled; and, as to the latter, it is difficult to understand how he could corroborate himself. Hence these two items of testimony could not be admitted to corroborate Eldridge.

This conclusion renders it necessary to inquire whether the court was right in its original ruling that no sufficient foundation had been laid for the admission of the declaration of deceased to Eldridge either as a part of the *res gestæ* or as a dying declaration. If it should have been admitted for either of these reasons, we are not concerned with the fact that the court assigned a wrong reason for its ruling in admitting it.

[4] As to the matter of *res gestæ*, little need be said. The declaration in question was made by the deceased after he had shut the front door and his assailant had fled, and was in response to a question of Eldridge, who arrived at the scene after an interval during which deceased was unconscious, and his wife had telephoned for the police and a doctor, and had then attempted to get deceased to recognize and speak to her. It was not the natural and spontaneous outgrowth of the murderous assault upon him, but a mere narrative of a past transaction, and hence not a part of the *res gestæ*. Code Civ. Proc. § 1850; 8 Cal. Jur. 95; *People v. Hinshaw*, 194 Cal. 1, 227 P. 156; *People v. Murphy*, 28 Cal. App. 708, 153 P. 732.

[5] We think it must also be held that the statement of deceased was not admissible as a dying declaration. To be admissible as such, a declaration must have been made under a sense of impending death. Code Civ. Proc. § 1870, subd. 4. It was shown by the surgeon who performed an autopsy on the body of deceased that there were two gunshot wounds, one in the leg and one in the abdomen. The bullet which made the latter wound entered the body in front and passed through the liver, the stomach, and the first lumbar vertebra, grazing the spinal cord, and causing profuse internal hemorrhage. The surgeon testified that such a wound would have caused death in a very few moments, and that, as a rule, there would be unconsciousness or collapse immediately; that there would be paralysis from the hips down, and the brain would be affected almost immediately by shock reaction; that unconsciousness would probably result in ten minutes or less, depending upon the vitality of the victim, but in the meantime he could make a statement with realization of what he was saying and answer questions intelligently. The evidence also showed that, when deceased was shot he at once told his wife to call the police, then shut the door, and fell backward on the floor, from which position he never got up; that, after telephoning for the police and a doctor, his wife came back to him, and found him unconscious, breathing heavily and bleeding profusely, and thought he was dying. She kissed him and spoke to

him, but he made no response. This was before Eldridge came in. Eldridge testified that he reached the deceased in from one to three minutes after he heard the shots; that deceased was then moaning, but not loudly; that, just as he finished cleaning the wound, deceased raised himself on his elbow and said; "I am sick," but said nothing more as to his condition; that this occurred both before and after the question and answer as to who shot him; that at the time of these statements he seemed conscious, but his powers of articulation were not of the best, because he would kind of clear his throat from time to time; and that the wound was so located that deceased could not see it very well. Eldridge could not fix the time that elapsed between the shots and his conversation with deceased, but said it was not more than one-half an hour. Consideration of the intervening events indicates that it was considerably less. No other facts were shown which could throw any light on the question whether deceased knew that he was about to die.

The evidence most frequently received to show a sense of impending death is the statement of the declarant himself tending to show such a state of mind on his part. In this case there is nothing of the kind. The only statement made by deceased as to his condition was "I am sick," and this falls far short of showing that he realized his dying condition. No argument has been made on this subject in the briefs; both sides having apparently considered that this appeal could be disposed of without its consideration, but fortunately the record contains a full report of the elaborate argument made on this point by the people in the lower court. It was there ably and elaborately argued that the nature of the wound itself, together with the other facts shown as to the conduct and condition of the deceased, was sufficient to show that he knew he was about to die.

In *Greenleaf on Evidence*, § 158, the rule is stated as follows:

"It is essential to the admissibility of these declarations, and is a preliminary fact, to be proved by the party offering them in evidence, that they were made under a sense of impending death; but it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears in any mode, that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind."

This statement has been cited or quoted with approval in many California cases. *People v. Ybarra*, 17 Cal. 166, 168; *People v. Sanchez*, 24 Cal. 17, 24; *People v. Gray*, 61

Cal. 164, 175, 44 Am. Rep. 549; *People v. Bemmerly*, 87 Cal. 117, 118, 25 P. 266; *People v. Taylor*, 59 Cal. 640, 646; *People v. Yokum*, 118 Cal. 440, 50 P. 686. In *People v. Hoffman*, 195 Cal. 295, 307, 232 P. 974, substantially the same rule is declared. In 2 Wigmore on Evidence, § 1442, the author says:

"In ascertaining this consciousness of approaching death, recourse should naturally be had to all the attending circumstances. It has been contended that only the statements of the declarant could be considered for this purpose; or, less broadly, that the nature of the injury alone could not be sufficient, i. e., in effect, that the declarant must have shown in some way by conduct or language that he knew he was going to die. This, however, is without good reason. We may avail ourselves of any means of inferring the existence of such knowledge; and, if in a given case the nature of the wound is such that the declarant must have realized his situation, our object is sufficiently attained. Such is the settled judicial attitude."

In all the California cases above cited there were in fact other circumstances, or statements of the declarant, in addition to the nature of the wound, tending to show that the declarant knew, and realized, his condition. We find no California case in which it is directly held that the nature of the wound alone is sufficient to show that the wounded person believed himself about to die. The court, however said in *People v. Ybarra*, supra:

"We think the circumstances of the case, as shown by the witnesses, warranted the admission of the testimony. The evident danger of such a wound as that shown, with the immediate effect upon the victim produced by it, even unaccompanied by the other circumstances corroborating the idea of her sense of her true condition, would probably have been sufficient to admit her declarations, but with the other circumstances, they leave no doubt as to the propriety of the admission."

The statement as to the facts is very meager, but it appears that the deceased at the time of making the declarations was lying down, suffering very much from the effects of a mortal gunshot wound received in the abdomen; that she was in great misery all the time, never was easy, and was continually failing, and also that she said she believed she was going to die. Here, of course, we have the express statement of the declarant as to her condition, and it also seems that she must have known the nature and effect of the wound. In *People v. Sanchez*, supra, the court said:

"The character of his wound, his suffering and pain, the opinion of the surgeon or other attendants as to his condition, if stated to him, his alarm and anxiety, if manifested, his final preparation for death, if any was made, his taking leave of friends, his seeking the consolations of religion and the last offices of the church, if such was the case—are all circumstances which are frequently quite as satisfac-

tory in determining the question of belief as any express statement on the part of the declarant."

The circumstances thus referred to, other than the express statement of the declarant, were all present in that case, and the court held the declarations properly received, but here again the knowledge of the declarant as to his condition clearly appears.

The question as to what facts will justify a finding that the declarant was under a sense of impending death, in the absence of a statement by him to that effect, has received consideration in many cases from other jurisdictions which are collected and reviewed in extensive notes found in 56 L. R. A. 406, 30 L. R. A. (N. S.) 396, and Ann. Cas. 1912C, 85. An English authority which has been often cited is *John's Case*, reported in 1 East P. C. 357, where it was held:

"That if a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence."

In this case, however, where the wounds were bruises and contusions from blows and kicks, it was held that there was no foundation for supposing that the deceased considered herself in danger.

The cases that most nearly resemble the case at bar in their facts are: *Territory v. Eagle*, 15 N. M. 609, 110 P. 862, 30 L. R. A. (N. S.) 391, Ann. Cas. 1912C, 81, and *Jones v. State*, 130 Ga. 274, 60 S. E. 840. In the New Mexico case it appeared that the deceased did not indicate at any time by word of mouth or otherwise that he realized his condition and had no hope of recovery, and nothing was said to him by any one on this subject. He had been shot, the bullet entering his body from the front, traversing his abdomen, and coming out in the back. There was severe internal hemorrhage. On the next day after he was shot there was a discharge of the intestinal contents from the wound, his abdomen was markedly distended, his temperature subnormal, and his pulse rapid; he was conscious, but in a rather dazed condition, and he could retain nothing in his stomach, but was vomiting blood. The declarations were made after these symptoms appeared, and, although the time intervening between the shooting and the declarations was not stated, it must have been at least several hours. The court quoted from Wigmore on Evidence the language which we have already quoted, and held that the declarations were admissible. In this case it is clear that the declarant had ample opportunity to observe the nature and extent of his wounds and the effect caused on him thereby, and he could hardly have failed so to do. In the Georgia case the deceased was found by his wife a short time after he was shot, and he neither did nor said anything

expressly indicating a sense of impending death, but the court said:

"In this case, the fact that when his wife found him the deceased was prostrate on the ground; that he was shot through the heart; that he was unable to get one of his arms to the shoulder or neck of his wife, who was assisting him to his home; that he never spoke again after the words complained of were uttered, and that he died in fifteen or twenty minutes after making the statement, were circumstances from which the jury might infer that when he made the declarations he was in the article of death and conscious of his condition."

It is apparent here that the deceased at least knew of his inability to help himself.

Another somewhat similar case is *Anthony v. State*, Meigs (Tenn.) 265, 33 Am. Dec. 143, where it appeared that the wound was a large pistol shot entering the navel, and such a wound 99 times in 100 would produce death; that, when the declaration was made, the declarant, was in the opinion of her physician fast sinking, but neither he nor any one else informed her of this fact; that she said she was suffering from great pain, burning heat, and great sickness of the stomach. The court quoted from *John's Case*, supra, the language we have already stated, and added what we conceive to be the true rule as to the meaning of such statements as that made in *John's Case* and the one made in the passage we have above quoted from *Greenleaf* regarding the "evident danger" of the deceased, in the following language:

"It is obvious that this rule or principle, so distinctly stated, does not mean that the inference may be drawn from the mere fact, that the wound, in the opinion of the man of science, was in point of fact mortal; but that the nature of the wound or the state of illness should be such as to affect the knowledge, and control the opinion of the dying person himself, as to the danger to which he stands exposed. * * * In the case before us, the dreadful nature of the wound, the state of illness as proved by the physician and declared by the deceased herself, were such as could not leave her, or any rational being in doubt as to her being in great danger of immediate death."

In the case now before us, the deceased, after being shot, almost immediately fell over backward and became unconscious. There is no ground to suppose that before unconsciousness intervened he became aware of the mortal nature of his wounds. After he revived, his only express indication of his knowledge as to his condition was to moan slightly and say, "I am sick." Since he could not see the wound, he could have gained no knowledge from an inspection of it. He may have had a sense of pain, indicated by his moaning, which told him that he was wounded through the body, but such wounds are not necessarily fatal. In all of the cases which we have found after an extensive investigation, in which it has been held that a

sense of impending death might be inferred from the nature of the wounds, it appeared that the wounds were of an obviously mortal character, and that this fact was known or at least was manifestly open to the observation of the declarant; e. g., in some of them it appeared that his throat had been cut from ear to ear, and his windpipe severed. In the present case, we think the court was right in its ruling that the declaration of the deceased was not shown to have been made under a sense of impending death.

[6, 7] It follows that there was no evidence properly before the jury regarding the declaration by the deceased that Carl shot him, unless it be the testimony of Eldridge given at the coroner's inquest that the deceased made such a declaration. This was offered by appellant merely for the purpose of impeaching Eldridge, on the theory that it showed a previous contradictory statement by him. This theory was correct, if at all, only as to the time when the declaration was made, and not as to the fact that it was made, and appellant endeavored to omit the latter fact when reading the testimony, but, upon the insistence of the prosecution that the sentence be finished, the whole was allowed to go in without protest. We think, however, that, by thus acquiescing in the demand of the prosecution that the whole sentence be read, appellant did not abandon his offer of the testimony as mere impeaching testimony, but was entitled to have the whole of it considered on the theory that he offered it for that purpose only. "It is a settled rule that impeaching evidence of contradictory statements does not tend to establish the truth of the matter contained therein, but may be considered only in so far as it tends to affect the credibility of the witness sought to be impeached thereby, and if a timely request therefor is made, a party is entitled to have the jury so instructed." 27 Cal. Jur. 169; 2 Wigmore on Evidence, § 1018; Thiele v. Newman, 116 Cal. 571, 48 P. 713; Albert v. McKay & Co., 174 Cal. 451, 456, 163 P. 666; Estate of Relph, 192 Cal. 451, 458, 221 P. 361; *People v. Corey*, 8 Cal. App. 720, 729, 97 P. 907.

Certain decisions in this state might perhaps at first blush be regarded as holding to the contrary by reason of the fact that this impeaching evidence was offered by appellant, but, on careful consideration, we think they do not. In *Sill v. Reese*, 47 Cal. 294, 340, the court said:

"We are not prepared to say that counsel is bound by the declaration of a limited purpose, so as to be estopped, after the introduction of evidence, from drawing from it other deductions than that suggested by the terms of the offer. Certainly he should not be, unless injustice has been done to the opposite party by permitting such new inferences; and this cannot be made out by mere assumption or conjecture, unsupported by any fact appearing in the record. Indeed, counsel has no power to

limit the effect of evidence; it would hardly be contended that the opposite party cannot use it in any legitimate manner before the jury. The statement of a 'purpose' is only a reason, addressed to the court, why the particular evidence should be admitted; the effect of the evidence is to be limited, in proper cases, in the charge to the jury."

In *Sears v. Starbird*, 78 Cal. 225, 230, 20 P. 547, 549, the court said, after citing *Sill v. Reese*, supra:

"In the absence of an express understanding between counsel and the court that evidence is to be limited to a particular matter, the court will be authorized to consider it for any purpose for which it is competent and relevant to the issues."

In *Fox v. Harvester, etc., Works*, 83 Cal. 333, 342, 23 P. 295, 296, the court said in regard to certain documents:

"We cannot see that because they were read in evidence as a part of the cross-examination of other witnesses, therefore they were not in the case for all purposes for which they were admissible. The papers having been already put in evidence, the court did not err in refusing to allow them to be put in the second time."

All of these cases limit the use that may be made of evidence by the opposing party to that for which it is "legitimate," "competent," or "admissible." According to the authorities already cited, the impeaching evidence produced on the cross-examination of Eldridge was not legitimate, competent, or admissible as proof of the facts therein stated. The prosecution was therefore not entitled to use it for that purpose.

[8] The court refused appellant's request for an instruction, No. 28, to the effect that the above-mentioned testimony of Smith was admitted for the limited purpose of impeaching Eldridge, and could be considered by the jury for no other purpose. This evidence was not admitted to impeach Eldridge, but to corroborate him, and the court was justified in refusing the instruction for that reason. Instruction No. 3 given by the court, apparently of its own motion, informed the jury that the evidence of question and answer passing between Eldridge and the deceased was admitted for consideration only upon the credibility of Eldridge, and directed them to consider it for no other purpose. This instruction sufficiently identified and referred to the testimony of both Smith and Eldridge, and, in effect, told the jury not to consider the declaration of deceased narrated in the testimony as proof of the fact declared by him. Whether the giving of this instruction cured the error in the admission of the testimony so referred to we will consider later.

[9] Appellant also requested an instruction, No. 27, to the effect that the evidence as to Eldridge's statement at the coroner's inquest could be considered by them only for the limited

purpose of impeaching Eldridge, and not as any proof of the guilt or innocence of the defendant. This instruction was refused, and no instruction on this point was given, although appellant was entitled to such an instruction. As proposed by him, the instruction was perhaps misleading, for, in the final analysis, evidence which impeaches a witness may have some bearing upon the question of defendant's guilt or innocence. But the error in the proposed instruction, if any, was not sufficient to justify a refusal to give any instruction on the point under the circumstances. The court should have instructed the jury as to the true rule on this matter. *People v. Frey*, 165 Cal. 140, 147, 131 P. 127.

[10] Appellant complains, not only of the admission of the direct evidence as to the conversation between Eldridge and the deceased, but also of the use made of it, and also of the statement of Eldridge at the inquest, in the closing argument of the prosecution. In this argument the deputy district attorney read at length the record of the impeaching question put to Eldridge, including the statement that deceased said Carl shot him. Before this reading the following occurred:

"Mr. Hill (deputy district attorney): The dying man replied—

"Mr. Spicer (counsel for appellant): Now, your honor, we object to counsel commenting on that, for the reason it is not introduced as evidence in the case.

"Mr. Hill: That part I have stated is absolutely in the evidence in this case so far.

"The Court: The court expects to instruct the jury it is for a limited purpose.

"Mr. Hill: The fact that he spoke?

"The Court: No, not the fact that he spoke.

"Mr. Hill: That is all I have commented on so far, if your honor please."

After reading the testimony the prosecutor commented on this declaration of the deceased and the probability of its being true for nearly three pages of the record, and thereupon the following proceedings occurred (to the proper understanding of which it is necessary to know that appellant on the night of the murder bought a copy of a newspaper, in which there was an account of the murder, and a statement that he was accused of committing it, and that upon seeing this he went to the police station and surrendered):

"What else have we in the evidence in this case? Carl Westcott appears at the police station claiming that he had read in the newspaper that his father had been killed, and that he was accused of having killed him. That is a fact legally established in evidence. What deduction and inference can be drawn from that? It is common knowledge that newspapers are in the business of gathering news. They have trained reporters assigned to get the facts, write them, and report them to their paper for publication. The deduction from the course of business. Why, no newspaper publishes things unless it is warranted by some investiga-

tion of theirs and an ascertainment of the facts because no newspaper likes a libel suit. And so you have got it in the evidence here that the dying man did make a dying statement that Carl shot his father; you have got it from the inference and the deduction from the facts from the evidence in this case, and you can't escape it.

"Mr. Spicer: Just a moment. I make this objection, and ask the court to withdraw this from the jury. The remarks of the newspapers, it is not in evidence. There is no testimony as to whether those statements in there were true. It is highly prejudicial. It is known to the district attorney it is prejudicial, and I believe he is making it for that particular purpose.

"The Court: The remarks of the district attorney going outside of the record will be stricken from the argument.

"Mr. Hill: May I, for the guidance of my further remarks, have the court call my attention to what particular remarks you deem objectionable in the argument? There is the evidence that a newspaper was published, and Carl claimed to have seen the paper in which it was stated he was accused of the murder of his father. What was the basis of the accusation? Who was present at the scene of the murder? Who of all persons alone saw the murder? He whose lips are now sealed, Charles G. Westcott, and he alone. We have it in the evidence that he did speak before his immortal soul passed from this life. We have the paper coming out stating that the defendant, the son, was accused of his murder. What is your inference and your deduction from the course of business and the course of nature? From what source possibly could the information be obtained than from the word of mouth of Charles G. Westcott that his son had murdered him? Don't you believe Charles G. Westcott? Don't you believe that of all persons in the world he was the one who knew best the features of his son? Don't you know—

"Mr. Spicer: We object to this, your honor, again, and move the court to admonish the jury.

"The Court: The court will instruct the jury and the deputy district attorney that the means or method and course by which the newspaper—referring to a newspaper which Westcott in his statement stated that he did see on that evening—that that means of information, method, and source is not in evidence, and that anything you may say on that subject is merely your inference.

"Mr. Hill: Exactly so, why, certainly. Everything I have said in my argument is my opinion of the analysis of the evidence, the same as counsel for the defense.

"The Court: Well, I don't think it proper that you should go into the source of the newspapers' information from which they made the publication, however.

"Mr. Hill: All right. I will ask the jury be instructed to disregard that part of it. Westcott testified that he read the newspaper, and from the newspaper alone he had obtained the information, not only of his father's death, but that he (Carl Westcott) was accused of his murder. Put those facts with the other facts in this case, the other inferences and the other deductions in this case, and I say to you that the inference, and the only inference, war-

ranted by this evidence is that Charles Westcott, before he died, spoke, and that counsel recognized that that was in evidence, and couldn't get away from it. Mr. Compton in the closing argument for the defense referred to it, and he tried to laugh it off. He tried to give another construction of it. He gave his inference of it, and what did he say? He said that, if the dying man did speak the word 'Carl,' it wasn't as an accusation of guilt, it wasn't accusing Carl of having murdered him, but that just as life was fluttering from the body his last earthly thought was for his loved son Carl. If that had been the fact, do you think counsel would have fought for two days and a half to keep that out of the evidence?

"Mr. Spicer: We object to that, and move that it be stricken out, and I think that counsel should be instructed by the court that he is not to speak upon those subjects which he knows are not questioned to go before this jury.

"Mr. Hill: This jury is not blind. They have been out of court and in court and out again—

"Mr. Spicer: We take exception to counsel's remark on that, and move the court to instruct the jury.

"The Court: The court will instruct the jury to entirely disregard the personal conversation between counsel. As to this particular evidence that is being referred to now the court expects to and will instruct you it is in for a limited purpose, impeachment, offered for that purpose, and the truth of the statements there made were permitted to be met by the other side going only to the credibility of the witness Eldridge, not for general purposes.

"Mr. Hill: Unquestionably it is before you, ladies and gentlemen, for that limited purpose of showing that, at the time of the coroner's inquest, Mr. Eldridge under oath at that time testified that he asked the question, 'Who shot you?' and the dying man replied, 'Carl.'

"Mr. Spicer: We object to that and take exception to counsel's remarks as prejudicial, intended so by counsel, and made for the purpose of prejudicing the jury.

"The Court: I don't know what counsel intended, but, if he is limiting it to matters of credibility—

"Mr. Hill: Exactly. And you can consider it for the purpose of determining whether or not Mr. Eldridge has been impeached as to the testimony given in this case."

We have thus stated the argument at some length before considering the effect of the court's instructions upon the error in the admission of the declaration of deceased in evidence, because it is apparent from this statement that the two matters must be considered together. Under the circumstances of this case the error in the admission of the evidence could not be rendered harmless by an instruction from the court to consider it for a limited purpose only or to disregard it altogether. The evidence was extremely damaging to appellant. Here is a son charged with the murder of his father, and evidence is allowed to go to the jury that the father, before he died, accused his son of the murder. By the established legal rules governing such matters this evidence was improper. Is it possible that any jury, after hearing such evi-

dence, in such a case, can erase it from their minds, and not be influenced by the accusatory declaration, merely because the court tells them to consider the evidence only in passing on the credibility of a witness, whose credibility was, in fact, not substantially impugned thereby? We unhesitatingly answer "No." In so doing we but follow the established rule in such cases. *People v. Oldham*, 111 Cal. 648, 654, 44 P. 312; *People v. Rodriguez*, 134 Cal. 140, 66 P. 174; *People v. Anthony*, 185 Cal. 152, 159, 196 P. 47; *People v. George*, 72 Cal. App. 124, 236 P. 934.

[11] Even if there had been a possibility that the jury would forget the evidence of the declaration by deceased, that possibility would have been utterly dissipated by the argument of the prosecuting attorney. That argument was entirely unwarranted by the record in many respects. There was nothing before the jury to indicate where the newspaper got its report that appellant was accused of the murder, and the argument based on that report was an entirely unjustified attempt to present to the jury something which they were not entitled to consider. The argument which we have quoted shows a persistent disregard by the district attorney of the directions and admonitions of the court, and an apparent intent so to impress the matter on the jury that they could not forget it, no matter what the instructions of the court might be. It manifests a complete departure from the spirit of fairness which should animate the conduct of that officer, and must be regarded as prejudicial misconduct. *People v. Derwae*, 155 Cal. 592, 102 P. 266; *People v. Hail*, 25 Cal. App. 342, 358, 143 P. 803; *People v. Keko*, 27 Cal. App. 351, 149 P. 1003; *People v. Irby*, 67 Cal. App. 520, 528, 227 P. 920; *People v. Fleming*, 166 Cal. 357, 381, 136 P. 291, Ann. Cas. 1915B, 881; *People v. Tufts*, 167 Cal. 266, 273, 139 P. 78; *People v. Anthony*, 185 Cal. 152, 196 P. 47.

[12] There remains for consideration the question whether section 4½, article 6, of the Constitution, prevents a reversal of this case. With this section in mind, we have carefully considered the evidence adduced to identify appellant as the perpetrator of the crime. It is entirely circumstantial, and we see no good object to be accomplished by stating it here. While the combined effect of all the circumstances relied on to show appellant's guilt is such as to support the verdict, without the declaration of deceased, yet each of them taken separately is susceptible of an explanation consistent with appellant's innocence. Appellant attacks the credibility of the testimony by which some of these circumstances were shown, and as to some of them the evidence was conflicting. While these matters are not for this court, yet we are unable to say how the jury regarded them, or that they may not have disbelieved the evidence as to some of the incriminating circumstances, or regarded these circumstances

as insufficient, and based their verdict on the declaration of the deceased. In short, we are unable to determine whether appellant would or would not have been convicted had the testimony as to that declaration not been admitted and the argument of the district attorney thereon not been made. In such case section 4½ of article 6 has no application to uphold the judgment. *People v. Macphee*, 26 Cal. App. 218, 226, 146 P. 522; *People v. Irby*, 67 Cal. App. 520, 530, 227 P. 920; *People v. Degnen*, 70 Cal. App. 567, 606, 234 P. 129; *People v. Black*, 73 Cal. App. 13, 38, 238 P. 374.

[13, 14] In view of the reversal which must be ordered, certain other matters must be considered. Appellant complains of the action of the court in omitting from his requested instruction No. 25 a portion thereof. The part thus omitted and refused by the court is included in parenthesis in the following quotation:

"The defendant in this case has introduced evidence to prove the fact that he was not at the place where the crime was alleged to have been committed at the time charged in the indictment (and if in your deliberations you determine that the defendant was not at the place where the alleged offense is said to have been committed, at the time alleged in the indictment, but was at another place, then, under this state of facts, you must find the defendant not guilty, for it is impossible for the same person to be in two different places at the same time).

"The burden of proof is not upon the defendant to establish an alibi by a preponderance of the evidence, but it is sufficient to entitle the defendant to an acquittal in this case, if the evidence of alibi, considered in connection with all the evidence in this case, raises in the minds of the jury a reasonable doubt as to the guilt of defendant."

The portion omitted is doubtless correct, and was approved as part of an instruction given in *People v. Foster*, 198 Cal. 112, 243 P. 667, but we do not think that its refusal can be regarded as error. The meat of the portion omitted was the statement that it is impossible for the same person to be in two different places at the same time, and this was contained in instruction 10, given at the request of the prosecution. Moreover, the language omitted was a mere commonplace, which would be known to any intelligent jury, and the refusal to give it cannot be regarded as error. *People v. Machuca*, 158 Cal. 62, 109 P. 886; *People v. Perrin*, 67 Cal. App. 612, 227 P. 924.

[15] Appellant also complains of the action of the court in omitting a part of his instruction No. 3, which was as follows, the part omitted being included in the parenthesis:

"To warrant a conviction on circumstantial evidence each fact necessary to the conclusion sought to be established must be proven by competent evidence, beyond a reasonable doubt, and all the facts necessary to such conclusion

must be consistent with each other and with the main facts sought to be proved and the circumstances, taken together, must be of conclusive nature, leading, on the whole, to a satisfactory conclusion and producing, in effect, a reasonable and moral certainty beyond a reasonable doubt, that the accused and no other person committed the offense charged. (The mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to generate and justify full belief according to the standard rule of certainty. It is not sufficient that they coincide with, and render probable, the guilt of the accused, but they must exclude every other reasonable supposition. No other conclusion but that of the guilt of the accused must fairly and reasonably grow out of the evidence, but the facts must be absolutely incompatible with innocence, and incapable of explanation upon any other reasonable supposition than that of guilt.)"

[16] The reference in the language which the court declined to give to the "standard rule of certainty" would have introduced into the instruction an expression of vague and uncertain meaning not heretofore approved as an accurate statement of the law in any case to which our attention has been called. We think, also, that the statement that "the mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction," is too favorable to the appellant. In support of it, appellant refers to *People v. Anthony*, 56 Cal. 397; but we find no such instruction discussed in that case. In his brief, but in another connection, appellant also refers to *People v. Staples*, 149 Cal. 405, 425, 86 P. 886, 894, where the court said of circumstantial evidence:

"* * * Where the evidence is of such a character it must be not only consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis. The deduction to be drawn from these circumstances is ordinarily one for the jury, but where, in a case such as this, every circumstance relied on as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court."

This case has been considered and reviewed in several other cases. In *People v. Muhly*, 15 Cal. App. 416, 114 P. 1017, the court said regarding it:

"In the case now here the defendant presents in numerical order most, if not all, of the circumstances relied on for conviction, and endeavors to show each of these circumstances to be equally compatible with innocence, and hence there is a failure of proof necessary to sustain a conviction. The principle enunciated in the *Staples* Case is undoubtedly proper to be given as an instruction to the jury, and it was given by the learned trial court in unmistakable terms. But we do not think it can be accepted, or was intended to be accepted, as a rule of universal application to guide the

appellate court in all cases arising out of or dependent upon circumstantial evidence. It rarely happens that circumstances attending the commission of a crime may not, in the opinion of the reviewing court, reasonably be susceptible of an interpretation compatible with the innocence of the person associated with such circumstances; and if one after another of the alleged incriminatory circumstances may be eliminated, they would necessarily cease to have any probative force considered collectively. * * * As we understand the *Staples* Case, the rule there laid down followed an analysis of the evidence from which the court was authorized to conclude that there was no evidence warranting the verdict. We do not understand that case to hold that where the circumstances are such as to reasonably justify the inference of guilt, the case will be taken from the jury because an inference of innocence might also reasonably have been drawn."

In *People v. Strauss*, 75 Cal. App. 447, 454, 243 P. 67, the above language was quoted with approval from *People v. Muhly*, and the rule there established was followed, and in this case a rehearing was denied by the Supreme Court. In *People v. Tom Woo*, 181 Cal. 315, 328, 184 P. 389, 394, where the evidence was circumstantial, the court said:

"In our opinion the facts which we have indicated could have been found by the jury are sufficient to sustain the verdict. It is the law that neither mere opportunity to commit a crime, nor perjured testimony is sufficient to support a verdict of guilty. Nor are false statements or suspicious circumstances sufficient. It may be conceded that no one of the facts summarized would, if standing alone, be sufficient to uphold the verdict, but when all the circumstances which the jury may have resolved from the evidence are considered together, it cannot be held on appeal that they are not sufficient to warrant an inference of guilt."

[17] The above language which the court excluded from appellant's instruction No. 3 would have required the jury in effect to consider the various circumstances independently, and to exclude from their consideration the joint effect of a number of concurring circumstances where each one alone could be explained in such a manner as to be consistent with defendant's innocence. This they were not required to do. The remaining language omitted by the court from instruction No. 3 was fully covered by the general instruction given by the court on the subject of reasonable doubt.

[18] Appellant also complains of the refusal of the court to give his instructions Nos. 4, 5, 14, and 21. We have carefully considered these instructions, and compared them with the instructions which the court did give, and are satisfied that all the principles of law set forth in the instructions requested by appellant were given in other instructions. The language was not in all cases the same, but the subject was fully covered, and, of course, appellant was not entitled to

have the same principle of law given twice, or to insist on his own particular phrasing therefor.

The judgment and order appealed from are reversed, and a new trial ordered.

We concur: CONREY, P. J.; HOUSER, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. In denying the petition to have this cause heard here, the court is not to be understood as foreclosing the court below on a retrial thereof from again passing upon the admissibility of the testimony offered as to the statement of deceased, made shortly after the fatal shot, in which he uttered the name "Carl" in answer to a question of the witness.

86 Cal. App. 432

PEOPLE v. McKENZIE. (Cr. 1362.)

District Court of Appeal, First District, Division 2, California. Oct. 29, 1927.

1. Criminal law §1115(1)—No error is presented by point that defendant was apprehended in one county and lodged in jail in another unsupported by record.

Point that defendant was apprehended in one county and taken to another and then lodged in jail presents no error where without support in record.

2. Criminal law §1144(5)—Where record is silent it will be presumed on appeal that transfer from one to another department of superior court was regularly made.

On appeal from judgment on plea of guilty of subornation of perjury and from orders denying motions to withdraw plea and enter plea of not guilty and for probation, where defendant made no formal assignments of error at trial, but in brief stated that defendant was taken before department of superior court other than that to which his case had been assigned, in view of silence of record on such point, it will be presumed that cause was regularly transferred from one superior court department to another.

3. Criminal law §274—Denial of motion to withdraw plea of guilty as induced by promises of probation held not error, in view of evidence refuting defendant's version of prosecutor's statements.

In prosecution for subornation of perjury, denial of motion to withdraw plea of guilty held not error, in view of evidence that person who promised defendant prosecuting officers would ask judge for probation if he would plead guilty was not prosecuting officer, or that he did not make alleged statement or promise, or, if he did, that such statement was not as defendant testified.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

John W. McKenzie was convicted of subornation of perjury, and he appeals. Affirmed.

Melvin, McClure & Sullivan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel B. Browne, Deputy Atty. Gen., for the People.

STURTEVANT, J. The grand jury of Alameda county returned an indictment against the defendant and another charging them with subornation of perjury. John W. McKenzie pleaded guilty and applied for probation; the cause was referred to the probation officer, who made an investigation and filed a report; before the hearing on the report was had the defendant moved to withdraw his plea of guilty and to enter a plea of not guilty; the motion was denied; the application for probation was heard and denied, and judgment on the indictment was entered. From the judgment and from the orders denying the two motions, the defendant has appealed.

For the purpose of making clear the facts contained in this record it should be stated that the defendant was by the grand jury, under a separate indictment, accused of the crime of perjury and that the same proceedings were had and the same appeal was taken, and that all of said proceedings were had consecutively.

Both indictments were returned and filed July 7, 1926. Both pleas were entered July 9, 1926. The application for probation was made in each case on the latter date. Proceedings in each case were, on the request of the defendant, or with the consent of the defendant, continued from time to time until August 24, 1926. When the cases were called on that date the attorney for the defendant answered ready. Immediately thereafter the defendant, in person, stated to the court:

"I pleaded guilty to the charge of subornation of perjury to the court, and this was through an understanding with the district attorney's office to convict the other defendants, Marion Scott and George Holmden, and I find I have convicted myself of subornation of perjury, and I desire, under the circumstances, to change my plea to not guilty."

Thereafter the defendant's attorney stated to the court that the defendant had stated to him that the pleas were entered because the prosecuting officers had represented to the defendant that he would be used as the state's witness and would not be sent to prison. On that statement the cases were continued for a hearing on the question as to whether the prosecuting officers had made such statements.

Neither at the time above mentioned, nor at any other time, did the defendant make any formal assignments of error in the trial court. He made such assignments and filed the same with the clerk on the day he took an appeal. In his brief he repeated those assignments, six in number. However, he did not argue any one of those points, he did not cite those parts of the record which he claimed

supported him, and he did not cite any authorities; but he then proceeded to state three points.

[1] 1. Defendant in this case was apprehended in the city and county of San Francisco and taken to the county jail of Alameda county where he was lodged. The record is wholly silent on the point. The point, as stated, discloses no error.

[2] 2. The next step in the proceedings was that defendant was taken before a department of the superior court other than that to which his case had been assigned. The record is silent on the point. On this appeal we must presume that the cause was regularly transferred from one department to another department of the superior court. As a part of this point, it is asserted that immediately prior thereto a deputy district attorney of Alameda county had conferred with defendant and had told him the best thing he could do was to plead guilty to both charges and that they would ask for probation from the judge of the court. The record shows that the defendant supported that statement by his oath. It also discloses that the deputy mentioned was Mr. St. Sure, and that the latter testified that he never made such statements to the defendant.

3. Finally, it is contended the defendant did not have an opportunity of conferring with counsel at any time for more than a minute or two prior to the entry of his plea of guilty, which he rushed into relying on the hope held out to him by the deputy district attorney. The latter part of the point we have just discussed. The first part of the point is wholly unsupported by the record.

[3] Notwithstanding no formal motion had been made and although no issue was presented, on August 28, 1926, the trial court heard counsel argue, and allowed witnesses to be sworn and examined on the issue as presented by the informal statement made by the defendant's attorney on August 26, 1926. The defendant testified to certain statements made to him by Oscar Rasmussen, Mr. Hill, P. F. St. Sure, R. P. Tracy, and G. R. Helms, supporting or tending to support his statement theretofore made in open court. He also testified as to the time and place that each statement was made. The prosecution called the persons who, the defendant testified, had made the statements and by such witnesses proved that the person was not a prosecuting officer, or that he did not make the alleged statement or promise to the defendant, or, if he did, that the statement was not as the defendant had testified.

During the examination of the witnesses as above referred to, the attorney for the defendant stated that there was a doubt as to the defendant's sanity. Thereupon the trial judge appointed a commissioner to examine the defendant as to being sane or insane and continued the case for the purpose of having the examination made. Later, Dr. Hamlin,

the commissioner, made an examination of the defendant's sanity and thereafter appeared in open court and testified that the defendant was not insane.

The facts recited in the defendant's brief have caused us to make a meticulous examination of the entire record. After making that examination it is clear to us that in the trial court the defendant proceeded most informally; but it is quite clear that in every respect the rights of the defendant were most carefully guarded by the trial court.

We find no error in the record. The judgment and orders appealed from are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

86 Cal. App. 800

The PEOPLE of the State of California, Plaintiff and Respondent, v. John W. McKENZIE, Defendant and Appellant. (Cr. No. 1363.)

District Court of Appeal, First District, Division 2, California. Oct. 29, 1927.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Melvin, McClure & Sullivan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel B. Browne, Deputy Atty. Gen., for the People.

STURTEVANT, J. For the reason stated in the decision this day filed in the case entitled *The People of the State of California v. John W. McKenzie* (Cal. App.) 260 P. 912, the judgment and orders appealed from are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

86 Cal. App. 390

PEOPLE v. HAACK. (Cr. 995.)

District Court of Appeal, Third District, California. Oct. 27, 1927.

1. Criminal law § 741(5)—Corroboration of accomplice held sufficient to warrant submission of larceny case to jury (Pen. Code, § 1111).

In prosecution for grand larceny, based on testimony of accomplice, corroborating testimony held sufficient to warrant submission of case to jury, under Pen. Code, § 1111.

2. Criminal law § 761(15)—Instruction on effect of recent possession of stolen property must be predicated on jury's belief from evidence that defendant had possession.

Instruction that recent possession of stolen property, unless satisfactorily explained, is circumstance tending to show guilt, and must be taken with other evidence to determine defendant's guilt or innocence, must be predicated upon the jury believing from the evidence that defendant had such possession.

3. Criminal law § 761(15)—Instruction on effect of possession of recently stolen property held erroneous as instructing that prop-

erty was recently seen in defendant's possession.

Instruction that, if stolen property "as" seen in the possession of the defendant shortly after being stolen, failure to account therefor was circumstance tending to show guilt, *held* erroneous, as instructing that stolen property was recently seen in possession of defendant.

4. Larceny $\S$ 64(1)—Possession of recently stolen property is not *prima facie* evidence of guilt, and does not warrant conviction, but is mere circumstance to be considered, if unexplained.

Evidence that defendant charged with larceny had possession of recently stolen property is not *prima facie* evidence of guilt, and is not sufficient to warrant conviction, but is mere circumstance to be considered in determining his guilt, if it is not explained.

5. Larceny $\S$ 77(1)—Instruction that possession of recently stolen property is "*prima facie* evidence" of guilt, and, if unexplained, may warrant conviction, *held* error; "*prima facie* case."

Instruction that possession of recently stolen property is *prima facie* evidence of guilt, and throws on possessor the burden of explaining such possession, and, if unexplained, may be sufficient to warrant conviction, *held* error, "*prima facie* case" being defined as that amount of evidence which would counterbalance presumption of innocence and warrant conviction, if not contradicted; and "*prima facie* evidence," being defined as evidence which, standing alone and unexplained, would maintain proposition, and which would establish a fact, unless rebutted (citing Words and Phrases, "*Prima Facie* Case," "*Prima Facie* Evidence").

6. Criminal law $\S$ 512—Testimony of accomplice cannot be given same effect as testimony of nonaccomplice, unless corroborated, though jury be convinced of truth (Pen. Code, $\S$ 1111).

Jury cannot give testimony of accomplice same effect as testimony of one who is not implicated in offense, unless testimony be corroborated by evidence tending to connect defendant with crime separate and apart from accomplice's testimony under Pen. Code, $\S$ 1111, no matter if it is convinced of the truth of the accomplice's testimony.

7. Criminal law $\S$ 780(3)—Instruction that accomplice's uncorroborated testimony would not sustain verdict, but, if convinced of truth, jury might give it same effect as other testimony, *held* error (Pen. Code, $\S$ 1111).

Instruction that testimony of accomplice is competent evidence, and that his credibility is for jury, and, while testimony of accomplice will not sustain verdict when uncorroborated, if testimony carries conviction, and jury are convinced of its truth, they should give it same effect as would be allowed to witness not implicated in offense, *held* error as inaccurate and confusing, under Pen. Code, $\S$ 1111.

8. Criminal law $\S$ 1186(4)—Errors in instructions on effect of possession of stolen property and testimony of accomplice held to require reversal (Const. art. 6, $\S$ 4½).

Errors in instructions on recent possession of stolen property and uncorroborated testi-

mony of accomplice, when considered together, *held* to require reversal, and not to be harmless, within Const. art. 6, $\S$ 4½, where it could not be said that, without the giving of the erroneous instructions, jury would have brought in a verdict of guilty.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Carl Haack was convicted of grand larceny, and he appeals. Reversed and remanded.

Clinton Johnson, of Oroville, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. On the 7th day of May, 1927, an indictment was filed in the superior court of Butte county, containing four counts charging the defendant with the offense of grand larceny. The jury returned a verdict of guilty upon counts 1, 2, and 3 contained in said indictment, and a verdict of not guilty upon count 4.

Count 1 charges the defendant with the theft of two calves, the property of one Nettie Frishholz; count 2 charges the defendant with the theft of two calves, the property of William Cordoza; and count 3 charges the defendant with the theft of one calf, the property of John Bettincourt.

The defendant's motion for a new trial having been denied, this appeal is taken therefrom and from the judgment based upon the verdict of the jury finding him guilty in counts 1, 2, and 3.

This appeal presents for our consideration two major reasons why the judgment of the trial court should be reversed, to wit: First, that conviction was had upon the uncorroborated testimony of an accomplice; and, second, alleged error on the part of the trial court in instructing the jury on matters of law.

A careful reading of the testimony set out in the transcript discloses that there is absolutely no corroborating testimony, as required by section 1111 of the Penal Code, in so far as counts 2 and 3 of the indictment are concerned, and no further comment need be made thereon.

[1] As to count No. 1 charging the defendant with the theft of the two calves belonging to Nettie Frishholz, the transcript presents a different state of facts. The corroborating testimony, which we think sufficient to send the case to the jury, will be best understood by our first summarizing the testimony of the accomplice, Mrs. King, who participated with the defendant in the theft of the two calves. The offense mentioned in count 1 is alleged to have been committed on April 1, 1927, which the testimony shows to have been a rainy day. Mrs. King testified that, some time between 9 and 10 o'clock on the evening of April 1st, the defendant met her at an appointed place on the highway, and took her for an automobile ride in

a Studebaker car belonging to the defendant; that she looked at the name plate on the car, and saw that it was a Studebaker; that for some time previously the defendant and Mrs. King had been taking automobile rides late at night; that on the night in question they drove out westerly from Gridley on the Gridley-Colusa highway to a place opposite a barn situate in a field, and a short distance from the highway on property belonging to Mrs. Nettie Frishholz; that one or the other of them spoke of going over to the barn and scouting around in search of calves; that the automobile was driven off the paved portion of the highway, and permitted to stand along the side thereof; that the defendant and the witness got over the wire fence, went to the barn, found three young calves tied, two of them with ropes, took them from the barn, and over to the fence adjoining the highway; that about this instant of time the lights of an automobile were seen coming from the west; that thereupon the defendant, leaving the witness and the two calves inside the field, got over the fence into his automobile, and drove up the highway a short distance until after the automobile just mentioned had passed by, and then returned to the place where the calves were lying tied; that the witness and the defendant lifted the calves over the fence, and put them into the defendant's automobile, and drove back to the home of the witness, where the calves were turned loose in a field on property occupied by the witness and her husband; that some days afterwards, when it became evident that the lost calves were being searched for, the husband of the witness took the two calves in question in an automobile over to a field in which was situate the tin barn, and which is mentioned in the testimony as the "tin barn place." The evidence does not disclose who had possession of the premises known as the "tin barn." Mrs. King testified that the defendant came to the home of her husband and herself, mentioned the fact that trouble was likely to follow on account of the calves, and thereupon helped her husband to load the two calves in an automobile, and that her husband took the calves away. Mrs. King's testimony was further to the effect that the larceny of the calves took place about midnight. This, in brief, is the testimony of Mrs. King in relation to the larceny charged in count 1. As we have stated, there being no corroborating testimony relative to counts 2 and 3, it would serve no useful purpose to set forth her testimony in relation thereto.

The following circumstances are relied upon as corroborative of the testimony of the accomplice as tending to connect the defendant with commission of the offense: The Studebaker automobile owned by the defendant and taken from his possession a few days after the alleged larceny, was found to

be equipped with three smooth tires and one tire comparatively new. The three smooth tires were on the front wheels of the automobile and on the right rear wheel thereof. The comparatively new tire with the tread thereon still intact was found upon the left rear wheel of the defendant's automobile. As stated herein, rain had fallen on the day preceding the night of the alleged larceny. The automobile tracks alongside the highway in the neighborhood of the Frishholz barn, discovered the morning after the larceny, discloses that they were made by an automobile on which three of the tires were smooth and that the tire on the left rear wheel was comparatively new and the tread was intact. An examination of this tread was made by witnesses familiar with the different makes of tires, and these witnesses testified that the tracks made by the tire on the left rear wheel of the car that was stopped along the Frishholz barn on the night of the larceny were made by a Federal tire, and that the left rear wheel of the defendant's automobile was equipped with a Federal tire having a like tread with the tire that made the marks to which we have just referred. The testimony also showed a number of foot tracks leading from the place where the automobile was stopped to and from the Frishholz barn. These tracks indicated that a man and a woman had participated in the larceny. The man's tracks were large; the woman's tracks were small. Measurements were made of these tracks, and especially of the tracks made by the larger of the two persons participating in the larceny. The length of these tracks were found to be identical with the length of the shoe worn by the defendant at the time of his trial. The width, however, was slightly in excess of the width of the shoes then worn by the defendant. Upon being arrested, the defendant stated to the arresting officer "that, if they were going to send him to the penitentiary, there would be more go with him," and, also, that the calves could be found at the tin barn. The whereabouts of the automobile belonging to the defendant prior to about the hour of 9 or 10 o'clock on the evening of April 21, 1927, is not disclosed by the testimony. The narrative begins with the meeting of Mrs. King and the defendant between the hours of 9 and 10 p. m. of that day, at what appears to have been an understood meeting point between the defendant and the witness. The father of the witness testified that the Studebaker automobile was brought to, and left at, the place of his residence, or, rather, the residence belonging to the mother of the defendant, some time between 12 and 1 o'clock on the morning of April 2d; that he called out to the person driving the automobile there, and received no answer, went out to see who it was, and the person who left the automo-

bile ran away. The place where the automobile is thus said to have been left was about a mile and one-half distant from the residence of the defendant. The defendant denied all participation in the larceny, but admitted helping Mr. King load the two calves in the automobile driven by Mr. King, and in which the calves were by Mr. King taken away from his place of residence to the tin barn hereinbefore referred to. While that part of the corroborative testimony relating to the automobile tracks may be said to be exceedingly weak, owing to the fact of the large number of Federal automobile tires in use, and also due to the fact that the tread on all kinds of tires wear smooth, it is at least more than a coincidence that there should be found three smooth tires and one tire with the tread comparatively new on the automobile belonging to the defendant, and that his automobile should be found equipped with tires corresponding exactly with the manner in which an automobile should be equipped to make the tracks found near the Frishholz barn, from which the calves were stolen. This, taken in connection with the statement of the defendant that, if he was sent to the penitentiary, others would go with him, and the close measurement of the large tracks which we have referred to, to the size of the shoes worn by the defendant, and the admission by the defendant that he assisted Mr. King in loading the two calves into the automobile in which they were taken away by Mr. King, tended, in some measure, to connect the defendant with the larceny charged in count 1, and sufficiently fills the measure of proof required by section 1111 of the Penal Code.

[2] At the request of the people the court gave, among others, the following instructions to the jury, which, for convenience, we have numbered 1, 2, 3, and 4.

Instruction No. 1 reads:

"The court instructs the jury that the recent possession of stolen property, unless satisfactorily explained, is a circumstance tending to show the guilt of the defendant, and must be taken with the other evidence in this case to determine his guilt or innocence."

Instruction No. 2 reads:

"If the jury believes, from the evidence, the property mentioned in evidence was stolen from the premises described in evidence, and as seen in the possession of the defendant shortly after being stolen, the failure of the defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and accused is bound to explain the possession, in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence disclose such."

Instruction No. 3 reads:

"The court instructs the jury that the possession of recently stolen property is prima

facie evidence of guilt, and throws upon the possessor the burden of explaining such possession, and, if unexplained, may be sufficient to itself to warrant a conviction, yet, when recently stolen property is found in the possession of another, if the attending circumstances, or from any explanation made, or in view of all the evidence or lack of evidence, if any, there remains a reasonable doubt as to whether or not such person stole the property, he should not be convicted."

Instruction which we have marked No. 4 reads as follows:

"The court instructs the jury that the testimony of an accomplice is competent evidence, and the credibility of such accomplice is for the jury to pass upon as they do upon any other witness; and, while the testimony of an accomplice will not sustain a verdict when uncorroborated, but if the testimony carries conviction, and the jury are convinced of its truth, they should give to it the same effect as would be allowed to a witness who is in no respect implicated in the offense."

In the consideration of these instructions it must be borne in mind that the stolen calves were not found in the possession of the defendant, and the only evidence of the defendant's ever having had possession thereof consists of the testimony of the accomplice, Mrs. King. Other instructions were given by the court to the jury, but these are the ones of which the appellant complains, and to which our attention is directed. Before considering these instructions, we will state that a reading of the other instructions given by the court fails to remove any errors contained in the challenged instructions, if they are found to be erroneous.

The instruction which we have called instruction No. 1 is taken literally from an instruction given in the case of *State v. McCarty*, 47 N. D. 523, 182 N. W. 754, and there approved as a correct instruction. An examination of the opinion of the court in that case, however, reveals that additional instructions were asked for by the defendant, which added to, and made, the quoted instruction complete. The instruction, taken alone, assumes the recent possession of stolen property on the part of the defendant. To make it a complete and accurate statement of the law it should have been predicated upon the jury believing from the evidence the fact of the recent possession of the stolen property by the defendant, and, then, that such possession, unless satisfactorily explained, was a circumstance tending to show the guilt of the defendant, and should be taken with other evidence in the case in determining the guilt or innocence of the defendant. The insufficiency of this instruction to properly advise the jury becomes apparent when we examine the instruction which we have called No. 2, given to the jury immediately after reading of instruction No. 1.

[3] In instruction No. 2 the court assumes the very fact of possession of the stolen property by the defendant shortly after the theft. Instruction No. 2 says:

"If the jury believes from the evidence the property mentioned in the evidence was stolen from the premises described in the evidence, and as seen in the possession of the defendant shortly after being stolen," etc.

Instruction No. 2 appears to have been taken from the case of *People v. Alba*, 52 Cal. App. 603, 199 P. 894, but in transcribing this instruction the error was made of changing the word "was" to the word "as." It might be suggested that this appears in the record as a clerical error on the part of the clerk in making up the transcript, but an examination of the reporter's notes as transcribed by him shows that the instruction was read to the jury just as we have quoted it. And, having gone to the jury in that language, it directly instructed the jury that the stolen property was recently seen in the possession of the defendant.

[4, 5] Instruction No. 3 was given by the court to the jury immediately after the reading of the instruction which we have called instruction No. 2. By instruction No. 3 the court instructed the jury that "the possession of recently stolen property is prima facie evidence of guilt, and throws upon the possessor the burden of explaining such possession, and, if unexplained, may be sufficient to (of) itself to warrant a conviction." This is not a correct statement of the law in the state of California, although it is a literal copy of an instruction given by a trial court in the state of Kansas, and found in the opinion of the Supreme Court of that state in the case of *State v. Brundige*, 114 Kan. 849, 220 P. 1039. As given in that case, it was held not to be prejudicial, being a burglary case, in view of the fact that there was "no basis in the evidence for a substantial doubt that whoever stole the wheat (subject of the larceny) also broke into the house in which it was stored." The opinion in the *Brundige* Case is based upon two earlier cases decided by the Supreme Court of Kansas, to wit: *State v. Hoffman*, 53 Kan. 700, 37 P. 138, involving the theft of cattle, where it was held that "the possession of stolen property recently after it is stolen is prima facie evidence of guilt, and, if unexplained, may be sufficient of itself to warrant a conviction." In the case of *State v. White*, 76 Kan. 654, 92 P. 829, 14 L. R. A. (N. S.) 556, the instruction to which we have referred was criticized, but not condemned.

Beginning with the case of *People v. Chambers*, 18 Cal. 383, the courts of this state have laid down, and consistently followed, the statement of the law set forth in that case relative to the recent possession of stolen property. It is there said:

"Possession of stolen property is not alone sufficient to convict of larceny, though such possession is a circumstance to be considered in determining the guilt of the possessor."

In *People v. Gassaway*, 23 Cal. 51, the trial court instructed the jury as follows:

"In the absence of evidence of good character, the recent possession of stolen property, unexplained, is prima facie evidence that the possessor is guilty of larceny."

For the giving of this instruction the case was reversed, the court citing the cases of *People v. Chambers*, 18 Cal. 383, and *People v. Ah Ki*, 20 Cal. 177.

In *People v. King*, 8 Cal. App. 329, 96 P. 916, upon the subject of possession of stolen property the trial court instructed the jury as follows:

"The court instructs the jury that the mere possession of stolen property, unexplained by a defendant, however soon after the taking, is not, of itself and standing alone, sufficient to justify a conviction, even if it be shown to a moral certainty and beyond a reasonable doubt that the alleged burglary was committed. But it is a circumstance which, taken in connection with other incriminating evidence in the case, if any there be, is to be considered by the jury in determining the question of the guilt or innocence of a defendant so charged. The failure of a defendant to account for such possession, or to show that such possession was honestly obtained, if it is found that there was such possession, is a circumstance tending to show his guilt, and he is bound to explain such possession in order to remove the effect thereof as a circumstance, considered in connection with other incriminating facts, if any such are found in the evidence."

This instruction is supported as a correct and accurate statement of the law by a long list of authorities cited on page 332 of the opinion in the case of *People v. King*, supra.

In the case of *People v. Alba*, 52 Cal. App. 603, 199 P. 894, from which the instruction which we have called No. 2 was attempted to be taken, is to be found a correct statement of the law as held by the courts of this state, to wit:

"The mere possession of stolen property, unexplained by the defendant, however soon after the taking, is not sufficient to justify a conviction; it is merely a guilty circumstance, which taken in connection with other testimony is to determine the question of guilt."

Then follows the application of the instruction to the particular facts involved in that case. To tell the jury that the possession of stolen property recently after the alleged larceny constituted prima facie evidence of guilt was, in and of itself, sufficient to tell the jury that nothing further was necessary to warrant conviction, but the instruction with which we are now dealing went further, and did tell the jury that that

fact alone was sufficient upon which a conviction might be based. As said in *State v. Hardelein*, 169 Mo. 579, 70 S. W. 130, "a prima facie case is that amount of evidence which would be sufficient to counterbalance the general presumption of innocence, and warrant a conviction, if not encountered and controlled by evidence tending to contradict it," etc. And, as defined in *State v. Lawlor*, 28 Minn. 216, 9 N. W. 698:

"Prima facie evidence is evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced."

Practically all of the authorities follow the definition found in *Bouvier's Law Dictionary*, to wit:

"Prima facie evidence of a fact is in law sufficient to establish the fact, unless rebutted."

See, also, 6 Words and Phrases, p. 5549. The correct statement of the law to be given to the jury is also found in 15 California Jurisprudence, p. 932, § 26.

Without further citation of authorities, it is sufficient to state that all the California cases having to do with the question of recent possession of stolen property as an incriminating circumstance hold that evidence of possession alone does not constitute prima facie evidence of guilt, and is not sufficient to warrant conviction.

[8, 7] The instruction, which for convenience we have called No. 4, has been taken from the case of *Shiver v. State*, 41 Fla. 630, 27 So. 36, where the court had to do with a conviction founded upon the testimony of an accomplice, and where it is held contrary to the Code rule in this state that conviction can be had upon the uncorroborated testimony of an accomplice. The instruction there given is worded as follows:

"The testimony of an accomplice is competent evidence, and the credibility of such accomplice is for the jury to pass upon as they do upon any other witness; and, while the testimony of an accomplice will sustain a verdict when uncorroborated, yet the testimony of an accomplice must be received with great caution; but if the testimony carries conviction, and the jury are convinced of its truth, they should give to it the same effect as would be allowed to a witness who is in no respect implicated in the offense."

The instruction given to the jury in the instant case omits the cautionary portion thereof, and inserts the word "not" after the word "will," and before the word "sustain." In commenting upon this instruction, the Supreme Court of Florida stated that, while it was somewhat inartificially worded, it substantially set forth the correct rule of law as laid down in that state. While instruction No. 4, as given by the trial court in this case, might not, in and of itself, be held sufficient to compel a reversal of the

judgment, it is not a correct statement of the law. The instruction tells the jury that the uncorroborated testimony of an accomplice will not sustain a verdict, but the jury is immediately advised that, if the testimony of an accomplice carries conviction, and if the jury be convinced of its truth, the jury shall give to it the same effect as would be allowed to a witness who is in no respect implicated in the offense. This is not correct. No matter if the jury be convinced of the truth of the testimony of an accomplice, such testimony cannot be given the same effect as may be given the testimony of one who is not implicated in an offense, unless such testimony be corroborated by evidence tending to connect the defendant with the crime charged, separate and apart from the testimony of the accomplice. In any view that may be taken of this instruction, it leads to a confused state of thought, and does not place before the jury a clear or accurate statement of their province when acting upon the testimony of an accomplice.

Our attention is called by respondent to the language of this court in the case of *People v. Hoosier*, 24 Cal. App. 746, 142 P. 514, where this court, speaking through Mr. Justice Hart, said:

"If there is other evidence which measures up to the requirement of said section tending to connect the defendant with the commission of the crime charged, then the testimony of the accomplice is to be considered by the jury, as is any other testimony, and given such weight as they may conclude that it is entitled to."

This is far different from telling the jury that the testimony of an accomplice may be given the same effect as the testimony of one who is not an accomplice. One requires corroboration before it can be given any effect; the other may be acted upon independently. The language of the instruction, which, for convenience, we have called No. 4, fails to make this distinction, and directly tends to leave the jury in doubt as to just what the powers of the jury may be under such circumstances. As we have stated, the opinion in the Florida case sets forth the law only where conviction is permitted upon the uncorroborated testimony of an accomplice. As no instruction was requested, based upon the language of subdivision 4 of section 2061, Code of Civil Procedure, comment upon its constitutionality would, so far as this case is concerned, be mere obiter, and therefore is omitted.

[8] In view of the instructions given to the jury as hereinbefore stated, which we must hold to be erroneous, does section 4½ of article 6 of the state Constitution apply? We think not. The corroborating testimony in this case is just barely sufficient to warrant sending it to the jury upon count 1 set forth in the indictment. It is one of the

borderline cases where it became necessary to search the transcript diligently in order to cull therefrom sufficient testimony tending to connect the defendant with the commission of the crime charged before it could be said that there was any corroborating testimony whatever. Without the giving of the erroneous instructions to which we have adverted, we cannot say that the jury would have brought in a verdict of guilty. Where the people elect to avail themselves of the testimony of one of a band of thieves, section 1111 of the Penal Code and the decisions of the Supreme Court of this state apply, and we have nothing to do with the policy of the law as enunciated in that section.

Some minor points have been raised by the appellant, but they are not of sufficient importance to demand consideration in this opinion.

For the reasons herein stated, the judgment and order of the trial court are reversed, and the cause remanded for a new trial.

We concur: HART, Acting P. J.; WEY-AND, Justice pro tem.

86 Cal. App. 332

JONES v. POLICE COURT OF CITY OF ALHAMBRA et al. (Civ. 5092.)

District Court of Appeal, Second District, Division 2, California. Oct. 25, 1927.

1. Criminal law §258(3)—Imposing penalty for violation of vagrancy law of \$300 or 300 days held within police court's power (Pen. Code, §§ 1205, 1446, and § 647, subd. 5).

Imposition by police judge of a fine, for violation of the vagrancy law (Pen. Code, § 647, subd. 5), of \$300 or a sentence of 300 days or such proportionate part of 300 days as was not paid by fine, held warranted under section 1446; section 1205, that \$2 must be allowed for each day's imprisonment, not being applicable to proceedings in justices' or police courts.

2. Certiorari §49—Return to writ of review constitutes answer and evidence, case being heard thereon, unless, upon motion, additional or amended return is made.

The return to the writ of review constitutes the answer as well as the evidence, and the case is heard thereon unless, upon motion, an additional or amended return is made.

3. Criminal law §90(2)—Police court held to have jurisdiction of vagrancy prosecution (Pen. Code, § 647, subd. 5).

Police court held to have jurisdiction of the subject-matter, where defendant was accused of violation of Pen. Code, § 647, subd. 5, relative to vagrancy.

4. Criminal law §1134(7)—That evidence was insufficient to sustain conviction could not be raised by certiorari, being matter for appeal.

Certiorari held not proper remedy to raise question whether evidence was sufficient to sus-

tain conviction of petitioner for vagrancy in police court, proper method being by appeal.

5. Criminal law §260(2)—Where appeal could have been taken from conviction in police court to superior court, resort could not be had to writ of review (Pen. Code, §§ 1466-1470; Code Civ. Proc. § 1068).

Where an appeal from conviction for vagrancy in police court could have been taken to superior court under Pen. Code, §§ 1466-1470, resort could not be had to a writ of review, in view of Code Civ. Proc. § 1068, even though time for appeal had elapsed.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Petition by B. H. Jones for certiorari to the Police Court of the City of Alhambra and another to review a judgment of that court. Petition denied, judgment affirmed, and petitioner appeals. Affirmed.

Paul M. Nash and Charles P. Huey, both of Los Angeles, for appellant.

T. C. Gould, of Los Angeles, for respondents.

COLLIER, Justice pro tem. B. H. Jones, the appellant, was arrested by police officers of the city of Alhambra. A complaint was duly filed against him in the police court of said city, charging that:

"On the 11th day of June, 1923, in said county of Los Angeles, state of California, a misdemeanor was committed by B. H. Jones, as follows: That the said B. H. Jones *did* at the time and place last aforesaid was willfully and unlawfully a lewd and dissolute person. All of which is contrary to the form, force and effect," etc.

Thereafter a warrant was issued, and on June 13, 1923, the defendant was duly arraigned. The complaint was read to him, and he was informed of all of his legal rights; he pleaded not guilty, whereupon a trial by the court was had, a jury having been waived. Witnesses for the prosecution and defense were sworn and testified, and on June 14, 1923, the court found Jones guilty and entered judgment that Jones pay a fine of \$300, and in case said fine be not paid by 12 o'clock noon of July 14, 1923, that Jones be imprisoned in the county jail of Los Angeles county until the fine be satisfied in the proportion of 1 day's imprisonment for every dollar of the fine, and on the payment of such portion of said fine as should not be satisfied by imprisonment at said rate that Jones be discharged from custody. Jones gave notice of appeal. Thereafter a proposed statement on appeal was delivered to said police judge, but was returned by him to the attorney for the appellant, and was not filed, for the reason that it did not contain a true statement of the evidence produced at said trial.

Thereafter Jones filed in the superior court of Los Angeles county his petition for review. From the judgment of affirmance therein this appeal is taken. The affidavit of his attorney filed therewith recites that after said proposed statement of appeal was returned to said attorney by said police judge, said attorney prepared a new statement of appeal, incorporating therein the amendments proposed by said police judge, and returned the same to said police judge for signature, but that said police judge refused and still refuses to sign the same.

The return of said police judge to said writ of review recites the delivery to him of said first proposed statement, and his return then says, "that thereafter and up to the present time *no new or true statement of appeal has been filed.*" There is, therefore, a clear contradiction in the record as to that matter. It does not appear that any legal effort was made by mandamus or otherwise to compel said police judge to sign any statement on appeal. The appeal was never perfected.

The writ of review came on duly for hearing and was submitted to said superior court on briefs. Apparently no evidence was taken (for none is presented in the transcript herein). Both sides rely on the written record composed of the petition for the writ, the affidavits attached thereto, the writ itself, and the return of the police judge, all of which are before us. Thereafter the superior court duly entered its judgment denying said petition and affirming the judgment of said police court. From that judgment of said superior court Jones appeals.

The appellant presents but one point with several subheads, as follows: (1) That the police court judgment was irregular and void for the following reasons:

(a) Because the trial of the police judge exceeded his authority when he imposed the alternative penalty of imprisonment that in lieu of the payment of a fine the defendant should be imprisoned for 300 days, relying upon that portion of section 1205 of the Penal Code, as follows:

"But the judgment must specify the extent of the imprisonment, which must not exceed one day for every two dollars of the fine, nor extend in any case beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted."

(b) That the return does not disclose "any evidence upon which the appellant was convicted of the crime charged, and hence the return does not certify the facts showing the court's jurisdiction."

(c) That the remedy through a writ of review has not been lost by failure to perfect the appeal.

[1] We will discuss the points in the order above set forth. Appellant's point (a) is clearly untenable. Section 1205 of the Penal Code

has no application to proceedings in justices' or police courts. Section 1446 of the Penal Code is the one which applies. Under the latter section the judgment pronounced was one within the power of the police court. See *In re Kennerly*, 190 Cal. 774, 214 P. 857, where the question has been exhaustively discussed and determined by Mr. Justice Wilbur, and his opinion concurred in by the full court. See, also, *In re Glavich*, 196 Cal. 723, 239 P. 708; *In re Kinney*, 53 Cal. App. 792, 200 P. 966; and *In re Adams*, 61 Cal. App. 239, 214 P. 469.

[2] Coming now to appellant's point (b):

"The return to the writ constitutes the answer, *as well as evidence*, and the case is heard thereon, *unless upon motion an additional or amended return is made.*" *Stumpf v. Supervisors*, 131 Cal. 364, 366, 63 P. 663, 664 (82 Am. St. Rep. 350). (Italics ours.)

"The province of certiorari is to review the record of an inferior court, board, or tribunal, and to determine from the record whether such court, board, or tribunal has exceeded its jurisdiction. *The reviewing court is bound by the record, which must be taken as true.* If the contrary is the fact, it must be corrected by motion or suggestion to the court below. *Roe v. Superior Court*, 60 Cal. 93." *Halpern v. Superior Court*, 190 Cal. 386, 212 P. 917. (Italics ours.)

The rule to be applied in the instant case is well stated in the following language:

"The rule that when a court once obtains jurisdiction of the subject-matter of an action, it then has jurisdiction to decide a question arising therein erroneously as well as correctly, has no application to a case where the very question to be determined is whether the court has the legal authority to hear and determine the matter before it. The rule simply means that *when the court has jurisdiction of the subject-matter of the action, and makes error during the course of the trial or in its final decision, such error is correctible, not through a jurisdictional writ, but solely by appeal.* Obviously, if the trial court is called upon to decide whether it has jurisdiction of the subject-matter of the action and determines the question erroneously, or, having no jurisdiction, nevertheless claims it, it can be prevented from proceeding to exercise the usurped authority or, having exercised it, its action may be annulled and vacated by means of the remedy appropriate thereto." *Rich v. Superior Court*, 31 Cal. App. 689, 694, 161 P. 291, 293. (Italics ours.)

[3] It needs no citation of authority to show that the police court of the city of Alhambra had jurisdiction of the subject-matter, to wit, a violation of subdivision 5 of section 647 of the Penal Code. That being so, the "jurisdictional" error claimed by appellant is that:

"It appears from the return to the alternative writ that there was an entire absence of facts showing upon what basis of accusation or proof the offense of 'vagrancy' or 'lewd conduct' could be, or was, established. It is not sufficient to

declare a citizen of California a vagrant, or a lewd person, without some proof to establish the assertion. We cannot indulge the conjecture. Nothing in the mentioned 'return' nor in the several purported statements of fact, as shown in the proposed appeal, cast any light upon the subject."

[4] This is but another method of saying that the evidence was insufficient to sustain the judgment; in other words, that the court has made an "error during the course of the trial or in its final decision," but we are at once met with that portion of the rule just quoted, that "such error is correctible, not through a jurisdictional writ, but solely by appeal." *Rich v. Superior Court*, supra. "Where a court is invested with jurisdiction to determine the question of the guilt or innocence of one charged with a public offense, as was the police court in this case, by the filing of the complaint and by acquiring jurisdiction over the person of the defendant, its determination on the question of guilt or innocence, whether based on sufficient evidence or not, is a determination arrived at in the exercise of its jurisdiction, and however erroneous it may be, it is not void for want of power in the court to render the decision. Invested with the jurisdiction to determine the matter, the court has the power to determine it wrongly upon the evidence as well as correctly, and, under our law, the defendant's only remedy in the event of an incorrect decision is by appeal. On certiorari, as approvingly quoted in *Matter of Hughes*, supra [159 Cal. 360, 113 P. 684], 'upon every question except the mere question of power, the action of the inferior tribunal is final and conclusive.' In such a case a claim of insufficiency of evidence to show guilt of the offense charged does not go to the jurisdiction. It has been said that 'an exception to the rule that the sufficiency of the evidence will not be reviewed is made when the question is whether jurisdictional facts were or were not proved' (*Stumpf v. Board of Supervisors*, 131 Cal. 364, 367, 63 P. 663, 82 Am. St. Rep. 350), that is, whether facts upon which the jurisdiction of a board or inferior tribunal depends were or were not proved. We have in our reports many decisions wherein this exception has been applied, the case in which this declaration was made being one, and the case of *Thrasher v. Board of Medical Examiners*, 44 Cal. App. 26 [185 P. 1006], relied on by petitioner, being another. But the exception has no application whatever to a tribunal invested with jurisdiction to try and determine a fact in issue, with reference to proof of that fact. In such a case that fact is not what is known as a 'jurisdictional fact.' It is the fact to be determined by the court having jurisdiction to determine it, and the determination of such court thereon is not void, however defective the evidence upon which it is based. (See 15 Corp. Jur. p. 729, §§ 25

and 26.)" *Roberts v. Police Court*, 185 Cal. 65, 68, 69, 195 P. 1053, 1054. (Italics as quoted.) See, also, *Halpern v. Superior Court*, supra, and *Fleming v. Superior Court*, 196 Cal. 344, 238 P. 88.

Hence we conclude that the police court of the city of Alhambra had jurisdiction of the subject-matter, and that the other questions raised by appellant under this point cannot be presented in this proceeding.

We will now discuss point (c). All questions raised by the appellant on this appeal could have been determined by an appeal to the superior court.

The jurisdiction of a police or justice's court to hear or determine any case may be settled by an appeal to the superior court. *Hochheimer & Co. v. Superior Court*, 65 Cal. App. 206, 223 P. 564. Our Penal Code, §§ 1466 to 1470, provides for such appeals.

Section 1068 of the Code of Civil Procedure governs the issuance of a writ of certiorari. "From this provision it is made manifest that three concurring requisites are essential to the issuance of the writ of review, viz.: 1. An excess of jurisdiction by the inferior tribunal, etc., exercising judicial functions. 2. That there is no appeal. 3. That there is no other plain, speedy, and adequate remedy. * * * That the writ will not lie under our statutes where there is a remedy by appeal is equally settled by the Code of Civil Procedure, and by the adjudications of this court" (citing cases). *Noble v. Superior Court*, 109 Cal. 523, 526, 42 P. 155, 156. (Italics ours.) "What is meant by the words, 'there is no appeal,' is not an open question. It is settled that, if the law has provided for an appeal but the time for taking it has been suffered to elapse, the writ of certiorari cannot be resorted to as a substitute. *Miliken v. Huber*, 21 Cal. 166; *Bennett v. Wallace*, 43 Cal. 25." *Faut v. Mason*, 47 Cal. 7, 8. "The statute (Code Civ. Proc. § 1067) was intended to supply a remedy where none existed in the first instance." *Bennett v. Wallace*, 43 Cal. 25. It was never intended that it should be substituted for an appeal. *Faut v. Mason*, 47 Cal. 7." *Valentine v. Police Court*, 141 Cal. 615, 617, 75 P. 336.

In *Postal, etc., Co. v. Superior Court*, 22 Cal. App. 770, 774, 136 P. 538, 539, it was also said:

"It is not, of course, the consideration whether the petitioner takes advantage of the right of appeal, but whether the right of appeal exists in his favor that is decisive of the question. For instance, he cannot allow the time for appeal to lapse and then successfully urge this circumstance as a legal justification for the writ of certiorari." (Italics ours.)

[5] We may well conclude this opinion with the following:

"That the defendant might have appealed to the superior court from the * * * judgment there can be no question. And it is well set-

tled that when an appeal may be taken resort cannot be had to a writ of review. The cases so holding are numerous and need not be cited." *Tucker v. Justice's Court*, 120 Cal. 512, 514, 52 P. 808.

See, also, *Stuttmeister v. Superior Court*, 71 Cal. 322, 12 P. 270; *Noble v. Superior Court*, 109 Cal. 523, 526, 42 P. 155; *Elliott v. Superior Court*, 144 Cal. 506, 77 P. 1109, 103 Am. St. Rep. 102; *Candelas v. Superior Court*, 51 Cal. App. 128, 196 P. 86; *Olcese v. Justice's Court*, 156 Cal. 82, 84, 103 P. 317; *Hochheimer & Co. v. Superior Court*, supra.

It follows from the foregoing that the judgment appealed from must be and it is hereby affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

88 Cal. App. 259

GILMAN et al. v. SUPERIOR COURT IN AND FOR NEVADA COUNTY.*
(Civ. 3339.)

District Court of Appeal, Third District, California. Oct. 22, 1927.

Hearing Denied by Supreme Court Dec. 19, 1927.

1. Pleading $\S$ 252(2)—Admitting original complaint and attaching it to amendment rendered amended complaint immune from collateral attack, since original complaint was superseded.

Where there was doubt as to whether amended complaint superseded original complaint or was amendment thereto, since court admitted original complaint, and permitted it to be attached to the amended complaint, amended complaint was immune from collateral attack because original complaint was superseded by amended complaint.

2. Injunction $\S$ 219—Failure to allege that defendants claimed interest in property adverse to judgment liens held not to render judgment void in contempt proceedings.

In suit to enjoin directors of corporation from transferring its property to defraud plaintiff and create unlawful preference, conceding that complaint was defective in failing to allege that defendants other than corporation claimed some interest in property adverse to plaintiff's judgment liens, such defect did not render judgment void as against directors when sought to be punished for contempt for violation of judgment's injunctive provisions.

3. Injunction $\S$ 223(1)—Assertion, in violation of restraining order, of interest adverse to judgment liens, held to constitute "contempt."

Where corporation's directors were restrained from asserting claim to interest in corporation's property adverse to judgment liens of plaintiff, assertion by defendant directors in another county of adverse claims held to constitute "contempt."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contempt.]

4. Fraudulent conveyances $\S$ 255(2)—All persons claiming present interest or affected by decree are necessary parties defendant in action to set aside fraudulent conveyances.

Generally, all persons claiming present interest in property or interest in controversy, or who may be affected by decree, should be made parties to action to set aside fraudulent conveyance.

5. Appeal and error $\S$ 447—Pending appeal from order granting prohibitive injunction, lower court can punish its violation.

Since prohibitive injunction is self-executing, pending appeal from order granting it, lower court has full power to punish its violation.

Original certiorari by C. E. Gilman and another to review an order of the Superior Court of the State of California in and for the County of Nevada adjudging the petitioners guilty of contempt. Judgment in contempt proceeding affirmed.

Sherman & Peters and Marcel E. Cerf, all of San Francisco, for petitioners.

E. E. Wright, of Los Angeles, Lynne Kelly, of Grass Valley, and Henry B. Neville, of Downieville, for respondent.

FINCH, P. J. This is an original proceeding to review the action of the respondent in adjudging the petitioners guilty of contempt of court.

December 5, 1925, the Alpha Hardware & Supply Company commenced an action in the superior court of Nevada county against the Ruby Mines Company and other defendants, including the petitioners herein. The complaint therein set up six alleged causes of action, in the first five of which judgment was entered in favor of the defendants. In the sixth cause of action it is alleged that the Ruby Mines Company "is indebted to the plaintiff in the sum of \$4,838.19 on account of" five judgments in favor of plaintiff or its assignors against the defendant company; that all of the judgments have been docketed in Sierra county, and constitute liens on all real property of the Ruby Mines Company in that county; that said company is the owner of the lands in Sierra county described in the trust deed hereinafter referred to; that petitioners and other defendants were the directors of the Ruby Mines Company, and, as such directors, "for the purpose of hindering, delaying, and defrauding plaintiff and plaintiff's said assignors, and creating an unlawful preference or gift to the defendant Dwight Hutchinson, * * * and without any valuable consideration therefor, * * * caused to be executed * * * the promissory note and deed of trust * * * described in Exhibit A attached hereto and made a part hereof"; that the Ruby Mines Company "has never at any time been indebted to any of the defendants herein"; that "defendant M. C. Mitchell

claims some right, title, or interest in and to said property under and by virtue of said trust deed, and that defendants H. L. Breed and W. M. Thornton, trustees named in said trust deed, and defendant M. C. Mitchell, have taken, and are prosecuting, proceedings under the terms and conditions of said trust deed * * * to sell said property * * * and to foreclose all the right, title, and interest of said defendant, the Ruby Mines Company, in and to said property"; that executions upon said judgments were issued and "returned wholly unsatisfied"; that the defendant Ruby Mines Company is insolvent; that it is controlled by said defendant directors, and "is prevented by said defendants from taking any action to pay the indebtedness owing to plaintiff as aforesaid"; and that the petitioners herein and certain other defendants are stockholders of the Ruby Mines Company, and were such when the alleged debts were incurred. The alleged trust deed was executed by the Ruby Mines Company to Breed and Thornton as trustees to secure the payment of its promissory note to Hutchinson for \$40,000.

The defendants demurred to the complaint, and apparently it is conceded that the demurrer was sustained, although the petition does not so allege. Thereafter the plaintiff filed a pleading, designated as "First Amended Complaint," and, in so far as material here, reading as follows:

"Now comes the above named plaintiff, and amends the complaint on file herein as follows, to wit: * * * That paragraphs I to VI, both paragraphs inclusive, in the sixth cause of action, set forth in the original complaint, are hereby referred to and made a part hereof as fully for all purposes as if set forth at length herein; that the deed of trust attached to said original complaint is hereby referred to and made a part hereof as fully for all purposes as if set forth at length herein."

The sixth cause of action, as stated in the original complaint, contained but six paragraphs. The prayer of the amended complaint is for judgment:

"That each of said defendants may be required to set forth the nature of his claim in and to the stock, note, trust deed, and property of said defendant, Ruby Mines Company, or either of them, and that all adverse claims of the said defendants, or either of them, be determined by this court; * * * that it be adjudged, decreed, and determined that said deed of trust and promissory note are fraudulent and void; * * * that the title of said defendant, Ruby Mines Company, in and to the said property, be quieted against any and all claims of said defendants; * * * that said defendants, other than said defendant, Ruby Mines Company, * * * be forever debarred from asserting any claim whatever in or to said land, property, and premises adverse to the said defendant, Ruby Mines Company, or to the said liens of this plaintiff; * * * and for such other and further relief as is meet and agreeable to equity."

The defendants other than the Ruby Mines Company demurred to the amended complaint, and, their demurrer being overruled, they answered the allegations of the original complaint referred to in the amended complaint. Upon the issues so framed, the court found, among other facts, as follows:

That the Ruby Mines Company is the owner of the real property described in the trust deed; that the alleged judgments in favor of plaintiff constitute valid liens thereon; that the trust deed is a fraudulent conveyance, "executed for the purpose * * * of hindering, delaying, and defrauding the creditors of said defendant Ruby Mines Company and * * * plaintiff and plaintiff's assignors, in the collection of the several debts then owing them from said defendant, Ruby Mines Company; * * * that plaintiff's claims and liens in and upon the title to said real property are superior to the right, title, and interest of said defendants, and each of them, in and to said real property."

Judgment was entered on the findings, canceling the said promissory note and trust deed; adjudging that the Ruby Mines Company is the owner of the real property in controversy, subject to plaintiff's judgment liens, but "not subject to any valid right, title, estate, lien, or interest of any or all the other defendants, * * * and that the aforesaid judgment liens of plaintiff are superior to the claims of all such * * * defendants; that said defendants, and each and every of them, * * * be, and they are hereby, forever debarred and restrained from asserting any claim whatever in or to said real property and premises, or any part thereof, adverse to the said defendant, Ruby Mines Company, or adverse to the said judgment liens of plaintiff."

The petitioners herein and certain other defendants appealed from the judgment, and thereafter commenced an action in the superior court of Sierra county against the Ruby Mines Company, the Alpha Hardware & Supply Company, and others to have it adjudged "that the claims and liens of the defendant Alpha Hardware & Supply Company and its assignors, against the hereinabove described properties (the real properties described in the aforesaid trust deed) by virtue of judgments obtained against the Ruby Mines Company, or otherwise, be declared null and void; that the plaintiffs' title be quieted in said properties; * * * that the defendant Ruby Mines Company holds the record title to and possession of the said properties only as trustee for the benefit of the plaintiffs herein"; and that the Alpha Hardware & Supply Company "be forever enjoined and restrained from * * * asserting or enforcing any claims of liens or otherwise, or exercising any acts of ownership or control over the said properties or any part thereof by virtue of any judgments or rights against

the defendant Ruby Mines Company, or otherwise."

It is clear that the prosecution of the Sierra county action was a violation of the injunctive provisions of the Nevada county judgment. Petitioners contend that those provisions are void on several grounds.

[1] It is first urged that the judgment is entirely void because the original complaint was superseded by the amended complaint, and that the latter "is no complaint at all"; that the references in the amended complaint to the allegations of the original complaint are wholly ineffectual, because neither the original complaint nor a copy thereof was attached to the amended complaint. It is uncertain whether the amended complaint was intended as such, or merely as an amendment to the original complaint. At the trial the court granted the plaintiff's motion to attach the original complaint to the amended complaint, stating:

"The court will admit the original complaint, and it may be attached to the amendment to the complaint. * * * The original complaint is not admitted as evidence in the case. The court is admitting it as part of the pleadings in the case and attached to the amended complaint."

[2] Surely this rendered the amended complaint immune from collateral attack on the ground urged by petitioners. It is further urged that the complaint as so amended does not state facts sufficient to give the court jurisdiction to render the judgment in question. Conceding that the complaint is defective in failing to allege that the defendants, other than the corporation, claimed some interest in the property adverse to the plaintiff's judgment liens, the defect is not such as to render the judgment void as against the petitioners. In *Estate of Ross*, 180 Cal. 651, 659, 182 P. 752, 755, it is said:

"It is thoroughly settled in this state that the failure of a complaint to state a cause of action is not a defect going to the jurisdiction of the superior court, and that a judgment given upon such a complaint cannot be held void upon collateral attack. * * * Of course the same thing is true as to an objection that the findings do not support the judgment given."

In another case it is said:

"A judgment is not void if the court has jurisdiction of the parties and of the subject-matter, irrespective of whether or not the complaint states a cause of action so long as it apprises the defendant of the nature of the plaintiff's demand." *Christerson v. French*, 180 Cal. 523, 525, 182 P. 27; *Trans-Pacific T. Co. v. Patsy F. & R. Co.*, 189 Cal. 509, 513, 209 P. 357. "The court having jurisdiction of such an action has power to determine what facts are put in issue by the pleadings, where they are ambiguously or imperfectly stated, and, having such power, it may make an erroneous decision of the question, and such decision cannot be questioned collaterally." *Koehler v. Holt Man-*

ufacturing Company, 146 Cal. 335, 338, 80 P. 73, 74.

[3] Petitioners concede that the Nevada county court "had jurisdiction to render a decree setting aside the deed of trust. *Woodbury v. Nevada, etc., Ry. Co.*, 120 Cal. 463, 52 P. 730." But they contend that the court did not have jurisdiction "to quiet title against unlitigated and unpleaded claims of the individual defendants in the suit." It is true that the judgment purports to quiet title in the Ruby Mines Company, but it was not for the violation of that provision alone that the petitioners were adjudged guilty of contempt. The judgment in the contempt proceeding recites that the petitioners violated the quoted injunctive provisions of the Nevada county judgment by asserting, in the Sierra county case, "a claim or claims in and to said real property and premises referred to in said judgment, adverse to said defendant, Ruby Mines Company, and adverse to the said judgment liens of said plaintiff therein referred to," and that "said claim or claims of said defendants were and are based upon alleged title or titles to said real property alleged by said defendants to have been vested in them prior to the entry of said judgment, and which said claim or claims were concluded by said judgment adversely to said defendants." Irrespective of the finding that petitioners asserted claims which were adverse to the Ruby Mines Company, it was sufficient to constitute a contempt that they asserted claims of interest adverse to the judgment liens of the Alpha Hardware & Supply Company, unless the injunctive provisions of the Nevada county judgment are void. As between that company and the petitioners, the action was one to determine priority of liens or interests rather than to quiet title to the real property.

[4] "The general rule is that all persons claiming a present interest in the property should be made parties defendant in an action to set aside a fraudulent conveyance thereof." 27 C. J. 751. "All persons interested in the controversy or who may be affected by the decree should be made parties to an action to set aside a fraudulent conveyance, though the interest of all may not be affected alike." 12 Cal. Jur. 1048.

In such an action, of course, the court has jurisdiction to restrain a party from further assertion of an invalid claim adversely to a valid claim of another party. Petitioners make no contention to the contrary.

[5] Petitioners contend that the appeal "rendered the judgment ineffective," and that therefore the court was without power to punish them for violation of the injunction. "By a line of decisions beginning with the early history of the state, the rule has been settled that an appeal does not stay the force of a prohibitive injunction. Such an injunction requires no execution for its en-

forcement. It acts directly without process upon the defendant, or, in other words, it is self-executing, and, pending an appeal from an order granting such injunction, the lower court has full power to punish its violation." 2 Cal. Jur. 439.

The judgment in the contempt proceeding is affirmed.

We concur: PLUMMER, J.; BURROUGHS, Justice pro tem.

86 Cal. App. 454

McGUINNESS et ux. v. LESTER et al.
(Civ. 3309.)

District Court of Appeal, Third District, California. Oct. 31, 1927.

1. Trusts ⚡93—Purchaser, whose deed includes by mistake lands paid for by another, cannot claim ownership of such other's lands (Civ. Code, § 2224).

Where prospective vendor and purchasers of land agreed that latter would purchase tract in two separate parcels, and a dividing line between such parcels was agreed upon in advance, but, unknown to any of the parties, the dividing line in the deeds subsequently given did not correspond with the line agreed on in advance, so that the purchaser of one part had paid for part of that which the other received by his deed, held, that the purchaser whose deed called for more than the original agreement was not, in view of Civ. Code, § 2224, in a position to claim ownership under his paper title, as against the equitable title of the other purchaser.

2. Trusts ⚡93—Plaintiff had notice of defect in grantor's title to lands paid for by adjoining owner and fenced by him at time plaintiff purchased (Civ. Code, § 19).

Where, through mistake in a deed, one of the purchasers of adjacent land parcels received a paper title to part of the land for which the other paid, one who took conveyance knowing of such mistake in the description and of dispute as to title and that adjoining owner had fenced his lands had such notice, because of Civ. Code, § 19, of the other landowner's rights as to preclude his asserting his rights under the paper title as against one having the equitable title.

3. Evidence ⚡441(8)—Evidence of adjoining owners' oral understanding as to dividing line held admissible in suit by one who purchased with knowledge or notice.

In action to quiet title where defense was that the paper title of plaintiff, due to a mistake, showed the dividing line at a place other than that agreed upon by the parties at the time of plaintiff's grantor's purchase, all of which plaintiff knew, evidence of an oral understanding of the parties at the time plaintiff's grantor purchased was admissible to show the true dividing line.

Appeal from Superior Court, Siskiyou County; K. S. Mahon, Judge.

Action by Henry McGuinness and wife against William Lester and another. From the judgment, plaintiffs appeal. Affirmed.

Taylor & Tebbe and J. P. McNamara, all of Yreka, for appellants.

Horace V. Ley, of Yreka, for respondents.

FINCH, P. J. Plaintiff brought this action to quiet his title to a strip of land of which he holds the record title, but which is in the possession of the defendant Jane Lester and within her inclosure, they being the respective owners of adjoining parcels of land. The defendant William Lester filed a disclaimer, and Jane Lester will be referred to as the defendant. Henry McGuinness will be referred to as the plaintiff. Judgment was entered in favor of the defendant, and the plaintiff has appealed.

In the year 1917 the Pacific Improvement Company owned a tract of land near the town of Dunsmuir, containing 80 acres. About 20 acres on the west end of the tract "is waste land, nothing but gravel and overflow." An "old river channel divided the agricultural (land) from the gravel and sand." "There are about 9 acres lying east of the river channel that is flat agricultural land, very good soil." The remainder of the land apparently lies in the hills and is valuable only for the timber upon it. S. D. Root "was a brick mason and handled sand and gravel at Dunsmuir. Mr. Root was figuring on a new project" and "was quite anxious to get this gravel. * * * He didn't want the agricultural land." Dall Kalbaugh and John R. Jones "wanted some additional farming ground. They were putting this land into some vegetable gardens." Root, Kalbaugh, and a representative of the Pacific Improvement Company met upon the ground and there came to an agreement to the effect that Root would purchase the land west of and including the old river channel for \$650, and that Kalbaugh and Jones would purchase the remainder of the 80 acres for \$2,850. These prices, fixed by the grantor, were based on an estimate of the value of the timber on the respective parcels and the further fact that Kalbaugh and Jones were to get the agricultural land. The purchasers thereafter employed a surveyor who established on the ground the dividing line agreed upon. Subsequently the Pacific Improvement Company entered into separate contracts with the purchasers for the sale of the land to them and later conveyed the land to them by deeds. Both in the contracts and the deeds the boundary line between the two parcels of land was described in accordance with the field notes of the said survey. These field notes do not agree with the boundary line

fixed by the purchasers and laid out upon the ground by the surveyor, hence the present controversy. According to such field notes and description, a considerable part of the 9 acres of agricultural land within the defendant's inclosure was conveyed to Root. Kalbaugh and Jones "built a fence together * * * right on the line the surveyor surveyed." This fence has stood in its present location continuously since July 3, 1918, but the evidence does not show definitely when it was built. The land east of the fence has been in the open and notorious possession of the defendant and her predecessors in interest since the early part of 1918. Most of the 9 acres of agricultural land "is now cultivated, and has been from the beginning of the deal." The defendant testified:

"I am familiar with the land mentioned in this case lying east of a certain fence, and have known that land since 1917 and have been living there since the 3d day of July, 1918. The improvements on the land consist of that little house that they were talking about, a barn, woodshed, chicken house, and several cabins. We farm there and raising strawberries. We have water on the place that we get from the mountain above by a 6-inch pipe, 8-inch pipe, and 2-inch pipe. * * * During the time that I resided there, Mr. Root nor any one else claimed the land on our side of the fence. Mr. Root hauled gravel out of there every day for a long time, using his land as a gravel pit, up to the time Mr. McGuinness took it over. I am acquainted with Mr. Root and saw him frequently during the period while he was there. Root never tore the fence, never disputed the fence."

Root conveyed the land which he acquired from the Pacific Improvement Company to the plaintiff. The plaintiff testified:

"I received the deed early in 1924. * * * At the time I was on the premises during the lifetime of John R. Jones, a fence was on the premises. I don't know how many years it has been there. It was there * * * when I purchased from Mr. Root. * * * When I purchased the land I knew that there was a dispute as to where the line was and that Mr. and Mrs. Jones were living there, I didn't know how long. They were living there when I prepared the agreement with the Rainbow Mill & Lumber Company (March 9, 1920), but I don't know how long before that."

The defendant is the successor in interest of Kalbaugh and Jones. The lands were assessed in accordance with the descriptions contained in the deeds executed by the Pacific Improvement Company, and the parties and their predecessors in interest have paid all taxes levied upon their respective lands as so described.

Respondent relies upon the foregoing facts as showing an agreed boundary line. Appellant contends that only the owners of adjoining lands can establish their dividing line by agreement, and that at the time of the agreement proved in this case neither Root nor Kal-

baugh and Jones had acquired any interest in either parcel of the land. Respondent also claims title by adverse possession, relying on *Price v. De Reyes*, 161 Cal. 484, 489, 119 P. 893, *Raney v. Merritt*, 73 Cal. App. 244, 251, 238 P. 767, and *Wagner v. Meinzer*, 53 Cal. App. 783, 784, 200 P. 838. It is not necessary to determine either of these questions, nor is it necessary to determine whether, under the principles of law discussed in *Grants Pass Land, etc., Co. v. Brown*, 168 Cal. 456, 461, 143 P. 754, the plaintiff is estopped to claim any interest in the land in dispute.

[1, 2] The evidence shows without conflict that Root came to an understanding with Kalbaugh and Jones that he would purchase a part of the 80 acres of land involved, and that they would purchase the remainder, which included the land in dispute; that their grantor fixed the prices to be paid by the purchasers in accordance with the estimated values of such respective parcels; that, in pursuance of such understanding, Kalbaugh and Jones purchased and finally paid for the land in dispute at the price so fixed therefor; and that through a mistake in description, unknown to any of the parties to the deeds of conveyance, Root was given a paper title to part of the land so purchased and paid for by Kalbaugh and Jones. The court found:

"That the deeds do not correctly describe the lands as selected by said predecessors in interest, but through a mistake of said predecessors in interest the lines separating the respective parcels of land selected and purchased by each of them was erroneously described in said deeds; that the true line dividing the parcels of land so selected and purchased is marked by the fence now and for more than five years existing upon said line."

Root was not in a position to claim ownership under his paper title as against the equitable title of Kalbaugh and Jones. "One who gains a thing by * * * mistake * * * is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Civ. Code, § 2224. "The general rule is that the real nature of the transaction concerning property conveyed * * * can be investigated and determined unless where in good faith interests of third parties have intervened and would be injuriously affected. It may be shown that the taking of a conveyance in the name of the grantee, or one of them, was a mistake, * * * or was taken under such circumstances as created a resulting trust or trust of some other character." *Parks v. Parks*, 179 Cal. 472, 475, 177 P. 455, 456. At the time of his purchase from Root, according to his own testimony, the plaintiff knew, and for several years prior thereto had known, the location of the division fence, and that the defendant and her predecessors in interest held exclusive pos-

session of the land in controversy, and he also knew that there was a dispute as to the location of the dividing line. He was in no sense an innocent purchaser, but, on the contrary, he had at least constructive notice of the defendant's ownership of the land which he now claims under his deed from Root. Civ. Code, § 19; *Scott v. Henry*, 196 Cal. 666, 671, 239 P. 314; *Gibbons v. Yosemite Lumber Co.*, 190 Cal. 168, 172, 211 P. 4. Plaintiff's rights, therefore, are no greater than were those of his grantor.

[3] Appellant contends that the trial court erred in admitting evidence of the oral understanding between Root and Kalbaugh and Jones relative to the division of the land to be purchased by them. What has already been said shows that such evidence was properly admitted. There is no evidence in the record which would warrant a judgment in favor of the plaintiff.

The judgment is affirmed.

We concur: WEXAND, Justice pro tem.; HART, J.

86 Cal. App. 244

TAYLOR v. VOLFI. (Civ. 3300.)

District Court of Appeal, Third District, California. Oct. 22, 1927.

1. Municipal corporations ⇨705(2)—Automobile driver held negligent in not seeing plaintiff's automobile approaching from right at intersection.

In action for injuries suffered in an automobile collision occurring at intersection, testimony by defendant that he was traveling 15 to 17 miles per hour and looking to the left, and did not see plaintiff's automobile approaching from the right until he was within 3 or 4 feet of it, and did not turn to right to see if there was any car at right showed that defendant was negligent.

2. New trial ⇨71—Trial ⇨139(1)—New trial is allowable under conflicting evidence if verdict is against weight of evidence, but nonsuit or directed verdict cannot be granted unless evidence, as matter of law, fails to support verdict.

Trial court may grant motion for new trial, notwithstanding there may be substantial conflict in evidence on every material issue, if, in opinion of court, verdict is contrary to weight of evidence, but trial court cannot grant motion for nonsuit or direct verdict for defendant unless evidence is insufficient, as matter of law, to support verdict for plaintiff.

3. New trial ⇨70—New trial for insufficiency of evidence to sustain verdict for plaintiff held properly allowed under evidence, raising justifiable inference that plaintiff was negligent.

Where evidence in action for injuries from automobile collision showed defendant was

guilty of negligence continuing up to collision, and justifiable, though not necessary, inference from plaintiff's testimony was that he did not exercise ordinary care to avoid collision in failing to stop after becoming aware of probability thereof through continuing negligence of defendant, it was not error for court to grant new trial on ground of insufficiency of evidence to sustain verdict for plaintiff.

4. New trial ⇨70—Trial court is not bound by implied findings of jury, if evidence sustains contrary findings.

In passing on motion for new trial, trial court is not bound by implied findings of jury, if there is sufficient evidence to sustain contrary findings.

5. Negligence ⇨100—Whether defendant was grossly negligent is immaterial in determining defense of contributory negligence.

In action for injuries resulting from automobile collision at intersection, it is immaterial in determining defense of contributory negligence whether defendant was guilty of gross negligence or not.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Leonard T. Taylor against John Volfi, in which defendant filed a cross-complaint. Judgment for plaintiff. From an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

J. Oscar Goldstein, of Chico, and W. H. Hatfield, of Sacramento, for appellant.

Irving D. Gibson, of Sacramento, for respondent.

FINCH, P. J. The plaintiff brought this action to recover damages suffered in an automobile collision, alleged to have been caused by defendant's negligence. The answer denies the allegations of negligence and alleges that the plaintiff was guilty of contributory negligence. The defendant also filed a cross-complaint for the recovery of damages to his automobile, alleged to have been caused by the plaintiff's negligence. The jury returned a verdict in favor of the plaintiff for damages in the sum of \$6,139 and against the defendant on his cross-complaint. Judgment was entered accordingly. The defendant thereafter moved the court for a new trial, and the motion was granted on the "ground of the insufficiency of the evidence to sustain or justify the verdict." This appeal is from the order granting the motion.

The collision occurred at the intersection of Thirty-Sixth street and Fourth avenue, in the city of Sacramento. Sacramento boulevard, running from northwest to southeast, includes within its boundary lines the northeast corner of such intersection. At the time of the collision the plaintiff was driving his automobile north along Thirty-Sixth street

and the defendant was driving his machine, a half-ton Ford delivery truck, east on Fourth avenue.

[1] The defendant testified that he was traveling 15 to 17 miles an hour; that he was looking to the left at an automobile on Sacramento boulevard and did not see plaintiff's automobile until he was within 3 or 4 feet of it, "or a little bit more"; and that he "did not turn to the right side to see if there was any car at the right." It is clear that such conduct on the part of the defendant constituted negligence.

The plaintiff testified that he had reached about the south curb line of Fourth avenue, when he looked to the left and—

"saw a machine (that of defendant) coming up this street * * * about 10 feet outside of the intersection, and he (defendant) was looking around; I started in blowing my horn. I supposed he would see me. * * * He did not look at all until he struck me. * * * I was going not any faster than 6 miles an hour. * * * The motor was cold and would not pick up. I just got in the high gear. * * * He was looking around to his left, around back, like he was looking in his machine. * * * He was traveling * * * 25 to 30 miles an hour. * * *

"Q. Why didn't you stop? A. I thought I had plenty of time to go in front when I first saw him. * * * If I could have speeded up my motor, I would have got across. I could not speed it up on account of it being cold. * * * I thought the man would look around and see me. * * * He did not look around, * * * never looked around at all. * * *

"Q. Did he slacken up any? A. He did not. * * * He was looking right around back into the machine.

"Q. Could you see what he had there inside of his machine? A. Looked to me like he was working something back. * * * I did not realize but what he was going to stop. I had plenty of time to stop—plenty of time when I saw him 10 feet below the crossing. * * *

"Q. You could have stopped your car coming in here at 6 miles an hour? A. I could have stopped; yes. * * *

"Q. Do I understand your testimony now, that Mr. Volfi was looking around the whole time, from the time you first saw him until this accident happened? A. Yes, sir.

"Q. Did not turn his head at all? A. No, sir."

In appellant's opening brief it is said:

"The true test of the question as to whether the trial court was correct in granting the defendant's motion for new trial could be reached by determining the question as to whether * * * the trial court, * * * upon exactly the same evidence, * * * could grant a motion for a nonsuit."

[2] The distinction between the power of the trial court to grant a motion for a new trial on the ground of insufficiency of the evidence and that to grant a motion for a nonsuit or a directed verdict has been pointed out so often that citation of authorities on

the question is deemed unnecessary. The trial court has the power to grant a motion for a new trial, notwithstanding there may be a substantial conflict in the evidence upon every material issue, if, in the opinion of the court, the verdict is contrary to the weight of the evidence, but such court is not authorized to grant a motion for a nonsuit or to direct a verdict for the defendant unless, as a matter of law, the evidence is insufficient to support a verdict for the plaintiff.

[3, 4] It is clear in this case that the defendant was guilty of negligence, and that his negligence continued up to the very instant of the collision. A justifiable, though not a necessary, inference from the plaintiff's testimony is that he did not exercise ordinary care to avoid the collision, in failing to stop, after becoming aware of the probability thereof through the continuing negligence of the defendant. As said by appellant in another part of his brief:

"Whether plaintiff was guilty of contributory negligence, or whether any acts or omissions on his part, caused or directly contributed to the accident, * * * were questions of fact peculiarly to be determined by the jury."

In passing on a motion for a new trial, however, the trial court is not bound by the implied findings of the jury if there is sufficient evidence to sustain contrary findings.

[5] Appellant contends that the defendant was guilty of gross negligence, and that, in such a case, contributory negligence is not a defense. "It makes no difference in the analysis of a defense based upon the contributory negligence of a person injured or killed whether the negligence of the defendant was gross, ordinary, or slight." *Tucker v. United Railroads*, 171 Cal. 702, 704, 154 P. 835, 836.

The order is affirmed.

We concur: BURROUGHS, Justice pro tem.; PLUMMER, J.

86 Cal. App. 445

FIDELITY & CASUALTY CO. OF NEW YORK v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 5709.)★

District Court of Appeal, Second District, Division 1, California. Oct. 31, 1927.

Hearing Denied by Supreme Court Dec. 29, 1927.

Master and servant ~~§~~361—Under contract providing fixed sum for builder's services and equipment, finding that builder, not owner, was employer of injured workman, held warranted.

In proceeding to recover compensation for injuries, finding by Industrial Commission that workman hired by foreman working under supervision of contractor, and injured in performing work necessary to carry out contractor's agreement, was employee of supervising contractor, held justified by evidence sustaining

award of compensation, notwithstanding contract with owner provided for payment of fixed sum to contractor for services and equipment, in addition to day wages.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act (St. 1913, p. 279) by Clyde Rhone, employee, opposed by A. M. Thompson, employer and the Fidelity & Casualty Company of New York, insurance carrier. From an order of the Industrial Accident Commission, awarding compensation for injuries, the insurance carrier brings certiorari. Award affirmed.

Jennings & Belcher, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

YORK, J. On writ of review of a finding and award by the Industrial Accident Commission, rendered in favor of one Clyde Rhone and against petitioner, as insurance carrier of A. M. Thompson.

The sole question raised is whether or not Clyde Rhone was an employee of Thompson, alleged to be the contractor in charge of the work. It is admitted that Thompson was a supervising contractor and "builder," the terms of whose contract are hereinafter stated. He denies that he ever employed Clyde Rhone, and there is evidence to show that he had no direct knowledge of the employment of Rhone until he received a time-card and made out a check in Clyde Rhone's favor for the amount of this card.

At the time of the injury Rhone was working on certain iron grill work, and was injured by a piece of steel or iron flying from the hammer and anvil to his eye and lodging in the eye, which later necessitated the removal of the eye itself.

Petitioner's claim of nonliability rests upon the further claim that Rhone was not an employee of Thompson, and that Louis E. Plummer, the owner of the job at Fullerton for which the ironwork was being prepared, was paying Thompson only a fixed sum for his services in building the house, and was furnishing Thompson the money to make payments for material and labor as the work progressed in sums of approximately \$1,000 at a time. Although in his answer Thompson denies that the applicant in the proceedings before the Industrial Accident Commission had received a check for the sum of \$15.41, "or for any other sum, from this answering defendant as his employer," yet Mr. Plummer testified at the hearing:

"Q. (by Referee). How did this grill work happen to be turned over to the boys in the structural iron course of the school? A. At my suggestion to Mr. Thompson.

"Q. Who took up the matter with Mr. Hart, you or Mr. Thompson? A. I took the matter up

with him informally; all plans, drawings, etc., were submitted to him by Mr. Thompson.
* * *

"Q. Mr. Plummer, who paid for the materials that went into the ironwork on your job? A. Mr. Thompson."

Hart was acting as foreman of this work, under supervision of Thompson.

Mr. Plummer's testimony as to the contract and its terms is best set forth in the exhibit following, which he testified fully set out the only agreement with Contractor Thompson:

"Defendant Plummer's Exhibit 1.

"Harry Kenneth Vaughn, Architect,

"736 So. Flower St., Los Angeles.

"30th November, 1925.

"Mr. Louis E. Plummer, Fullerton Union High School, Fullerton, California.—Dear Louis: The following is a confirmation and memo of changes and suggestions regarding the drawings and specifications; also methods of procedure pertaining to the building of your residence.

"Decision was made to have the house built by Mr. A. M. Thompson. He was to charge \$400 for his services and equipment, and in addition to receive \$1 per hour for the time he is actually engaged as a workman or mechanic on the building.

"Mr. Thompson's estimated cost was \$12,593 complete, as per plans and specifications, exclusive of painting. The foregoing estimate is to be reduced by certain revision and changes in the drawings and specifications.

"Before ordering any material, the builder is to submit to the owner for his approval the quantity of materials, the estimated cost in unit and in total, and the names of the person or persons or firms from whom the purchase is to be made.

"Portions of the material and all of the labor are to be paid by check by the contractor. At a time agreed upon, the contractor is to submit an itemized statement with the bills to the owner. Upon approval of the same, the owner is to deposit money to the contractor's credit for the payment of the labor and material called for in the statement, or an approved revision of the same.

"Permit for the building to be taken out for the amount of \$10,000, by the contractor.

"Very faithfully,

"[Signed] Harry K. Vaughn."

It was stipulated at the hearing that Clyde Rhone received between June 12, 1925, and July 12, 1925, the total sum of \$116.74, this being at the rate of 35 cents per hour, and it was further stipulated that such sum should be considered as the applicant's earnings as an ornamental iron worker during that period. The evidence shows that the \$15.41 received by Rhone from Thompson was paid by Mr. Thompson out of amounts paid to him to his credit as such contractor for the purpose of paying "for the labor and material called for in the statement, or approved revision of the same."

The commission has made its direct find-

ing on the foregoing evidence and other evidence taken, which showed in detail the nature of the work to be done, and the persons ordering the same, and the supervision or exercising of supervision over the work and the employee, Rhone, and has made a direct finding that at the time Clyde Rhone was injured he was performing work as an employee of Thompson, and was to be paid by Thompson as the contractor supervising the entire work.

It is plain that Rhone was the employee of some one. He was hired directly by Hart, but the evidence shows that Hart was an employee, and in engaging the services of Rhone was acting as such employee. Both of them were working for Hart's employer, and the liability for injury to Rhone is necessarily the liability of that employer. Under the terms of the building contract, as evidently understood and acted upon by the several parties, the commission was justified in finding that the men working under Thompson, on the jobs necessary to carry out his agreement, were his employees.

The award is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

86 Cal. App. 414

GAMBLE v. UTLEY. (Civ. 4970.)

District Court of Appeal, Second District, Division 1, California. Oct. 28, 1927.

1. Garnishment $\S$ 63—Salary of district attorney is not subject to garnishment, office being created by Constitution (Code Civ. Proc. $\S$ 710; Const. art. 11, $\S$ 5).

Code Civ. Proc. $\S$ 710, providing for garnishment of moneys owing a judgment debtor from any county, city, or other municipal or public corporation, is not applicable to salary received by a district attorney, such office being created by Const. art. 11, $\S$ 5.

2. Exemptions $\S$ 48(1)—Exemption statute is not restricted to those who do physical labor (Code Civ. Proc. $\S$ 690).

Code Civ. Proc. $\S$ 690, exempting earnings of a debtor for his family, supported in whole or part by his labor, is not restricted to physical laborers.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Garnishment proceeding by A. W. Gamble against Ernest R. Utley. From an order releasing certain money from garnishment, plaintiff appeals. Affirmed.

Robert G. Hill, of El Centro, for appellant.

Harry W. Horton, of El Centro, for respondent.

McLUCAS, Justice pro tem. This is a proceeding under section 710 of the Code of Civil

Procedure, providing for garnishment of moneys owing a judgment debtor from any county, city and county, city, or other municipal or public corporation. In this proceeding the county auditor filed his warrant for the sum of \$250 with the clerk of the court in the above-named action. The defendant filed notice of motion to order said sum paid to the defendant, upon the ground that said sum is the earnings of a judgment debtor for his personal services rendered within 30 days next preceding the levy of the garnishment, and that said earnings are necessary for the use of his family, residing in this state, and supported in the whole by his labor; and upon the further ground that the sum garnished is the compensation of a constitutional officer of the state of California and is, therefore, not subject to garnishment under the provisions of section 710 of the Code of Civil Procedure. In support of the motion the defendant filed an affidavit stating:

That he "receives a monthly compensation of \$250 per month from the county of Imperial in full compensation for all his services rendered as said district attorney. That the income of affiant does not exceed the total sum of \$250 per month, and that affiant has no other or further income than the said sum of \$250 per month received as compensation as district attorney of the aforesaid county of Imperial. That the said income of \$250 a month and the whole thereof of this affiant above mentioned is necessary for the use of affiant's family residing in the city of El Centro, county of Imperial, state of California, and that the said family consists of his wife, a minor daughter and affiant himself, and that said three named persons are supported, in whole by the labor, services, and compensation of affiant as district attorney of the county of Imperial. That affiant is the head of a family consisting of his wife and minor daughter and himself, all of whom reside together in the said city of El Centro, and each and all of said persons are dependent entirely upon the earnings of affiant for their support and maintenance and the necessities of life, and that all of the earnings of said defendant as said district attorney are necessary and indispensable for the use and support of his family, and that affiant has no other earnings and receives no other compensation than as herein mentioned."

Plaintiff filed three counter affidavits, one of Robert G. Hill, a resident of El Centro, stating:

"That a grocery account of \$50 per month is sufficient for the necessary provisions for a family consisting of the husband and wife and one child about 6 years old of the defendant; that \$40 per month rent for a house in which to reside is a suitable and appropriate expenditure for house rent; that \$60 per month in addition thereto is a sufficient sum for any and all necessary expenditures for a family, making a total of \$150 which is sufficient to support the family of the defendant herein per month."

Another of C. H. Whitecotton, stating:

"That he resides in Imperial county, Cal., and is working for Imperial irrigation district and has a family consisting of himself, wife, and two children; that his grocery account for his entire family is approximately \$50 per month, and that a grocery account for provisions for a family of three persons would be approximately \$35 per month; that he believes that \$40 per month for a house to reside in in El Centro, being fairly well acquainted with rentals for residences in El Centro, would be \$35 to \$40 per month which would be suitable for a man, wife, and one child, and that \$50 or \$60 per month would be amply sufficient for any additional expenditures per month necessary for a man, a wife, and one child."

And another of J. C. Cox, a grocer of El Centro, stating that the average grocery account of a man and wife and one child is \$35 per month.

Upon submission, the court granted the motion of the defendant, ordered the money released from garnishment, and the clerk was ordered to pay over and deliver to the defendant the warrant filed by the county auditor. Plaintiff appeals from the order, and the appeal has been submitted upon appellant's brief, no brief having been filed by the respondent.

Plaintiff asks a reversal upon the following grounds:

"First. That the salary of a district attorney is subject to garnishment under section 710 of the Code of Civil Procedure. Second. That exemptions allowed under section 690 exempt earnings of the debtor for his family, 'supported in whole or in part by his labor,' and a lawyer is not (a) laborer as contemplated by the statute. Third. That no more than what is necessary for the use of the family is exempted from garnishment, and the amount that is necessary for the use of the family is a question of fact to be determined by the evidence, and the burden of proof is on the defendant to establish the amount necessary, and that the defendant failed in his proof."

It has generally been held that statutes authorizing garnishment of the salary or wages of public officers or employees are within the legislative power. 22 A. L. R. 760. In California the power of the Legislature to determine the state's policy in respect to legislative officers, as distinguished from constitutional officers, of subjecting their salaries to garnishee process, was upheld in *Ruperich v. Baehr*, 142 Cal. 190, 194, 75 P. 782, wherein the court said, in construing section 710 of the Code of Civil Procedure:

"It may be conceded that it is as much against public policy to subject the salaries of public officers and employees to garnishee process as it is to subject the public funds to such process or the public property to liens or executions. The Legislature, however, undoubtedly has the power to determine its own policy on this subject with respect to the offices, officers, and employees within its control. We are not here

concerned with constitutional officers and officers, and we do not wish to be understood as holding that the act under discussion can be applied to them. But with respect to those clearly within legislative control, if it fairly appears that by this act, properly construed, the legislative intent to declare as its policy that the salaries or wages may be thus diverted to the payment of debts of such officers and employees, is manifested by the language used, then the courts are bound by this declared policy, with respect to the officers to whom it can be applied, and the rule of construction above mentioned becomes, to that extent, inapplicable."

In a concurring opinion, Justice Van Dyke said (page 197 [75 P. 784]):

"I concur in the foregoing, as it is expressly limited to such offices as the Legislature may create or abolish at its pleasure in the interest of the public service. As to such offices, the Legislature may doubtless subject the employees or officers appointed or elected to fill the same to the garnishee process. The act under consideration, adding a new section to the Code of Civil Procedure, is, however, broad enough in its terms to cover all offices in the state. As to constitutional officers, however, the salary or compensation of the incumbents of which is provided for by the Constitution, it is clearly not within the power of the Legislature to interfere with the payment of such salary or compensation in the least."

In *Lawson v. Lawson*, 158 Cal. 446, 447, 448, 111 P. 354, the court said:

"It is established by the decision in *Ruperich v. Baehr*, 142 Cal. 190 (75 P. 782), that section 710 of the Code of Civil Procedure is not violative of the provisions of our Constitution inhibiting special legislation and requiring that a general law shall have a uniform operation. It is further established by that decision and the decision in *Payne v. Baehr*, 153 Cal. 441 (95 P. 895), that the section is applicable to the salaries of all such public officers and employees as do not come within the term 'constitutional officers' as that term is used in *Ruperich v. Baehr*, 142 Cal. 190 (75 P. 782). In that case the court, expressly reserving the question whether the Constitution prohibited its application to certain officers, said: 'But with respect to those clearly within legislative control, if it fairly appears that by this act, properly construed, the legislative intent to declare as its policy that the salaries or wages may be thus diverted to the payment of debts of such officers and employees, is manifested by the language used, then the courts are bound by this declared policy, with respect to the officers to whom it can be applied.' The effect of the two cases cited is that the section must be held applicable to the salaries of all officers as to which its application is not inhibited by reason of some provision of the Constitution. Assuming for the purposes of this decision that with relation to some officers the effect of existing constitutional provisions may be to prevent the application of this section, we are satisfied that there is nothing in the Constitution precluding its application to salaries or fees of justices of the peace. Such salaries or fees are not fixed by the Constitution, and there is no provision therein, as in the case of some officers, that they 'shal

receive for their service' a compensation, fixed either by the Constitution or to be fixed in some other way. Nor is there as to such officers any provision, as in the case of some officers, to the effect that the compensation so to be received, whether fixed by Constitution or otherwise, shall not be diminished during the term for which the incumbent shall have been elected."

The office of district attorney is one created by the Constitution (art. 11, § 5), wherein it is provided that:

"The Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of * * * district attorneys, * * * and shall prescribe their duties and fix their terms of office. It shall regulate the compensation of all such officers, in proportion to duties. * * *"

A district attorney can hardly be said to be an officer within the control of the Legislature, as required by *Ruperich v. Baehr*, supra. There is a provision in the Constitution that the Legislature shall "regulate the compensation" of district attorneys; but there is no provision in the Constitution in the case of district attorneys to the effect that the compensation to be received shall not be diminished during the term for which the incumbent shall have been elected. Salaries of public officers or employees have been held subject to garnishment under the provisions of section 710 of the Code of Civil Procedure in the following cases: A city and county stenographer (*Ruperich v. Baehr*, supra); a justice of the peace (*Lawson v. Lawson*, supra); a stenographer of a city and county police court (*Payne v. Baehr*, 153 Cal. 441, 95 P. 895); and a deputy city treasurer (*Trow v. Moody*, 27 Cal. App. 403, 150 P. 77). As has already been seen, the Legislature cannot constitutionally subject to garnishee process the salaries of the holders or incumbents of constitutional offices which are provided for by the Constitution; that is, the offices over which it has no control, as distinguished from those offices which it may create or abolish at its pleasure in the interests of the public service. *Ruperich v. Baehr*, supra.

[1] In no case have the provisions of section 710 of the Code of Civil Procedure been held applicable to the salary of a district attorney or similar officer whose office is directly created by the Constitution. In our opinion, the office of district attorney is a constitutional office, and the provisions of section 710 of the Code of Civil Procedure should be held inapplicable thereto.

[2] The foregoing conclusion renders it unnecessary to discuss the other grounds for reversal as raised by appellant. Suffice it to say that we do not agree with plaintiff's contention that only laborers, or those who do physical labor, are entitled to the benefit of exemptions as provided in section 690, Code of Civil Procedure. The defendant's

affidavit is, in our opinion, sufficient to support the ruling of the trial court in ordering the money paid to the defendant.

The order appealed from is affirmed.

We concur: HOUSER, J., Acting P. J.; YORK, J.

86 Cal. App. 451

WATTS v. PEERS et al. (Civ. 3313.)

District Court of Appeal, Third District, California. Oct. 31, 1927.

Highways ⇨180—Judgment for injuries to horses from collision with automobile held not warranted without finding of negligence and proximate cause.

Where, in an action for negligent injury to plaintiff's horses from being struck by defendant's automobile, judgment was rendered for plaintiff although the trial court's findings did not show that defendant was negligent or that his negligence was the proximate cause of the injury, held, that the findings were insufficient to support the judgment.

Appeal from Superior Court, Placer County; Raglan Tuttle, Judge.

Action by James E. Watts against Robert Stewart Peers and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Johnson & Lemmon and Evan J. Hughes, all of Sacramento, for appellants.

W. H. Slade, of Auburn, and C. H. Stilson, for respondent.

HART, J. The action is for damages for the alleged negligent maiming of two horses belonging to the plaintiff. Judgment was awarded the plaintiff in the total sum of \$334, which included the sum of \$9 for expenditures made by plaintiff in the procurement of the medicine necessary to the treatment of the injured animals. The case was tried by the court without the aid of a jury. The defendants appeal from the judgment.

The defendant Robert Stewart Peers was, at the time of the filing of the complaint herein, a minor of the age of about 19 years, and the defendant Robert A. Peers is the minor's father. It is alleged in the complaint, and admitted by the answer, that upon an application in writing of Peers, Sr., prior to the accident in which the alleged injuries were inflicted upon the animals mentioned, the state division of motor vehicles issued to said minor a license authorizing him to operate a motor vehicle within the limits of the state of California, said application having also been signed by the defendant minor. It further appears that on the 2d day of January, 1925, at or about the hour of 5:35 p. m., the said defendant Robert Stewart Peers was in the act of driving or operating an automobile on the highway near a point about two miles

in a general southerly direction from the town of Colfax, Placer county. The complaint alleges that the said automobile was at said time the property of the defendant Robert A. Peers "and was so being operated and driven by his said minor son" with his (the said Robert A. Peers') assent. It is also alleged:

"That on said day, and at or about said hour, said plaintiff commenced to drive his two horses across the state highway opposite his home adjoining said highway, and at the aforementioned place, about two miles in a general southerly direction from the said city of Colfax, in said county and state; that said plaintiff was at that time within the side boundary lines of said highway right of way and immediately in the rear of said horses; that as plaintiff so started said horses across said highway he looked and saw said motor vehicle approaching at a rapid pace; that said plaintiff then and there had a lighted lantern in his hand, and immediately upon seeing said motor vehicle approaching proceeded toward the center of said highway, driving said horses ahead of him and waving said lighted lantern to warn the driver or operator of said motor vehicle, to wit, the said Robert Stewart Peers, of the danger before him.

"That the said Robert Stewart Peers, notwithstanding the said warning signal of the said plaintiff, so carelessly, recklessly and negligently operated said motor vehicle that he drove the same into and struck down the smaller of said horses, then and there the property of said plaintiff; that said horse, as a result of being so struck down, was so injured that it was incapacitated and unable to perform the work which it was accustomed to perform for a period of 54 school days (said horse being a pony used by plaintiff's child to ride to school); that said injuries are permanent in nature; and that by reason thereof the value of said horse has been reduced to the extent and in the amount of \$25."

In another count of the complaint it is alleged that another horse was likewise run into by said minor and was thereby so seriously injured as to wholly incapacitate said animal as a work horse, to which use the same had been put by the plaintiff. It may be stated that as to this particular animal, the evidence shows that some four or five months after it was injured it died.

The damages claimed were for the value of the injured animals for the respective purposes for which they were and had been used by the plaintiff and the loss of the use thereof for the periods, respectively, of 52 and 82 working days.

The answer specifically denies each of the material allegations of the complaint and also sets up the defense of contributory negligence.

The testimony as presented by the record is such that a reviewing court would not perhaps legally be at liberty to hold, as a proposition of law, that proper findings made either in accord with the allegations of the complaint or in favorable response to the claim by the defendants of contributory negligence were without evidentiary justification.

The case, however, presents an unusual situation, in that, while there was an attempt to make findings, such attempt was, so far as is concerned the essentially important issue made by the pleadings, entirely futile. What purports, and undoubtedly was intended, to be a finding upon the pivotal issue in the case reads:

"That on the 2d day of January, 1925, the said defendant, Robert Stewart Peers, while operating a motor vehicle, ran into two horses of plaintiff, resulting in the death of one and the total uselessness of the other, plaintiff being thereby damaged in the sum of \$325."

Obviously, unless the act of Robert Stewart Peers in running into and injuring the property of plaintiff was the direct result of his negligence as charged in the complaint, then the defendants are not liable for damages for such injury to his horses as may have been sustained by plaintiff by reason of said act. There is no finding that the act of the defendant minor was negligent, or that the injury to the horses was proximately caused by his negligence.

The judgment is devoid of support and must be reversed. Accordingly, the judgment is reversed and the cause is remanded.

We concur: FINCH, P. J.; WEYAND, Justice pro tem.

86 Cal. App. 484

FIRST NAT. BANK OF PARK RAPIDS v. PRAY. (Civ. 6015.) ★

District Court of Appeal, First District, Division 1, California. Nov. 1, 1927.

Hearing Denied by Supreme Court Dec. 29, 1927.

1. Limitation of actions §=151(3)—No effect could be had on running of statute against action on note by admissions or acknowledgments prior to maturity (Code Civ. Proc. §§ 337, 339, 360).

No effect could be had on running of statute of limitations (Code Civ. Proc. §§ 337, 339), under section 360, against action against guarantor of note by admissions or acknowledgments prior to maturity of note, except possibly as waiver of right to plead limitations statute.

2. Limitation of actions §=148(4)—Acknowledgment is sufficient to lift bar of statute of limitations, if it shows writer treats indebtedness as subsisting, and that debtor is willing to pay (Code Civ. Proc. §§ 337, 339, 360).

Code Civ. Proc. § 360, does not prescribe any form in which an acknowledgment or promise sufficient to lift bar of statute of limitations (Code Civ. Proc. §§ 337, 339) shall be made, and it is sufficient if it shows that writer treats indebtedness as subsisting and one which debtor is liable and willing to pay, and from this acknowledgment law implies promise to pay.

3. Limitation of actions ⇨148(1)—Express promise to pay besides acknowledgment is not required, where statute has not already run against debt (Code Civ. Proc. §§ 337, 339, 360).

Code Civ. Proc. § 360, does not require express promise to pay as part of, or in addition to, acknowledgment of indebtedness to lift bar of statute of limitations (Code Civ. Proc. §§ 337, 339), where it has not already run against indebtedness.

4. Limitation of actions ⇨151(1)—Debtor, stating that he did not wish to "stall" matter in letter claimed to toll limitations statute, meant that he had no desire to postpone payment (Code Civ. Proc. §§ 337, 339).

Debtor, stating that he did not wish to "stall" matter off in letter, which it was claimed tolled running of statute of limitations (Code Civ. Proc. §§ 337, 339), meant that he had no desire to postpone or delay payment or to feign or simulate or to frame up any defense to notes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Stall.]

5. Limitation of actions ⇨151(1)—Term "settlement" in letter tolling limitations statute by guarantor on note replying to letter containing offer of compromise did not refer to such offer "payment" (Code Civ. Proc. §§ 337, 339).

Where payee wrote guarantor on note offering compromise, term "settlement" in guarantor's letter, which payee claimed tolled statute of limitations (Code Civ. Proc. §§ 337, 339), wherein guarantor wrote that he believed distribution received from trustee of maker should be applied on notes before making settlement, should not be construed to refer to such offer of compromise; term "settlement" including within it more than term "payment," since it includes an ascertainment of balance and adjustment of credits.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Payment; Settle—Settlement.]

6. Limitation of actions ⇨150(4)—Liability of guarantor on note was fixed, leaving only amount necessary to extinguish liability to be determined by extent of principal's performance.

As respects definiteness of acknowledgment of liability of guarantor, liability of guarantor on note was fixed, definite, and certain, leaving only amount of money necessary to fully extinguish this liability to be determined by extent of his principal's performance.

7. Limitation of actions ⇨148(3)—Letters by guarantor on note held to acknowledge liability so as to lift bar of statute of limitations (Code Civ. Proc. §§ 337, 339, 360).

Letter from guarantor on note to payee, stating that, after distribution by trustee of insolvent maker, guarantor would be glad to hear from payee again, and that he did not wish to stall matter off, but believed it was only proper to apply distribution before making settlement, held to acknowledge liability on note so as to lift bar of statute of limitations (Code Civ. Proc. §§ 337, 339), under section

360, relating to acknowledgment necessary to take case out of operation of statute.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action on a written contract of guaranty by the First National Bank of Park Rapids against R. F. Pray. From a judgment for defendant, plaintiff appeals. Reversed, with directions.

Willard P. Smith, of San Francisco (Kennett B. Dawson, of San Francisco, of counsel), for appellant.

Albert A. Rosenshine and Goldman, Nye & Surr, all of San Francisco, for respondent.

PARKER, Justice pro tem. Plaintiff brought this action to recover from defendant upon a written contract of guaranty, as will more fully appear hereinafter. In the court below judgment went for defendant, and thereafter a motion for a new trial, interposed by plaintiff, was denied. Plaintiff appeals.

The only question before us relates to the application of section 360, Code of Civil Procedure, which provides that no acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of the statute of limitations, unless the acknowledgment or promise is contained in some writing signed by the party to be charged thereby.

The facts follow:

At Park Rapids, in the state of Minnesota, on the 22d day of March, 1915, the White Stores Company made, executed, and delivered to plaintiff its promissory note in writing which said note was in the usual form, containing a waiver by all signers and indorsers of demand, notice of nonpayment, and protest. The note was signed "the White Stores Company, by J. Shere, Pres. and by R. F. Pray, Secretary." Indorsed on this note is as follows: "For value received I guarantee the payment of the within note at maturity or any time thereafter, waiving demand, protest and notice of protest. [Signed] R. F. Pray." Indorsement on principal: "On principal 5/7/18 \$993.21. Balance due, \$3,506.79."

Nothing has been paid on said note or guaranty save and except the sum of \$993.21.

This action was commenced on November 20, 1922.

The trial court found that the action was barred by the statute of limitations of the state of California and by the provisions of section 337 of the Code of Civil Procedure, and by section 339 of said Code.

It is the claim of appellant herein that this finding is erroneous, and he bases his claim upon a chain of correspondence between plaintiff and defendant running over a number of years, in which correspondence it contends the defendant did make written ac-

knowledge sufficiently evidencing a new or continuing contract by which to take the case out of the operation of the statute of limitations. We pass then to an examination of the correspondence and the writings presented.

[1] The letters comprising the correspondence may be classed in three groups; the first group being letters written prior to the due date of the instrument. Obviously these can be of little aid, as excepting possibly the case of a waiver of the right to plead the limitations statute, no effect could be had upon the running of the statute by admissions or acknowledgments prior to maturity.

The second group consists of letters and correspondence following maturity, but prior to the time when ordinarily the statute would have barred the enforcement of the claim. Payment on original note was due on March 22, 1916. It is admitted that at or about this time the White Stores, maker of the note, became insolvent, and its affairs went under the management of a trustee. In June of 1916 the plaintiff wrote defendant concerning the indebtedness here sued on, and requested some new arrangement whereby defendant could have the note guaranteed canceled and replaced by a new note executed directly by defendant. In reply, dated June 22, 1916, defendant stated that, inasmuch as plaintiff already had the notes indorsed by himself and Shere, he could not see how it could add to the strength of plaintiff to sign another bunch.

In November, 1916, defendant again wrote plaintiff, stating that he was awaiting word from the trustee and his coguarantor Shere, saying, "Do not wish to appear as delaying, but I must hear from them before stating definitely what I can do." On December 28, 1916, defendant again wrote plaintiff, wherein he requests that, if plaintiff decides to sue on the notes, he make the coguarantor Shere a party to the action, saying, "There is no reason why he should escape his liability and the loss be placed upon me, where it does not belong." In this same letter defendant says further that with what plaintiff can get from the trustee and such equities as plaintiff may have against other securities "it would seem that you are pretty well fortified, and I hope you will not see fit to crowd the collection on the indorsement of the paper until the interest of the trusteeship is ascertained."

These letters of 1916 are not relied upon in themselves to offset the bar of the statute of limitations. Giving these letters their utmost strength, the statute would have barred the claim on December 28, 1920. They are referred to here merely to illustrate the situation as it then existed between the parties and to show no repudiation of the contract up to that time.

After this correspondence of 1916 the mat-

ter rests until 1918. On November 19th of that year plaintiff again wrote to defendant, advising him of balance due on note. In this letter plaintiff makes an offer of compromise and adjustment, in which offer it agrees to accept one-half of the amount, waiving claim for accrued interest. In reply to this letter, and under date of November 26, 1918, defendant replies, acknowledging receipt and thanking plaintiff for the kind manner in which he refers to the notes. In the letter defendant states:

"By same mail I also had a letter from the new trustee of the White Stores Co. in regard to a final hearing, and have written my attorneys for a little further information. I should hear from them in a few days and will then communicate with you."

On December 2, 1918, plaintiff acknowledges receipt of this last-cited letter, and requests consideration at an early date, and for defendant's final answer before the 15th of December, 1918. On December 11, 1918, defendant writes plaintiff as follows:

"Referring to our recent correspondence in regard to the White Stores Co. notes I have just received a letter from my attorneys at Duluth, saying there was in the hands of trustee considerable amount for distribution to creditors of that company and the distribution would soon be made. When this is done I should be very glad to hear from you again. Please understand I do not wish to stall this matter off, but believe it is only proper to apply the distribution which you receive on these notes before making settlement."

In July of 1919 the matter was by plaintiff placed in the hands of an attorney for action, and the correspondence hereafter is between this attorney and defendant. On July 31, 1919, the attorney wrote defendant, advising him of his handling the matter, and requesting his attention. The result of the letters back and forward up to October 4, 1919, shows but little other than defendant's statement of his effort to get his coguarantor Shere to pay his half, in which case defendant promises to send the other half and get it out of the way. In 1920 defendant finally, without express repudiation of the debt, invites suit to determine just what his legal liabilities are. This ends the correspondence, and constitutes all of the writings upon which appellant rests its claim that the statute has been tolled to the extent that the present action is not barred.

The law applicable seems undisputed; in fact, both parties here cite much of the same authority in support of their conflicting contentions.

At the outset section 360, Code of Civil Procedure, is cited, and its application conceded to be determinative of the issue involved. This section reads:

"No acknowledgment or promise is sufficient evidence of a new or continuing contract, by

which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

The title referred to in the section is title 2, c. 4, General Provisions as to Time of Commencing Actions.

[2] It is well established that the Code section does not prescribe any form in which an acknowledgment or promise sufficient to lift the bar of the statute of limitations shall be made. It is sufficient if it shows the writer treats the indebtedness as subsisting, and one which the debtor is liable and willing to pay. From this acknowledgment the law implies a promise to pay. *Concannon v. Smith*, 134 Cal. 14, 66 P. 40; *Foster v. Bowles*, 138 Cal. 346, 71 P. 494, 649; *Clunin v. First Fed. Trust Co.*, 189 Cal. 248, 207 P. 1009; *Searles v. Gonzalez*, 191 Cal. 430, 216 P. 1003, 28 A. L. R. 78. The California cases on this subject are reviewed at some length in the case of *Clunin v. First Fed. Trust Co.*, supra, and this conclusion reached by Shaw, C. J.:

"It is clear from all these decisions that no writing is sufficient as an acknowledgment under section 360, unless it contains some reference to a debt, which, either of itself or with the aid of permissible evidence of extrinsic facts in explanation, amounts to an admission that there is a debt existing to the creditor to whom the writing is sent which the debtor is liable to pay and willing to pay."

Such acknowledgment may be made to an agent of the creditor or to some person authorized to receive it. *Searles v. Gonzalez*, supra.

In the *Clunin* Case the court quotes from *Southern Pacific v. Prosser*, 122 Cal. 415, 52 P. 837, 55 P. 146, as follows:

"The distinct and unqualified admission of an existing debt, contained in a writing, signed by the party to be charged, and without intimation of an intent to refuse payment thereof, suffices to establish the debt to which the contract relates as a continuing contract, and to interrupt the running of the statute of limitations against the same."

There appears at first blush a difference between the *Prosser* Case and the *Clunin* Case, inasmuch as it appears from the conclusion of the court in the latter case that the acknowledgment must contain an admission of a debt which the debtor is liable and willing to pay. However, in the *Clunin* Case all that the court was called upon to decide, and all that was decided, was that the writings offered contained no reference to any debt, or any language which could be said to be uncertain in its meaning and subject to explanation by the aid of extrinsic circumstances so as to be made to refer to a debt.

[3] In the instant case respondent concedes that the law does not require an express promise to pay as a part or in addition to the acknowledgment of indebtedness,

where the statute has not already run. In *Foster v. Bowles*, 138 Cal. 351, 71 P. 495, it is said:

"It was not necessary that respondents should promise to pay the indebtedness in order to establish a new date for the statute to commence running. * * * All that was required was a plain and distinct acknowledgment in writing of the existence of the mortgage."

In the more recent case of *Searles v. Gonzalez*, supra, no promise was held necessary to bring the acknowledgment within the terms of the statute.

In the case of *Shirley v. Shirley*, decided in this court on May 26, 1927, now found in 256 P. 823, the rule is announced as in *Concannon v. Smith*, 134 Cal. 14, 66 P. 40, that it is sufficient if the writing shows that the writer regards or treats the indebtedness as subsisting, and from the acknowledgment of a subsisting indebtedness the law implies a promise to pay based upon the consideration of the old debt. See, also, *Minifie v. Rowley*, 187 Cal. 481, 202 P. 673; *Curtis v. Holee*, 184 Cal. 726, 195 P. 395, 18 A. L. R. 1024; *Worth v. Worth*, 155 Cal. 599, 102 P. 663; 16 Cal. Jur. 585, 587.

Before proceeding to apply the doctrine of these cases to the facts before us, there is one additional fact to be noted. The note in controversy here constituted the only indebtedness from defendant to plaintiff, and the letters in evidence from defendant referred to this particular note.

The letters which appellant offers to constitute the written acknowledgment are particularly the letters of November, 1918. Upon these letters rests the determination of the question involved. True, we consider all of the correspondence for whatever facts therein may be pertinent in showing the general relationship between the parties, but in themselves any of the correspondence of 1916 could hardly extend the running of the statute to the time this action was commenced. Taking up then the 1918 correspondence: On November 19, 1918, plaintiff wrote defendant Pray that there was no longer any hope of getting anything from White Stores Company, the maker of the note, and advising defendant of the balance due on the said note. Then plaintiff makes the offer that, if defendant will send one-half of the balance, without consideration of the interest, the defendant will be released from further liability. On November 26, 1918, defendant writes acknowledging receipt of letter of plaintiff, and says: "Wish to thank you for the kind manner in which you have referred to the notes"; in the letter also stating that defendant has written to his attorneys to learn more about the affairs of the White Stores Company and that when he gets this information he will communicate with plaintiff. In reply comes the letter of December 2, 1918, from plaintiff to defendant, again

requesting due consideration of plaintiff's letter of November 26, 1918, and asking to finally answer before December 15, 1918. Now comes the letter of December 11, 1918, from defendant to plaintiff, upon which letter, it may be said, the present controversy centers. We will give this letter in full, omitting date and address:

"Referring to our recent correspondence in regard to the White Stores notes, I have just to-day received a letter from Courtney & Courtney, attorneys at Duluth, saying that there was in the hands of trustee considerable amount for distribution to creditors of that company, and the distribution would soon be made. When this is done I should be very glad to hear from you again. Please understand I do not wish to stall this matter off, but believe it is only proper to apply the distribution which you receive on these notes before making settlement."

[4, 5] In interpreting this letter counsel have devoted some effort in an endeavor to give us the meaning of the term "to stall." An accepted definition as given by Webster is: "In contests, to do less than one's best, as to deceive for any purpose or to husband strength." There is also another definition, "To delay or postpone payment of an obligation or debt." The word, however, has become current in vernacular, and in its generally accepted sense is accurately defined in the first reference, and which might also include the latter given definition. We think that the word in common usage has a shade of meaning somewhat broader than that embraced in either definition. When one states his intention to desist from "stalling" he expresses thereby a determination to forego further evasive argument, and cut through all needless preliminaries, and come direct to the subject or matter in hand. Therefore this letter of December 11, 1918, said in just so many words:

"When we learn how much the White Stores Company have paid, I will be glad to hear from you again. Please understand I have no desire to postpone or delay payment or to feign or simulate or frame up any defense to these notes, but I think that the amount you receive from the principal debtor or maker of the note should first be applied thereon before I as guarantor make any settlement."

[6, 7] It is urged by respondent that this letter of defendant, being in reply to a letter wherein an offer of compromise was presented, was in itself, if anything, merely referring to such offer, and the term "settlement" should be construed accordingly. We think this construction would be too strict. While plaintiff had offered to accept less than the amount due, the defendant neither accepted nor rejected the offer, nor made any reference thereto. It must be borne in mind that the entire liability of defendant was as a guarantor. Though his contract or guaranty was a

contract separate and distinct from the contract of the maker of the note, yet his liability was contingent upon, and measured by the performance or nonperformance of the original obligation. The term "settlement" includes within it a little more than the term "payment." It includes an ascertainment of the balance and an adjustment of credits. Naturally it might be argued then that the acknowledgment was thus uncertain, and not within the statute or the decisions cited. However, the obvious answer to this is that the liability of the guarantor was fixed, definite, and certain, leaving only the amount of money necessary to fully extinguish this liability to be determined by the extent of his principal's performance. There seems little room for doubt but that the liability was acknowledged and settlement deferred only until exact amount was computed, coupled with disavowal of intent to unnecessarily defer. It is our opinion that plaintiff has brought himself within the statute.

The only dispute in this case was on the point of the statute of limitations. Execution and nonpayment are admitted. Therefore there are no further issues found against plaintiff to warrant a new trial.

The judgment is reversed, with directions to enter judgment in favor of plaintiff for the face of the note, less amount found paid thereon; namely, for the sum of \$4,500, less \$993.21, together with interest as in the note provided.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

86 Cal. App. 377

BLAKE v. BLAKE et al. (Civ. 5384.)

District Court of Appeal, First District, Division 1, California. Oct. 27, 1927.

1. Fraudulent conveyances ⚡264—Complaint to subject property to satisfaction of judgment need not recite that statutory steps relating to proceedings supplementary to execution had been taken (Code Civ. Proc. §§ 717-720).

In action to subject to judgment property conveyed by judgment debtor to grantee, complaint alleging prior judgment and issuance of execution which was returned unsatisfied was not defective, because plaintiff did not recite therein that steps provided by Code Civ. Proc. §§ 717-720, relating to proceedings supplementary to execution, had been taken against grantee prior to filing of suit.

2. Execution ⚡397—Where judgment creditor claims title under conveyances is invalid, issue as to ownership and title should be made.

In proceedings supplementary to execution, where judgment creditor claims that title under conveyances is invalid, issue as to such ownership and title should be properly made and tried in appropriate action in which judgment may be had and parties conclusively bound.

3. **Fraudulent conveyances** ⚡239(2)—**Remedy by supplementary proceedings to reach property conveyed by judgment debtor did not supersede remedy by action, where transferee of judgment debtor asserts title** (Code Civ. Proc. §§ 717-720).

While remedy by supplementary proceedings under Code Civ. Proc. §§ 717-720, to reach property conveyed by judgment debtor was intended as substitute for a creditor's bill, it did not supersede remedy by action, where grantee or transferee of judgment debtor asserts title.

4. **Pleading** ⚡214(1)—**On demurrer, allegations of complaint must be taken as true.**

For the purposes of demurrer, all allegations of complaint must be taken as true.

5. **Judgment** ⚡913—**To plead judgment of court of general jurisdiction, it is sufficient to allege judgment was recovered in designated action in named court** (Code Civ. Proc. § 456).

In pleading judgment of court of general jurisdiction, it is sufficient, under Code Civ. Proc. § 456, merely to allege that judgment was obtained or recovered in designated action, in such court, or to make equivalent averment.

6. **Judgment** ⚡913—**Allegations of recovery of judgment, unappealed from, and stating where it was recorded, held sufficient pleading of judgment.**

Allegation in complaint to subject property to satisfaction of judgment that on stated day in named county plaintiff recovered judgment in action for divorce, stating number of action, that judgment was docketed in book of judgments in certain volume and at certain page, that judgment was not appealed from, that final decree was signed by judge of superior court and filed and recorded, *held* sufficient pleading of judgment.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Adelaide U. Blake against Alfred E. Blake and another. From judgment for defendants, plaintiff appeals. Reversed.

H. L. McAllister, of San Francisco, for appellant.

Ross & Ross, of Redwood City, for respondents.

TYLER, P. J. Action in equity to subject certain property to the satisfaction of a judgment. Plaintiff alleges, in substance, that defendants Alfred E. Blake and Elizabeth V. Blake intermarried on March 7, 1921, and still are husband and wife; that prior thereto on November 13, 1919, plaintiff, in an action for divorce against defendant Alfred E. Blake, prosecuted in the city and county of San Francisco and numbered 99,681, recovered a judgment in the sum of \$125 per month for the support and maintenance of herself and minor child beginning with said month and continuing; that said judgment was docketed in the office of the county clerk

of said city and county in book 138 of Judgments at page 195; that said judgment was never appealed from or modified, and is still in full force and effect; that a final decree was signed by Hon. E. P. Shortall, judge of said superior court of said city and county, and filed and recorded on the 16th day of November, 1920; that there is a balance now due upon said judgment so recovered in the sum of \$2,300. It is then alleged that defendant Alfred E. Blake is the owner of certain described property situated in the city of Menlo Park, San Mateo county, and that said property stands of record in the name of defendant Elizabeth V. Blake, wife of Alfred E. Blake, who claims to be the owner in fee thereof under and by virtue of deeds thereto from said defendant Alfred E. Blake, her husband; that execution was issued out of the superior court of the state of California in and for the city and county of San Francisco, directed to the sheriff of said city and county against the property of defendant Alfred E. Blake on the 12th day of December, 1923; and that said execution was returned wholly unsatisfied. It is then charged that prior to their marriage and subsequent thereto defendants conspired between themselves to defraud plaintiff of the proceeds of her judgment. Then follows allegations to the effect that defendant Alfred E. Blake had acquired by purchase certain real property and conveyed the same to defendant Elizabeth V. Blake prior to her marriage with defendant Alfred E. Blake under her then name Elizabeth Enright; that this property was subsequently sold and the proceeds derived therefrom, was, with money received by Alfred E. Blake from other sources, used to construct a residence upon the property located in San Mateo county above referred to. It is then alleged that these transactions were acts of insolvency which left defendant Alfred E. Blake wholly insolvent. Allegations of no speedy or adequate remedy in plaintiff are made, for which reason it is prayed that defendant Elizabeth V. Blake be charged with a constructive trust of all the real and personal property found to have been conveyed or transferred to her subsequent to the rendition of the judgment above referred to, and for other relief. To this complaint a general demurrer was filed and sustained. Plaintiff was given ten days in which to amend. She refused to do so, and judgment that plaintiff take nothing by her action followed such refusal, and this appeal is from such judgment.

[1-3] The contention raised by defendant and respondent was and is that nowhere in the complaint is there a recital that the statutory steps provided for in sections 717 to 720, Code of Civil Procedure, relating to proceedings supplementary to execution, had been taken against defendant Elizabeth V. Blake prior to the filing of the instant suit in equity

against defendants. It is also claimed that the demurrer was properly sustained, for the reason that plaintiff's judgment is insufficiently pleaded. We are of the opinion there is no merit in either contention, and that the demurrer was improperly sustained. Upon the question of plaintiff not having exhausted her legal remedies, before seeking equitable relief, it seems clear to us that the complaint has alleged all that is necessary to entitle her to prosecute her present suit, and this is certainly true as against a general demurrer. She alleges the procurement of her judgment and the issuance of an execution thereon which has been returned wholly unsatisfied. She alleges that Elizabeth V. Blake claims to be the owner in fee of the property sought to be impressed with the judgment, under and by virtue of deeds thereto, from defendant Alfred E. Blake, which were executed with the intent of defrauding her. No order under the provisions of the Code supplementary to execution could be legally made requiring Elizabeth V. Blake to surrender the property in satisfaction of plaintiff's judgment, otherwise than upon her admission that it was the property of the judgment debtor. Under the provisions of the Code referred to, a court has no jurisdiction to order a grantee of a judgment debtor, who claims title to the property conveyed, to surrender it or to subject it to the satisfaction of a judgment. *McDowell v. Bell*, 86 Cal. 615, 25 P. 128. Where a judgment creditor claims that title under a conveyance is invalid, an issue as to such ownership and title should be properly made and tried in an appropriate action in which a judgment may be had and the parties conclusively bound. *Lewis v. Chamberlain*, 108 Cal. 525, 41 P. 413. While the remedy by supplementary proceedings, where property may be reached, is intended as a substitute for a creditor's bill, these proceedings do not supersede the remedy by action where the grantee or transferee of a judgment debtor asserts title in himself, for the reason that they are not adequate to accomplish the purpose of the action. The reason is, that to make an order directing the application of property claimed by a person in his own right, if it could have any effect, would be to deprive him of his property upon a summary proceeding and without due process of law. 11 Cal. Jur. p. 157.

[4-6] Under such circumstances, the seeking and obtaining of an order upon supplementary proceedings to institute an action, upon the theory that a creditor must exhaust his legal remedy before commencing a suit, would therefore be an idle act and of no avail to plaintiff. *Rapp v. Whittier*, 113 Cal. 429, 45 P. 703; *Phillips v. Price*, 153, Cal. 146, 94 P. 617. Here it is alleged that defendant Elizabeth V. Blake claims to be the owner in fee of the property described in the complaint. For the purposes of the demurrer all the allegations of the complaint must be taken as true. *Spangenburg v. Spangenburg*, 19 Cal. App. 439, 126 P. 379. There is no merit in the contention. The same may be said of the claim that plaintiff's judgment is insufficiently pleaded to sustain a cause of action. Section 456 of the Code of Civil Procedure provides that in pleading a judgment it is not necessary to state the facts conferring jurisdiction, but such judgment may be stated to have been duly given or made. Here it is alleged that on a certain stated day in a certain county plaintiff recovered a judgment in an action for divorce, and the number of the action is pleaded; that such judgment was docketed in the book of judgments in a certain volume and at a certain page; that it had never been appealed from, and was in full force and effect; that the final decree of divorce was signed by a particular judge of the superior court of the state of California, in and for the city and county of San Francisco; that it was filed and recorded in the office of the county clerk of said city and county on the 16th day of November, 1920. An allegation in a pleading that a judgment was recovered, entered, and docketed is sufficient. *McCutcheon v. Weston*, 65 Cal. 39, 2 P. 727. In pleading a judgment of a court of general jurisdiction it is sufficient merely to allege that a judgment was obtained or recovered in a designated action, in such a court, or to make an equivalent averment. *High v. Bank of Commerce*, 95 Cal. 385, 30 P. 556, 29 Am. St. Rep. 121; *Weller v. Dickinson*, 93 Cal. 108, 28 P. 854; 15 Cal. Jur. p. 283. The complaint contains all of these requisite allegations. Moreover, the demurrer was a general one.

For the reasons given, the judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

In re McCRAY'S ESTATE.★

McCRAy et al. v. CITIZENS' TRUST & SAVINGS BANK OF LOS ANGELES, CAL. (Civ. 5688.)

District Court of Appeal, Second District, Division 1, California. Oct. 25, 1927.

Hearing Granted by Supreme Court Dec. 22, 1927.

1. Perpetuities ⇐3—English perpetuity statute held part of common law under Code (Pol. Code, § 4468).

English perpetuity statute (Thelluson Act, 39 & 40 Geo. III, c. 98) that maximum period during which power of alienation could be restrained was lives in being and 21 years 9 months, held part of common law under Pol. Code, § 4468, providing that common law of England is rule of decision unless repugnant to Constitution or laws of the state.

2. Perpetuities ⇐3—Perpetuities forbidden by Constitution held to be limitations restraining alienation, according to English statute (Const. 1879, art. 20, § 9; Pol. Code, § 4468).

Perpetuities forbidden by Const. 1879, art. 20, § 9, held to be limitations restraining power of alienation for longer than lives in being and 21 years 9 months, according to English perpetuity statute (Thelluson Act, 39 & 40 Geo. III, c. 98), which is applicable under Pol. Code, § 4468, making common law of England state rule of decision.

3. Perpetuities ⇐3—Statute authorizing suspension of power of alienation for 25 years held void (Const. 1879, art. 20, § 9; Pol. Code, § 4468; Civ. Code, § 715, subd. 2).

Civ. Code, § 715, subd. 2, authorizing suspension of power of alienation for 25 years, held void under Const. 1879, art. 20, § 9, which forbids suspension of power of alienation for longer than lives in being, and 21 years 9 months thereafter, according to English perpetuity statute (Thelluson Act, 39 & 40 Geo. III, c. 98), which is applicable under Pol. Code, § 4468, making common law of England state rule of decision, unless it is repugnant to Constitution or laws of the state.

4. Perpetuities ⇐3—Statute confining suspension of power of alienation to less than time allowed by common law held valid (Const. 1879, art. 20, § 9; Pol. Code, § 4468; Civ. Code, § 715, subd. 1).

Civ. Code, § 715, subd. 1, prohibiting suspension of power of alienation for longer than continuance of lives in being at creation of limitation or condition, held valid, although less than time allowed by English perpetuity statute (Thelluson Act, 39 & 40 Geo. III, c. 98), made a state rule of decision under Pol. Code, § 4468, and which is applicable in defining perpetuities meant by Const. 1879, art. 20, § 9, forbidding perpetuities except for eleemosynary purposes.

5. Perpetuities ⇐6(5)—Provision in will that real estate be held in trust 10 years at least held void as suspension of power of alienation for longer than lives in being (Civ. Code, §§ 715, 716, 749).

Provision in will that real estate be held in trust 10 years at least, then to be distributed

among sons, held void under Civ. Code, §§ 715, 716, 749, as suspending the absolute power of alienation of the realty for a period beyond the continuance of the lives of persons in being at time of testatrix's death.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

In the matter of the estate of Ella McCray, deceased. From that part of decree directing distribution which appointed the Citizens' Trust & Savings Bank of Los Angeles, Cal., as trustee of real property, Harold A. McCray and others appeal. Reversed with directions.

T. Frank Courtney and D. Webster Egan, both of Los Angeles, for appellants.

Henry Merton, of Los Angeles, for respondent.

CONREY, P. J. Ella McCray, residing in Los Angeles county, died on the 19th day of February, 1925, leaving an estate which consists of both real property and personal property. She left a holographic will bearing date August 20, 1924, which was duly probated; the executor being Citizens' Trust & Savings Bank, of Los Angeles, Cal. Omitting those parts of the will which refer to personal property, we find therein the following language referring to real property:

"The real estate held in trust 10 years at least and income equally divided among the sons."

On the back of the document the testatrix had written the following:

"I want this real estate fixed so that the McCray estate will be held in trust for a time so that it cannot be squandered & wasted."

There was no appointment of a trustee other than such as may be inferred from the words hereinabove quoted.

Decedent had three sons, all of whom survived her, viz. Richard H. McCray, aged 32 years, Wilbur D. McCray, aged 28 years, and Harold A. McCray, aged 26 years. Richard died in February, 1926, and his widow is administratrix of his estate. The appeal now before this court is from that part of the decree which reads as follows:

"To Citizens Trust & Savings Bank, a Corporation, of Los Angeles, California, as trustee, all the real property belonging to said estate, herein described, to be held in trust for 10 years from August 20, 1924, and the income therefrom to be equally divided annually hereafter share and share alike, one-third to Harold A. McCray, his heirs and assigns, one-third to Wilbur D. McCray, his heirs and assigns, and one-third between the heirs of Richard H. McCray, now deceased, their heirs and assigns, until August 19, 1934, on which last date this trust shall terminate, and the title in fee of all said real property shall thereupon vest, an undivided one-third in Harold A. McCray, his heirs and assigns forever, an undivided one-third in Wilbur D. McCray, his heirs and assigns forever,

and an undivided one-third in the heirs of Richard H. McCray, now deceased, their heirs and assigns forever, free from the control of said trustee, or its successors."

Appellants contend that for several reasons the will failed in its inception to create a valid express trust; that, if there was a valid trust, the attempted appointment by the superior court, sitting in probate, of a trustee, as accomplished in the decree of distribution, was void for want of compliance with certain statutory requirements, that the will does not dispose of the real property, and that therefore it passed to the heirs by succession.

We select, as the first item for consideration, point VI of appellants' brief, which is there stated as follows:

"That, if the will otherwise contained all the elements of a valid express trust, it was still void as an express private trust in real property by a limitation or condition suspending the absolute power of alienation for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition in violation of sections 715, 716, and 749, Civil Code."

Sections 715, 716, and 749 of the Civil Code read as follows:

Civil Code, § 715:

"Restraints upon Alienation. Except in the single case mentioned in section seven hundred seventy-two, the absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than as follows:

"1. During the continuance of the lives of persons in being at the creation of the limitation or condition; or

"2. For a period not to exceed twenty-five years from the time of the creation of the suspension."

Civil Code, § 716:

"Future Interests Void, Which Suspend Power of Alienation. Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed."

Civil Code, § 749:

"Time of Creation, What. The delivery of the grant, where a limitation, condition, or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition, or interest, within the meaning of this part of the Code."

The future interest of the beneficiaries, provided for by the terms of the will as interpreted by the decree of distribution, was the fee-simple title which at the termination of the trust would "thereupon vest" in the three sons. During all of the intervening ten years that title, according to the decree, is to

be vested in the trustee. Since one or all of the sons might die at any time, but the title of the trustee was to continue at all events for the full period of ten years, there was from the very beginning of the trust period a possibility that the absolute power of alienation would be suspended for a longer period than the lives of the beneficiaries. It is the contention of appellants that those terms of the will and decree which attempt to establish a trust subject to such a possibility are void.

[1] Section 9 of article 20 of the California Constitution of 1879 reads as follows: "No perpetuities shall be allowed except for eleemosynary purposes." This is an exact repetition of the same provision contained in article 11, § 16, of the Constitution of 1849. Having in mind that the common law of England is the rule of decision in this state "so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state" (Pol. Code, § 4468), it is clear that the "perpetuities" forbidden by the Constitution are those perpetuities defined by the common law in relation to that subject. The Supreme Court of California has held that our Legislature, in the use of the phrase "common law," had in contemplation the whole body of that jurisprudence as it stood, influenced by statute, at the time when the Code section was adopted. *Martin v. Superior Court*, 176 Cal. 289, 293, 168 P. 135, L. R. A. 1918B, 313. This particular Political Code section was enacted in 1872, but was based on a similar statute of 1850. In the *Martin Case*, Mr. Justice Shaw, with the concurrence of Mr. Justice Sloss, stated a modified view of the subject as follows:

"In 1850 there were in England, I have no doubt, many general acts of parliament in force which no one would claim were adopted as parts of our law by the act of our Legislature. The statement of what is included by that section needs more qualification and elaboration than is given to it in the main opinion."

[2, 3] We are of the opinion, however, that an English statute of the year 1800, dealing with restraints upon the power of alienation, will be conceded to be a part of the common law adopted in this state. "By the Thelluson Act (39 & 40 Geo. III, c. 98), the maximum period during which the power of alienation could be restrained was lives in being and twenty-one years and nine months." In *re Walkerly*, 108 Cal. 627, 658, 41 P. 772, 779 (49 Am. St. Rep. 64). From the foregoing it follows that the Constitution forbids the enactment of any statute having for its purpose to permit a suspension of the power of alienation of property for a period beyond the lives in being and 21 years and 9 months. By amendment of section 715 of the Civil Code, approved May 18, 1917, the Legislature added to that section the subdivision 2 which we have quoted, and thereby attempted to authorize such suspension of the power of

alienation "for a period not to exceed twenty-five years from the time of the creation of the suspension." This amendment being in direct violation of the rule against perpetuities as declared in the Constitution, we are of the opinion that such amendment is void.

[4] But it was within the power of the Legislature to confine the suspension of the power of alienation to a period of time less than that allowed by the common law. This has been accomplished by subdivision 1 of said section 715, which prescribes a limitation of such power to "the continuance of the lives of persons in being at the creation of the limitation or condition."

[5] Therefore, if the attempted creation of a trust in real property, as shown in the case at bar, cannot be recognized and enforced without at the same time suspending the absolute power of alienation of said real property for a period beyond the continuance of the lives of persons in being at the time of the death of the testator, then it must be held that the provisions of the will or of the decree attempting to create such trust are void. And we think that they are void. As was said in the case of *In re Walkerly*, 108 Cal. 627, 646, 41 P. 772, 775 (9 Am. St. Rep. 64), where a similarly defective will was in question:

"The fatal defect in the trust is that it provides for an absolute period of years for its determination, during which period the power of alienation is suspended."

It was pointed out that every express trust, valid in its creation, vests the whole estate in the trustees. "If this trust be not valid in its creation, the trustees would take no estate, but neither would the beneficiaries whose rights are dependent upon the validity of the trust. If it be valid, then the 'whole estate' vests in the trustees." In that case, as in the present case, it was suggested by those seeking to sustain the trust that a given remainder was vested, which remainder would be alienable by the remainderman, subject only to the prior interest limited to the trustees. But the court said:

"The fact that a given remainder is vested renders it absolutely alienable, so far as it is itself concerned, but the absolute fee may at the same time be inalienable. Therefore, to convey this absolute interest in possession, the beneficiaries would be compelled to unite with their conveyance that of the trustees in whom the fee is vested. But the trustees cannot convey until the expiration of 25 years. An attempt by them to convey before that time would contravene the trust, and be a void act (Civ. Code, § 870), and so even by this method of progression our path leads to that barrier of perpetuity which cannot be surmounted. So, even though the beneficiary should be a remainderman under such a trust as this, he still could not alienate the land within the trust period so as to avoid the statute. Such a trust cannot be terminated or destroyed during the

period fixed for the existence, even by the consent and joint act of all the trustees and beneficiaries."

The decision in the *Walkerly* Case has been mentioned with full approval in *Estate of Maltman*, 195 Cal. 643, 234 P. 898.

The conclusion to which we have come upon those phases of the case which we have attempted to discuss renders it unnecessary to give particular attention to the other points argued by counsel. That part of the decree of distribution described in the notice of appeal is reversed, with the direction that an amended decree be entered distributing the real property of said estate to the persons entitled therein as heirs at law of the decedent.

We concur: HOUSER, J., YORK, J.

86 Cal. App. 347

SANER v. KNIGHT et al. (Civ. 3305.)

District Court of Appeal, Third District, California. Oct. 25, 1927.

1. Adverse possession $\S$ 43(3)—Where defendant's predecessors in interest made correction deeds to include land in controversy, successive adverse possessions could be tacked.

Where predecessors in interest of cross-complainant, claiming adverse possession and asking that his title be quieted, made correction deeds to land in controversy reciting that land conveyed had been inadvertently omitted from original deed, it was proper to tack successive adverse possessions of occupants.

2. Adverse possession $\S$ 70—One claiming adverse possession of disputed land need not connect paper title of predecessor in interest with patentee, where she occupied premises through her tenants.

One claiming adverse possession of property and asking that title be quieted did not have to connect paper title of predecessor in interest with patentee, where land in question had been in one inclosure since 1904 and had been occupied through tenants by all predecessors in interest.

3. Adverse possession $\S$ 114(1)—Evidence sufficiently established 20-year period of occupancy of land adjoining cross-complainant's lot (Code Civ. Proc. § 749).

In action to determine adverse claims to real property in which defendant filed cross-complaint alleging ownership by prescription of certain parcel and asking that his title thereto be quieted, evidence held sufficiently to establish 20-year period of occupancy by cross-complainant and his predecessors in interest of land adjoining his lot and inclosed by fence, under Code Civ. Proc. § 749.

4. Quieting title $\S$ 44(4)—As against stranger to title, actual possession of lands makes prima facie case of ownership in action to quiet title.

As against an entire stranger to title, actual possession of lands makes prima facie case

of ownership and is sufficient to support judgment in action to quiet title.

5. Adverse possession ⚡114(1)—Evidence held to establish more than five years' adverse possession of property adjoining cross-complainant's lot (Code Civ. Proc. §§ 321-325).

In action to determine adverse claims in which defendant filed cross-complaint alleging ownership by prescription of certain parcel and asking that his title thereto be quieted as against plaintiff, evidence held sufficient to establish more than five years' adverse possession by cross-complainant of tract adjoining his lot under Code Civ. Proc. §§ 321-325.

6. Appeal and error ⚡1056(4)—Excluding patent showing record title to disputed land in county judge for public uses in suit to quiet title held not reversible error, where court found plaintiff had no title.

In action to determine adverse claims in which defendant filed cross-complaint asking that his title to certain parcel be quieted, plaintiff could not complain of exclusion of evidence of patent to county judge covering land in dispute for public uses therein designated, for purpose of showing that defendant could not acquire adverse title, where court found that land in controversy was at all times in possession of cross-complainant and his grantors and plaintiff had no title thereto.

7. Judges ⚡42—Excluding evidence of patent to county judge in trust for public of land in dispute, offered to disqualify judge, held not error; "interest" (Code Civ. Proc. § 170).

In action to determine adverse claims to real property, in which defendant filed cross-complaint, exclusion of evidence of patent from United States to county judge of land in dispute in trust for benefit of occupants of town site, offered for purpose of disqualifying trial judge, held not error, since interest of trial judge, if any, was only that of a successor of trustee for occupants of town site and would not have disqualified him; word "interest," as used in Code Civ. Proc. § 170, implying only a direct, proximate, substantial, and certain interest in result of action.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest (In Suit or Action).]

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action to determine adverse claims to real property by Irene Saner against N. A. Knight and others. Judgment was rendered for plaintiff, and Noah C. Crewdson later appeared and filed answer and a cross-complaint. From a judgment for cross-complainant and an order denying a new trial, plaintiff appeals. Affirmed.

Ira B. Langdon and Paul D. Dexter, both of Stockton, for appellant.

Berry & Watson, of Stockton, for respondents.

BURROUGHS. Justice pro tem. This action was brought under the provisions of section 749 of the Code of Civil Procedure to determine all adverse claims to the land described in the complaint. The action was originally entitled "Irene Saner, Plaintiff, v. N. A. Knight and All Persons Unknown, etc., Defendants." There was no appearance by any person claiming to be a defendant, and on September 8, 1924, upon the evidence presented by the plaintiff, the court entered its judgment in favor of the plaintiff as to all of the said land. On May 18, 1925, after appropriate proceedings for that purpose, Noah C. Crewdson appeared in the action and filed an answer denying plaintiff's ownership to the easterly 50 feet of lot 12 of block 1 of Thomas' new addition to the town of Woodbridge, said parcel of land being a portion of the land described in plaintiff's complaint. He also filed a cross-complaint alleging ownership by prescription of said easterly half of lot 12 and asking that his title thereto be quieted as against the said plaintiff. The issue thus raised was tried by the court and findings and judgment entered in favor of the said defendant and cross-complainant. This is an appeal by the plaintiff from said judgment and from the order denying her motion for a new trial.

The court made the following finding of fact:

"That said defendant and cross-complainant, Noah C. Crewdson, has, by himself and his predecessors in interest, been in the actual, exclusive, and adverse possession of the real property, described in his cross-complaint herein, continuously for 20 years prior to the filing of the plaintiff's complaint herein, to and including the present time, claiming to own the same in fee against the whole world."

It is appellant's contention that the foregoing finding is not warranted by the "law or the evidence." However, an examination of the record discloses the fact that this finding is not only warranted, but the little evidence there is to the contrary is so palpably weak that it can hardly be said to raise a conflict. The facts are that lots 8, 10, and 12 of block 1 of Thomas' new addition to the town of Woodbridge are located in the northeasterly corner of said block 1, said block lying adjacent to Indiana street on the north and Orange street on the east. It is not disputed that lot 8 of said block is owned by the defendant and cross-complainant Crewdson. It has a frontage on Orange street. Lot 10 is owned by the plaintiff and lies to the west of and adjoining lot 8. Lot 12 is an irregular shaped tract of land lying to the north of, and is directly in front of and adjoining, both lots 8 and 10. Lot 12 extends to Indiana street on the north and Orange street on the east. The westerly half of said lot 12 has been, for many years past, and now is, used in

connection with lot 10 owned by the plaintiff; in fact plaintiff's house is partly on the westerly half of lot 12 and partly on lot 10, and it is not disputed that this portion of lot 12 belongs to the plaintiff. The easterly 50 feet of said lot 12 has been, and now is, used in connection with lot 8. The house of the cross-complainant is situated partly on lot 8 and partly on the easterly 50 feet of lot 12.

It was stipulated by both parties that said lot 12 had not been assessed nor any taxes levied thereon for more than 20 years prior to the filing of the complaint in this action.

The testimony shows that at least as early as 1905 there was a line fence between lots 8 and 10 and that it extended across lot 12 to Indiana street, and thence along Indiana street in an easterly direction to Orange street and southerly along the latter street to an old barn on the back of lot 8. It is true that at times this fence was broken down in places and was not kept in very good repair, but nevertheless it existed and was sufficient at all times to show that lot 8 and the easterly 50 feet of lot 12 were in one inclosure.

The evidence also discloses that the easterly 50 feet of said lot 12 has been used continuously since 1904 in connection with and as a part of lot 8; that the children of the people who occupied the house on lot 8 used it for a playground, and that a Chinaman who occupied the house for about three years used the lot as a place for drying almonds, and that after the cross-complainant had purchased the property early in the year 1921, he employed a man named Davis, whose wife was then the owner of lot 10, to plow and level the easterly 50 feet of lot 12. Said cross-complainant also renewed the fence between lots 8 and 10 and dividing lot 12, and around the exterior boundary of lot 8 and the easterly 50 feet of lot 12, and planted fruit trees on all of said land. This was all done with the knowledge of the owner and the occupants of lot 10 and without any objection on their part. When Mrs. Davis, the owner of lot 10, conveyed it to plaintiff, who is her daughter, lot 12 was not described in the deed, and, according to the testimony of the plaintiff, the latter did not know of the existence of lot 12, she believing that lot 10 extended to Indiana street. When cross-complainant Crewdson bought the property described in his cross-complaint from Mrs. Kyber, his predecessor in interest, Mrs. Kyber told him lot 8 extended to Indiana street.

As against this testimony there are some contradictions as to the fence having been in existence at the times testified to by the cross-complainant and his witnesses. There is also some testimony that occasionally Davis, the father of the plaintiff, who for a short time was engaged in street sprinkling, parked his sprinkling wagon on the east half of lot 12; that at times he staked his milk cows

thereon, and occasionally cut some grass there. Davis also testified that he plowed and leveled the easterly portion of lot 12, but the evidence is satisfying that this was done under the employment of the cross-complainant, who paid him for the work.

The plaintiff was asked on cross-examination when she discovered that there was such a piece of land as lot 12 in block 1. She replied that it was three years previous when she wanted to sell it, discovering it then from the abstract of title, and thereafter commenced this action to quiet her title thereto. After obtaining the original judgment in this action, plaintiff, on November 9, 1924, wrote a letter to the cross-complainant demanding that he remove his fences from lot 12 and stating to him, "You are no longer in possession of it." This was the first intimation she ever gave the cross-complainant that she claimed any title to the land in dispute, and it was a clear recognition of the cross-complainant's possession.

The evidence is overwhelming that the plaintiff's claim to this land was an afterthought based upon her discovery that there was such a piece of land as lot 12; and her claim to that portion of the Crewdson land as lies within the latter's inclosure is without merit.

[1] It is further contended on behalf of appellant that the judgment is erroneous because in extending to cross-complainant Crewdson the benefit of adverse title, the court was compelled to tack successive adverse possessions and that no priority of title was shown to exist between said cross-complainant and the former adverse occupant. Many cases are cited by appellant in support of this view, and there is no doubt that the law as cited is sound. *Allen v. McKay & Co.*, 120 Cal. 332, 52 P. 828, and *Messer v. Hibernia Savings & Loan Society*, 149 Cal. 122, 84 P. 835. But record title in the case at bar shows a conveyance of lot 8 to Blanchie Frazier, January 12, 1905; that in 1910 the latter conveyed said lot to Stella Kyber and the latter conveyed the same to cross-complainant Crewdson in 1921. On July 23, 1925, Blanchie Frazier made a correction deed to Stella M. Knight, formerly Stella M. Kyber, of said easterly half of lot 12 of block 1, and the latter, on July 28, 1925, made the same character of deed to cross-complainant Crewdson, both of these deeds containing a recital that the parcel conveyed had been inadvertently omitted from the original deed. These deeds remedied the defect complained of by the appellant herein, and clearly bring the case within the rule laid down in *Allen v. McKay & Co.*, supra, and *Messer v. Hibernia, etc., Society*, supra.

[2] Appellant urges that respondent did not offer proof at the trial that Stella M. Knight was in the possession of the disputed land and therefore she must connect her paper title with the patentee. A large number

of cases are cited in support of this view, and the principle of law thus cited by counsel is sound, but is not applicable to the facts of this case for the reason that all of lot 8 and the easterly half of lot 12 were under one inclosure in 1904 and were rented to tenants by Dr. Brown, the predecessor in interest of Blanchie Frazier, and that the former conveyed lot 8 of said premises to the latter, and that during the ownership of said Blanchie Frazier the premises were occupied by her tenants and that after she conveyed the title to Stella Kyber, the latter also occupied the said premises through her tenants.

[3, 4] We are of the opinion that this sufficiently establishes the 20-year period of occupancy required by section 749 of the Code of Civil Procedure, but even if the evidence was held to be insufficient to establish the 20-year period required by section 749 of the Code of Civil Procedure, cross-complainant has clearly established that he and his predecessors have been for many years last past and that at the time of the filing of the plaintiff's complaint and at the time of the trial he was in the actual and exclusive possession of the land in controversy, and as against the plaintiff, who was never in possession, nor ever had a record title to said land, and is a stranger to the title, she cannot complain of the judgment, for, as held in *Davis v. Crump*, 162 Cal. 513, 123 P. 294, as against an entire stranger to the title, actual possession of lands has uniformly been held in actions to quiet title to make out a prima facie case of ownership and sufficient to support a judgment.

[5] There is also another reason why the plaintiff cannot prevail in this action, and that is because the proof on behalf of the cross-complainant is sufficient to establish more than 5 years' adverse possession under the provisions of sections 321 to 325 of the Code of Civil Procedure, and the allegations of the cross-complaint are broad enough under the provisions of section 738 of the Code of Civil Procedure to sustain the judgment herein.

In *Faxon v. All Persons, etc., et al.*, 166 Cal. 707, 137 P. 919, L. R. A. 1916B, 1209, and *Ernst v. Tiel*, 51 Cal. App. 747, 197 P. 809, it is held that where an action is brought under the provisions of section 749 of the Code of Civil Procedure, and the issue of title is raised by the pleadings of the parties and is properly before the court for determination, the court, upon proof, may render judgment quieting plaintiff's title to the property under the general provision of law relating to actions of that character, although the proof is not in strict accordance with section 749 of the Code of Civil Procedure.

[6] Plaintiff's next contention is that the court erred in not receiving in evidence the patent from the United States to W. E. Green, county judge of San Joaquin county, in trust

for the benefit of the occupants of the townsite of Woodbridge, which, according to the claim of appellant, includes the easterly 50 feet of lot 12 of block 1; the objection being that the record title would thus be shown to rest in the county judge and his successors, for the public uses therein designated, and that no adverse title could be acquired there-to by an individual.

We are not called upon to pass upon this question, because the public is not here complaining, and it is no concern of the appellant for the reason that the trial court has found that the parcel of land in controversy was at all times in the possession of the cross-complainant and his grantors and plaintiff has no title thereto. Plaintiff's principal reliance in support of the foregoing point is the case of *Placer County et al. v. Lake Tahoe Ry. Transportation Co.*, 58 Cal. App. 764, 209 P. 900. But in that case the facts are that a public commons had been legally dedicated to public use and therefore became the property of the public and the county of Placer was the plaintiff, and it was there held that as to such a parcel of land title by prescription could not be acquired against the public.

The case of *Tripp v. Duane*, 74 Cal. 85, 15 P. 439, while not directly in point, is somewhat analogous, and it is there held that in an action to quiet title a defendant against whom the plaintiff's title is properly quieted to an undivided interest in the premises cannot object, on an appeal taken by himself alone, that the decree as against the other defendants not appealing quieted plaintiff's title to a greater extent than was justified by the evidence.

[7] The last contention that we are called upon to answer is that the court erred in not receiving evidence of the patent which was offered by the plaintiff, it being offered for the purpose of disqualifying the trial judge, and arises upon the following offer of evidence:

"Mr. Langdon: We will introduce testimony * * * to show the title to this property in point, lot 12, and the only existing title we are able to show, the only registered title, stands in the judges of San Joaquin county, * * * and that patent to this land was issued to the judges of San Joaquin county and their successors, which would disqualify the judge of San Joaquin county to hear and try this case."

It further appears from counsel's offer of proof that the patent referred to was issued "in trust for the benefit of the occupants of the townsite of Woodbridge." This offer of evidence was refused and is now assigned as error. In support of his contention appellant cites *Lindsay-Strathmore I. Dist. v. Superior Court*, 182 Cal. 315, 187 P. 1056; but in that case it was held that the trial judge, through ownership in his own right of a parcel of land, held a direct interest in the water underlying it, which was the subject-matter of the litigation, and that it was im-

material how small that interest might be, it was sufficient to disqualify the trial judge.

In the case at bar the interest of the trial judge, if in fact there was any interest, was only that of a successor of the trustee for the occupants of the townsite, and, as said in *Oakland v. Oakland Water Front Co.*, 118 Cal. 249, 50 P. 268, where the question of disqualification involved was that of the judge being a taxpayer of the city and might benefit by a diminution of taxes as the result of revenue to be derived from the water front, the subject-matter of the litigation, in case of the success of the city, the word "interest" as used in section 170 of the Code of Civil Procedure embraces only a direct, proximate, substantial, and certain interest in the result of the action. In the language used by Judge Olney in his concurring opinion in *Lindsay-Strathmore I. Dist. v. Superior Court*, supra, the judge's "right, if he has any, is purely theoretical and his so-called interest is not a thing of reality."

Under the circumstances it does not appear that, even though the court had permitted the introduction of the evidence offered and there had been no rebuttal thereof, the interest of the trial judge, as shown by such evidence, would have disqualified him. There was therefore no error in rejecting the testimony.

We have examined each of the assignments of error, and in our opinion they are without merit.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

PEOPLE v. HARDWICK. (Cr. 1507.)★

District Court of Appeal, Second District, Division 2, California. Oct. 31, 1927.

Hearing Granted by Supreme Court Dec. 29, 1927.

1. Assault and battery §64—Peace officer in arresting for misdemeanor need not retreat before using extreme measures to prevent receiving injury, but must press forward to accomplish his purpose.

While a private citizen may be obliged to retreat to avoid the necessity of resorting to extreme measures to prevent receiving great bodily injury, a peace officer in making an arrest for a misdemeanor is not under such compulsion, but must press forward to accomplish his purpose.

2. Assault and battery §96(2)—Jury should have been instructed that defendant in making arrest for misdemeanor was not obliged to retire to avoid conflict.

In prosecution for assault with a deadly weapon, under evidence that defendant was endeavoring to make an arrest for a misdemeanor, jury should have been instructed he was under no obligation to retire in order to avoid a conflict.

3. Criminal law §757(6)—Instruction that witness convicted of felony was less likely to be truthful than one not so convicted held reversible error.

In prosecution for assault with deadly weapon, where to impeach defendant as a witness evidence was introduced that he had been convicted of manslaughter in Oklahoma, instruction that one convicted of felony is less likely to be honest and truthful in his testimony than one who has not been convicted held reversible error, where credibility of witness was for jury and court was unauthorized to suggest as matter of law that former conviction deprived witness of credit presumptively due him.

4. Criminal law §823(12)—Error in charge on credibility of witness convicted of felony held not cured by general statement jury were sole judges of evidence.

In criminal prosecution, where evidence that defendant was convicted of manslaughter in Oklahoma was admitted to impeach his credibility as a witness, error in instruction that one convicted of felony was less likely to be honest and truthful in testimony than one not so convicted held not cured by general instruction that jury were sole and exclusive judges of effect and value of evidence.

5. Witnesses §345(4)—Pardon of witness convicted of felony is admissible and to be considered by jury in determining his credibility.

In criminal prosecution, where conviction of defendant of felony is admitted to impeach him as a witness, if pardon has been granted him, it is admissible in evidence so that jury may determine his credibility thereafter.

6. Witnesses §345(4)—Whether witness convicted of felony was wrongfully convicted cannot be inquired into because of admission of pardon on issue of credibility.

In criminal prosecution, where conviction of witness of felony is admitted as affecting his credibility, if pardon is introduced in evidence, whether conviction was wrongful may not be inquired into, since to do so would require examination into collateral matter.

7. Criminal law §778(3)—Instruction that presumption of innocence continues throughout trial should always be given.

In criminal prosecution, charge that presumption of innocence continues with defendant throughout trial and deliberations of jury should always be given.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Joe Hardwick was convicted of assault with a deadly weapon, and he appeals. Reversed.

Edgar B. Hervey and M. W. Conkling, both of El Centro, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Dep. Atty. Gen., and Elmer W. Heald, of Brawley, for the People.

THOMPSON, J. The defendant was convicted of assault with a deadly weapon upon William A. Taylor and appeals from the

Judgment of the court pronounced upon the verdict and from an order denying his motion for a new trial.

The undisputed facts are that on the evening of February 3, 1927, Taylor, in company with his wife and six male companions and their wives, had been at the Climax Café in Mexicali, Mexico, from about 7:30 in the evening, eating, drinking and dancing; that about 8:50 p. m. they recrossed the international line into Calexico, Cal.; that upon their arrival in Calexico they separated into two groups of seven each, for the purpose of driving home in two automobiles; that very soon after Taylor and a Mrs. Booker seated themselves in one of the machines, the defendant, who was a peace officer, approached the automobile and demanded that they not make so much noise; that in the conversation which immediately ensued the defendant said in effect that he ought "to throw" Taylor "in"; that Taylor demanded to see Hardwick's authority; that Hardwick grabbed Taylor in an effort to pull him out of the machine and shortly after shot him; that the bullet entered the body near the left nipple and lodged under the skin in Taylor's back, whence it was subsequently removed; that after the shooting Taylor was taken into the police station, where the officers secured the services of a physician. This, in substance, comprises the undisputed facts. There is a sharp conflict on other matters. The defendant and several of his witnesses testified that the party returning from Mexico was very noisy and boisterous. The defendant asserts that his attention was attracted to the car in which Taylor and Mrs. Booker were sitting by the noise made by a woman and that as he approached it he heard her exclaim, "Oh! Oh!" "Quit; let me alone!" several times. Appellant further testified that when Taylor demanded his authority he threw back his coat and displayed his badge, not once but twice; that after he tried to pull Taylor out of the machine Taylor made a move with his right hand toward his right hip pocket as though to draw a gun, accompanying the move with profanity; and that he, being fearful of his life, shot. He testified further that the only members of Taylor's party in or at the automobile were Taylor and Mrs. Booker. He was corroborated in this testimony by his nephew, who said that he heard a woman screaming; that his uncle went over to see what the trouble was and a few minutes later called him and his cousin, Roly Hardwick, over there, saying something about trouble; that he saw his uncle show Taylor his badge, saw the attempt to pull Taylor out of the automobile, followed by the motion of Taylor as though to draw a gun, and saw the shooting; that Roly was there with him until he was told by his uncle to get a policeman and get him quick; and that no member of Taylor's party was present except Taylor and the one woman. The testimony of the people's

witnesses may be fully illustrated by stating in substance the testimony of Taylor, who was corroborated in all important points by four of his witnesses who claimed to have been in a position to see and hear. He testified that Mr. and Mrs. Smith and Mrs. Jones branched off from his party of seven, the three of them going to the rest rooms of a Shell Oil Company station near by and did not come up to the car until about the time that he told the defendant that he was not aware of the fact that they were making any noise and also told the defendant to leave the young lady "out of the conversation"; that Hardwick at no time placed him under arrest or showed him an emblem of authority; that after his refusal to show his authority he resisted the defendant when he tried to pull him out of the car, whereupon Hardwick called out, "Come over here, you fellows," and after a few more words, pulled his gun and shot.

The appellant's first complaint is the refusal of the court to give the following instruction:

"An officer having legal authority to make an arrest who is resisted by the person whom he attempts to arrest is under no obligation to wait for assistance or retire in order to avoid a conflict with the person he thus attempts to arrest, or to retire in order to avoid injury at the hands of any such person whom he attempts to arrest, or to wait for assistance in the making of any such arrest by reason of any resistance offered, and that *it is the duty of all persons who commit any crime be it felony or misdemeanor in the presence of an officer to peacefully submit to arrest and not to offer any resistance.*" (Italics ours.)

The court refused to give the instruction in toto, but did give the italicized portion, and also gave an instruction, a portion of which reads as follows:

"If you believe from the evidence in this case that Taylor, at the time of his arrest, if he was arrested, or at the time defendant was approaching the car which Taylor and Mrs. Booker had entered, was drunk or committing a disturbance of the peace or any other public offense, then and in either such case it was the duty and right of the defendant to arrest Taylor, and for that purpose he was authorized to use whatever force was necessary to take Taylor into custody, and if Taylor resisted such arrest, and in the course of such resistance threw back his hand as if to draw a gun, and if from that act and other circumstances in the case the defendant honestly believed, and, as a reasonable man, had good cause to believe, that he was in imminent danger of suffering death or great bodily harm at the hands of Taylor, then the defendant was justified in shooting Taylor for the purpose of disabling or killing him, if that appeared to be necessary in order to protect himself, and in such case the defendant would not be accountable, and you should acquit him even though it should afterwards appear that Taylor was unarmed, and that the indication on which the defendant acted was wholly fallacious, and that he was not in actual peril. On the other hand, if, after considering all of

the evidence in this case, you believe, beyond a reasonable doubt, that Taylor had neither committed, nor was in the act of committing, any public offense at the time the defendant approached the car on the night in question, then the arrest of Taylor by the defendant, if he was arrested, would be unlawful, and Taylor would have a right to resist such unlawful attempt to arrest him, though he would not have a right to resort to extreme measures such as using a gun, or other dangerous weapon in such resistance, unless circumstances existed at the time the arrest was being attempted which were reasonably sufficient to justify him in the belief that he was about to be injured in body or limb, or that his life was in danger from the defendant. If the arrest of Taylor was unlawful and was made without probably [sic] cause, or, if the arrest was made by the defendant in bad faith and for the purpose of oppression, then and in either such case the defendant, as between himself and Taylor, would be the first aggressor, and the defendant would not be permitted under the law to justify his act of shooting Taylor on the ground of self-defense, unless he had in good faith, before he fired the shot that wounded Taylor, desisted from all threats, if any, and all acts of violence, if any, and had withdrawn from his attempt to arrest Taylor, if he was attempting to arrest him."

There was another instruction which stated the conditions under which the right of self-defense may be asserted, including the following:

"That the party may not himself be the first aggressor, or, if the aggressor, that he has in good faith withdrawn from the contest before the fatal blow."

[1, 2] It is the claim of appellant that in these instructions, together with others which define with greater particularity the element of apparent necessity to resort to extreme measures to prevent receiving great bodily injury, the trial judge overlooked the distinction between a peace officer and a citizen; that while the citizen may be obliged to retreat to avoid the necessity, that the officer is under no such compulsion, but rather is obligated to press forward for the accomplishment of his purpose. There can be no doubt that appellant's statement of the law is correct, but in this connection we must bear in mind that there is a substantial difference, in using an undue amount of force to prevent escape, from that of using all the force necessary to overcome resistance. In *Krueger v. State*, 171 Wis. 566, 177 N. W. 917, it is said that:

"While in order to apprehend the person charged with a misdemeanor only an officer may not take the life of the person so charged, it does not follow by any means that any resistance offered to the arrest may not be overcome to the extent of taking life, if that be necessary to overcome the resistance. * * * It was not only his privilege but his duty to overcome such resistance, and the taking of life necessary to do so constitutes justifiable homicide under section 4366, Stats."

And in *State v. Dierberger*, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380, the court says:

"The officer must of necessity be the aggressor. His mission is not accomplished when he wards off the assault. He must press forward and accomplish his object. He is not bound to put off the arrest until a more favorable time. Because of these duties devolved upon him the law throws around him a special protection."

Further quotations might be added to the same effect from the old books of the common law, which are to-day accepted as guides to our modern law. See quotations and citations, *Bishop's New Criminal Law*, vol. 2, §§ 647 et seq. Under this state of the law the jury should unquestionably have been told, in view of the testimony which justified them in believing that the defendant was endeavoring to make an arrest for a misdemeanor, that he was under no obligation to retire in order to avoid a conflict. They were informed that before the defendant could possibly be justified in the use of a deadly weapon he could not have been "the first aggressor, or, if the aggressor, that he" had "in good faith withdrawn from the contest before the fatal blow." As is stated in the quotation from *State v. Dierberger*, supra, the officer must under the law be the aggressor. The court endeavored, however, to define what was meant by the term aggressor as used in the instruction by saying that if the arrest were unlawful or oppressive the defendant would be the first aggressor. Did the jury understand from this that the defendant in the eyes of the law would only be the aggressor in the event of an unlawful attempt to make an arrest? Ordinarily, it may be said that the statement of one instance where the person would be an aggressor would not conclude the possibility of his being an aggressor otherwise. However, as a part of this same instruction, the jury were told that if Taylor was in fact committing any offense at the time of the attempted arrest, "it was the duty and right of the defendant to arrest Taylor, and for that purpose he was authorized to use whatever force was necessary to take Taylor." Reading the two portions of these instructions together, we think the jury could gather no other idea than the one that only in the event the attempted arrest were unlawful or oppressive would the defendant be the aggressor, and that otherwise it was his duty to press forward and make the arrest, using all the force necessary to accomplish that purpose.

[3] During the trial of the defendant, who was a witness, evidence was introduced, for the purpose of impeachment, establishing that the defendant had been convicted of the offense of manslaughter in the state of Oklahoma, and thereafter the defendant sought to introduce an unconditional pardon by the Governor of that state in which it is recited that the defendant was first granted a parole

on the recommendation of the board of prison control, and that "since the granting of said parole" the defendant has "lived the life of a good, upright, law-abiding citizen, and as such is entitled to a full pardon." The court excluded the pardon and in connection with this phase of the case instructed the jury as follows:

"Where the defendant in a criminal case, testifies as a witness in his own behalf, he may be impeached by showing that he has been convicted of a felony, if such is the fact; and such showing may be made by examination of the defendant himself or it may be shown by the record of the judgment of the conviction. Such impeachment affects only the credibility of the witness. It is permitted upon the theory that a man who has been convicted of a felony is less likely to be honest and truthful in his testimony than a man who has not been convicted of a felony. It does not, however, impeach the character of defendant for the peace and quiet, or prove, or tend to prove, in any way, the charge upon which he is on trial, and no such inference should be drawn from the impeachment or from the judgment of conviction upon which the impeachment is based (Code Civ. Proc. § 2051), and anything said or done in the presence of the jury concerning a pardon, which may or may not have been granted to defendant, it having been stricken from the record, is of no consequence in this case, and must be disregarded by the jury, as must all other evidence which has been ruled out or stricken, or to which objections have been sustained."

Counsel complains of the action of the court in this respect for two reasons: First, that the court erred in giving the instruction, and particularly that portion in which it is stated that one "who has been convicted of a felony is less likely to be honest and truthful in his testimony" than one who has not been convicted, asserting that the court should have given a requested instruction to the effect that it is for the jury, and the jury alone, to say what effect the conviction will have upon their mind; second, that, the conviction being admitted, the pardon was admissible, together with the circumstances attending the conviction. He also asserts that the record disclosing that the district attorney having knowledge of the pardon, it was prejudicial error for the district attorney to mention the conviction before the jury. However, inasmuch as appellant concedes the admissibility of the conviction regardless of the pardon, it is impossible to conceive any legitimate reason why the district attorney should not mention the conviction.

Should the court have given that portion of the instruction just mentioned and refused to give the following instruction:

"A previous conviction of a felony does not necessarily destroy the credibility of any witness, nor does it raise a presumption that the witness has or will testify to that which is false. It is simply a circumstance of more or less weight which you are authorized to take into consideration in determining what credit shall be given to him with respect to his testimony."

[4] It is not debatable that the instruction asked by defendant correctly states the law applicable to the situation. It was for the jury to say, in view of all the circumstances, what credit should be given the witness, and the court has not the authority to suggest that, "as a matter of law," a former conviction "deprived the particular witness of any portion of the credit presumptively due to the testimony of witnesses [sic]." *People v. McLane*, 60 Cal. 412. It has been held that the effect of a former conviction, where introduced for the purpose of impeachment must be left to the jury. *Leventhal v. Home Ins. Co.* (Sup.) 165 N. Y. S. 323. But here the trial judge in no uncertain terms informed the jury that the witness was not entitled to the same credibility as one who had not been convicted. And in so far as he did so he stepped beyond the judicial function and attempted to discharge the duty of the jury. This he could not do, nor was the error cured by a general statement included in the instruction usually if not always given, to the effect that the jury are the sole and exclusive judges of the effect and value of evidence. In this instance they were given to understand that, as a matter of law, a person who has been convicted is deprived of a part, at least, of the credibility presumptively due the witness. We have heretofore recited sufficient of the testimony to disclose that the testimony was in sharp conflict and that had the jury not been misinstructed the trial might have terminated otherwise. We cannot say that the error is not prejudicial or that it has not resulted in a miscarriage of justice.

While the error found to exist requires a reversal, yet, in view of the fact that the admissibility of the pardon will probably arise on a retrial, we must determine the law upon that question.

[5, 6] In our consideration of the problem thus presented, and especially at a period in our civic development when there is being given great attention to procedural reform in an effort to secure sure and speedy justice, with the hope that it will result in a lessening of the commission of crime, it is most desirable that we realize that while the certain and swift conviction of the guilty is an end "devoutly to be hoped for," yet, more important still, in the aim to free the citizens from violence, is the certain acquittal of the innocent. It is obvious that whenever in any country, in a mistaken zeal for conviction, the administration of the law has reached a point where the innocent are not safe, that respect and reverence for institutions and regard for the rules of social intercourse are blighted. There is no surer avenue to the increase of social crimes than for the state to permit the punishment of those who are not guilty. Long ago it was discovered that convictions were sometimes had where there was a doubt concerning the guilt, and that sometimes a man was guilty who was not really

bad at heart and who evinced a sincere desire to atone for his misdeed. Such persons were fit subjects for pardon by the crown, in much the same manner as many persons who may have rebelled under a sense of grievance, mistaken or otherwise, were proper objects of a general amnesty. And as a general amnesty blots out the offense from the memory, so we find the early authorities concerning pardons making like statements. In *Hay v. Justices of the Tower*, 24 Q. B. 561, we read from Baron Pollock's opinion:

"By the prerogative of the crown the pardon extends far beyond the mere discharge of the prisoner from any further imprisonment. It is a purging of the offense. The King's pardon, says Hale, 'takes away poenam et culpam.' 2 P. C. 278. This points to the character, condition and status of the convict. Again, in 2 Hawkins, P. C., s. 48, the author says that pardon 'does so far clear the party from the infamy and all other consequences of his crime that he may not only have an action for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness. * * *'"

And Justice Hawkins, in his opinion in the same case, says:

"I cannot believe that it was the intention of the Legislature that if a man had the great misfortune to be *wrongly convicted, and was pardoned on the ground that the conviction was wrong*, the queen's pardon, although absolving him from the pains of imprisonment, should nevertheless leave him to suffer the penal effect of his conviction by being prevented in future from following his avocation, notwithstanding the rectification of the error which had occurred." (Italics ours.)

And in an earlier case (*Cuddington v. Wilkins*, 1 Hob. 67, 80 English Rep. [Full reprint] 216), which was an action for slander by Cuddington, who had been convicted of larceny and subsequently pardoned, against Wilkins, who called the plaintiff a thief and attempted to justify his words by the conviction, it was held that the plaintiff was entitled to recover, because "the felony is by the pardon extinct." Later, in the case of *Osborn v. U. S.*, 91 U. S. 474, 23 L. Ed. 388, Mr. Justice Field, delivering the opinion of the court, says:

"The pardon of that offense necessarily carried with it the release of the penalty attached to its commission, so far as such release was in the power of the government, unless specially restrained by exceptions embraced in the instrument itself." (Italics ours.)

And in Oklahoma, where the defendant in this case was formerly convicted and pardoned, we find that:

"Pardon reaches both the punishment prescribed for the offense and the guilt of the offender; it obliterates, in legal contemplation, the offense itself, and hence its effect is to make the offender a new man." (Italics ours.) *Ex parte Collins* (Okla. Cr. App.) 239 P. 696, cit-

ing *Ex parte Crump*, 10 Okla. Cr. 133, 135 P. 428, to the same effect.

Mr. Chief Justice Wallace, in discussing a restoration to citizenship as distinguished from a full pardon, in the case of *People v. Bowen*, 43 Cal. 439-443 (13 Am. Rep. 148), says:

"It did not purport to remove the guilt of Davis, nor wipe away the infamy by the law of the land attaching upon him by reason of his conviction. It sought to restore him to all the rights of citizenship possessed by him before his conviction of the offenses 'above referred to,' and to so restore him, while he yet remained a convicted felon, and with the consequent legal infamy attaching by law to that status. The stain of his iniquity flowing from his conviction, is still left upon him by the executive. The judgment of the law upon that fact is that the credit of his oath is so absolutely and effectually destroyed that he cannot be trusted to testify at all; that it is not to be hoped that he will speak the truth, but must be conclusively assumed that he will not. *If the judgment be reversed, the disability is, of course, necessarily removed; if the offense be pardoned the same consequence, too, would follow.*" (Italics ours.)

Also, in a disbarment proceeding (*Matter of Emmons*, 29 Cal. App. 121, 154 P. 619), founded upon a conviction of a felony which had subsequently been pardoned, after quoting from *Ex parte Garland*, 4 Wall, 333, 18 L. Ed. 366, to the effect that pardon not only releases the person from punishment but also blots "out the guilt thus incurred, so that in the eye of the law he is as innocent of that offense as if he had never committed it," and other authorities of like wording, it is said:

"Notwithstanding that the respondent at one time stood convicted of a felony and that the record of conviction might have been used as the foundation for this proceeding while the judgment of conviction was in force, it is no longer possible, after the pardon, to disbar him by this statutory proceeding wherein, if it is maintainable at all, judgment must go against him without any opportunity to defend against any present imputation against his moral character." (Italics ours.)

We conceive of this case as being particularly in point, because the record of conviction when introduced for impeachment purposes is a "present imputation against" the "moral character" of the witness.

Basing the opinion in part upon the authority of *Sims v. Sims*, 75 N. Y. 466, wherein it is held that a conviction in a foreign jurisdiction, if admissible at all, is not conclusive, but may be rebutted by proof of innocence, the court in the case of *Sisson v. Yost*, 58 Hun. 609, 12 N. Y. S. 373, not only decides that the pardon is admissible, but also that the witness may show "the promptitude with which the pardon itself was granted, the reason why it was granted, and the time when the defendant was discharged," the statement being added that "all these facts would

necessarily have had a very important bearing on the question of the credibility to be given to the witness." The judgment was reversed for this error. As long as it remained the law that the witness was disqualified by the conviction there was a unanimity in the decisions that the pardon removed the disqualification. The pardon was consequently always admissible to effect the removal. Gradually the law was changed in many jurisdictions so that the conviction does not work a disqualification. And with this change has come a small measure of difference in the language of the opinions. The only authority which we have been able to discover wherein the pardon was refused admission by the court of last resort is the case of *Gallagher v. People*, 211 Ill. 158, 71 N. E. 842, and although the appellate court in a former hearing of the same matter, then entitled *O'Donnell v. People*, 110 Ill. App. 250, decided that the pardon was admissible on the ground of "common fairness to the witness," the Supreme Court dismissed the argument with these words:

"Under the statute" (permitting the conviction for impeachment purposes only) "the guilt or innocence of the defendant of the crime for which he had been convicted, his punishment, his term of service, etc., are wholly immaterial and incompetent. That he may have been pardoned proves nothing as to his credibility, and to permit evidence of that fact would simply be to introduce into the case a collateral issue."

This statement is at variance with the history of the reason for and the effect of a pardon. Respondent relies upon a statement in the case of *People v. Mackey*, 58 Cal. App. 123, 208 P. 135, but the question there was whether one who had pleaded guilty and been granted probation and served his probationary period might be confronted with the record, and it was held that he could not. The declaration that, "although the grant of a pardon makes a 'new man' of the pardoned individual, his manhood is not revived to the extent that he may not be confronted with the record of his conviction whenever he testifies as a witness," although obiter, correctly states the great weight of authority, concerning which we might have grave doubt, were it not for section 2051, Code of Civil Procedure, and the almost unanimous voice of the decisions. It does not, however, decide the inadmissibility of the pardon. Counsel attaches considerable importance to

the remarks of the district judge in the case of *Wallamet R. T. Co. v. Oregon S. N. Co.*, 29 Fed. Cas. 88 (No. 17,106) to the effect that:

"It is, or certainly was at the date of this pardon, an ex parte proceeding, taken upon the ex parte statements, representations and solicitations of sympathizing friends and interested and uninformed parties, and cannot be said to prove anything except its own existence and the fact that the party was entitled to have, or had the influence requisite to procure the application of the executive clemency to this case. A pardon does not profess to be a reversal of the judgment of conviction, but only a relief from the punishment imposed by it. In every other respect the judgment stands as if no pardon had been granted."

This statement is certainly in sharp contrast with the opinions heretofore noted from the United States Supreme Court and does not fit as well with our notion of official duty performed by the executive as another found to have been quoted from *1 Starkie's Ev.* (7th Am. Ed.) 99, in the case of *Bennett v. State*, 24 Tex. App. 73, 5 S. W. 527, 5 Am. St. Rep. 875:

"And although a pardon cannot convert a wicked man into an honest one, and confer credibility upon one who through the infamy of his conduct is not credible, yet such a pardon must be presumed to have been conferred after inquiry, upon good and sufficient ground, on an object worthy of the indulgence, and therefore worthy of being heard, but the degree of credit is still to be left to the jury."

From this rather lengthy résumé of the authorities it is apparent that sound reason and a proper sense of justice dictate that the jury should be left to determine the credibility of the witness after having laid before it the pardon; that while the subject of the wrongful conviction, if such in fact it was, may not be inquired into, because that would require a lengthy examination into collateral matters, nevertheless the pardon is a proper subject of evidence.

[7] We have examined the other assignments of error, but find nothing requiring further comment other than to say that the instruction, in substance, that the presumption of innocence continues with the defendant through the trial and the deliberations of the jury should always be given. *People v. Ye Foo*, 4 Cal. App. 730, 89 P. 450.

Judgment and order reversed.

We concur: WORKS, P. J.; CRAIG, J.

86 Cal. App. 269

KENYON v. HARTFORD ACCIDENT & INDEMNITY CO. (Civ. 3351.)

District Court of Appeal, Third District, California. Oct. 22, 1927.

1. Appeal and error ⇨931(1)—On appeal from judgment for plaintiff, it is presumed that trial court believed plaintiff's testimony.

In action to recover damages for false imprisonment, it is presumed, on appeal from judgment for plaintiff, that trial court believed plaintiff's testimony that officer had circular on day of arrest, and that his attention was called to fact that description in circular did not fit plaintiff.

2. False imprisonment ⇨7(3)—Plaintiff could not be held without warrant by city marshal for misdemeanor committed in Oregon (Pen. Code, § 836).

Under Pen. Code, § 836, city marshal had no authority to hold plaintiff, suing for false imprisonment, without warrant for misdemeanor committed in Oregon.

3. False imprisonment ⇨15(3)—City marshal is not liable for imprisonment merely because arresting officer may have been subject to his orders.

In action for false imprisonment, mere fact that officer making arrest may have been subject to orders of city marshal does not make marshal liable for arrest or imprisonment.

4. False imprisonment ⇨15(3)—Superior officer, directing arrest, or personally co-operating therein, is liable for false imprisonment.

Superior officer is liable for false arrest or imprisonment when he has directed such acts to be done, or personally co-operated therein.

5. False imprisonment ⇨15(3)—City marshal, shown to have directed plaintiff to be held in county jail, held liable for false imprisonment.

In action to recover damages for false arrest, brought against surety of city marshal, evidence that city marshal received telegram from sheriff requesting arrest, placed same on office desk where it was observed by officer making arrest, and that immediately after arrest city marshal directed plaintiff to be held in county jail, was sufficient to make city marshal liable for subsequent false imprisonment.

6. False imprisonment ⇨29—Published article giving account of plaintiff's arrest and release held admissible to show damage for false imprisonment.

In action for damages for false imprisonment, evidence of article published in newspaper, giving fair and unbiased account of plaintiff's arrest, and subsequent release, which was natural consequence of arrest and imprisonment, was admissible to show damage suffered by plaintiff.

7. Torts ⇨15—Wrongdoer is liable for all natural consequences, though produced by intervening agents set in motion.

Generally, person committing illegal or wrongful act is answerable for all consequences that ensue in ordinary and natural course of

events, though consequences be merely brought about by intervening agents, provided such agents were set in motion by primary wrongdoer, or acts causing damage were necessary or legal consequence of wrongful act.

8. False imprisonment ⇨34—Publication of article concerning arrest held natural consequence of false imprisonment as regards right to damages.

In action for damages for false imprisonment, publication in newspaper of account of arrest is a natural and ordinary consequence of false imprisonment, and must be deemed to have been contemplated as regards right to recover damages therefor.

9. Appeal and error ⇨1051(1)—Admitting letter given plaintiff suing for false imprisonment, reciting that plaintiff was not person whose arrest was requested, was not prejudicial, where facts contained therein were otherwise proved.

In action for damages for false imprisonment, admission of letter given to plaintiff on his release, stating that he was not same person as was wanted, was not prejudicial, where it recited no fact which had not already been proved, and it was not contended at trial that plaintiff was person whose arrest was requested.

10. False imprisonment ⇨36—\$1,000 for false imprisonment for five days causing loss of job held not excessive.

In action for damages for false imprisonment of plaintiff, locked in cell for five days, suffering humiliation and mortification, losing employment, and finding great difficulty in securing another job, damages at \$1,000 held not excessive.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by W. D. Kenyon against the Hartford Accident & Indemnity Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 260 P. 954.

James T. Matlock, of Red Bluff, for appellant.

Ralph Lewis and George E. Foote, both of Sacramento, for respondent.

FINCH, P. J. The plaintiff was given judgment against the defendant in the sum of \$1,000, as damages for his false imprisonment by W. F. Montgomery, city marshal of Red Bluff, on whose official bond the defendant was surety. The court found, among other things, as follows:

"That * * * the said W. F. Montgomery, acting in his capacity as city marshal of said city of Red Bluff (maliciously and with force), and without an order, or warrant, or process of any court authorizing him so to do, did arrest and imprison and cause to be arrested and imprisoned the plaintiff herein, W. D. Kenyon, and did then and there restrain and deprive him of his liberty on a pretended charge of failing to provide for a wife or minor child, claimed by

the said W. F. Montgomery to have been committed by this plaintiff in the state of Oregon, and for no other reason whatsoever; that thereupon the said W. F. Montgomery, acting in his official capacity aforesaid, did imprison and cause to be imprisoned this plaintiff in the county jail of the county of Tehama, * * * and did there cause the said plaintiff to be restrained of his liberty, without bail and without any provision for bail for the period of five days thereafter; that said W. F. Montgomery did, during all of said time, maliciously and forcibly keep the said plaintiff in his said custody, and restrained and deprived of his liberty without bail, and refused to permit said plaintiff to give bail or be admitted to bail during all of said time; that, by reason of said imprisonment and restraint of the liberty of plaintiff, the said plaintiff was injured in his good name and reputation and subjected to humiliation from the citizens of the said county of Tehama and of the county of Sacramento, and among his friends and acquaintances and was thereby damaged in the sum of \$1,000."

The plaintiff testified that at the time of his arrest he was, and for three or four years prior thereto had been, a resident of Sacramento; that he was then receiving \$30 a week and expenses for driving a truck between Sacramento and Redding; that on February 15, 1925, between 3:30 and 4 o'clock in the morning, he was arrested in Red Bluff by the "night officer" of that city, Fred Griffith, who "called the sheriff and made reservations" for the plaintiff in the county jail, to which he was then taken and "locked up"; that between 8 and 9 o'clock of the same morning Montgomery appeared at the jail with a circular which contained a description of R. B. Kenyon and a request for his arrest for "desertion and nonsupport in Polk county," Or.; that the plaintiff demanded an immediate hearing, but received "no response"; that the sheriff "stated in the presence of Mr. Montgomery that I was not the man that the circular called for," but that Montgomery said "to hold me in the county jail until he had further orders"; that the plaintiff was held in the county jail for five days; that he then employed an attorney, who procured the issuance of a writ of habeas corpus for his release, but that, prior to the time set for the return thereon, Montgomery released him from custody; that the circular contained a picture of R. B. Kenyon, but there was "absolutely no resemblance whatever" between the picture and himself; and that he lost his job by reason of his arrest and imprisonment and was out of steady work for several months thereafter.

[1, 2] The circular, to which reference has been made, was headed, "\$100 Reward," and it contained the following description:

"Ross B. Kenyon, age 35, weight 170-180, height 6 feet, ash blond hair with gray mixed through, blue eyes, heavy brows, meeting on bridge of nose; gold bridge work in upper jaw; two gold teeth on each side of two central teeth

on upper jaw, no lobes on ears, very broad shoulders."

The defendant's eyes are gray. His brows do not meet on the bridge of his nose. He has no dental work in his mouth and no indication of dental work. His teeth are absolutely whole. He has normal lobes on his ears. His shoulders are not unusually broad, but medium only. Montgomery testified that he did not receive this circular until three days after the plaintiff's arrest, but it must be presumed on appeal that the trial court believed the plaintiff's testimony that Montgomery had the circular on the day of the arrest and that his attention was then called to the fact that the description in the circular did not fit the plaintiff. Regardless of such discrepancy, however, the city marshal exceeded his authority in holding the plaintiff without a warrant for a misdemeanor committed in Oregon. Pen. Code, § 836; *In re Milstead*, 44 Cal. App. 239, 186 P. 170; *Miller v. Turner*, 49 Cal. App. 653, 194 P. 66.

[3-5] Appellant contends that the city marshal had nothing to do with the arrest or imprisonment of the plaintiff. The mere fact that the policeman who made the arrest may have been subject to the orders of the city marshal does not make the latter liable for the arrest or imprisonment. *Michel v. Smith*, 188 Cal. 199, 201, 205 P. 113, 114. The case cited, however, recognizes the rule that the superior officer is liable for a false arrest or imprisonment when "he has directed such acts to be done or has personally co-operated therein." Montgomery received a telegram from the sheriff of Polk county, Or., on February 14, 1925, requesting the arrest of R. B. Kenyon. He placed the telegram on his office desk and left it there. He testified:

"The telegrams and descriptions of people that comes there, I take it and lay it on the office—on the desk, and the night man comes and looks over the telegrams and descriptions of people and whatever comes in during the day when he comes there at 6 o'clock. * * * The telegram was there, come just the same as all other telegrams. Mr. Griffith picked up the telegram that night and arrested the man at 4 o'clock in the morning. * * * I did not see the night man the next morning. He left a note in the jail box saying that he had arrested Mr. Kenyon and taken him to the county jail."

Montgomery wired the Oregon sheriff, "We have got your man." Whether or not Montgomery directed the arrest, there is sufficient evidence to show that, almost immediately thereafter, he directed that the plaintiff be held in the county jail, and he is certainly liable for the subsequent false imprisonment. *Michel v. Smith*, supra; *Adair v. Williams*, 24 Ariz. 422, 210 P. 853, 26 A. L. R. 278; *Grimes v. Greenblatt*, 47 Colo. 495, 107 P. 1111, 19 Ann. Cas. 603.

[6-8] Over defendant's objection that "it is incompetent, irrelevant, and immaterial,"

there was introduced in evidence an article published in the Sacramento Bee, giving a fair and unbiased account of plaintiff's arrest and subsequent release. The publication was a natural consequence of the arrest and imprisonment, and the article was admissible to show the damage suffered by the plaintiff. "The general rule of law is that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately brought about by intervening agents, provided such agents were set in motion by the primary wrongdoer, or provided those acts, causing the damage, were the necessary or legal and natural consequence of the wrongful act. The publication was such a natural, usual, and ordinary consequence of defendant's act [false imprisonment] that it must be deemed to have been contemplated." *Filer v. Smith*, 96 Mich. 347, 355, 55 N. W. 999, 1002 (35 Am. St. Rep. 603); *Burke v. Watts*, 188 Cal. 118, 127, 204 P. 578; *Ray Wong v. Earle C. Anthony, Inc.*, 199 Cal. 15, 18, 247 P. 894.

On the day of the plaintiff's release from custody, he was taken by Montgomery to the office of the district attorney, and there, in the presence of Montgomery, the district attorney dictated and he and the sheriff of Tehama county signed and delivered to the plaintiff a letter reading as follows:

"To Whom It May Concern:

"The bearer of this letter is Mr. W. D. Kenyon of Sacramento, who was recently detained in Red Bluff on a telegraphic warrant from Dallas, Oregon, for R. B. Kenyon. After investigation by the undersigned it has been clearly established that W. D. Kenyon is not the same person as R. B. Kenyon and peace officers detaining him by reason of Oregon circulars, or upon warrant, or request of Oregon authorities for R. B. Kenyon will undoubtedly be laying themselves liable for such detention."

[9] This letter was introduced in evidence over defendant's objection that "it is incompetent, irrelevant, and immaterial, and hearsay." It need not be determined whether or not the letter was admissible in evidence. It states no fact which had not already been proved by uncontradicted evidence, and no pretense was made at the trial, and none has been made here, that the plaintiff is the person whose arrest was requested by the Oregon sheriff. The defendant therefore could have suffered no prejudice by the admission of the letter.

[10] It is urged that the judgment is excessive. The language of the trial court in fixing the amount of damages is a fair statement of the case, as follows:

"I think I will assess the damages at \$1,000. I am quite sure that in doing that I am not making it excessive. The arrest was not technical. It was substantial. The imprisonment was not

a mere detention in the city or in an outer room or held for a few hours until his train came in. This man was put in a cell and locked up there for five days, slept on a prison cot, ate prison fare, and suffered the humiliation and mortification and real grief that a man must feel under those circumstances. He lost employment. He lost a job that was remunerative and has encountered a great deal of difficulty in securing another."

In *Gomez v. Scanlan*, 155 Cal. 528, 533, 102 P. 12, 15, it is said:

"The amount of money which will compensate one for an unwarranted restraint of his person is not the subject of exact computation. * * * The extent to which the allowance may go must, in large measure, be left to the sound discretion of the jury."

The record in this case shows no abuse of discretion on the part of the trial court in fixing the amount of damages to be awarded.

The judgment is affirmed.

We concur: PLUMMER, J.; BURGESS, Justice pro tem.

86 Cal. App. 266

KENYON v. HARTFORD ACCIDENT & INDEMNITY CO. (Civ. 3043.) ★

District Court of Appeal, Third District, California. Oct. 22, 1927.

Hearing Denied by Supreme Court Dec. 19, 1927.

1. Appeal and error $\S$ 965—Venue $\S$ 52(1)—Motion for change of venue for convenience of witnesses is addressed to trial court's discretion, to be disturbed only for abuse.

Determination of motion for change of venue on ground of convenience of witnesses rests largely in sound discretion of court to which it is addressed, and its order therein will be disturbed only for abuse of discretion.

2. Venue $\S$ 52(1)—Denial of motion for change of venue for convenience of witnesses in action for false imprisonment was not abuse of discretion.

In action for false imprisonment, denial of motion for change of venue on ground of convenience of witnesses held not abuse of discretion under evidence.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by W. D. Kenyon against the Hartford Accident & Indemnity Company. From an order denying motion for change of venue, defendant appeals. Affirmed.

See, also, 260 P. 952.

James T. Matlock, of Red Bluff, for appellant.

Ralph H. Lewis and George E. Foote, both of Sacramento, for respondent.

FINCH, P. J. This is an appeal by defendant from an order denying a motion for a change of the place of trial from the coun-

ty of Sacramento to the county of Tehama.

The complaint alleges that W. F. Montgomery, as city marshal of Red Bluff, Tehama county "maliciously and with force, and without an order, or warrant, or process of any court authorizing him so to do, did arrest and imprison the plaintiff herein * * * in the county jail of the county of Tehama * * * for a period of seven days," and that the defendant was at that time surety on Montgomery's official bond. The complaint contains other appropriate allegations, including an allegation that by reason of such imprisonment the "plaintiff was injured in his good name and reputation." The answer denies that Montgomery arrested or imprisoned the plaintiff and denies that the plaintiff was injured in his good name or reputation by the alleged arrest and imprisonment.

The complaint was filed May 15, 1925, and the answer on the 23d of June. On June 29th, the court made an order setting the cause for trial on the 24th of September, 1925; counsel for defendant being present in court and having notice of the order. August 31st the defendant served and filed notice that it would move the court, on the 8th day of September, 1925, for an order changing the place of trial to Tehama county. In support of the motion, affidavits were filed, from which it appears that the defendant's witnesses, six in number, three of them being officers of Red Bluff and three of them officers of Tehama county, all reside in Red Bluff; that their official duties require their personal attention; that their attendance as witnesses in the superior court of Sacramento county would cause them great inconvenience, the distance from Red Bluff to Sacramento being 140 miles; and that "defendant would be unable to procure the personal attendance of any of the witnesses" at Sacramento, on account of such distance.

In opposition to the motion, plaintiff made affidavit that he had resided in Sacramento for three years next preceding his arrest; that he was scarcely known in Red Bluff or Tehama county, and that no one knew him there who could testify as to his innocence of the charge upon which he was arrested, but that five witnesses, naming them, residing in Sacramento, would so testify; that four other named witnesses, also residing in Sacramento, would testify that the plaintiff "has always borne a good reputation, * * * and that, on account of said arrest, affiant lost his position"; and that defendant "has deferred its application for a change of venue to this late date solely for the purpose of delay and procrastination."

From the foregoing, it would be difficult to decide whether the convenience of witnesses would be best served by the trial of the case in the one county or the other.

[1, 2] "The determination of a motion of this character upon the ground of the convenience of witnesses rests largely in the sound discretion of the court to which it is addressed, and its order thereon will be disturbed only for an abuse of such discretion." *Scott v. Stuart*, 190 Cal. 526, 527, 213 P. 947, 948. No abuse of discretion appears in this case.

The order is affirmed.

We concur: PLUMMER, J.; BURGESS, Justice pro tem.

80 Cal. App. 239

CALIFORNIA BREEDERS' SALES & PEDIGREE CO. v. SHOWERS. (Civ. 3203.)

District Court of Appeal, Third District, California. Oct. 22, 1927.

1. Estoppel $\S$ 63—Defendant, inducing plaintiff to purchase bull purchased by defendant at auction sale, held estopped from denying validity of sale or setting up own fraud (Code Civ. Proc. $\S$ 1962, subd. 3; Civ. Code, $\S$ 1797, and $\S$ 1710, subd. 3).

Defendant purchasing a bull at an auction sale under contract of conditional sale, which was subsequently assigned to plaintiff, having himself induced plaintiff to make the purchase, held estopped from denying validity thereof or setting up his own fraud as defense to an action on the contract, in view of Code Civ. Proc. $\S$ 1962, subd. 3, Civ. Code, $\S$ 1710, subd. 3, in that defendant was employed by seller of the bull to bid at the sale without intention on part of defendant actually to buy or on part of seller to enforce the bid contrary to section 1797.

2. Estoppel $\S$ 114—Estoppel could be urged against defense of fraud, though not pleaded by plaintiff (Civ. Code, $\S$ 1797).

In action by assignee of contract of sale, fraudulent because in violation of Civ. Code, $\S$ 1797, prohibiting by-bidding at auction sales, where defense was fraud between defendant and seller, plaintiff held entitled to set up an estoppel to urge such defense, notwithstanding failure to plead estoppel, since affirmative allegations of answer are deemed denied, and all affirmative matters by way of replication are deemed to have been pleaded by plaintiff.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by the California Breeders' Sales & Pedigree Company against F. F. Showers. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Adolph M. Schwarz, of San Francisco, and John J. Coghlan, of Madera, for appellant.

Barcroft & Barcroft, of Madera, for respondent.

FINCH, P. J. In the summer of 1922 D. G. Maxwell, being the owner of a herd of

registered Holstein cattle, entered into an agreement with the plaintiff, by the terms of which the latter engaged to conduct an auction sale of the cattle. The agreement provided that there should be "no by-bidding, direct or indirect," and that the owner should pay a penalty of 25 per cent. in case of proof of by-bidding. The sale was conducted August 30 and 31, 1922. The defendant purchased a bull at this sale for \$1,150, of which sum he paid \$385 in cash, and agreed to pay the remainder of \$765 on August 31, 1923, with interest at 8 per cent. per annum, upon the payment of which it was agreed that Maxwell would deliver to the defendant "a good and sufficient bill of sale of the said property, together with warranty of title." The contract provided that title should remain in Maxwell, or his assigns, until payment was made in full, but that the defendant "assumed all responsibility for loss or damage of said property by reason of fire or improper care thereof, or any other cause whatsoever, and hereby agrees to insure said property against loss or damage by fire or death from any cause to the full value of the same, the loss, if any, to be payable to the parties hereto, as their interests may appear." This agreement was executed on August 31, 1922, and on the same day Maxwell assigned it to the plaintiff. The defendant did not take possession of the bull, but left it in the possession of Maxwell. The defendant made at least two subsequent payments on the contract, the first of which was made in February, 1924. At the time the suit was commenced there remained due and unpaid \$367.62 principal and \$19.02 interest, for the amount of which the plaintiff prayed judgment. The court found all the allegations of the complaint to be true, and all the denials and allegations of the answer to be untrue except the "third and separate defense," which the court found to be true, and, based on that defense alone, judgment was entered "that plaintiff take nothing by its action against defendant." The plaintiff has appealed from the judgment. The third separate defense to which reference has been made reads as follows:

"That another consideration for the execution of the instrument sued upon herein was the request of payee Maxwell that bid in the bull referred to therein, and the promise of said Maxwell that, if defendant would bid for and nominally purchase said bull, said Maxwell would retain possession of said animal, and would sell him, and divide the profits of said sale. That, pursuant to said agreement, defendant bid in said bull at an auction sale, and executed the instrument, but said Maxwell wholly failed, neglected, and refused to sell said bull after taking possession thereof, and said bull died while in the possession of said Maxwell."

In support of such alleged separate defense, the defendant testified:

"I was in attendance at the sale, and purchased a number of females, and in the course of the sale a bull * * * was sold, and the bids were not, as Mr. Maxwell thought, sufficient, * * * so he sent his manager, McDonald, over to me, and asked me to bid the bull in, or to buy the bull, and the bull would be left there on the ranch under Mr. Maxwell and Mr. McDonald's supervision until he was sold. He said, in fact, they had a purchaser already lined up for the bull. I made a bid on the bull and some one made a counter bid, * * * and I refused to go any higher, or to bid any more, and Mr. Maxwell come over * * * personally and said, 'We will agree to sell this bull and keep him here until he is sold, so that we can divide the profits, or whatever he brings above the price that you give,' and I agreed to that, and bid, I think \$1,150 * * * on the bull, and he was knocked off at that price."

The written agreement referred to herein was thereafter, on the same day, executed by Maxwell and the defendant.

Charles L. Hughes, sales manager of the plaintiff, testified:

"On the date preceding the sale, Mr. Showers introduced to me * * * one of the directors of the Carlton College Corporation. * * * He said to me that Carlton College was in the market for some cows, that Mr. Showers was there to purchase them for that account, and told me that whatever purchases were made by Mr. Showers would be settled for by Carlton College. He asked me if arrangements could be made for a year's credit on any purchases that they made. * * * I told him that we were not in a position to buy their note from Mr. Maxwell for the total amount of their purchase on a year's time, but that, if it was agreeable to Mr. Maxwell to take their promissory note for one-third of the amount, we would take their lease contract note for the balance of the contract. * * * Mr. Maxwell was willing to do this, did subsequently. * * * Mr. Showers purchased certain females, * * * and he also purchased the bull. * * * When it came to settling for these cattle after the sale was over, Mr. Showers * * * told me that, while he had purchased the females for the account of Carlton College, he had purchased the bull * * * on his own account, and told me that he expected me to extend him the same terms in payment that I had extended to Carlton College, or that Mr. Maxwell, rather, had extended to Carlton College. We took this matter up then with Mr. Maxwell, * * * and the settlement was made in that manner."

The witness further testified that he had no notice or knowledge of any agreement or understanding between Maxwell and the defendant, as alleged in the third separate defense of the answer, until informed thereof by the defendant in the early summer of 1924. The foregoing evidence of Hughes is uncontradicted. Maxwell was not a witness at the trial; his whereabouts being then unknown.

It need not be determined whether, the contract between Maxwell and the defendant having been reduced to writing, evidence of their prior oral negotiations was admissible

in evidence to vary its terms, because the judgment must be reversed on other grounds.

"The employment by a seller of any person to bid at a sale by auction, without the knowledge of the buyer, without an intention on the part of such bidder to buy, and on the part of the seller to enforce his bid, is a fraud upon the buyer, which entitles him to rescind his purchase." Civ. Code, § 1797.

[1] While section 1797 is intended for the protection of purchasers at auction sales, the conduct thereby denounced constitutes a fraud upon the public. *Dealey v. East San Mateo Land Co.*, 21 Cal. App. 39, 130 P. 1066. It is not necessary, however, to determine the effect of such fraud as between Maxwell and the defendant. While the contract sued on is not negotiable, the evidence shows without conflict that the plaintiff took the assignment thereof at the special instance and request of the defendant, and without notice of the fraud of the parties thereto. His conduct constituted an implied representation that his apparent purchase of the bull was a bona fide transaction. *Irrigated Valleys L. Co. v. Altman*, 57 Cal. App. 413, 428, 207 P. 401. The transaction with the plaintiff constituted, in effect, a loan by the plaintiff to the defendant of the balance due Maxwell upon the purchase price of the bull. This fact alone is sufficient to overcome the affirmative defense upon which the judgment is based. But, further, the defendant having himself induced the plaintiff to make the purchase, he is estopped from denying the validity thereof or setting up his own fraud as a defense to an action thereon. Code Civ. Proc. § 1962, subd. 3; Civ. Code, § 1710, subd. 3; 10 Cal. Jur. 631; 21 C. J. 1150.

[2] The plaintiff did not plead an estoppel, but, under the circumstances proved, such a plea was unnecessary. "Under our system of pleading the affirmative allegations of the answer are deemed denied, and all affirmative matters by way of replication are deemed to have been pleaded by the plaintiff." *Hale v. Gardiner*, 186 Cal. 661, 664, 200 P. 598, 600; *Wenban Estate, Inc., v. Hewlett*, 193 Cal. 675, 703, 227 P. 723.

The only inference to be drawn from the evidence is that, when the defendant asked the plaintiff to extend him credit on the same terms as had been agreed upon with Carlton College, he intentionally suppressed the fact of his fraudulent understanding with Maxwell, because he must have known that such credit would have been refused if he had communicated that fact to the plaintiff, and it is a reasonable inference that the plaintiff would not have given such credit with knowledge of that fact.

Pursuant to the provisions of article 6, § 4 $\frac{3}{4}$, of the Constitution and section 956a of the Code of Civil Procedure as added by St. 1927, p. 583, in addition to the facts found

by the trial court, this court hereby makes the following findings of fact: That, at the special instance and request of the defendant, and for a valuable consideration, the plaintiff purchased the contract described in the complaint and all of said Maxwell's rights and interest therein and thereunder; that at the time of such purchase the defendant had full knowledge of the secret agreement between himself and Maxwell alleged in the third separate defense set up in the answer, but that the plaintiff had no notice or knowledge thereof; that, for the purpose of misleading the plaintiff, and inducing it to make such purchase, the defendant represented to the plaintiff that he had purchased the bull referred to in such third separate defense, and intentionally suppressed and omitted to communicate to the plaintiff any information of or concerning such secret agreement; that the plaintiff believed and relied on said representation, and was misled thereby and by such suppression and omission, and was thereby induced to, and did, make such purchase, which it would not have made but for such suppression and omission.

As conclusions of law from the foregoing facts, together with the facts found by the trial court, it is hereby found: That the defendant is estopped from denying the validity of the contract described in the complaint or his obligation to make payment to the plaintiff of the balance due thereon in accordance with the terms thereof; that the plaintiff is entitled to judgment against the defendant in the amount prayed for in the complaint.

The judgment is reversed, and the trial court is hereby directed to enter judgment in favor of the plaintiff against the defendant for the amount prayed for in the complaint.

We concur: PLUMMER, J.; WEYAND, Justice pro tem.

86 Cal. App. 474

O'FARRELL v. ANDRUS. (Civ. 6028.) ★

District Court of Appeal, First District, Division 1, California. Nov. 1, 1927.

Hearing Denied by Supreme Court Dec. 29, 1927.

1. Appeal and error $\S$ 1002—Where evidence is conflicting, verdict will not be disturbed on appeal.

Where there is a conflict in the evidence, the judgment of the trial court on a verdict will not be disturbed on appeal.

2. Municipal corporations $\S$ 706(6)—Negligence of automobile driver striking pedestrian at night held for jury.

In pedestrian's action for injuries when struck by automobile when crossing street on a dark foggy night on the highway, whether driver was guilty of negligence held for the jury.

3. Municipal corporations $\S$ 706(7)—Contributory negligence of pedestrian, struck by automobile at night, held for jury.

In an action by a pedestrian struck by an automobile when crossing street on a dark foggy night, whether plaintiff was guilty of contributory negligence *held* for the jury.

4. Negligence $\S$ 136(9)—Contributory negligence is for court where evidence leaves no fact in doubt, and no inferences other than negligence can be drawn.

It is only where no fact is left in doubt nor inference other than negligence can be drawn by the jury from the evidence that the court can say, as a matter of law, that contributory negligence is established.

5. Trial $\S$ 296(4, 5)—Instruction, if objectionable as omitting element of contributory negligence, held not error, in view of further instruction.

In pedestrian's action for injury when struck by automobile, instruction, predicated upon proposition that defendant's lack of ordinary care was proximate cause of injury, therefore precluding anything else as proximate cause, if open to criticism as omitting element of contributory negligence standing alone, *held* not misleading, in view of further instruction that if defendant was negligent and plaintiff was also negligent, and his negligence proximately contributed to the accident, then he could not recover.

6. Trial $\S$ 191(7)—Instruction relative to automobile driver's control and excessive rate of speed held not to assume defendant's negligence and absence of contributory negligence.

In pedestrian's action for injury from automobile, an instruction that if defendant was driving at such an excessive rate of speed that he did not have his automobile under proper control, and by reason thereof he struck the plaintiff, then, in the absence of any contributory negligence on the part of plaintiff proximately causing the injury, plaintiff could recover *held* not to assume defendant's negligence nor an absence of contributory negligence.

7. Municipal corporations $\S$ 705(10)—Last clear chance doctrine held applicable where automobile driver observed pedestrian, but relied upon pedestrian's stopping.

Evidence showing that driver of automobile striking pedestrian had observed the pedestrian before the accident, but relied upon the pedestrian's stopping, when in fact he kept on going, *held* to render last clear chance doctrine applicable.

8. Trial $\S$ 260(1)—Refusal to give instruction is not error where covered by others given.

Error cannot be predicated upon the refusal to give an instruction requested, where the substance of the instruction refused is covered by other instructions given.

9. Trial $\S$ 260(8)—Refusing instruction that, if plaintiff deliberately walked into automobile, he could not recover held not reversible error, in view of further instruction.

In pedestrian's action for injuries when struck by automobile, refusal of instruction pre-

cluding recovery if plaintiff deliberately walked into automobile *held* not reversible error, where jury were repeatedly told that even slightest negligence on part of plaintiff proximately contributing to accident would bar recovery.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Patrick O'Farrell against George Andrus. Judgment for plaintiff, and defendant appeals. *Affirmed.*

Barry J. Colding and Theodore Hale, both of San Francisco, and B. P. Gibbs, of Los Angeles, for appellant.

A. P. Black, of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from a judgment entered on the verdict of the jury awarding respondent \$2,000 damages for personal injuries received by being struck by an automobile operated by appellant.

Appellant assigns the following errors upon which he relies for a reversal of the judgment:

"(1) The verdict is contrary to the evidence and is contrary to law in this: (a) The proof discloses negligence on the part of the defendant; (b) the plaintiff himself, as shown by all the testimony, was guilty of contributory negligence, as a matter of law, in placing himself in a position of danger in the street and in failing to exercise ordinary care for his own safety, said negligence contributing directly and proximately to his injuries. (2) The court erred in giving an instruction to the jury making the defendant liable if guilty of negligence which proximately contributed to plaintiff's injuries, irrespective of and ignoring the issue of plaintiff's contributory negligence, which was pleaded by defendant and upon which substantial evidence was introduced thereon. (3) The court erred in giving to the jury a certain instruction which suggests and assumes negligence on the part of defendant, and suggests and assumes an absence of contributory negligence on the part of plaintiff. (4) The court erred in giving an instruction upon the doctrine of the 'last clear chance' for the reasons: (a) That the doctrine has no application to the facts of this case, and the evidence is insufficient to justify such an instruction; (b) that the instruction is insufficient in form to present fully the doctrine of 'last clear chance.' (5) The court erred in refusing to give to the jury certain instructions requested by defendant upon his theory of the case which there was sufficient evidence adduced to support the same."

The material facts as disclosed by the record in narrative form are as follows: According to the testimony of plaintiff, on the evening of August 27, 1923, he went to a grocery store on Mission street, in San Francisco, to get some eggs. On his way home he walked westerly along the northerly side of Twenty-First street. When he reached Valencia street he looked both north and south,

and a street car passed northerly on the easterly track on Valencia street. He then looked north and stepped into the street. He looked two or three times to the right to see if there were any street cars or automobiles coming toward him. When a street car passed going north he saw some machines on the other side of the street going south, but when he got out into the middle of the street and looked to the right he did not see any machine anywhere near him. He had looked the very second he was struck; the last time he looked before that was when he crossed the car rails, and when crossing the rails he looked all the time to the right. The machine was 20 feet away when he first saw it, and it was going at such speed it would go 20 feet in a second. Before he started to cross the street at the time the street car passed he saw other machines going south. He saw there was a good show to get across the street, and he walked out into the car tracks; then he looked north and did not see any machine coming anywhere near him. It was misty or foggy, but he could see about 200 feet; his eyesight was good, and he could hear well and did not hear any horn sounded. When he got to a point about 6 or 7 feet from the westerly curb of Valencia street he first saw the machine coming, and he did not have time to get out of the way of it. The machine must have been 20 or 25 feet away. He had no time to stand. The left front fender hit him. He was watching carefully when he was crossing the street, and defendant was driving at a high rate of speed—came like a shot—and he thought he was going 35 or 40 miles an hour, though it might have been more or less.

Charles Heslin, a passenger in defendant's car, called as a witness for plaintiff, said O'Farrell was 6 or 8 feet from the westerly curb when he was struck. The machine swung around into Twenty-First street and stopped. When he saw O'Farrell coming, it might be 75 or 80 feet. He could not tell whether they carried O'Farrell from where he fell on Valencia street around to the side of the automobile. The machine did not stop on Valencia street, but on the corner when it went around. He did not see the accident.

Both the defendant and Peter J. Schmitt, called for the defense, testified that defendant's car was moving slowly; that defendant kept blowing his horn, but that plaintiff paid no attention to it and walked right into the right-hand side of the car, the witness Schmitt saying that he walked into the rear of the machine, and defendant, Andrus, testifying that he walked into the right rear fender of the car. According to the witness Schmitt, there was a drizzling rain on the street; that the accident happened about 5 feet from the intersection of Valencia and Twenty-First streets; that it had been raining about 15 minutes and the streets were

real greasy; and that they were about 50 feet from the corner when he first saw Mr. O'Farrell. Appellant in his testimony placed this distance from 50 to 75 feet.

[1] From this summary of the evidence it is apparent that there is a direct conflict as to material facts, plaintiff testifying that defendant was driving at a high rate of speed—35 or 40 miles, more or less, at a crossing on a rainy or foggy night. "It came like a shot," he said, and the defense witnesses testified that defendant was going "real slow." Plaintiff stated that he was struck by the left front fender, while defendant and his witness Schmitt testified that plaintiff walked into the rear of the machine or at the rear wheel on the right-hand side of the car. Plaintiff testified that his hearing was good and that he heard no horn, while defendant testified that he sounded his horn when he first saw plaintiff on the car track when he was practically in the middle of the street, and defendant's witness Schmitt said defendant kept blowing his horn. Upon this conflict the finding of the jury must stand under the well-established rule that where there is a conflict in the evidence the judgment of the trial court will not be disturbed on appeal.

[2, 3] Appellant urges that the proof discloses no negligence on the part of defendant, and that the evidence shows that plaintiff was guilty of contributory negligence, as a matter of law. We do not agree with appellant's contention, but on the contrary are of the opinion that whether defendant, driving his automobile at a high rate of speed or at the rate of speed of 35 or 40 miles an hour within 5 feet of a crossing after dark on a foggy or rainy night, was or was not negligence, or whether plaintiff was guilty of contributory negligence under the circumstances here disclosed, was a question of fact for the jury to decide.

Appellant concedes that it is settled law in this state that where the evidence is conflicting, or where there is some substantial evidence to support the verdict, the appellate court will not order a reversal, but contends that the evidence here, according to the testimony of the witness Schmitt, shows that respondent was wandering about with his head down, apparently not paying any attention to the approach of defendant's car and the constant honking of the horn, and that the evidence is incontrovertible that plaintiff walked into and against defendant's car. We do not agree that these facts stated by the witness Schmitt are without dispute and incontrovertible. They are certainly disputed by plaintiff, who testified that he continually looked up the street in the direction from which defendant's car approached; that he could see about 200 feet; that he saw no car approaching until it suddenly loomed up about 20 feet from him, coming at a high rate of speed; and that he did not walk into

the rear of the car or near the right rear wheel, but was struck by the left front fender of defendant's car. Nor is the fact that defendant constantly honked his horn admitted; on the contrary, plaintiff testified that his hearing was good and he heard no horn sounded, from which the inference could be drawn that the horn was not sounded. Again, as there was at least 20 feet between plaintiff and the middle of the street and defendant had ample room to have driven in safety to avoid hitting plaintiff, the jury may have drawn the inference that defendant was not watching the road ahead of him and did not see the plaintiff.

Appellant cites us to *Diamond v. Weyerhaeuser*, 178 Cal. 540, 174 P. 38. In that case the court held negligence is not to be inferred from the mere fact of injury; that giving all the weight which plaintiff's testimony could fairly bear, it went no farther than to show that there had been a collision between the wagon and the automobile. "There was a total lack of any circumstances from which it might reasonably be inferred that the collision was caused by any want of care on the part of the driver of the automobile, rather than by the negligence of the driver of the wagon." Here, however, as has been shown, there are facts and circumstances aside from the fact of the injury from which the jury could have inferred negligence. While it is true that "high rate of speed" and "like a shot" and such statements have been held to be entirely too uncertain to serve as a basis for a finding that the rate of speed was in excess of the maximum rate which would be dictated by the demands of ordinary prudence (*Diamond v. Weyerhaeuser*, supra), here, however, in addition to such expressions there is evidence that it was raining; that the street was real greasy; that defendant saw plaintiff 50 or 75 feet before the accident; that he did not alter his course nor slow down; that he was driving, under such weather conditions, 35 or 40 miles an hour; that he covered 20 feet distance in practically a second of time; that he had ample room to pass behind plaintiff and avoid the accident, but did not do so.

[4] *Tower v. Humboldt Transit Co.*, 176 Cal. 602, 169 P. 227, cited by appellant, was reversed because the court applied the doctrine of *res ipsa loquitur*, and as to that the court said:

"It has no * * * application to the case of a collision between a street car and a pedestrian on the street."

Nor should the present case be reversed on the authority of *Zibbell v. So. Pac. Co.*, 160 Cal. 237, 116 P. 513, cited by appellant; rather it is an authority to sustain the judgment. There the court uses this language:

"The real decision of the question by the court is a decision of fact. When the evidence is

such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then does the law step in and forbid plaintiff a recovery. * * * Again, the question whether or not a plaintiff has been guilty of contributory negligence is usually one of fact for the jury's verdict. 'It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say, as a matter of law (italics ours) that contributory negligence is established. * * *'"

Applying this standard to the facts and circumstances here, we cannot but conclude that the question of negligence was one of fact for the jury.

[5] As to the court's instructions it may be said that, taken as a whole, they correctly state the law governing accident cases. Appellant complains of instruction 15 as omitting the element of contributory negligence. This instruction is predicated upon the proposition that defendant's lack of ordinary care was the proximate cause of the injury, and therefore precludes anything else as the proximate cause. If, however, standing alone, the instruction is open to criticism, taken in conjunction with instruction 18, the jury could not have been misled. That instruction is as follows:

"If you find from the evidence that the defendant was negligent in the manner charged in the complaint but that the plaintiff was also negligent, no matter how slightly, and that his negligence proximately contributed to the accident, then and in such event I charge you that your verdict must be against the plaintiff and in favor of the defendant."

The instructions thus given are in harmony and not subject to the criticism called forth in *Pierce v. United Gas & Elec. Co.*, 161 Cal. 176, 118 P. 700, stressed by appellant. In the *Pierce* Case the instructions were in conflict and could not be harmonized, but here it stands as though the court had instructed the jury:

"If you find the defendant did not use ordinary care to avoid running into and injuring the plaintiff, and you find that such a lack of care was the proximate cause of the accident, then you should find for the plaintiff and against the defendant, but if you find that the plaintiff was also negligent, no matter how slightly, and his negligence proximately contributed to the accident, then your verdict must be against the plaintiff and in favor of the defendant."

Not only does instruction 18 instruct the jury that plaintiff cannot recover if he has been guilty of negligence proximately contributing to his injury, but it was also so instructed in instructions 20 and 21.

[6] The point urged that instruction 16 assumes negligence on the part of defendant

and assumes in absence of contributory negligence on the part of plaintiff is without merit. The instruction does not assume defendant's negligence nor an absence of contributory negligence. The instruction expressly states that:

"If you find from the evidence that the conditions surrounding the crossing at Valencia and Twenty-First streets at the time plaintiff was injured were such that you are satisfied from the evidence the defendant was driving at such an excessive rate of speed that he did not have his automobile under proper control when he approached the crossing and by reason of said lack of proper control he struck the plaintiff, then, in the absence of any contributory negligence on the part of plaintiff proximately causing the injury, it is your duty to find for the plaintiff and against the defendant."

[7] Appellant urges that the court erred in its instruction upon the doctrine of the "last clear chance," and that such doctrine has no application to the facts; that the contributory negligence of plaintiff continued down to the very instant of the accident and was therefore concurrent and contemporaneous, and cites us to *Wallis v. So. Pac. Co.*, 184 Cal. 662, 673, 195 P. 408, 412 (15 A. L. R. 117), as holding:

"The rule is well settled in this state that in order to make the defendant liable, notwithstanding contributory negligence of the plaintiff, the defendant must not only be aware of the danger in time to avert it, but must also know or have reason to believe that the plaintiff is oblivious of the danger and is in a position where he cannot extricate himself from it. *Arnold v. San Francisco-O. T. Rys.*, 175 Cal. 1, 164 P. 798; *Basham v. So. Pac. Co.*, 176 Cal. 320, 168 P. 359; *Young v. So. Pac. Co.*, 182 Cal. 369, 190 P. 36."

And also to *Matteson v. So. Pac. Co.*, 6 Cal. App. 318, 326, 92 P. 101, 105, holding:

"The last clear [chance] * * * rule can never apply * * * where, * * * the negligence of the injured party continued up to the very moment of the injury, and was a contributing and efficient cause thereof."

In the present case, however, the defendant testified:

"O'Farrell gave no evidence of realizing I was approaching him. I thought he was going to stop, but he kept on. I continuously blew the horn and still he didn't look up. So at that time I was almost on top of him."

And defendant further testified that at the speed he was driving he could have stopped his machine in a distance of one foot.

[8, 9] Lastly, appellant complains of the court's refusal to give certain instructions requested by him covering the presumption that one possessed of normal faculties of sight and hearing must see and hear that which is in the range of his sight and hearing, and that if plaintiff deliberately walked in

front of the machine or against it, he is guilty of negligence as a matter of law and cannot recover. With the exception of that portion of the instruction dealing with plaintiff's walking deliberately into the automobile, the principles of law in the instructions, the refusal of which is complained of, are fully covered in instructions 18 and 25. As to the requested instruction regarding the plaintiff deliberately walking into the automobile, while it was proper to give it, it cannot be said that its refusal constitutes error, as the jury were repeatedly told that even the slightest negligence on the part of plaintiff proximately contributing to the accident would bar his recovery. It certainly cannot be said that the jury did not understand, under the instructions of the court, that walking deliberately into a moving automobile would come under the instruction that plaintiff could not recover, if slight negligence on his part contributed to the accident.

The issues in the case were simple, and certainly under the instructions no confusion could arise. Was defendant guilty of negligence? Was plaintiff guilty of contributory negligence? If defendant alone was guilty of negligence which was the proximate cause of the injury, plaintiff is entitled to the verdict; but if plaintiff was also guilty of negligence which proximately contributed to his injury, defendant is entitled to the verdict. These issues were amply covered by the court's instructions, which, taken as a whole, correctly stated the principles of law involved and were as full and fair as either party could reasonably expect.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

86 Cal. App. 421

FERGUSON v. GARDNER et al. (Civ. 6018.)★

District Court of Appeal, First District, Division 1, California. Oct. 29, 1927.

Rehearing Denied Nov. 28, 1927.

1. Pleading $\S$ 8(15)—General allegations of fraud, wrong, and oppression in assessing tax added nothing to complaint to declare tax void, allegation of specific facts being required.

Complaint to have a tax levy for road purposes declared null and void and for injunction is not strengthened by general allegations of fraud, wrong, and oppression in assessing tax, but the pleader is required to allege the specific facts from which such conclusions will follow as matter of law.

2. Counties $\S$ 190(1)—Taxing power of county board of supervisors must be expressly given by Legislature.

Whatever taxing power rests in county board of supervisors must necessarily come from Legislature and be expressly given.

3. Counties $\Leftarrow$ 190(1)—Taxing power is measured by statute conferring power, and taxes not assessed in accordance with statute are void.

Statute conferring taxing power on county board of supervisors affords measure of power, and taxes not assessed in accordance with provisions of statute are void.

4. Counties $\Leftarrow$ 190(2)—County board of supervisors had power to levy tax for general county purposes of 80 cents on \$100 of taxable property, to constitute county general fund to be used for general purposes (Pol. Code, §§ 2639, 2651, 2653-2655, and section 4041, subds. 13, 38).

Under Pol. Code, §§ 2639, 2651, 2653-2655, and section 4041, subds. 13, 38, conferring on county board of supervisors power to levy taxes for all county purposes, board had power to levy tax for general county purposes, fix rate of tax at 80 cents on each \$100 of taxable property, and create county general funds from such tax to be used for general purposes.

5. Appeal and error $\Leftarrow$ 909(6)—Conditions precedent to levy of tax for general purposes are presumed to have been complied with on appeal from judgment refusing to avoid tax levy.

On appeal from judgment refusing to declare tax null and void, appellate court must presume that all conditions precedent to levy of tax for general county purposes were complied with.

6. Counties $\Leftarrow$ 191—County supervisors are not limited by statute in determining rate of taxation for general county purposes (Pol. Code, §§ 2639, 2651, 2653-2655, and section 4041, subds. 13, 38).

Under Pol. Code, §§ 2639, 2651, 2653-2655, and section 4041, subds. 13, 38, rate of taxation which supervisors of various counties may fix is not limited, power to tax being expressly conferred on board of supervisors without restriction as to amount to be raised thereby for general county purposes.

7. Counties $\Leftarrow$ 23—Courts cannot inquire into anticipated needs of county after determination by county supervisors of tax rate necessary for county general purposes.

Where board of county supervisors determined that tax rate fixed for general county purposes was necessary to meet anticipated needs of county, it is not within province of court to inquire further into these necessities.

8. Counties $\Leftarrow$ 191—Supervisors in fixing tax rate for general purposes must anticipate every necessary expense, including expenses for construction and maintenance of roads (Const. art. 11, § 18; Pol. Code, §§ 2639, 2640, 2651, 2653-2655, and section 4041, subds. 13, 38).

Under Pol. Code, §§ 2639, 2651, 2653-2655, and section 4041, subds. 13, 38, and Const. art. 11, § 18, county board of supervisors in fixing rate of taxation for general purposes must determine amount necessary to be raised, and anticipate and provide for every necessary expense, including such expense as might arise for acquisition or construction of new road or re-

pair and maintenance of existing roads, under section 2640, and fact that board may have intended to expend moneys obtained in certain way would not affect legality of levy.

9. Highways $\Leftarrow$ 99 $\frac{1}{4}$ —Expenditures for construction and maintenance of roads from general fund of county held authorized (Pol. Code, §§ 2640, 2712, 4041, 4043).

Pol. Code, §§ 2712, 4041, 4043, authorizes general fund of county to bear expense of construction and maintenance of roads, in addition to section 2640 specifically providing for payment for roads from general fund.

Appeal from Superior Court, Marin County; R. L. Thompson, Judge.

Action by Keith Ferguson against Casper Gardner and others, as and constituting the Board of Supervisors of Marin County, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Jordan L. Martinelli, of San Rafael, and Keith Ferguson, of San Francisco, for appellant.

Henry E. Greer, Dist. Atty., of San Rafael, for respondents.

PARKER, Justice pro tem. Plaintiff, as a taxpayer, commenced an action against defendants, seeking certain relief to be herein more fully detailed. Defendants filed a general demurrer to the complaint, which demurrer was sustained by the court below, and plaintiff was allowed 10 days to amend. Plaintiff declined to amend, and, the time elapsing, a judgment was entered that plaintiff take nothing and that the relief sought be denied. The question before us for review is on the sufficiency of the complaint as against a general demurrer.

The complaint alleges:

That the plaintiff is a citizen, resident, and taxpayer and at all times was such in supervisor district No. 1 of Marin county, alleging, likewise, the division of the county into supervisor districts as by law provided.

That the defendants named constitute the board of supervisors of said Marin county, and that the additional defendants are treasurer and auditor of Marin county, the remaining defendant being a person who was a supervisor at the time of the proceeding complained of, but since out of office.

Then follow the allegations by which the cause of action is sought to be embodied, namely:

That the defendant supervisors, excepting Barr, constituting four-fifths of the members of the board, did at a regular meeting on Thursday, September 2, 1924, with the intent to violate the provisions of the Political Code of this state and without authority of law, and with the intent to violate the rights of the plaintiff as a citizen of

Marin county, and with the unlawful intent to oppress plaintiff and the citizens of supervisor district No. 1 of Marin county and to compel him and them to bear more than his and their just share of the burdens of taxation, and with the intent to unfairly and unjustly assess against the taxable property of plaintiff and the taxpayers of supervisor district No. 1 a part of the cost of permanent road construction in Marin county not lying within the territorial limits of said supervisor district No. 1, levy a special tax, to wit, a tax of 50 cents upon each \$100 of assessed valuation on all taxable property in Marin county for the unlawful purpose and with the fraudulent intent of wrongfully and unlawfully raising a fund to be expended for permanent road improvement and construction in that portion of Marin county outside of the territorial limits of supervisor district No. 1, and with the fraudulent intent and purpose of levying a tax for the creation of a fund for permanent road improvement and construction in Marin county.

Plaintiff further alleges that for the purpose of concealing and disguising the unlawful purpose of said special tax, with the fraudulent, unlawful, and wrongful intention of violating the rights of plaintiff and oppressing plaintiff and the citizens and taxpayers of supervisor district No. 1, and of unfairly and unjustly compelling him and them to pay more than his and their just share of taxation, and with intent to unfairly and unjustly assess against the taxable property of supervisor district No. 1, a part of the cost of permanent road improvements and construction in Marin county outside of the territorial limits of supervisor district No. 1, the said supervisors willfully, knowingly, wrongfully, unlawfully, and fraudulently caused said special tax to be levied with and as a part of the general fund of 80 cents upon each \$100 of assessed valuation of all taxable property in Marin county for the year 1924, said defendants knowing and in fact having decided then and there that a levy of 30 cents upon each \$100 of the assessed valuation of all taxable property in Marin county for the year 1924 was a sufficient tax levy to raise money sufficient to defray the general expenses of said county during the period for which said tax was levied.

That said action of the board of supervisors, in levying said 50-cent tax under the name and style of "General County Fund" and including said 50-cent tax in said levy of 80 cents as and for said general county fund, was a scheme, fraud, and subterfuge to evade the laws of the state of California and to create a fund for permanent road improvement and construction in Marin county for the construction and improvement of the main county public road lying without the territorial limits of supervisor district No. 1, contrary to law.

The complaint then further sets forth the

collection of the tax pursuant to the assessment and levy, and, further, that the board of supervisors of Marin county has, in the execution of the original plan of road building, let numerous contracts for the furnishing of materials and performance of permanent road improvement and construction and repairs in Marin county, outside of the territorial limits of supervisor district No. 1, and that the cost of this work has been willfully and unlawfully charged to the moneys in the general fund derived and collected by the levy of the 50-cent tax aforementioned, and further alleges many claims against said fund by reason of similar work.

Further, it is alleged that defendants will, unless restrained, continue the acts complained of; namely, the execution of road contracts outside supervisor district No. 1, and the payments to the exhaustion of the fund.

The relief asked is that the court adjudge that the 80-cent general county tax includes the 50-cent special tax, raised for the purpose of creating a fund for the doing of permanent road improvements in Marin county, and that the tax levy of 50 cents be declared null, void, and of no effect; that the supervisors be enjoined from allowing, and the auditor and treasurer from auditing and paying, demands against said fund, and that any balance in said fund be repaid to plaintiff and the other taxpayers within the county of Marin.

It may be here repeated that all of the acts of the board of supervisors throughout are characterized as having been wrongful, fraudulent, oppressive, evasive, and with intent to evade the laws of the state of California, and oppressive as to the plaintiff and the taxpayers in general.

The complaint is thus set forth in its particularity to the end that the subject-matter of the controversy may be more intelligently discussed and understood.

The question raised concerns the power of the board of supervisors in making the original levy for general county purposes.

Summing up the allegations of the complaint, this situation is disclosed: The supervisors at the time appointed for fixing the annual tax rate determined that the amount that could be legally raised by a tax levy for road purposes would not suffice for the general highway needs of the county. The board, apparently feeling that throughout the ensuing year there would arise occasions when general road construction costs would have to be paid from the general fund, therefore fixed a rate sufficient to assure a general fund which would meet the demands foreseen.

[1] At the outset it may be stated that the allegations of fraud, wrong, and oppression add nothing to the force of the complaint, and the complaint is in no way strengthened by the conclusions of the pleader thus ex-

pressed. Mere general allegations of fraud are insufficient in stating a cause of action: the pleader must state the specific acts or language constituting the fraud complained of. General allegations that certain acts or proceedings are illegal or void are mere conclusions of law, and wholly insufficient in the absence of facts from which such conclusions will follow as a matter of law. For example, such averments as the following have been held to be legal conclusions, viz., that a certain tax or assessment was illegal and void, or was not levied in accordance with law, or that the tax valuation on the property was unequal and unjust, 5 Stand. Ency. of Proc. 217; *Carlson v. County Comm.*, 38 Wash. 616, 80 P. 795; *Osborn v. Hoyt*, 181 Cal. 336, 184 P. 854; *Glenn v. Cal. Trona Co.*, 38 Cal. App. 601, 177 P. 178.

The contention of plaintiff and appellant is that the levy of the 50-cent tax was for permanent road improvements outside of supervisor district No. 1, and the inclusion of this tax within the amount levied for the general county fund was obviously a subterfuge and an evasion.

The appellant seems to rely upon the sections of the Political Code having to do with the levy of taxes and the creation of funds to be devoted exclusively to road and highway purposes; namely, sections 2639, 2653, 2654, 2655, and 4041.

Section 2639 provides, in enumerating the powers and duties of supervisors over highways, that the supervisors must, by proper order, levy a tax on property for road purposes, and cause the road tax collected each year to be apportioned to the several road districts entitled thereto, and kept by the county treasurer in separate funds.

Section 2651, Political Code, reads:

"The board of supervisors may, at the meeting at which they are required to levy the property tax for road purposes, establish a general road fund and order to be apportioned thereto an amount not exceeding thirty-five per centum of the aggregate road tax collected from all sources."

Section 2653, Political Code, reads:

"The board of supervisors must, each year, at the meeting at which they are required to levy the property tax for county purposes, estimate the probable amount of property tax for highway purposes which may be necessary for the ensuing year, over and above the road tax, and must regulate and fix the amount of property highway tax, and levy the same thereby, provided, that said property tax for highway purposes shall not exceed the sum of forty cents upon each one hundred dollars of assessable property in any one year."

Section 2654 provides the method of assessment, levy, and collection of the annual property tax for road purposes, and provides that the moneys thus collected shall be turned over to the county treasurer for the

use of the road districts from which it is respectively collected.

Section 2655 provides that all property road tax collected in each road district shall be expended for road purposes within the district in which it is collected.

Section 4041. The board of supervisors in their respective counties shall have jurisdiction and power, under such limitations and restrictions as are prescribed by law:

Subdivision 13. To levy taxes upon the taxable property of their respective counties for all county purposes, and also upon the taxable property of any district for the construction and repair of roads and highways and other district purposes; provided, that no tax shall be levied upon any district until the proposition to levy the same has been submitted to the qualified electors of such district and received a majority of all the legal votes cast.

Subdivision 38. To levy a special road fund tax, not to exceed 2 mills on the \$1 of assessed valuation on all property in such counties outside of any incorporated city or town. Such tax shall be in addition to all taxes otherwise provided for, and the funds so created shall be expended for the construction and maintenance of the main public roads or county highways in the several road districts in proportion to the amount collected from such districts; provided that in addition to the tax mentioned in this subdivision the board of supervisors shall have the power, and it shall be their duty upon petition of a majority of the property owners of any road district, to levy a special road fund tax, not to exceed 2 mills on the \$1 of assessed valuation, on all property in such road district, to be expended in the maintenance of the public roads of such district.

We have incorporated these Code provisions herein for the reason that appellant contends that in these sections is to be found the source of whatever taxing power may be in the board of supervisors to raise funds by direct taxation for use in the acquiring, construction, or maintenance of public roads or highways within the various counties of the state. It is appellant's theory that the Legislature intended by the enactment of these sections to specifically limit the taxing power of the supervisors to the extent set forth. He urges that the provisions found in the sections cited are all-embracing and embody the complete grant of power to the supervisors as far as the subject of roads and highways within a county is concerned, and that there is no way authorized by law through which the taxpayers, directly or indirectly, may be compelled to assume the burden of road maintenance through taxation other than as therein stated. Here it may be incidentally stated that the subject of bonds or bonding is not under discussion and is particularly disregarded for the purposes hereof.

[2, 3] Without detailing appellant's argument, we can concede that whatever taxing power rests in the supervisors must necessarily come from the Legislature and be expressly given. Abundant authority supports this conclusion. *Estate of Potter*, 188 Cal. 55, 204 P. 826; *Connelly v. San Francisco*, 164 Cal. 101, 127 P. 834; *Merced County v. Helm*, 102 Cal. 159, 36 P. 399; 24 Cal. Jur. 26. The statute not only confers the power, but affords the measure thereof, and taxes not assessed in accordance with the provisions of the statute are void. *Huntington v. Central Pac. R. R.*, 2 Sawy. 503, Fed. Cas. No. 6,911; *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94.

[4] The statutes quoted do, however, in addition to providing for road funds, specifically confer upon the supervisors the power to levy taxes upon taxable property of their respective counties for all county purposes. As alleged in the complaint, the supervisors of Marin county did levy a tax for general county purposes and fixed the rate of such tax at 80 cents on each \$100 of taxable property, which sum, when collected, constituted what is known as the county general fund. It is conceded that there is sufficient and specific grant of power authorizing the board of supervisors to levy such a tax and create such a fund, and that such a fund may be used for general purposes.

[5] We must presume that all conditions precedent to the levy of the tax for general purposes were complied with. *Cooley on Taxation*, § 1017, and cases cited.

[6, 7] The rate of taxation which the supervisors of the various counties may fix is not limited by statute, the power to tax being expressly conferred upon the board of supervisors without restriction as to the amount to be raised thereby for general county purposes. The statutes of the state provide for detailed statements to be presented to the supervisors by the various county officers at stated intervals to the end that the board may be constantly aware of the financial condition of the county and the needs thereof. No question is presented here as to the power of the board of supervisors to fix a tax rate for general county purposes sufficient to raise an amount equal to that required to meet the general running expense of the county for the ensuing year. It is not here urged or pleaded that the rate fixed by the board in the instant case, to wit, 80 cents on each \$100 of taxable property within the county, is unreasonable or excessive. It must be conceded in the instant case that, if the board of supervisors of Marin county determined that the rate fixed for general county funds was necessary to meet the anticipated needs of the county, it is not within the province of the courts to inquire further into these necessities. Indeed, it would be a useless procedure and an assumption of power

not resting in the judicial branch of government.

Appellant contends in this respect that the board did determine that the rate of 80 cents on the \$100 was not necessary, but that a rate of 30 cents on the \$100 was sufficient, and that the difference, 50 cents, was levied as and for the general fund by way of subterfuge and to evade the controlling provisions hereinbefore cited which limit the power of the board in raising funds for road purposes. He alleges that the board, after determining the lesser amount sufficient, then resolved that there should be raised the additional 50 cents on each \$100 of taxable property "for the purpose and intent of wrongfully and unlawfully raising a fund to be expended for permanent road improvement and construction in that portion of Marin county not included in or incorporated within the territorial limits of supervisor district No. 1, to wit, for the construction and improvement of the main public county road lying between Manor and the boundary lines of road districts Nos. 4 and 5 westerly from Milleston on Tomales Bay in said Marin county."

Section 2610, Political Code, at the time of the levy, read as follows:

"Whenever it is determined by a four-fifths vote of the board of supervisors of any county that the public convenience and necessity demand the acquisition or construction of a new road or the grading, regrading, paving, macadamizing, surfacing, repairing or maintaining of any existing road, and that the cost of such new road when acquired and constructed, or the cost of grading, regrading, paving, macadamizing, surfacing, repairing or maintaining such existing road, is too great to pay out of the road fund of the district, the board of supervisors may, by resolution passed by a four-fifths vote of said board, determine to acquire or construct such new road, or grade, or regrade, pave, macadamize, surface, repair or maintain such existing road, and charge the cost thereof to the general county fund."

[8] The appellant contends that this section is to be read apart from and in no wise connected with the sections hereinbefore referred to, and that it has no reference to the taxing power or the means by or through which the funds that may be required under this section are to be raised. His argument seems to be that while the general fund of the county may be used to defray costs of road construction or repair and maintenance, the supervisors may not anticipate the necessities therefor and provide a general fund sufficient to meet them. Such a construction would render the section meaningless for the reason that if in any one fiscal year there should be insufficient funds in the general fund to meet conditions as might arise under this section the board would be powerless to make any future levy. In the very nature of things it is incumbent upon

the board, in fixing the general rate of taxation, to provide for and anticipate every legitimate expense that might arise. As a general scheme of finance and revenue it is contemplated that the tax rate shall be sufficient to provide sufficient funds for the entire fiscal year, and the activities and progress of the county are dependent upon the rate being adequate. The idea is elemental and is manifest in the constitutional provision limiting the county in incurring liability exceeding the income provided for the year. Const. art. 11, § 18.

We conclude that the board of supervisors had the right and power when fixing the rate of the taxation for general purposes to determine the amount necessary to be raised thereby, and in determining the amount it was proper and legal that they should anticipate every requirement, including such expense as might arise under section 2640; and the fact that the board may have had in mind or by resolution expressed any intention to expend the moneys obtained in any certain way would neither add to nor take away from the legality of the levy. Mr. Cooley, in his work on taxation, supporting his text by abundant and authoritative citations, says:

"If a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful and therefore no taxation whatever could be levied. The financial needs of a county may outrun any human calculation, so the power to meet those needs by taxation must not be limited even though the taxes become burdensome. The judiciary can afford no redress against oppressive taxation so long as the Legislature in imposing it shall keep within the limits of legislative authority and violate no express provision of the constitution." Cooley on Taxation (4th Ed.) § 72.

The plaintiff is not left without redress, nor can the funds raised be dissipated or expended to his injury. Whenever any expenditure is made or threatened which is without warrant or authority of law, the

courts are always solicitous of the taxpayer's prayer and full protection and relief are accorded.

In so far as the complaint herein prays injunctive relief against further expenditure of the funds, it does not appear but that the provisions of section 2640 have been and are being fully complied with, and that the exact situation exists as in the section contemplated and that situation determined by the board of supervisors to exist in Marin county.

There is no allegation in the complaint as to the condition of the funds in the various districts; neither is there any allegation that the public convenience and necessity does not demand the construction, repair, and maintenance of the roads contemplated. In fact, there are no allegations sufficient to sustain the prayer for the relief asked or for any relief if, as we have found, the levy for the general fund was legal.

Appellant cites the case of *Spitzer v. Munroe County* (D. C.) 274 F. 819. A reading of this case will show that it has no application to the case at bar. Detached statements would in a measure support the contention of appellant, but taken as a whole it throws no light upon the question here involved.

[9] We think it well settled as the policy of this state expressed in various legislative enactments that the acquisition, construction, maintenance, and repair of roads and highways are undisputed functions of government. In many instances it is readily apparent how impracticable and impossible it would be to restrict all progress or improvements to the old idea of purely local or district benefit and liability. The general law, in addition to section 2640, makes abundant provision for the general fund of the county bearing this expense, and the entire body of the law comprises the general road improvement scheme of the state. Sections 4041, 4043, 2712, Pol. Code.

Judgment affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

MOODY v. INDUSTRIAL ACC. COMMISSION et al. (Civ. 5885).★

District Court of Appeal, First District, Division 1, California. Oct. 27, 1927.

Hearing Granted by Supreme Court Dec. 22, 1927.

1. Master and servant ⇨417(7)—Whether nurse, claiming compensation for blood infection, contracted it from employer, held question of fact for commission (Workmen's Compensation Act).

In proceeding under the Workmen's Compensation Act (St. 1917, p. 831, as amended), by professional nurse for disability as result of blood infection, whether claimant contracted infection from employer was question of fact, final determination of which rested with Industrial Accident Commission.

2. Master and servant ⇨405(4)—Circumstantial evidence is sufficient to show nurse claiming compensation contracted blood infection from employer.

In determining whether nurse, claiming compensation for blood infection, contracted infection from employer, positive proof is not indispensable and absolute or mathematical demonstrations not essential, but evidence of circumstances from which inference could be fairly and legitimately drawn was all that was necessary.

3. Master and servant ⇨405(4)—Evidence held to support finding that nurse claiming compensation contracted blood infection from employer (Workmen's Compensation Act).

In proceeding under Workmen's Compensation Act (St. 1917, p. 831, as amended) by professional nurse for disability resulting from blood infection, evidence held sufficient to support Industrial Accident Commission's finding that claimant contracted such infection from employer.

4. Master and servant ⇨362—Employment of nurse to attend patient as long as he remained in hospital held not "casual" (Workmen's Compensation Act, § 8 [c]).

Employment of professional nurse, who claimed compensation for disability resulting from blood infection contracted from employer, held not "casual" within Workmen's Compensation Act (St. 1917, p. 835) § 8(c), where, at time of employment, it was contemplated her services should continue as long as employer remained in hospital, which was more than two months, during which she was to receive \$6 a day.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Casual.]

5. Master and servant ⇨367—Professional nurse held not "independent contractor" within Workmen's Compensation Act (Workmen's Compensation Act, §§ 8[b], 19[d]).

Professional nurse, seeking compensation for disability resulting from blood infection, held not "independent contractor" within Workmen's Compensation Act (St. 1917, pp. 835, 849) §§ 8(b), 19(d), though she was under su-

pervision of doctor rather than patient, where she was paid and subject to dismissal by the patient.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor].

6. Master and servant ⇨367—Whether claimant for compensation is "independent contractor" is determined by power of control and right to interfere; "employee" (Workmen's Compensation Act).

In determining, in proceeding under Workmen's Compensation Act (St. 1917, p. 831, as amended), whether claimant is "employee" or "independent contractor," question is, Who has power of control? not as to result of work only, but as to means and method, and it is not fact of interference, but right of interference, that is material.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

7. Master and servant ⇨403—Finding that nurse was performing service for patient when she contracted blood infection raised presumption that she was "employee" (Workmen's Compensation Act).

Where Industrial Accident Commission found, on sufficient evidence, that nurse, claiming compensation, contracted blood infection from patient, there was presumption that she was "employee" within Workmen's Compensation Act (St. 1917, p. 831, as amended) placing burden on patient to show she was independent contractor or engaged in an excluded employment.

8. Master and servant ⇨417(7)—Whether presumption that injured nurse was employee was controverted was question of fact for commission (Workmen's Compensation Act).

Whether presumption that nurse claiming compensation was employee of patient, within Workmen's Compensation Act (St. 1917, p. 831, as amended) was controverted by evidence showing she was independent contractor, was fact question for Industrial Accident Commission to determine.

9. Master and servant ⇨417(7)—Industrial Accident Commission's findings, supported by substantial evidence, are conclusive.

Findings of Industrial Accident Commission on questions of fact are conclusive, and are not subject to review, where there is any substantial evidence to support them.

10. Master and servant ⇨405(2)—Commission should determine reasonable inference from circumstances surrounding contract, considered with its nature, to determine whether nurse was independent contractor.

In determining whether injured nurse was employee of patient or independent contractor, Industrial Accident Commission should determine reasonable inference to be drawn from all circumstances surrounding making and execution of contract considered in conjunction with nature of contract and duties ordinarily to be performed thereunder.

11. Master and servant ☞403—Evidence held insufficient to operate, as matter of law, to nullify presumption nurse, contracting infection while performing services for patient, was employee (Workmen's Compensation Act).

In proceeding under Workmen's Compensation Act (St. 1917, p. 831, as amended) by nurse for disability resulting from blood infection contracted from patient, evidence held insufficient to operate, as matter of law, to nullify legal presumption that nurse was employee, resulting from finding that she was performing service for patient when she became infected.

12. Master and servant ☞405(2)—Presumption that nurse, contracting infection while performing services for patient, was employee of patient, will support finding that she was employee (Workmen's Compensation Act).

Presumption that nurse was employee of patient within Workmen's Compensation Act (St. 1917, p. 831, as amended) arising from fact that she was performing services for him when she contracted infection, is legally sufficient to sustain finding that she was employee.

13. Master and servant ☞348—Rights of parties under Workmen's Compensation Act arise from, and are measured by, definitions embodied in act.

Substantive rights of parties under Workmen's Compensation Act (St. 1917, p. 831, as amended) and liability of employer for compensation arise from, and are measured by, definitions embodied in act rather than on any agreement of parties.

14. Master and servant ☞417(7)—Authority of court to review Industrial Accident Commission's determination that nurse was employee is restricted to ascertainment whether commission exceeded jurisdictional power (Workmen's Compensation Act).

Where Industrial Accident Commission determined that injured nurse was employee, and not independent contractor, within Workmen's Compensation Act (St. 1917, p. 831, as amended), authority of reviewing court is restricted to ascertainment of whether commission had exceeded jurisdictional powers.

Proceeding under the Workmen's Compensation Act by Ida M. Dracket, opposed by Fred S. Moody, employer. An award of compensation was made, and the employer applies for certiorari to annul the order of the Industrial Accident Commission. Award affirmed.

R. P. Wisecarver, of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

KNIGHT, J. Ida M. Dracket, a professional nurse, hereinafter referred to as respondent, was hired on behalf of petitioner, Fred S. Moody, to attend him as a "special" nurse in a hospital, and, while thus employed, became disabled as a result of a blood in-

fection found by the Industrial Accident Commission to have been contracted from petitioner, for which disability respondent was granted compensation. Petitioner seeks by this proceeding in certiorari to have the award annulled upon the ground that respondent's status at the time she was stricken was not that of an employee, but was that of an independent contractor, and that therefore she is excluded from receiving the benefits of the provisions of the Workmen's Compensation Act (St. 1917, p. 831, as amended). He contends also that the award is void, for the reasons that the finding of the commission to the effect that respondent's infection was contracted from petitioner was based solely upon conjecture and surmise, and that, even though it be held that petitioner was an employee, her employment was casual.

The circumstances relating to respondent's employment were as follows: For three or four days preceding November 2, 1926, petitioner had been confined to his home and under the medical care of Dr. I. W. Thorne, suffering from the effects of an abscessed tooth which had been extracted some two weeks before. On the day mentioned petitioner's condition became serious. A large red area had appeared on his body, showing acute inflammation of the deep structures of the neck and posterior left shoulder, indicating a pus pocket in the shoulder. Besides suffering great pain, he was running a high fever, and was delirious. Believing that immediate draining of the infected shoulder was necessary, Dr. Thorne ordered petitioner sent to the Stanford Hospital, and thereupon requested the hospital to assign petitioner a room, to prepare the operating room, and to call in a special nurse. Respondent had been connected with said hospital for about ten years, as a regular and a special nurse, the distinction between the two employments being that the former is a regular employee of, and paid by, the hospital, whereas the latter is called in by the hospital at the instance of, and is hired and paid directly by, the patient. In response to Dr. Thorne's request, the hospital management summoned respondent to attend petitioner, her name being taken from a waiting list of nurses maintained by the hospital. Neither at the time she arrived at the hospital to assume her duties nor at any time during her employment did she have any express agreement or understanding with any one as to the nature of her duties, the right to control her services, hours of employment, or wages. The two latter matters, however, were covered by an operating schedule existing between the management of the hospital and the association to which respondent belonged, the working hours fixed thereby be-

ing from 7 a. m. until 7 p. m., and the wages at the rate of \$6 a day. Following the operation, petitioner's delirium continued for a week or ten days, and it was two months before he was in a condition to leave the hospital.

The operation consisted of opening the cellulitis on the neck. Blood cultures were then made, and, although the character of the germ could not be definitely typed, petitioner's infection was eventually diagnosed as streptococcus of the blood stream type. Acting under the doctor's instructions, respondent was required, as part of her duties as nurse, to apply compresses to the wound caused by the operation, which she applied with the aid of forceps, but without using rubber gloves. On November 8, 1926, which was the seventh day after petitioner entered the hospital, respondent complained to Dr. Thorne of having a sore thumb, whereupon she was immediately retired from the case; her wages being paid directly to her by petitioner's wife. The soreness in her thumb developed immediately into a case of streptococcus infection of the erysipelas type, and she, too, became very ill, remaining in the hospital as a patient upwards of two months.

Regarding the origin of respondent's infection, Dr. Thorne testified that rarely was infection inoculated through an unbroken skin; that, when respondent complained of soreness in her thumb neither he nor respondent after a careful examination, were able to find any abrasion or portal of entry on her thumb through which she might have become inoculated; and that he had no absolute knowledge as to the origin of her infection, that is, whether she picked it up from the patient or on the outside; but he further testified that her type of infection might have been the outgrowth of the type suffered by petitioner; that it could be communicated through a puncture wound too small to be visible, such as a prick of a needle or pin, a hang nail, or a nick from a knife; and that, since petitioner's infection was of a virulent type, and respondent had been caring for him as nurse, the reasonable inference was that she contracted her infection from petitioner.

[1-3] The question of whether or not respondent did become so inoculated was, in any event, one of fact, the final determination of which rested with the commission. Positive proof was not indispensable, nor was absolute or mathematical demonstration essential. Evidence of circumstances from which an inference could be fairly and legitimately drawn was all that was necessary. *Santa v. Ind. Acc. Comm.*, 175 Cal. 235, 165 P. 689.

Dr. Thorne gave what on the facts before him and in the light of medical science appeared to him to be the most plausible explanation of the event; and we are of the

opinion that his deduction, when viewed in the light of the circumstances from which it was drawn, was legally sufficient to support the commission's finding as to the origin of respondent's infection. *Santa v. Industrial Acc. Comm.*, supra; *Shell Co. v. Industrial Acc. Comm.*, 36 Cal. App. 463, 172 P. 611.

[4] Equally without merit is the contention of petitioner that, if respondent be deemed an employee, her employment was casual. Section 8 (c) of said act declares that the term "casual" as used in said act "shall be taken to refer only to employments where the work contemplated is to be completed in not exceeding ten working days, without regard to the number of men employed, and where the total labor cost of such work is less than \$100.00. * * *" The evidence here shows that, when respondent entered upon her duties, it was contemplated that her services would continue as long as petitioner remained in the hospital, and it further shows that the nurse who succeeded her continued in such employment at the rate of \$6 a day during the entire period of petitioner's confinement in the hospital, which, as before stated, lasted for over two months. It is apparent, therefore, that respondent's employment was not casual within the meaning of that term as it is defined by said act.

[5] Petitioner's contention with reference to respondent's status as an independent contractor is, in substance, that, at the time respondent became inoculated with the infection, the legal relationship of employer and employee did not exist between them; that, so far as he was concerned, at least, she was pursuing an independent calling, which brought her status within the excluded classification of the statute. This contention is in turn based upon the assertion that the evidence adduced at the hearing established the fact that respondent retained entire control over the manner and method of performing her duties as special nurse, without the right of interference on the part of petitioner.

Section 8 (b) of the Workmen's Compensation Act provides that any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, "*is presumed to be an employee*" within the meaning of said act; and that the term "independent contractor" shall be taken to mean, for the purposes of said act, any person who renders service for a specified recompense "*for a specified result*," under the control of his principal as to the result of his work only, and not as to the means by which such result is accomplished. Section 19 (d) of the act provides:

"The burden of proof lies upon the party holding the affirmative of the issue. The following are affirmative defenses, and the burden of proof shall rest upon the employer to establish them: (1) That an injured person claiming to be an employee is an independent con-

tractor or otherwise excluded from the protection of this act, *where there is proof that such injured person was at the time of his injury actually performing service for the alleged employer.*" (Italics ours.)

[6] "In determining in any given case whether a person was an employee or an independent contractor," says the Supreme Court in the case of *Fidelity & Casualty Co. v. Industrial Acc. Comm.*, 191 Cal. 404, 216 P. 578, 43 A. L. R. 1304, "there are usually present various circumstances which are persuasive to one conclusion, and other circumstances persuasive to the opposite conclusion. But an analysis of the cases makes it plain that the determinative factor is usually found in the solution of the question: Who has the power of control, not as to the result of the work only, but as to the means and method by which such result is accomplished?" And it is not the fact of actual interference or noninterference with control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent. *Hillen v. Industrial Acc. Comm.*, 199 Cal. 577, 250 P. 570.

[7-9] The commission in the present case, having found upon sufficient evidence that respondent, at the time she became infected, was actually performing service for petitioner, was at the outset of the hearing required by the act to presume that respondent's status was that of an employee within the scope of the provisions of said act (*Roman Catholic Archbishop v. Industrial Acc. Comm.*, 194 Cal. 660, 230 P. 1; *County of Monterey v. Industrial Acc. Comm.*, 199 Cal. 221, 248 P. 912, 47 A. L. R. 359), and the burden was upon petitioner to overcome this presumption with evidence sufficiently strong to convince the commission either that respondent was an independent contractor or that she was engaged in an excluded employment at the time of her disability. *Hillen v. Industrial Acc. Comm.*, supra; *Fidelity & Casualty Co. v. Industrial Acc. Comm.*, supra; *Pacific Employers' Insurance Co. v. Industrial Acc. Comm.* (Cal. App.) 249 P. 33; *Dearborn v. Industrial Acc. Comm.*, 187 Cal. 591, 203 P. 112. Whether or not such presumption was so controverted was a question of fact for the commission, as the trial court, to determine (*Gilmour v. North Pasadena Land, etc., Co.*, 178 Cal. 6, 171 P. 1066); and its ultimate finding the respondent was an employee was, in effect, a determination that such presumption had not been so controverted. As to the conclusiveness of such determination, it is a well-recognized rule that findings of the commission, upon questions of fact, are conclusive, and are not subject to review, where there is any substantial evidence to support them (*Western Pac. R. Co. v. Industrial Acc. Comm.*, 193 Cal. 413, 224 P. 754; *Massachusetts, etc., Co. v. Industrial Acc. Commis-*

sion, 177 Cal. 378, 170 P. 822; *Western Indemnity Co. v. Industrial Acc. Comm.*, 182 Cal. 709, 190 P. 27). It is also a settled rule that, where from the evidence two opposing inferences may be drawn, that inference which is accepted by the commission must be sustained, if there is evidence in the record to support it, and if it is a reasonable inference to be drawn from the evidence. *Eastman Co. v. Industrial Acc. Comm.*, 186 Cal. 587, 200 P. 17; *Roman Catholic Archbishop v. Industrial Acc. Comm.*, supra. That is to say, the commission is the final arbiter where there is a conflict in the evidence, or where opposing inferences may be drawn. *Tartar v. Industrial Acc. Comm.*, 191 Cal. 703, 218 P. 39; *Clapp's Parking Station v. Industrial Acc. Comm.*, 51 Cal. App. 624, 197 P. 369. Therefore the commission's finding here is binding upon this court (*Pacific Gas & Electric Co. v. Industrial Acc. Comm.*, 180 Cal. 497, 181 P. 788, unless there is such an entire absence of evidence in the record to render the finding unreasonable or in excess of the commission's jurisdictional powers (*Hillen v. Industrial Acc. Comm.*, supra). In other words, this court, in reviewing awards of the commission, does not act as a court of appeal, and the right to review its findings, even where there is no evidence to support them, is not based on the theory that they are not supported by evidence, and that we are weighing evidence to determine that proposition, but on the theory that the commission has no jurisdiction to make a finding where there is no evidence to support it. *Southern Pacific Co. v. Industrial Acc. Comm.*, supra.

The testimony relied upon by petitioner as overthrowing the statutory presumption mentioned was that given by respondent and Dr. Thorne, which was, in substance, that, in accordance with the ethics and the established practice of respondent's profession, her duty required her to follow implicitly the directions and instructions of the attending physician, and that, if a situation had arisen where such instructions were unavailable, and respondent and petitioner disagreed as to the propriety of doing, or refraining from doing, some particular act pertaining to petitioner's care and treatment, respondent would have ignored the request or suggestion made by petitioner in that behalf, and would have acted entirely upon her own responsibility and pursuant to the dictates of her professional training and skill. The witnesses mentioned, however, disclaimed that any express agreement to that effect had ever been made with, or on behalf of, petitioner, nor does it appear that any such dispute did arise.

[10-12] Upon analyzing this testimony, however, it becomes evident that the effect thereof did not tend to establish the express terms of any agreement which had theretofore been made between the parties, because, as stated,

there were none agreed upon. The testimony, as is apparent, was hypothetical in its character, and consequently at most amounted to no more than the opinions of the witnesses upon the question of the respective rights and duties of parties to a contract for the employment of a professional nurse, which, obviously, the commission was not compelled to adopt in preference to its own construction of the rights of the parties under such employment, because, in the absence of express terms affirming or negating the power of control and direction, its existence was to be determined by reasonable inference to be drawn from all the circumstances surrounding the making and execution of the contract considered in conjunction with the nature of the contract, and the duties ordinarily to be performed thereunder (*Press Publishing Co. v. Industrial Acc. Comm.*, 190 Cal. 116, 210 P. 820); and clearly the testimony above referred to did not alone operate, as a matter of law, to nullify the legal presumption declared by the legislative act. It follows, therefore, in view of the established fact that respondent, at the time she became inoculated with the infection, was actually performing service for petitioner, the commission was warranted, in the exercise of its power as judge of the facts, to base its finding that respondent was an employee solely upon the statutory presumption; and, if it did, such presumption was legally sufficient to sustain its finding. As stated in *California Jurisprudence* (vol. 10, p. 747):

"The reports are replete with decisions to the effect that disputable presumptions are evidence, often of sufficient force to require clear and convincing evidence to overcome them, and having such force as may in some cases, outweigh positive evidence against them."

However, the finding of the commission does not appear to have rested alone upon the statutory presumption, but, in direct support thereof and in opposition to the testimony relied upon by petitioner as establishing the right of control, the evidence shows without conflict that petitioner at all times retained the right to discharge respondent if her services should prove unsatisfactory; and, as held in *Press Publishing Co. v. Industrial Acc. Comm.*, supra, this right undoubtedly gave respondent "the potential power of control." Upon this point the court in that case said:

"This power of the employer to terminate the employment at any time is a strong circumstance tending to show the subserviency of the employee, since it is incompatible with the full control of the work usually enjoyed by an independent contractor. Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so. 14 *Ruling Case Law*, p. 72."

And later on in the same opinion the court said:

"As was held in *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 417, 156 P. 491, 495 (Ann. Cas. 1917E, 390) 'The real test by which to determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control and was liable to be discharged for disobedience or misconduct.'" Italics ours.

Furthermore, and aside from the question of the weight of the evidence, it will be observed that the act defines an independent contractor as one "who renders services * * * for a specified result * * *" (italics ours); and it has been held in effect that, where the element of "a specified result" is wanting, there can be no independent contract. *Brown v. Industrial Acc. Comm.*, 174 Cal. 457, 163 P. 664. In the present case the evidence does not show that in hiring out her services as special nurse respondent contracted to obtain any "specified result." The only result which was to be obtained in connection with petitioner's illness was to effect a cure by medical and surgical treatment; and the means by which that result was to be accomplished rested entirely in the judgment of the attending physician, and not the nurse. The duties of the nurse and the purpose for which she was hired on behalf of petitioner, were, as the evidence shows, merely to carry out the treatment prescribed and ordered by the doctor; and, in order to receive a full day's wages, she was obliged to devote all of her time during certain hours of the day to the performance of this work, part of which was to apply the compresses which resulted in her disability; and, in our opinion, the fact that, after being thus employed, her services were directed and controlled by the doctor, did not operate to terminate her legal status as an employee of petitioner, by whom she was hired and paid, and who retained the peremptory power of dismissal. Our conclusion in this latter respect finds full support, we think, in the case of *Claremont Country Club v. Industrial Acc. Comm.*, 174 Cal. 395, 163 P. 209, L. R. A. 1918F, 177. There a boy was injured on the golf links conducted by the club while caddying for a club member. The caddies were employed by the caddy master or greens committee of the club, in whom was vested the power to discharge; but, while actually caddying, the control of their activities was wholly with the members using them, and the club, as a club, had no means of knowing what particular orders or directions a member might give to his caddy, nor what unusual or dangerous duties the caddy might be called upon to perform. For these reasons it was contended that, although a caddy was the servant of the club while rendering personal service at the direction of the club, the relationship of master and serv-

ant ceased entirely when he was actually caddying for a member, since by virtue of that engagement he no longer was entirely under the control and direction of the members. The court declared this contention to be without merit, and, grounding its decision upon the proposition that the right of the club to control in the matter of the employment and discharge was the determinative factor in the case, held that the caddies were employees of the club.

In concluding this point, it may be stated that, if respondent had been serving as regular nurse, employed, paid, and subject to dismissal by the hospital, but whose services necessarily were under the immediate control of the attending physician, there could be little doubt but that she would have been an employee of the hospital within the meaning of the act. That being so, we think that having served as special nurse, employed, paid, and subject to dismissal by the patient, constituted her an employee of the patient, even though her services as special nurse, like those of a regular nurse, were under the control of the attending physician.

[13, 14] The cases cited by petitioner from other jurisdictions in support of his theory that respondent was an independent contractor are essentially different, we think, from the present one, both as to the nature of the actions and the principles involved, and therefore are not controlling here. The courts there were exercising either a trial or an appellate jurisdiction in considering the application of the doctrine of respondeat superior in connection with the relationship of master and servant as it exists under common-law rules. In other words, the issue upon which those cases were decided was as to the extent of the master's liability for the tortious acts of the servant as such liability attaches under the common law. No such question is, or could be, involved in the present proceeding. Here we are dealing with a question of employment as it is expressly defined by a statute designed to provide for the payment of compensation to certain employees who are injured in the course of their employments. The legislation rests upon the idea of status, not upon implied contract, and the substantive rights of the parties and the liability of the employer for compensation arise from, and are measured by, the definitions, embodied in the act rather than upon any agreement of the parties. *North Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, 162 P. 63, L. R. A. 1917E, 642. The determination of the question of whether the status of a person hired for personal service is that of an employee or of an independent contractor rests with a commission, operating under broad judicial powers conferred by the act; and, it having determined that question, the authority of this court to review such deter-

mination is restricted to an ascertainment of whether the commission has gone beyond the limits of those definitions, and consequently exceeded its jurisdictional powers. As was said in *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 159 P. 721, the courts, in exercising this authority, should not discard the wisdom and learning of the past in its efforts to decide what the Legislature intended by the language used in the act. But where, as here, the definitions embodied in the act seem plain and definite, they must be held as controlling.

After a review of the entire record, we are of the opinion that for the reasons given, and in the light of the legal rules announced in the cases hereinabove cited, the inference drawn by the commission from the peculiar facts of this case that respondent was an employee, and not an independent contractor, cannot be declared to be unreasonable, and that it finds substantial support in the evidence.

The award is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

202 Cal. 382

POSTAL TELEGRAPH-CABLE CO. v. PA-
CIFIC GAS & ELECTRIC CO.
(S. F. 11203.)

Supreme Court of California. Oct. 31, 1927.

1. Electricity ⇄20—Electric power line's field of force interfering with telegraph line, held not nuisance, giving telegraph company right of action (Civ. Code, § 3479).

Field of electrical force around electric power line carrying current of high voltage, causing inconvenience in sending messages over telegraph line nearby, does not constitute nuisance, within Civ. Code, § 3479, nor give telegraph company right of action for damages.

2. Electricity ⇄20—Telegraph company's complaint for interference by electric power line, held demurrable.

In telegraph company's action against electric company for damages from interference with transmission of messages because of field of electrical force around power lines near telegraph line, allegation stating that defendant's power lines between certain cities and in various other parts of state were negligently constructed, and that defendant had negligently failed to keep them in repair, causing damage to plaintiff's telegraph line between such cities and other portions of plaintiff's line and equipment in state, was too general and insufficient on general and special demurrer.

Shenk, J., and Waste, C. J., dissenting in part.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the Postal Telegraph-Cable Company against the Pacific Gas & Electric Com-

pany for damages. From a judgment for defendant, plaintiff appeals. Affirmed.

Willard P. Smith, of San Francisco, for appellant.

Thomas J. Straub, L. H. Susman and Chas. E. Finney, all of San Francisco, for respondent.

LANGDON, J. Plaintiff appeals from a judgment against it after a demurrer to the complaint had been sustained and plaintiff had declined to amend. The complaint, after alleging the corporate capacity of the parties and the nature of their respective businesses, as disclosed by their corporate names, sets out, in the first count, that one of the power lines of the defendant extends from the city of Sacramento to the city of Suisun, a distance of about 40 miles, over which the defendant transports normally an alternating electric current of high potentiality of about 53,000 volts, and that said line parallels the portion of said plaintiff's telegraph line for the entire distance between said cities, "being at no point more than 210 feet from the line of plaintiff, and for a distance of about 8 consecutive miles between said cities not more than 21 feet from plaintiff's line, and for a distance of 5 consecutive miles between said cities not more than 25 feet from plaintiff's line; and that the portion of said lines of defendant between said cities was constructed many years after the construction of plaintiff's said line."

It is then alleged:

That by reason of the said high voltage of defendant's line, "there extends, in all directions about it, a field of force for more than 210 feet, and said field of force carries within such field many electric currents of high and varying intensity which are not controlled by or confined to said power lines and due to said proximity and parallelism of plaintiff's and defendant's said lines between said cities of Sacramento and Suisun, and the fact that said field of force extends in every direction about its said power lines and carries within such field many currents of high and varying intensity which are not controlled by or confined to said power lines, a portion of the electric current transported by defendant on said lines is at all times inducted on to plaintiff's said lines, thereby interfering with the transmission of telegraphic messages thereover and greatly decreasing the quickness and accuracy with which telegraphic messages can be transmitted over plaintiff's said line as compared with what would be the case if such induction did not exist. That said inductive interference has been increasing within the past three years and particularly interferes with the use of machine transmission of messages, and at times completely prevents the operation of said machines. That there have been within the past three years interruptions and breaks in the said lines of the defendant, causing at such times the current passing through defendant's said line to surge and rise in voltage, and said high voltage to be inducted on to plaintiff's said line between

said cities whereby the said portions of plaintiff's said telegraph line and equipment thereof in this state have been burned out, destroyed, and damaged, and on many occasions it has been impossible, for several hours at a time, to transmit telegraphic messages over said line, and the physical damage to plaintiff's said line and the equipment thereof, from such surges and induction, within three years last past has amounted to the sum of \$2,000."

[1] Appellant contends that these allegations constitute the defendant's power lines a nuisance, within the meaning of section 3479, Civil Code. On the other hand, the respondent maintains that a distinction exists between cases where a plaintiff has been making an ordinary use of his property and is prevented from doing so by inductive interference, and cases where both plaintiff and defendant are making an extraordinary use of their property and inconvenience results to one in this extraordinary use of his property by reason of the use of the other. The case of *Eastern and S. A. Tel. Co. v. Cape Town Tram Co.* (1902) C. C. 381, 2 British Ruling Cases, 114, 126, contains the following language:

"A man cannot increase the liabilities of his neighbor by applying his own property to special uses, whether for business or pleasure. The principle of *Ryland v. Fletcher*, which subjects to a high liability the owner who uses his property for purposes other than those which are natural, would become doubly penal if it implied a liability created and measured by the nonnatural uses of his neighbor's property."

In the instant case the use of each party is extraordinary, and each makes a similar use, though different in degree. The distinction between the rights of parties thus situated and the respective rights of parties where one is engaged in the ordinary development of his land and the other is subjecting his land to an extraordinary use is pointed out in the case of *Lake Shore & M. S. Ry. Co. v. Chicago, etc., Ry. Co.*, 48 Ind. App. 584, 589, 92 N. E. 989, 991, 95 N. E. 596, where the court says:

"This controversy is between users of electricity; appellant using light currents, and comparatively delicate instruments, which are interrupted by escaping currents from the wires carrying exceedingly high voltage belonging to the appellee. It is not a question between one engaged in the ordinary development of his land and the customary and appropriate employment of it according to its inherent qualities and its surroundings, without bringing upon it artificially of any substance not naturally found there (*Evans v. Reading, etc., Co.*, 160 Pa. 209, 28 A. 702; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 6 A. 453, 57 Am. Rep. 445), and one engaged in the unnatural and extraordinary use of his property, calling for the application of the maxim '*Sic utere tuo*,' etc., which is the governing principle in *Fletcher v. Rylands* [1 L. R. Exch. 263] supra, and *Rylands v. Fletcher*, L. R. 3 H. L. 330. In this case the use of

electricity is common to both parties, and both are acting under legislative grants. In such cases it seems to be the consensus of opinion, both in England and in this country, that where one is acting under legislative authority, and within the right thus given, and reasonably within the exercise thereof, using care and caution regarding the rights of his neighbor, any inconvenience or incidental damage which may arise in the absence of any negligence from the reasonable use of his own property will be regarded as within the rule *damnum absque injuria*."

In *Phillippy v. Pac. Power & Lt. Co.*, 120 Wash. 581, 207 P. 957, 211 P. 872, 23 A. L. R. 1251, the telephone company brought action against the power company for the cost of metallicizing a telephone line to prevent inductive interference and for loss of profits occasioned by such interference. A judgment for plaintiff was reversed upon appeal. This case reviews, at some length, the conflicting authorities concerning the relative rights of telephone and telegraph companies and power companies and accepts the rule of nonliability for inductive interference, using the following language:

"The appellant contends that it, being rightfully on the highway by reason of a franchise properly granted, was under no duty of metallicizing or bearing the cost of metallicizing of the telephone line. The respondent contends that, since the power line interfered with the use of the telephones, that company should bear the expense of metallicizing. The controlling question, then, is whether the power company was under obligation to bear such cost. This question is one of first impression in this court. It should be remembered, in considering the question, that the telephone company did not own the land through which, with its single line system, the current returned to the point of origin. The weight of authority, so far as the question has been determined, is in favor of nonliability of the power company."

The case of *Yamhill County Mut. Tel. Co. v. Yamhill Elec. Co.*, 111 Or. 57, 224 P. 1081, 33 A. L. R. 373, is in harmony with the view above quoted, as are the cases of *Postal Telegraph-Cable Co. v. Chicago, etc., Ry. Co.*, 49 Ind. App. 697, 97 N. E. 20; *Citizens' Telephone Co. v. Ft. Wayne, etc., Co.*, 53 Ind. App. 230, 100 N. E. 309, Ann. Cas. 1916A, 132. The rule is summarized in 20 C. J. 315, as follows:

"As has been said, however, the right of the first licensee is not exclusive. So long as it is not disturbed in its occupancy, it must submit to such unavoidable inconvenience as may result from a reasonable and fair exercise of the junior licensee's franchise. Damages which are merely a natural incident to and the direct and immediate result of the junior licensee's operations are not actionable and such operations will not be enjoined. To give the prior licensee the right of action, the junior licensee must have been guilty of negligence, trespass, or malice."

The federal court rule also seems in harmony with the cases hereinbefore cited, for in *Cumberland Tel. & Tel. Co. v. United Elec. R. Co. (C. C.)* 42 F. 273, 284, 12 L. R. A. 544, it was said:

"We think the obligation is upon the telephone company to adopt it, and that defendants are not bound to indemnify it; in other words, that the damage incidentally done to the complainant is not such as is justly chargeable to the defendants. Unless we are to hold that the telephone company has a monopoly of the use of the earth, and of all the earth within the city of Nashville, for its feeble current, not only as against the defendants, but as against all forms of electrical energy which, in the progress of science and invention, may hereafter require its use, we do not see how this bill can be maintained."

[2] It seems unnecessary to multiply authorities to the same effect, and we shall pass to the second cause of action, which was based upon negligence. In considering the complaint, we must remember that the demurrer interposed thereto was both general and special, and when the order was made sustaining it the plaintiff was given leave to amend, but declined to do so.

After reiterating the pertinent allegations of the first cause of action, the statement of the second cause of action continues:

"That the portion of defendant's power lines between said cities of Sacramento and Suisun, and its power lines in various other portions of said state of California, all of which are connected up with said power lines between said cities of Sacramento and Suisun, are negligently constructed, and defendant has at all times negligently failed to keep the same in repair, and the same are negligently constructed, maintained, operated, and equipped; that old, weak, wooden poles, with single-pin insulators are used, and that many of said poles have rotted and broken off near the bottom, and have not been replaced by other poles, and have been imperfectly stubbed, and that said portions are too weak to properly support the wires strung on the same, and that said wires are negligently placed so that the wires of plaintiff are within the field of force of said 53,000 volt current.

"That by reason of the premises, there have been breaks in the defendant's lines, causing the current passing through defendant's said lines to surge and immediately rise in voltage above the said 53,000 volts, and to be inducted on to the plaintiff's said line between said cities, whereby the same and other portions of plaintiff's said line and equipment in this state have been burned out, destroyed, and damaged; and that the physical damage to plaintiff's said lines and equipment thereof from such surges and induction has been \$2,000."

It needs no citation of authority to support a ruling against such general allegations. Defendant is not required to meet, without notice, evidence regarding lines of plaintiff and defendant all over the state of California. Neither the time, the place, nor the nature of the negligence relied upon are fixed by

plaintiff's pleading, and the special demurrer thereto was properly sustained.

In the exercise of its regulatory power, the Railroad Commission has already made an order, affirmed by this court, for the relocation of appellant's line, the cost thereof to be borne equally by appellant and respondent herein. *Postal Telegraph-Cable Co. v. Railroad Commission*, 197 Cal. 426, 241 P. 81. There is involved in this appeal, therefore, no question of a continuation of the difficulties and damage for which compensation is sought, and under the rule of the authorities herein cited, defendant is not liable for the damage caused under the circumstances set forth in the complaint.

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; CURTIS, J.

SHENK, J. I concur in the foregoing opinion in so far as it holds that the special demurrer to the second cause of action was properly sustained, but I dissent from that portion of the opinion which holds that the first count fails to state a cause of action. The first count in my opinion clearly alleges a continuing nuisance in that the defendant so installed and maintained its transmission lines that its high voltage currents were inducted onto and interfered with the operation of the plaintiff's telegraph lines, causing substantial damage thereto. It is alleged that the induction interferes with the use of machine transmission of telegraph messages and at times completely prevents the operation of said machines.

Included in the definition of a nuisance is the obstruction to the free use of property. Section 3479, Civ. Code; 20 Cal. Jur. 261. Section 731 of the Code of Civil Procedure specifically provides for an action for damages for the maintenance of a nuisance, and the complaint shows that the alleged inductive interference is the direct and immediate result of the defendant's use of its property. The question of the superior right of a subsequent licensee in a public street or highway by reason of the paramount right of the public in the service performed by the subsequent licensee is not involved in this case. Here the two corporations, each exercising rights under a public grant of franchise for the purpose, are maintaining parallel lines on private rights of way in such manner that the defendant, the junior licensee, is so exercising the right as substantially to destroy the use to which plaintiff, a prior licensee, is reasonably putting its property. It is true that each is exercising what is called an extraordinary use, but I fail to comprehend the distinction endeavored to be made between the mutual rights and obligations of those putting their property to such extraordinary use.

The rule announced by the main opinion is too broadly stated. It must be conceded that wanton or negligent damage is actionable without regard to priority. And it may be assumed that the prior licensee may not complain of unavoidable inconvenience as a result of the junior licensee's operations. But when the interference by the junior licensee is avoidable and substantial damage ensues, a right of action should lie. As I read the numerous authorities cited in the briefs, this proposition cannot be successfully controverted. Reason and justice demand that it must be so. It is inconceivable that a junior licensee, merely because it has the right from the public to exercise the franchise and maintain its high tension power lines, may so exercise that right as to exclude the prior licensee from the exercise of its lawful rights when such interference may reasonably be avoided. The prior licensee has the right to carry on its operations without substantial impairment. *Deiser on Law of Conflicting Uses of Electricity and Electrolysis*, pp. 54-57, and cases cited. That the damage claimed by the plaintiff herein is substantial is shown by the allegations of the complaint. That it is avoidable is evidenced by the order of the Railroad Commission in directing a separation of the lines sufficient to obviate the damage. *Postal Telegraph-Cable Co. v. Railroad Commission*, 197 Cal. 426, 241 P. 81. The exercise of the police power is not here involved, and in no sense may the damage alleged be reduced to *damnum absque injuria*.

I concur: WASTE, C. J.

86 Cal. App. 588

BERONIO v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5886.)

District Court of Appeal, First District, Division 1, California. Nov. 5, 1927.

1. Master and servant §417(7)—Industrial Accident Commission's conclusion on conflicting evidence is conclusive.

Weight of evidence is for Industrial Accident Commission, and its conclusion on conflicting evidence cannot be disturbed by appellate court.

2. Master and servant §417(4½)—Industrial Commission has no jurisdiction, pending appeal, to consider new evidence adduced on petition for rehearing.

Where an appeal has been taken from a decision of the Industrial Accident Commission, the commission loses jurisdiction of the case, and cannot while such appeal is pending consider new evidence presented on a petition for rehearing.

Proceeding under the Workmen's Compensation Act by Louis Beronio, employee, against the Beronio Lumber Company, em-

ployer, and another, insurance carrier. To review an order of the Industrial Accident Commission awarding permanent disability rating and denying rehearing, employee applies for certiorari. Award affirmed.

Brobeck, Phleger & Harrison, of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondent.

TYLER, P. J. Certiorari to review an award of the Industrial Accident Commission. It appears from the evidence that on April 12, 1924, petitioner sustained an industrial injury while employed by respondent Beronio Lumber Company by being squeezed between a truck and a pile of lumber. The truck struck him directly over the kidney region, severely injuring his back, fracturing his third, fourth, and fifth transverse processes, and necessitating his immediate removal to a hospital. Thereafter application for industrial benefits was made by the employee, and on January 30, 1925, respondent Industrial Accident Commission made its findings and award in petitioner's favor and against respondent insurance carrier, by which petitioner was granted compensation until the termination of his disability or the further order of the commission. Petitioner received the compensation and medical treatment provided for from the insurance carrier. About a year after his injury a genito-urinary condition appeared in petitioner which was treated by the physicians of respondent insurance carrier under an authorization of its attorney. A claim was made by petitioner before the commission that his condition was the result of his original injury. The claim was disputed by the insurance carrier. A hearing was had by the commission upon the application, and on March 14, 1927, an order was made awarding petitioner a permanent disability rating based primarily upon the injuries to his back, but relief for the alleged genito-urinary condition was denied, the finding in this respect being that said injury disability referable to the urinary system was not caused nor aggravated by injury or strain arising out of and in the course of said employment. On April 1, 1927, petitioner's present counsel filed a petition for rehearing directed toward the findings concerning the genito-urinary condition above referred to. This petition for rehearing was answered by the insurance carrier, and it was denied April 27, 1927. On May 25, 1927, petitioner filed the present petition for a writ of review. Notwithstanding this fact, petitioner on May 23, 1927, filed a second petition for rehearing before the commission, setting forth the existence of certain new evidence. The insurance carrier opposed the granting of this petition upon the ground that the time provided for in which a rehearing could be filed, had ex-

pired. On June 3, 1927, the application was again denied. On June 13, 1927, a third petition for rehearing was filed, and it was denied on July 11, 1927. We are here only concerned with the question of whether or not the first petition for rehearing was properly denied, as the commission was without jurisdiction to entertain more than one application for rehearing. Crowe Glass Co. v. Ind. Acc. Comm. (Cal. App.) 258 P. 130.

[1, 2] It is petitioner's contention that there is no evidence to sustain the finding of the commission that "disability referable to the urinary system * * * was not caused nor aggravated by injury or strain arising out of and in the course of employment." The contention that is here made and the grounds in support thereof were presented to the commission on the application for a rehearing. The medical testimony upon the subject as to whether the injury now complained of originated from the original injury was conflicting. It is claimed that the weight of the evidence was in favor of the applicant. This was a matter for the commission to determine, and its conclusion upon this conflict is a matter that cannot here be disturbed. The new evidence presented on the second petition for rehearing could not be considered by the commission, as that body had lost jurisdiction of the case at the time it was presented.

The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

86 Cal. App. 605
METCALFE v. STEUR. (Civ. 5849.)

District Court of Appeal, First District, Division 2, California. Nov. 7, 1927.

1. Account stated $\S$ 19(3)—Finding against account stated on conflicting evidence as to plaintiff's acceptance of check with understanding that he should pay defendant part of amount held not without substantial support.

Court's finding against defense of account stated on conflicting evidence as to whether plaintiff accepted check from defendant's debtor for more than amount which defendant contended was due plaintiff, with understanding that latter should cash it and pay difference to defendant, held not without substantial evidentiary support.

2. Appeal and error $\S$ 1079—Proposition barely asserted, and not regarded as ground of appeal, held not presented for decision.

Proposition, barely asserted by appellant, and apparently not regarded by him as ground of appeal, held not properly presented for decision by appellate court.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by G. A. Metcalfe against Jacob Steur. Judgment for plaintiff, and defendant appeals. Affirmed.

Edgar C. Levey, of San Francisco, for appellant.

William Klein, of San Francisco, for respondent.

KOFORD, P. J. Plaintiff recovered judgment for eight hundred odd dollars upon this action for a balance due for electrical work and materials furnished defendant. The defense of the defendant in the court below and his ground of appeal as appellant here is that the parties had agreed between themselves upon the correct balance due and that such balance had been paid. He pleaded this defense as an account stated. The trial court made a finding against this defense, and it is urged here that such finding has no support in the evidence.

[1] The appellant's claim is as follows: That the parties met in the office of the Great Western Power Company; that at that meeting the plaintiff claimed some \$4,000 balance due and the defendant contended for only \$2,900 balance due; that the parties agreed upon \$2,900; that thereupon a sum of \$3,200 due defendant from the Great Western Power Company was paid by check to plaintiff; that plaintiff accepted it with the understanding that he should cash the check and pay the difference (\$300) to the defendant. Defendant presented a cross-complaint for the \$300. Plaintiff admitted being present at the meeting, admitted discussion of the \$2,900 and \$300 amounts, and admitted the receipt of the \$3,200, but denied that he agreed to the compromise or account stated as claimed by defendant.

It is appellant's contention that there is no substantial conflict in the evidence, and quotes testimony of plaintiff, given upon his cross-examination, in which his denials are not positive. There is other testimony quoted by respondent in which the plaintiff positively denied the alleged agreement of compromise or account stated. The witness Hardin an employee of the power company, who was present at the time and place of the meeting between the parties, was unable to remember whether such an agreement was made or not. From this record we cannot say that there is no substantial evidence to support the finding attacked by appellant.

[2] Appellant makes the bare assertion that it was improper for the court to allow as an item of labor a part of the wages of a superintending foreman where the written contract between the parties specified a 15 per cent. cost plus basis.

No argument is advanced in support of this assertion. Apparently appellant does not regard this as one of his grounds of appeal.

It is at least not properly presented for our decision.

The judgment is affirmed.

We concur: **NOURSE, J.; STURTEVANT, J.**

88 Cal. App. 657

KESSLER v. YOUNG. (Civ. 4495.) ★

District Court of Appeal, Second District, Division 2, California. Nov. 10, 1927.

Hearing Denied by Supreme Court Jan. 9, 1928.

1. Costs ⇨189—Statutes do not authorize employment of another than official reporter to take down evidence in shorthand as regards taxation of costs (Code Civ. Proc. § 269).

As regards right to tax costs, there is no provision in statutes authorizing employment of any other person than official phonographic reporter appointed by court under Code Civ. Proc. § 269, where it is desired that testimony, objections, and rulings be taken down in shorthand.

2. Costs ⇨189—Official reporter's fees for transcribing shorthand notes held taxable against defendant as costs, though private stenographer took notes of evidence (Code Civ. Proc. § 274).

Fees of official phonographic reporter for making transcript of shorthand notes of testimony, objections, and rulings pursuant to order of court, which transcript was used in preparing proposed amendments to defendant's proposed bill of exceptions, held taxable as costs against defendant under Code Civ. Proc. § 274, notwithstanding that defendant had private stenographer take notes of evidence and that they were used as basis of motion for new trial and proposed bill of exceptions.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Mae H. Kessler against Marie J. Young. From an order denying a motion to retax costs, defendant appeals. Affirmed.

Charles Lantz, W. P. Hyatt, and F. C. Huber, all of Los Angeles, for appellant.

Samuel R. Blake, of Los Angeles, for respondent.

CRAIG, Acting P. J. This is an appeal from an order denying the defendant's motion to retax costs after appeal from the judgment upon the merits, which was rendered in favor of the plaintiff. It is admitted that appellant had a private stenographer take notes of the evidence, and that a motion for new trial and proposed bill of exceptions were based upon that stenographer's report; that the official phonographic reporter also was present and made a record of the evidence, and the plaintiff and respondent requested and obtained an order for the official transcript, which was used in preparing proposed amendments to the bill of excep-

tions proposed by appellant. Respondent paid the official reporter, and the amount of such charge was taxed as part of the costs. Appellant moved the trial court to strike out the reporter's fees, upon the ground that a stenographer had already prepared a transcript, and that the official one was therefore unnecessary.

[1, 2] It is provided by section 269 of the Code of Civil Procedure that the court may appoint a competent phonographic reporter, who, at the request of either party, must take down in shorthand all of the testimony, objections, and rulings, and that, if so ordered by the court, he must write out the same. There is no provision authorizing the employment of another person for the performance of such services. Section 274 of the Code of Civil Procedure provides that the fees of the official reporter shall be taxed as costs and paid by the unsuccessful party, and the Supreme Court has held that the allowance of the reporter's fees for transcription, when order therefor is made by the court, is proper, and that a motion to strike out such item should be denied. *Barkly v. Copeland*, 86 Cal. 493, 25 P. 3; *Bell v. Pleasant*, 145 Cal. 410, 78 P. 957, 104 Am. St. Rep. 61.

The order appealed from is affirmed.

We concur: THOMPSON, J.; PEAIRS, Justice pro tem.

86 Cal. App. 607

B. L. CLARK, Plaintiff and Respondent, v. E. W. MORRIS et al., Defendants and Appellants. (Civ. 5969.)

District Court of Appeal, First District, Division 2, California. Nov. 7, 1927.

Appeal by defendants from a judgment of the Superior Court of Los Angeles County, Walton J. Wood, Judge, in an action for money due under contract of employment.

Dave F. Smith and Walter T. Casey, both of Los Angeles, for appellants.

Hilton & Critchley, of Los Angeles, for respondent.

KING, P. J., pro tem. The action is for a sum claimed under an oral contract of employment at \$120 per week and 10 per cent. of all business secured by plaintiff, amounting to \$3,268.50.

The answer of E. W. Morris, Daisy L. Morris, and Morris Audit Company (no other defendant appearing) admits that plaintiff entered into the contract of employment with defendant E. W. Morris, by which plaintiff was to receive \$120 per week and 10 per cent. "commission on all fees or charges paid to the defendants by its clients over and above the sum of \$25,000; that under said sum of \$25,000 plaintiff was to receive no commission." The answer also denies that E. W. Morris and Daisy L. Morris were copartners conducting business under the firm name and style of Mor-

ris Audit Company (as alleged in the complaint), "but allege that the Morris Audit Company is E. W. Morris."

Defendants filed an amendment to the answer, alleging that the amount of "fees obtained by plaintiff for the defendants" was \$30,320.02. The court found for plaintiff, and gave judgment against the defendants for \$3,032, commissions on this full amount, and \$80 balance of salary. Defendant's motion for a new trial was denied, and appeal taken from the judgment and from the order denying motion for new trial.

The main contention by appellants is the highly technical claim that: "(1) There was no copartnership. (2) Daisy S. Morris was not a copartner in Morris Audit Company. (3) No contract was entered into by the plaintiff to which Daisy L. Morris was a party, and under which she incurred any obligation or had any liability. (4) The contract sued upon was between the plaintiff and E. W. Morris only, and E. W. Morris alone is liable thereunder."

It is true that no evidence was introduced as to the Morris Audit Company being a copartnership, nor was Daisy L. Morris mentioned in the testimony. However, counsel for defendants announced at the beginning of the trial: "There is only one issue, I believe. Our contention is that he was to receive 10 per cent. after the sum of \$25,000 had been solicited." He then by consent filed the amendment to answer mentioned above, which alleged the amount of fees obtained by plaintiff "for the defendants" was \$30,320.02.

Again, on page 28 of the reporter's transcript, appellants' counsel remarked to the court: "As I said in the beginning, there is only one point at issue." In the answer appears this language: "Defendants allege that plaintiff was to receive 10 per cent. commission on all fees or charges paid to the defendants by its clients over and above the sum of \$25,000." And again: "Defendants allege that plaintiff was employed as a traveling man for defendants," etc. And: "These defendants deny that they have failed, neglected, and refused, and still refuse, to perform their part of the said contract." And "allege that they did not become indebted to plaintiff in excess of the sum of \$688 under said contract." And "allege that all of the alleged indebtedness owing to plaintiff by defendants has been satisfied by reason of the overpayment to plaintiff by defendants."

From the evidence and from the statements of counsel above quoted the court made its findings: "(1) That the defendants entered into a contract with plaintiff, whereby the plaintiff was to render service to the defendants for the year 1920 at the agreed wage or salary of \$120.00 per week and the further sum of 10 per cent. on all business that the plaintiff should procure for the defendants. That the plaintiff procured business for the defendants in the sum of \$30,320 during the said calendar year of 1920," etc.

The court having chosen to believe plaintiff's testimony as to the contract between the parties, these findings and the judgment following them are in accord with the statement of defendants' counsel to the court and with the allegations of defendants' answer.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

86 Cal. App. 620

KNOWLES v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5999.)★

District Court of Appeal, First District, Division 1, California. Nov. 9, 1927.

Hearing Denied by Supreme Court Jan. 5, 1928.

1. Master and servant **§405(6)**—Finding that contractor's failure to provide safety lines for workman rigging scaffolding was willful misconduct, warranting penalty, held sustained by evidence (St. 1913, p. 50, § 2, as amended by St. 1921, p. 451; Compensation Act, § 6b; Pen. Code, § 402c).

In proceedings for death under Workmen's Compensation Act (St. 1917, p. 831), evidence held to support findings of Industrial Accident Commission that injury and death of workman rigging scaffolding were caused by serious and willful misconduct of contractor, who failed to install tie backs or life lines for workmen's safety, as required by St. 1913, p. 50, § 2, as amended by St. 1921, p. 451, thus warranting additional award of penalty under Compensation Act, § 6b; violation of law requiring safety lines being offense under Pen. Code, § 402c.

2. Master and servant **§352**—That contractor deemed safety devices unnecessary by reason of character of scaffolding held not to excuse failure to provide safety lines (St. 1913, p. 50, § 2, as amended by St. 1921, p. 451).

Contractor was not excused from providing safety lines from roof of building for scaffolding, required by St. 1913, p. 50, § 2, as amended by St. 1921, p. 451, by fact that he was unfamiliar with faulty construction of fire wall to which scaffolding was suspended, and that he deemed safety devices unnecessary, by reason of character of scaffolding employed.

Proceedings under the Workmen's Compensation Act by Elsa Lundgren and others against A. Knowles for compensation for death. Order of the Industrial Accident Commission awarding compensation, and employer applies for certiorari. Award affirmed.

R. P. Wisecarver, of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

TYLER, P. J. Certiorari to review an award of the Industrial Accident Commission.

The petition sets forth that on December 10, 1926, one John Swanson was in the employ of petitioner working on the Relief Home of San Francisco. He was a laborer, and it was part of his duty to rig the scaffolding used in connection with the work. Subsequently, while he and certain plasterers were on the scaffolding, in the course of their employment, the wall to which the same was attached gave way and fell, precipitating the men to the ground some 50 feet below. As a result of the accident Swanson was killed, and the respondents Lundgren, ap-

plicants before the commission, were awarded compensation as partial dependents in the amount of \$1,560. This award was accepted by the insurance carrier of petitioner, and was paid. In the same proceeding an additional claim was made that petitioner was guilty of serious and willful misconduct. On June 20, 1927, the commission made and entered its findings of fact, and, in addition to normal compensation, it found:

"Said injury and death was caused by the serious and willful misconduct of the employer and the amount of compensation otherwise recoverable for said injury and death found herein is increased one-half, said one-half to be paid directly by the employer and to be in addition to the normal compensation."

[1, 2] Thereafter, within 20 days, petitioner asked for a rehearing. It was claimed that the commission acted without and in excess of its powers; that the evidence did not justify the findings of fact; that the findings of fact did not support the order, and the findings and award were unreasonable. This petition was denied. The same contentions are here made in support of the present application. We are of the opinion that they are without merit, as there is evidence in the record to fully support the conclusion by the commission. So much thereof as is necessary to support the findings shows that petitioner had a contract to do certain plastering on the Relief Home in San Francisco. In the performance of his work he used a scaffold which was suspended to the fire wall of the building by means of hooks. This fire wall had not been constructed in conformity with the law governing the erection of buildings. The additional weight of the scaffolding and the men caused it to collapse, with the result as above narrated. Petitioner and his superintendent had concluded that, owing to the character of scaffold used, it was unnecessary to install tie backs or life lines to insure the safety to the workmen, and none were used, notwithstanding they were familiar with the fact that the law required these precautions to be taken. It is petitioner's contention that the accident was not due to a lack of these instruments of safety, but rather to the faulty construction of the fire wall, and that the accident would have happened just the same had the hooks been tied back to the roof and life lines installed. But this may or may not be true. How can we say that the fire wall might not have received support from the tie back, or that the presence of life lines would not have afforded the employee an opportunity to protect himself by grasping the same? The law provides that it shall be the duty of an employer who uses scaffolding to furnish safety lines to tie all hooks and hangers back to the roof of the building upon which the work is being performed, and, in addition, to provide safety lines hanging from the roof se-

(260 P.)

curely tied thereto. Stats. 1913, c. 48, § 2, p. 50, amended by Stats. 1921, p. 451. The violation of this law is by the statute made punishable under section 402c of the Penal Code. Similar provisions are contained in the Workmen's Compensation Act (St. 1917, p. 831) and the safety orders of the Industrial Accident Commission. It was the duty of the employer to comply with these safety provisions, irrespective of the fact that he was unfamiliar with the faulty construction of the fire wall, and he had no right to conclude that these safety devices were unneces-

sary by reason of the character of scaffolding he employed. He was familiar with the law and regulations upon the subject, and his failure to comply with them justified the commission under the provisions of section 6b, Compensation Act, in penalizing petitioner in the manner which it did. *Blue Diamond Co. v. Ind. Acc. Comm.*, 188 Cal. 403-407. 205 P. 678.

The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.



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